Security of Payment in the Australian Building and Construction Industry

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Security of Payment in the Australian Building and Construction Industry

MARCUS S JACOBS QC

SIXTH EDITION

LAWBOOK CO.

2017

Published in Sydney by
Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668
19 Harris Street
Pyrmont NSW
First edition.....2005
Second edition 2007
Third edition 2010
Fourth edition 2012
Fifth edition 2014
Sixth edition.....2017
National Library of Australia
Cataloguing-in-Publication entry

Jacobs, Marcus S.
Security of payment in the Australian building and construction industry

6th ed
Includes index
ISBN 9780455238845 (pbk)

New South Wales. Building and Construction Industry Security of Payment Act 1999. Construction industry – Law and legislation – Australia. Conflict of laws – Construction contracts – Australia. Arbitration and award – Australia.

Jacobs, Marcus. Commercial arbitration, law and practice.

Editorial and Production Team: Ariel Galapo, Angela Bandiera, Ana Fitz, Vanessa Schlenert.
Product Developer: Paul Gye

Printed by Ligare Pty Ltd, Riverwood, NSW

I dedicate this edition of this book to my wife Pam, without whose patience and understanding the task could never have been completed.

She has been my sharpest and at the same time kindest critic. Her aim at perfection has been my guiding light.

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FOREWORD

This is the 6th edition of this book and I regard it as a privilege to have been asked to write the foreword again.

The New South Wales Act and its interstate siblings are a regular source of work for all courts in Australia. The legislation provides an important means by which disputes in the Building and Construction Industry are resolved. The legislation was innovative and time has provided certain complexities for the practitioner.

The High Court will soon speak on the New South Wales Act when it delivers judgment in an appeal from the New South Wales Court of Appeal in *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWCA 288, argued in Canberra on 12 October 2016.

Text books should be but are not always written by experts in the field. Happily the author in this instance enjoys an unparalleled reputation in the field which makes him eminently qualified for the task. He addresses and exposes the various complexities with clarity and precision. It is unqualified scholarship and remains the single most important contribution to learning in the field.

The Honourable Justice John R Sackar

Supreme Court of New South Wales

November 2016

PREFACE

The fact that this is the 6th edition of the *Security of Payment in the Australian Building and Construction Industry* in so many years, is testimony to the importance of this subject to Lawyers, Barristers, Courts, and all those involved in this industry.

It is the aim of this edition to bring the text up to date, with the latest legislative developments on this subject, and the important case law in all the States and Territories.

Some of the important decisions referred to and commented on are:

Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247, a decision of the Victorian Court of Appeal on the constitutionality of ss 16(2)(a)(i), 16(4)(b)(i) and 16(4)(b)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic); and

Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd [2015] NSWCA 288 referred to by Mr Justice Sackar in his forward to this book in regard to the important aspect of "reference dates".

I express my gratitude to my secretary Diane McWlliam, for her dedicated research, her secretarial work, and her correction of the text in this task.

This has been of tremendous assistance to me.

I acknowledge the very helpful research of my Queensland colleague, Chris Garlick of the Queensland Bar, in drawing my attention to unreported Queensland cases, and his helpful commentary thereon.

I again thank my publishers Messrs Thomson Reuters, and in particular Mr Paul Gye, Mr Ariel Galapo, and Mr Phil Winterton for their contributions in bringing this edition to press.

The Hon Mr Justice Sackar of the New South Wales Supreme Court has kindly once again agreed to do the Foreword to this edition. I record my sincere thanks to him.

Marcus S Jacobs QC

Chambers,

Sydney

19 October 2016

PUBLISHER'S NOTE

Acknowledgments

ABOUT THIS PUBLICATION

SCOPE OF THIS WORK

Security of Payment in the Australian Building and Construction Industry, 6th edition provides fresh analysis of the security of payment regimes across Australia.

Using the New South Wales Act as its cue, the book includes detailed commentary as well as relevant legislative material and case law from the eight States and Territories, underpinned by the invaluable insights of the author, Marcus Jacobs QC.

LEGISLATION

Security of Payment in the Australian Building and Construction Industry, 6th edition contains the following legislation:

Australian Capital Territory

- *Building and Construction Industry (Security of Payment) Act 2009*

New South Wales

- *Building and Construction Industry Security of Payment Act 1999*
- *Building and Construction Industry Security of Payment Regulation 2008*

Northern Territory

- *Construction Contracts (Security of Payments) Act 2004*
- *Construction Contracts (Security of Payments) Regulations*

Queensland

- *Building and Construction Industry Payments Act 2004*
- *Building and Construction Industry Payments Regulation 2004*

South Australia

- *Building and Construction Industry Security of Payment Act 2009*
- *Building and Construction Industry Security of Payment Regulations 2011*

Tasmania

- *Building and Construction Industry Security of Payment Act 2009*

Victoria

- *Building and Construction Industry Security of Payment Act 2002*
- *Building and Construction Industry Security of Payment Regulations 2003* [Repealed]
- *Building and Construction Industry Security of Payment Regulations 2013*

Western Australia

- *Construction Contracts Act 2004*
- *Construction Contracts Regulations 2004*

CURRENCY

The compilation of the Security of Payment Book is current as at 22nd November 2016.

Note: The legislation included in this work is current as at 20 August 2016. Since that date there have been no more amendments to the legislation contained in this book at the time of its publication.

LEGISLATIVE AMENDMENTS IN THIS EDITION

Security of Payment in the Australian Building and Construction Industry, 6th edition takes account of the amendments listed overpage.

Building and Construction Industry (Security of Payment) Act 2009 (ACT)
Amending Acts

- *Statute Law Amendment Act 2014 (No 2)* — Act 44 of 2014
- *Planning, Building and Environment Legislation Amendment Act 2016 (No 2)* — Act 24 of 2016
- *Building and Construction Legislation Amendment Act 2016* — Act 44 of 2016

Building and Construction Industry Security of Payment Regulation 2008 (NSW)
Amending Regulation

- *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015* — Reg 111 of 2015

Construction Contracts (Security of Payments) Act 2004 (NT)
Amending Act

- *Statute Law Revision Act 2014* — Act 38 of 2014

Building and Construction Industry Payments Act 2004 (Qld)
Amending Acts

- *Building and Construction Industry Payments Amendment Act 2014* — Act 50 of 2014 (as amended by *Health and Other Legislation Amendment Act 2014*)
- *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014* — Act 57 of 2014

Building and Construction Industry Payments Regulation 2004 (Qld)
Amending Regulations

- *Housing and Public Works Legislation (Fees) Amendment Regulation (No 1) 2014* — SL 121 of 2014
- *Building and Construction Industry Payments Amendment Regulation (No 1) 2014* — SL 311 of 2014
- *Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No 1) 2015* — SL 29 of 2015
- *Housing and Public Works Legislation (Fees) Amendment Regulation (No 1) 2015* — SL 64 of 2015
- *Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No 1) 2016* — SL 5 of 2016
- *Housing and Public Works Legislation (Fees) Amendment Regulation (No 1) 2016* — SL 98 of 2016

Building and Construction Industry Security of Payment Act 2009 (Tas)
Amending Act

- *Justice and Related Legislation (Miscellaneous Amendments) Act 2015* — Act 38 of 2015

Construction Contracts Regulations 2004 (WA)
Amending Regulations

- *Construction Contracts Amendment Regulations 2014* — Gaz 87, 17 Jun 2014, p 1961
- *Construction Contracts Amendment Regulations 2015* — Gaz 89, 23 Jun 2015, p 2170
- *Commerce Regulations Amendment (Fees and Charges) Regulations 2016* — Gaz 91, 3 Jun 2016, p 1745

FUTURE COMMENCEMENTS

Building and Construction Industry (Security of Payment) Act 2009 (ACT)

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commencement
Building and Construction Legislation Amendment Act 2016	44 of 2016	19 Aug 2016	S 47 commences on a date to be notified, or 19 Aug 2017.

Building and Construction Industry Security of Payment Act 1999 (NSW)

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commencement
Statute Law (Miscellaneous Provisions) Act (No 2) 2016	55 of 2016	25 Oct 2016	Sch 1.6 commences 6 Jan 2017.

Building and Construction Industry Security of Payment Regulation 2008 (NSW)

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commencement
Statute Law (Miscellaneous Provisions) Act (No 2) 2016	55 of 2016	25 Oct 2016	Sch 1.7 commences 6 Jan 2017.

Building and Construction Industry Security of Payment Act 2009 (Tas)

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commencement
Building (Consequential Amendments) Act 2016	12 of 2016	23 Sep 2016	Sch 1 commences on commencement of the *Building Act 2016* (to be proclaimed). Sch 2 commences on commencement of the *Building and Construction Industry (Security of Payment) Amendment Act 2016*; however if the *Building and Construction Industry (Security of Payment) Amendment Act 2016* (to be enacted) has commenced before the *Building Act 2016* commences, then commencement is on commencement of the *Building Act 2016*.

LEGISLATION — SPECIAL FEATURES

HISTORY NOTES

The history notes have been entered into an abbreviated form using the number and year of the amending Act or regulation and a descriptor (eg "insrt") to show the effect of the amending Act or regulation. The abbreviations used in the historical notes are as follows:

- insrt – inserted
- am – amended
- subst – substituted
- rep – repealed
- reinsrt – reinserted
- renum – renumbered
- reloc – relocated

Example: History note under subsection 10(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW):

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[15]]

This note indicates that subsection (1) in s 10 was amended by Act 133 of 2002, Schedule 1 item 15. S 3 is a reference to the enacting provision.

Details of the short title of the amending Act or regulation, assent/gazettal/registration and commencement dates are located in the Table of Amending Legislation following the Table of Provisions.

CROSS-REFERENCES

Cross-references have been integrated into this publication to indicate where a particular regulation affects a section of the NSW, NT, Qld, Vic and WA Acts.

Example: Cross-reference under s 70 of the *Building and Construction Industry Payments Act 2004* (Qld):

[**Cross-references:** *Building and Construction Industry Payments Regulation 2004*: s 4 and Sch 2 prescribe a $743.80 fee for renewal of registration as an adjudicator under s 70(2)(c).]

PROPOSED AMENDMENTS

Building and Construction Industry Security of Payment Act 2009 (Tas)

- *Building and Construction Industry Security of Payment Amendment Bill 2015* — 1st reading House of Assembly 27 Oct 2015. Ss 4-7 commence on a date to be proclaimed.

Construction Contracts Act 2004 (WA)

- *Construction Contracts Amendment Bill 2016* — passedLegislative Assembly 20 Oct 2016; 2nd reading speech Legislative Council 8 Nov 2016. Ss 4-6 and 8-19 commence 15 Dec 2016; ss 7 and 20 commence 3 Apr 2017.

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COMPARATIVE TABLE – SECURITY OF PAYMENT ACTS

The following table compares the provisions of the New South Wales *Building and Construction Industry Security of Payment Act 1999* with the primary statute of other Australian States and Territories that govern payments for construction work and goods and services carried out in respect of a construction contract.

The first column of the table lists the various section headings that appear in the NSW Act (in the order in which they appear in that Act). The second column sets out the section number to which that heading relates. For some of the section headings in the first column, additional wording has been added (appearing in square brackets) so as to better assist the reader in identifying the subject matter dealt with by the relevant section. Also, for subject matters not specifically addressed by the NSW Act (but addressed by one or more other State jurisdictions), additional wording has also been added (in square brackets) to the first column. Any provisions from other State and Territory Acts that address this subject matter specifically or generally will appear in the relevant row.

The remaining columns specify the full name of the Acts from the other State and Territory jurisdictions, their date of assent and commencement, and the sections of the relevant Act that are comparable to, or cognate with the NSW Act. Where useful, the provision heading of the relevant section has been inserted after the section reference (appearing in round brackets). In some instances, additional wording has also been inserted in these columns (appearing in square brackets) to provide the reader with a more comprehensive description of the relevant provision's subject matter.

No entry in a particular column of the table means that the subject matter is not dealt with specifically or generally by a provision of the relevant statute.

The table is current as at 20 August 2016.

	New South Wales	**Australian Capital Territory**	**Northern Territory**	**Queensland**	**South Australia**	**Tasmania**	**Victoria**	**Western Australia**
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
	Assent: 05/10/1999. Commence-ment 26/03/2000	Assent: 26/11/2009. Commencment: ss 1 & 2, 26/11/2009; Remainder, 01/07/2010.	Assent: 21/12/2004. Commence-ment: s 66, 1 August 2006; Remainder, 1 July 2005.	Assent: 20/05/2004. Commence-ment: ss 1 & 2, 20/05/2004; ss 9, 36-98, 104-106, 108-113, Sch 2, 1 July 2004; Sch 1 amendments 1, 3, 4, 5 to the Queensland Building Services Authority Act 1991, 30/09/2005; Remainder, 01/10/2004.	Assent: 10/12/2009 Commence-ment: 10/12/2011.	Assent: 17/12/2009 Commence-ment: 17/12/2009.	Assent: 14/05/2002. Commence-ment: 31/01/2003	Assent: 08/07/2004 Commence-ment: 01/01/2005
Preliminary	**Pt 1**							
Name of Act	s 1	s 1	s 1	s 1	s 1	s 1		s 1
Commencement	s 2	see s 73 of *Legislation Act 2001*	s 2	s 2	s 2	s 2	s 2	s 2

	New South Wales	Australian Capital Territory	Northern Territory	Queensland	South Australia	Tasmania	Victoria	Western Australia
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
Object of Act [means and affect on entitlement under contract or remedy for entitlement]	s 3	s 6	s 3	ss 5, 7 & 8	s 3	ss 3, 9	ss 1 & 3	(See Preamble to Act)
Definitions	s 4	s 3 & Dictionary at end of Act & Pt 1 of *Legislation Act 2001*	ss 4 & 5	s 9 & Schedule 2	s 4	ss 4 & 4A	s 4	ss 3, 24
Definition of "construction work"	s 5	ss 3, 7 & Dictionary at end of Act	s 6	s 10	s 5	s 5	s 5	s 4
Definition of "related goods and services"	s 6	ss 3, 8 & Dictionaryat end of Act	s 7	s 11	s 6	s 6	s 6	s 5
Application of Act	s 7	s 9	s 9	s 3	s 7	s 7	s 7	s 7

	New South Wales	**Australian Capital Territory**	**Northern Territory**	**Queensland**	**South Australia**	**Tasmania**	**Victoria**	**Western Australia**
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
[Interaction with other specified acts]	s 11(7) [Application of s 73(2) of *Personal Property Securities Act 2009*]; s 26B(3)(c) [notice of claim served under *Contractors Debts Act 1997*]	s 5 (Offences against Act – application of Criminal Code etc)	s 11A (Interaction with Community Justice Centre Act [director as prescribed appointer]; s 25 (application of Interpretation Act to implied provisions)	s 4 (Effect of giving notice of claim of charge under *Subcontractors' Charge Act 1974*); s 15(3) [Application of s 67P of *Queensland Building and Construction Commission Act 1991* in respect of interest]; s 15(1) (provision for payment not void under ss 67U or 67W of *Queensland Building and Construction Commission Act 1991*];		s 30(2) [Appointment of Security Payments Official in accordance with and subject to *State Service Act 2000*]	s 51 (Supreme Court – limitation of jurisdiction) [vary *Constitution Act 1975*]	s 23 [application of *Interpretation Act 1984* to implied provisions]

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				s 26(2) [adjudictor to consider provisions of Pt 4A of *Queensland Building and Construction Commission Act 1991*]; s 103(2) [application of s 39 of *Acts Interpretation Act 1954* regarding service]				
Rights to progress payments	**Pt 2**							
Rights to progress payments	s 8	s 10	s 18 & Schedule, Div 3	ss 9, 12 & Sch 2 [definition of reference date]	ss 4 [definition of reference date], 8	ss 4 [definitions of reference date and progress payment], 12(1)	s 9	s 15 & Sch 1, Div 3

	New South Wales	**Australian Capital Territory**	**Northern Territory**	**Queensland**	**South Australia**	**Tasmania**	**Victoria**	**Western Australia**
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Amount of progress payment	s 9	s 11	s 19 & Schedule, cl 5(2)& (3)	s 13	s 9	s 12(2), (3)	s 10	s 16 & Sch 1, cl 5(3)
Valuation of construction work and related goods and services [& variations thereof]	s 10	s 12	s 16 & Schedule, Div 1; s 17 & Schedule, Div 2	s 14	s 10	s 13	ss 10A, 10B, 11	s 13 & Sch 1, Div 1; s 14 & Sch 1, Div 2
Due date for payment [& interest on unpaid amount, statutory lien, priorities over existing charges/liens, third party owners of unfixed plant and materials]	s 11	s 13	s 20 & Schedule, cl 6(2); s 21 & Schedule, Div 6	s 15	s 11	ss 14, 15	ss 12, 12A	s 18 & Sch 1, Div 5; s 19 & Sch 1, Div 6; s 20 & Sch 1, Div 7
Effect of "pay when paid" provisions	s 12	s 14	s 12	s 16	s 12	s 16	s 13	s 9
[Other prohibited and implied provisions of construction contracts & their interpretation]			Div 1 (of Pt 2), ss 13, 14, 15 (Prohibited and implied provisions of construction contracts) & s 25 (Interpretation of implied provisions)					ss 10, 11, 12 [other prohibited provisions] & s 23 (Implied provisions: interpretation etc.)

	New South Wales	Australian Capital Territory	Northern Territory	Queensland	South Australia	Tasmania	Victoria	Western Australia
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[When ownership of goods passes and duties regarding unfixed goods on insolvency]			s 22, Schedule, Div 7 (Ownership of goods); s 23, Schedule, Div 8 (Duties as to unfixed goods on insolvency)					s 20 & Sch 1, Div 7 (Ownership of goods); s 21 & Sch 1, Div 8 (Duties as to unfixed goods on insolvency)
[Retention money held by Principal]			s 24 & Schedule, Div 9 (Retention money to be held on trust [by Principal])					s 22 & Sch 1, Div 9 (Retention money)
[Evidentiary value of certificates of completion/ amounts payable]			s 37 (Evidentiary value of certificates of completion and amounts payable)					s 35(Certificates of completion etc., effect of)

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Procedure for recovering progress payments	**Pt 3**							
Payment claims and payment schedules	***Div 1***							
Payment claims	s 13	s 15	s 19 & Schedule, cl 5(1)	s 17	s 13	s 17	s 14	s 16 & Sch 1, cl 5(1), (2)
Payment schedules	s 14	s 16	s 20 & Schedule, Div 5	s 18	s 14	ss 18, 19(1)-(3)	s 15	ss 17 & 18 & Sch 1, cls 6 & 7
Consequences of not paying claimant where no payment schedule	s 15	s 17	ss 8, 20 & Schedule, cl 6, s 27	s 19	s 15	s 19(4)-(8)	s 16	ss 6, 25
Consequences of not paying claimant in accordance with payment schedule	s 16	s 18	ss 8, 20 & Schedule, cl 6, s 27	s 20	s 16	s 20	s 17	ss 6, 25

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Adjudication of disputes	***Div 2***							
Adjudication applications	s 17	s 19	ss 8, 27, 28, 30(1)	s 21	s 17	ss 20, 22(1)	s 18	ss 26 & 28
Eligibility criteria for adjudicators	s 18	s 20	s 52	s 22; see generally Div 3 (of Pt 4), in particular s 60	s 18	s 22(2), (3)	s 19	s 48(1)
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Adjudication responses	s 20	s 22	s 29	s 24	s 20	s 23	s 21	s 27
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Adjudicator's determination [and correction of clerical mistakes etc. in determination]	s 22	s 24	ss 33, 35, 38, 43	ss 26, 27, 28	s 22	s 25	ss 23, 23A, 24	ss 31(2)(b), 33, 36, 41
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Consequences of not paying claimant adjudicated amount	s 24	s 26	ss 44, 45	s 30	s 24	s 26(2)-(7)	ss 28O, 28Q	Pt 3, Div 5
Filing of adjudication certificate as judgment debt	s 25	s 27	s 45	s 31	s 25	s 27	s 28R	s 43

	New South Wales	**Australian Capital Territory**	**Northern Territory**	**Queensland**	**South Australia**	**Tasmania**	**Victoria**	**Western Australia**
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Claimant may make new application in certain circumstances [for adjudictor's failure to give acceptance notice or determine application in time]	s 26	s 28	ss 28A & 39	s 32	s 26 [new application also permitted in SA where adjudicator withdraws from adjudication]	s 28	s 28	s 37(2)
[Other instances of withdrawal, dismissal or discontinuation of adjudication]			s 28A ([Applicant W]ithdrawing an application for adjudication); ss 33(1)(a), 39 [Dismissal of application by adjudicator]; ss 33(2)-(3), 39 [Dismissal because application not determined in prescribed time by adjudicator]		s 27 (Claimant may discontinue adjudication)			s 31 (Adjudicator's functions) [dismissal of application by adjudicator] & s 37 (Dismissed applications)

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[Provision or publication of adjudictor's determination]			s54 (Publication of adjudicators' decisions)	s 102 (Adjudicator must give copy of decision to authorisednomi-nating authority)		s 38(1) & (2) (Information in relation to determinations of adjudication applications) [ajudicator and nominating authority to provide copy of determination]	s 23A (Adjudication determination to be given to parties and Authority) & s 24(3) [provision of corrected determination]; ss 47A(c)-(d), 47C [Authority to keep and publish determinations]	s 50 (Publica-tion of adjudicator's decisions)
[Disqualification of adjudicator on conflict grounds]			s 31 (Disqualifi-cation of adjudicator [from adjudicating dispute] on grounds of conflict of interest)			s 35 (Disqualifi-cation of adjudicator [from adjudicating dispute] of interest; s 36 (Request and review in relation to disqualification of adjudicator)		s 29 (Adjudica-tors: conflict of interest)

	New South Wales	**Australian Capital Territory**	**Northern Territory**	**Queensland**	**South Australia**	**Tasmania**	**Victoria**	**Western Australia**
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
[Progress Payments under determination on account]			s 42					s 40
[Review of adjudication decisions/application dismissals]		s 43 (Judicial review of adjudication decision) & s 44 (Determination of question of law by Supreme Court)	s 48 (Review of adjudicator's decision to dismiss application)				Div 2A (Review of adjudication [determination])	s 46 (Review [of dismissal of application], limited right of)
[Payment & consequences of non payment after review determination]							s 28N (Payment after review determination) & ss 28O, 28P (Consequences of claimant not paying adjudicated amount) & s 28Q (Adjudication certificates)	
[Costs of parties to payment disputes & power of adjudicator to determine one party pay costs for frivolous or unfounded applications]			s 36			s 25(7)		s 34

	New South Wales	Australian Capital Territory	Northern Territory	Queensland	South Australia	Tasmania	Victoria	Western Australia
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
Claimant's rights against principal contractor	***Div 2A***							
Principal contractor can be required to retain money owed to respondent	s 26A						See Div 4 (of Pt 3) (Recovery of unpaid amounts directly from Principal)	
Obligation of principal contractor to retain money owed to respondent	s 26B							
Contravention of requirement by principal contractor	s 26C							
Protections for principal contractor	s 26D							
Respondent to provide information about principal contractor	s 26E							
Other rights of claimant not affected	s 26F							
Claimant's right to suspend construction work	***Div 3***							
Claimant may suspend work	s 27	s 29	s 44	s 33	s 28	s 29	s 29	s 42
General	***Div 4***							

	New South Wales	**Australian Capital Territory**	**Northern Territory**	**Queensland**	**South Australia**	**Tasmania**	**Victoria**	**Western Australia**
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
Nominating authorities	s 28	ss 30, 31, 34, 35, 46. See generally ss 32 & 33 as to suitability of nominating authorities.	s 55	s 114. See generally Div 2 (of Pt 7);	s 29	ss 31, 32, 33	ss 42, 43, 43A, 43B, 43C, 44	s 51
Adjudicator's fees	s 29	s 36	ss 36, 46, 55	s 35	s 30	s 37	s 45	ss 34, 44, 51
Protection from liability for adjudicators and authorised nominating authorities	s 30	s 37	s 56	s 107	s 31	s 39(2) & (3)	s 46	s 54
Service of notices	s 31	See Pt 19.5 of *Legislation Act 2001*	s 25. See also s 25 of *Interpretation Act* as to service	s 103	s 34	ss 40 & 42	s 50	s 23. See also ss 75 & 76 of *Interpretation Act 1984*
Effect of Part on civil proceedings	s 32	s 38	ss 40, 47	s 100	s 32	ss 9 & 10	s 47	ss 38, 45
[Establishing registry/register/ registrar or equivalent]			Div 1 (of Pt 4) – (Construction Contracts Registrar)	Div 1 (of Pt 4) – (Establishing Adjudication Registry and related matters)		s 30 (Security of Payments Official)	ss 47A(b) & 47B [Authority to keep register of authorised nominating authorities]	s 48(6) [Building Commissioner to keep register of adjudicators]
[Registration process of authorised nominating authorities]				–				

	New South Wales	Australian Capital Territory	Northern Territory	Queensland	South Australia	Tasmania	Victoria	Western Australia
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
[Registration process of adjudicators]			See generally Div 2 (of Pt 4)	Div 3 (of Pt 4) – (Registration of adjudicators)				s 48 (Registering adjudicators)
[Renewals of registrations]				Div 4 (of Pt 4) (Renewals of registrations of adjudicators)				
[Amendment of registrations]				Div 5 (of Pt 4) (Amendment of registrations of adjudicators)				
[Suspension or cancellation of registrations]	s 28(1)(b) (Nominating authorities) [withdrawal of authority by Minister]		s 52(7)	Div 6 (of Pt 4)(Suspension or cancellation of adjudicators)		s 31(6)(c) [revoke authorisation of nominating authority]	s 42(1)(b) (Authorised nominating authorities) [withdrawal of authority by Authority]	
[Other provisions regarding registrations]				Div 7 (of Pt 4) (Other provisions about registrations of authorised nominating authorities and adjudicators)				

	New South Wales	**Australian Capital Territory**	**Northern Territory**	**Queensland**	**South Australia**	**Tasmania**	**Victoria**	**Western Australia**
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
[Protection from liability for other persons/ bodies]			s 56 [Protection from liability of Registrar]	s 106 (Protection from liability [for official])		s 39(1) (Protection from liability) [Security Payments Official]		
[Review of decisions regarding appointment/ dimissal of adjudicators & authorised nominated authorities]	s 28(2) [right of review in regards to refusal of appointment as a nominating authority]	Pt 5 (Notification and review of decisions [to refuse to authorise nominating authority])	s 32 (Review of disqualification decision [to disqualify adjudicator]); ss 52(7) & 53 (Review of registration decision [as adjudicator]); Pt 5 (Review of decisions)	Div 1 (of Pt 5) (Internal review of [Pt 4] decisions); Div 2 (of Pt 5) (External Review of [Pt 4] decisions)	s 29(3) [right of review in regards to refusal of application to be a nominating authority]	s 31(7) (Nominating authorities) [review of decision by Security Payments Official] & s 36(4) & (6) (Request and review in relation to disqualification of adjudicator) [review of adjudicator not ceasing to act due to conflict grounds]	Notes to ss 42 & 43 [right of appeal against decision of Authority to refuse application of, withdraw authority of or impose conditions on an authorised nominated authority under s 144A of *Building Act 1993*]	s 49 (Review of registration [of adjudicator] decisions)

	New South Wales	Australian Capital Territory	Northern Territory	Queensland	South Australia	Tasmania	Victoria	Western Australia
	Building and Construction Industry Security of Payment Act 1999 (No 46)	*Building and Construction Industry (Security of Payment) Act 2009* (No 50)	*Construction Contracts (Security of Payments) Act 2004* (No 66)	*Building and Construction Industry Payments Act 2004* (No 6)	*Building and Construction Industry Security of Payment Act 2009* (No 77)	*Building and Construction Industry Security of Payment Act 2009* (No 86)	*Building and Construction Industry Security of Payment Act 2002* (No 15)	*Construction Contracts Act 2004* (No 16)
Miscellaneous	**Pt 4**							
Act binds Crown	s 33		s 11	s 6		s 8	s 8	s 8
No contracting out	s 34	s 42	s 10	s 99	s 33	s 11	s 48	s 53
Nature of proceedings for offences	s 34A	s 5		s 108				
Regulations	s 35	s 48	s 64	s 111	s 35	s 41	s 52	s 55
Savings and transitional provisions	s 37		Pt 7	Pt 7	Sch 1	s 44	s 53	
Review of Act	s 38	s 45	ss 63, 65	s 41	s 36	s 38(3)	s 47A(a)	ss 52, 56
[Miscellaneous evidentiary provisions]			s 57 (Evidentiary provisions) [documents signed by Registrar]	s 104 (Proof of signature [of registrar] unnecessary) & s 105 (Evidentiary aids) [signed by registrar]				s 48(7) [Certificate as to registered adjudicator]
Schedules								
Savings and transitional provisions	Sch 2		s 67	Pt 7	Sch 1, Pt 4			
Table updated on 20 August 2016								

Commentary

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999 (NSW)

Part 1 – Preliminary

SECTION 5 – *Definition of "construction work"*

SECTION 6 – *Definition of "related goods and services"*

SECTION 10 – *Valuation of construction work and related goods and services*

SECTION 11 – *Due date for payment*

SECTION 12 – *Effect of "pay when paid" provisions*

SECTION 15 – *Consequences of not paying claimant where no payment schedule*

SECTION 16 – *Consequences of not paying claimant in accordance with payment schedule*

Division 2 – Adjudication of disputes

SECTION 20 – *Adjudication responses*

SECTION 21 – *Adjudication procedures*

SECTION 22 – *Adjudicator's determination*

Filing of adjudication

Curial review

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999

Act 46 of 1999

[Assented to 5 October 1999]

[Commenced 26 March 2000]

An Act with respect to payments for construction work carried out, and related goods and services supplied, under construction contracts; and for other purposes.

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Act 1999	46 of 1999	5 Oct 1999	26 Mar 2000 Gaz 37, 17 Mar 2000, p 1955

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Amendment Act 2002	133 of 2002	18 Dec 2002	3 Mar 2003 (Gaz 54, 28 Feb 2003, p 3503)
Statute Law (Miscellaneous Provisions) Act (No 2) 2003	82 of 2003	27 Nov 2003	Sch 3: 27 Nov 2003
Statute Law (Miscellaneous Provisions) Act 2008	62 of 2008	1 Jul 2008	Sch 2.4: 1 Jul 2008
Personal Property Securities Legislation Amendment Act 2010	57 of 2010	28 Jun 2010	Sch 1.1: 30 Jan 2012 (Proc 661 of 2011, 16 Dec 2011)
Building and Construction Industry Security of Payment Amendment Act 2010	103 of 2010	29 Nov 2010	Sch 1: 28 Feb 2011 (Proc 1 of 2011, 14 Jan 2011)
Building and Construction Industry Security of Payment Amendment Act 2013	93 of 2013	20 Nov 2013	Sch 1: 21 Apr 2014 (Proc 182 of 2014, 11 Apr 2014)
Civil and Administrative Legislation (Repeal and Amendment) Act 2013	95 of 2013	20 Nov 2013	Sch 2.15: 1 Jan 2014

[SOP1.30] Amendments – *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW)

Key changes were made in November 2013 with the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW). The amendments apply to contracts entered into from 21 April 2014:

(a) The removal of the requirement to endorse a payment claim
(b) Mandatory deadlines for making progress payments
(c) Head contractor supporting statement
(d) Enforcement of compliance by head contractors.

The 2002 amendments do not apply to a "payment claim" (for which see [SOP13.60]), served before the date of the commencement of the amending Act: see Sch 2.3.3 of the 2002 Amending Act. Of significance, however, is the retroactive application of the amendments to contracts even executed before 3 March 2002.

Davenport, in *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at p 7, gives the following examples:

> For example, s 11(2) of the Act provides a minimum rate of interest on overdue progress payments and it applies to construction contracts entered on or after 26 March 2000 even though s 11(2) only commenced on 3 March 2003. Similarly, a provision in a construction contract which made the time for release of security or retention moneys under a sub-contract dependent upon some certification under the head contract was rendered void on 3 March 2003 even though it was valid before then (s 12(2)(c)).

The Act is to be found at [SOP1.50]ff and the regulations under the "NSW" chapter.

Similar legislation is now on the statute books in Queensland, Victoria, South Australia and the Australian Capital Territory (the East Coast model). In Western Australia and the Northern Territory, the Security of Payments legislations depart from some of the fundamental principles enshrined in the East Coast model. The legislation in Western Australia and the Northern Territory is known as the West Coast model. These matters are discussed in more detail at [SOP2.50]. The text deals substantially with the New South Wales legislation with emphasis on some differences between that and the legislation in the other States.

PART 1 – PRELIMINARY

1 Name of Act

This Act is the *Building and Construction Industry Security of Payment Act 1999*.

SECTION 1 COMMENTARY

[SOP1.50] General introduction

The *Building and Construction Industry Security of Payment Act 1999* (NSW) was assented to on 5 October 1999, the date of commencement was 26 March 2000; s 2 and *Government Gazette* No 37 of 17 March 2000.

The focus of this work is on the New South Wales legislation, viz, the *Building and Construction Industry Security of Payment Act 1999* (NSW), as this was the first of such legislation in Australia, and most if not all the case law in Australia relates to its provisions.

The text below will therefore be directed at the New South Wales Act. Note: wherever there is a word in a heading quoted from a section, the New South Wales Act is referred to, unless specifically stated otherwise. Differences of any substance between that Act and any of the other substantially similar Acts will be emphasised.

It is indeed a pity, in light of the fact that major construction firms are involved across state borders, that there is no national uniformity in the relevant legislation.

The Acts and Regulations for the each of the States and Territories can be found in the Legislation section of this service.

The Explanatory Note and Second Reading Speeches to the *Building and Construction Industry Security of Payment Amendment Bill 2013* (NSW), are reproduced at [SOPND10.300] and [SOPND10.400] respectively.

The websites containing the Explanatory Notes and Second Reading Speeches for each of the other States and Territories, are listed below:

Vic (2002): http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/02A3593E07CDFBEACA256E5B00213FEA/$FILE/02-015a.pdf

Vic (2006): http://www.legislation.vic.gov.au/domino/web_notes/ldms/pubstatbook.nsf/f932b66241ecf1b7ca256e92000e23be/CFE64FBFCC464CCCCA2571B60023B5D6/$FILE/06-042a.pdf

WA: https://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_188_homepage.html

Qld: https://www.legislation.qld.gov.au/legisltn/current/b/buildngcipa04.pdf

NT: http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/a1e09736d605266a69257d900023d272?OpenDocument

SA: https://www.legislation.sa.gov.au/lz/c/a/building%20and%20construction%20industry%20security%20of%20payment%20act%202009.aspx

Tas: http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=86%2B%2B2009%2BAT%40EN%2B20160707000000;histon=;pdfauthverid=;prompt=;rec=;rtfauthverid=;term=;webauthverid=

ACT: http://www.legislation.act.gov.au/a/2009-50/

[SOP1.60] Victoria – legislative history

The Victorian Act mirrors to a large extent the New South Wales 1999 Act in its unamended form.

It is to be noted that Pt 3 of Div 4 contains provisions substantially similar to those contained in the *Contractors Debts Act 1997* (NSW), and it provides forms for the operation of this Part.

Under s 7(6) it is provided that it does not apply to a construction contract before its date of commencement (31 January 2003).

The *Building and Construction Industry Security of Payment Act 2002* was assented to on 14 May 2002 and came into operation on 31 January 2003: s 2(2).

The *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic) received assent on 25 July 2006. While the majority of the amendments in the Act commenced on 30 March 2007, ss 1, 3, 38, 39 and 41 commenced on assent.

As the amended provisions will apply to all construction contracts (as defined by the Act) entered into from the date the amending legislation formally commences, the reproduction of the Act as it was prior to 30 March 2007 still has utility. The Act prior to 30 March 2007 can be found online (online subscriptions to *Commercial Arbitration Law & Practice* only) and the Act from 30 March 2007 is reproduced under the "VIC" Chapter. The commentary on the amended sections of the existing Act will for the same reason be retained but there will be reference in the text below to the amendments.

In note [28] of the judgment in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119, the Supreme Court of Victoria – Court of Appeal noted that the Minister for Planning (Vic) said that the Amending Act would 'amend the *Building and Construction Industry Security of Payment Act 2002* to make it more effective in enabling any person who carries out building or construction work to promptly recover progress payments': Victoria, *Parliamentary Debates*, Legislative Assembly, 9 February 2006, 219–21 (Rob Hulls, Minister for Planning).

[SOP1.70] Western Australia – legislative history

The *Construction Contracts Act 2004* (WA) received assent on 8 July 2004 and commenced on 1 January 2005.

The Western Australian Act contains a number of conceptual differences from that of any of the other States' Acts. One of the fundamental differences is that it and the Northern Territory Act seek to imply a number of obligations in a construction contract. The Western Australian Act also provides a remedy for the review of an adjudicator's decision. The Western Australian model has, with great respect, a lot to commend it and serious attention should be accorded to it by the legislatures of the other States in amending their existing legislation to remove inconsistencies, anomalies and doubts.

[SOP1.80] Queensland – legislative history

The *Building and Construction Industry Payments Act 2004* was assented to on 20 May 2004. Sections 1–2 commenced on assent, ss 9, 36–98, 104–106, 108–113 and Sch 2 commenced on 1 July 2004 (2004 SL No 91) and the remaining provisions commenced on 1 October 2004 (2004 SL No 186).

The Queensland Act has been amended by removing the right to seek judicial review under the relevant Queensland Act: see *Building and Construction Industry Payments Amendment Act 2014* (Qld) at Pt 4, Div 2. See further the discussion at [SOP25.750] below.

A variation contract brought into existence on 14 October 2004, a fortnight after the material date, and which expanded the scope of the work of a contract entered into prior to the material date, but was not intended to replace it, was held by Byrne J in *Pioneer Sugar Mills Pty Ltd v United Group Infrastructure Pty Ltd* [2006] 1 Qd R 535; [2005] QSC 354 not to be the subject of the Queensland Act.

See further, *CBQ Pty Ltd v Welsh* [2006] QSC 235 per Cullinane J.

[SOP1.90] Northern Territory – legislative history

The *Construction Contracts (Security of Payments) Act 2004* (NT) received assent on 21 December 2004 and commenced on 1 July 2005.

As pointed out by Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46 (14 November 2008) at [46]:

> There are very significant differences between the *Building and Construction Industry Security Payment Act 1999* (NSW) and the *Construction Contracts (Security of Payments) Act 2004* (NT). There is no equivalent s 33(1)(a) of the NT Act and there are a number of other important differences. The NT Act is modelled on the *Construction Contracts Act 2004* (WA). Structurally, the WA Act and the NT Act bear little resemblance to the NSW, Victorian or Queensland Acts. Great care must be exercised in relying on decisions from those jurisdictions as to the interpretation to be given to the NT Act. Nevertheless, I consider that there is much guidance to be had on questions of statutory interpretation and jurisdictional error.

[SOP1.100] South Australia – legislative history

The *Building and Construction Industry Security of Payment Act 2009* (SA) received assent on 10 December 2009 with a commencement date of 10 December 2011.

[SOP1.110] Tasmania – legislative history

The *Building and Construction Industry Security of Payment Act 2009* (Tas) received assent on 17 December 2009 with a commencement date of 17 December 2009.

[SOP1.120] Australian Capital Territory – legislative history

The *Building and Construction Industry (Security of Payment) Act 2009* (ACT) received assent on 19 November 2009 with a commencement date of 1 July 2010.

[SOP1.130] Uniformity – the lack of

It must be a matter of considerable confusion to practitioners advising clients who have projects in more than one State/Territory when there is so little uniformity in the comparative legislation. Specific reference is made in this regard to the curial review of adjudicator's determinations. In New South Wales there was the heavy hand of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394. *Brodyn* was not followed in all of its aspects in Victoria, and for which see the judgment of Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 (24 April 2009), discussed at [SOP25.730].

Brodyn has for all intents and purposes been put to bed by the decision of the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190. The impact of that judgment on remedies for curial challenges to adjudication determinations will be dealt with more fully below.

In Queensland there is still the availability of judicial review (see the discussion at [SOP25.750]) and in Western Australia there is a provision for a review under some administrative tribunal (see the discussion at [SOP25.740]).

The sooner there is uniform legislation in a relatively small country such as Australia, the better for the construction industry.

The lack of uniformity and the desirability of national legislation is dealt with in an article by Teena Zhang: "Why national legislation is required for the effective operation of the security of payments scheme" (2009) 25 BCL 376. At 381, Zhang says:

> Differences in the legislation between jurisdictions create friction for contractors and suppliers who often work across a number of States and Territories. These operators need to keep up with developments in eight jurisdictions which become a great burden to bear, noting a submission by the Civil Contractors Federation. Acknowledging the tendency for individual jurisidictions to stray in different directions, attempts were made by the Australian Procurement and Construction Council (APCC) in 2002 to harmonise the jurisdictional approaches in the interests of national consistency, noting a submission by APCC. Despite these intentions, it can be seen that more divergence than convergence is arising as time progresses. (citations omitted)

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

SECTION 2 COMMENTARY

[SOP2.50] Comparative legislation in other States and Territories

The table below lists and provides data as to the date of assent and the date of commencement of legislation in Victoria, Western Australia, Queensland, the Northern Territory, South Australia, Tasmania and the Australian Capital Territory.

State/Territory	Name of Act	Date of Assent/ Commencement
Victoria	*Building and Construction Industry Security of Payment Act 2002*	Assented to on 14 May 2002. Commenced 31 January 2003.
	Building and Construction Industry Security of Payment (Amendment) Act 2006	Assented to on 25 July 2006. Commenced 30 March 2007. Sections 1, 3, 38, 39 and 41 commenced on assent, remainder on commencement. For the transitional provision, see s 53 of the *Building and Construction Industry Security of Payment Act 2002*, as amended.
Western Australia	*Construction Contracts Act 2004*	Assented to on 8 July 2004. Commenced 1 Jan 2005.
Queensland	*Building and Construction Industry Payments Act 2004*	Assented to on 20 May 2004. Commenced 1 October 2004.
Northern Territory	*Construction Contracts (Security of Payments) Act 2004*.	Assented to on 21 December 2004. Commenced 1 July 2005.
South Australia	*Building and Construction Industry Security of Payment Act 2009*	Assented to on 10 December 2009. Commenced 10 December 2011.
Tasmania	*Building and Construction Industry Security of Payment Act 2009*	Assented to on 17 December 2009. Commenced 17 December 2009.

State/Territory	Name of Act	Date of Assent/ Commencement
Australian Capital Territory	*Building and Construction Industry (Security of Payment) Act 2009*	Notified under the *Legislation Act 2001* on 26 November 2009. Commenced 1 July 2010.

The Acts and Regulations for the each of the States and Territories can be found in the Legislation section of this service.

The main emphasis of this commentary is in respect of the New South Wales legislation for the reason that it was the first of such legislation in Australia and it has given rise to a substantial amount of disputes that have wound their way through the courts, resulting in judgments of the Court of Appeal of New South Wales and the New South Wales Supreme Court on a number of important issues.

In her article, "Why national legislation is required for the effective operation of the security of payments scheme" (2009) 25 BCL 376, Teena Zhang traces the history of the New South Wales legislation. She says at 378–379:

> New South Wales was the first State to introduce the modern form of security of payment legislation with the *Building and Construction Industry Security of Payment Act 1999* (NSW) (NSW Act) assented to on 5 October 1999 and commencing on 26 March 2000. It was modelled partly on the *Housing Grants, Construction and Regeneration Act 1996* (UK) (HGCR) and the recommendations made by the Latham Report, a United Kingdom inquiry into the construction industry preceding the HGCR and released in 1994: see Latham M, Department of the Environment UK, *Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (1994). In 2002, the NSW Act was amended to make enforcement processes less susceptible to delay tactics with a key change being to prevent a party facing a claim for summary judgment raising a defence or cross claim: *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW), ss 15–16. Other minor amendments were made: *Statute Law (Miscellaneous Provisions) Act (No 2) 2003* (NSW), Sch 3, and another extensive review was conducted in 2005. Despite this, only a redundant reference was updated in 2008: *Statute Law (Miscellaneous Provisions) Act 2008* (NSW), Sch 2.4.

Zhang, at 376 ff, distinguishes between the East Coast security of payments model (including the Australian Capital Territory) on the one hand, and the West Coast model, comprising the security of payment legislation in Western Australia and the Northern Territory. At 380, she says:

> The introduction of the *Construction Contracts Act 2004* (WA) (WA Act) created significant disparities with the East Coast States. It was modelled on New Zealand statute and aspects of the United Kingdom legislation not emphasised by the East Coast States. For example, it gives greater prominence to eliminating the British Latham report's characterisation of "unfair contract terms": see generally Coulthard W, "Western Australian Security of Payment – A More Even Handed Approach?" (2004) 16(5) *Australian Construction Law Bulletin* 49. For an outline and discussion of Latham's unfair terms see Tyrill J, "reform in the UK – The Latham Report, Construction the Team, HMSO 1994" (1994) 40 *Australian Construction Law Newsletter* 55 at 57. It does not employ terminology such as the East Coast model's "payment claims" and "payment schedules" but instead relies on the defined term "payment dispute" (defined in s 6). This is because the Act does not prescribe how a party is to make a claim to another for payment (s 16). Its physical layout also varies as

does its adjudication procedures, to be discussed later. The *Construction Contracts (Security of Payments) Act 2004* (NT) (NT Act) was closely modelled on the WA Act. Despite the differences between the West Coast model and the dominant East Coast model: for a discussion of the two models (though slanted towards the West Coast), see Master Builders Association, *Submission 31/10/2008* (Security of Payment Legislation in SA), http://www.feg.com.au/documents/MBASubmissionreSoP.pdf, viewed 7 September 2009, the objectives of the legislation remain the same.

The differences between the New South Wales Act and the relevant Acts of the Northern Territory and Western Australia are noted by Mildren J at [46] of *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46, where his Honour said:

> There are very significant differences between the Building and Construction Industry Security of Payment Act 1999 (NSW) and the Construction Contracts (Security of Payments) Act (NT). There is no equivalent s 33(1)(a) of the NT Act and there are a number of other important differences. The NT Act is modelled on the Construction Contracts Act 2004 (WA). Structurally, the WA Act and the NT Act bear little resemblance to the NSW, Victorian or Queensland Act. Great care must be exercised in relying on decisions from those jurisdictions as to the interpretation to be given to the NT Act. Nevertheless, I consider that there is much guidance to be had on questions of statutory interpretation and jurisdictional error.

The differences between the NSW and Queensland legislation in regard to the curial review of adjudication determinations was brought into sharp focus by Chesterman J in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333 (14 November 2007) at [44] where His Honour said:

> The legislative difference has another significance. It means that the New South Wales authorities are of no, or very little, use in determining applications brought pursuant to the JR Act. That Act determines the grounds on which the review may be granted and whether relief may be given.

A curious set of facts came together in *Pioneer Sugar Mills Pty Ltd v United Group Infrastructure Pty Ltd* [2006] 1 Qd R 535; [2005] QSC 354 (25 November 2005) where the construction contract was concluded prior to the Queensland Act coming into force, but there were subsequent variations which were agreed to and carried out after the Act came into force.

Byrne J held that the Act did not apply to variations standing on their own. Obviously, the position would have been different had the entire contract concluded subsequent to the coming into effect of the Queensland Act, in which event, the variations would have been part and parcel of the construction contract and the Queensland Act would have applied thereto.

[SOP2.60] Necessity to ascertain and bear the legislative differences between the East Coast and West Coast models in mind at all times

In the setting out of this work initially, the focus was on the New South Wales Act which was the first security of payments legislation to be enacted, and where the majority of the authority on the construction of security of payments legislation was to be found.

Since this Service was first published, security of payment legislation has found its way into the statute books of all the States and Territories.

As set out above, there are substantial differences between the East Coast and the West Coast models, and even in some States and Territories where the same model has been followed, there are substantial differences

In order to accommodate the above facts, the layout of this work has been arranged as follows:

- Firstly, the relevant section of the New South Wales Act is set out.
- Secondly, there is a commentary on that section (or subsection) in regard to the words and phrases employed therein, and the citation of, and where applicable, a discussion on the relevant New South Wales case law.
- Thirdly, either at the end of most sections, or at some other convenient place in the text, there are references to each one of the other States and Territories, with a commentary of what is provided in the relevant comparative sections of their Acts.

A selection has had to be made in regard to the material inserted under the heading of each one of the States and Territories, other than New South Wales, as not to do so would escalate the length of this work beyond acceptable limits.

With each new update and further editions of this work, the comparative material will be expanded and developed.

The reader must be astute at all times to refer to the relevant comparative section, and should search for any unique provision therein that may, for time constraints, not have been commented on in full or at all, and which may impact upon the reader's task.

3 Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

[Subs (1) subst Act 133 of 2002, s 3 and Sch 1[1]]

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[2]]

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

(a) the making of a payment claim by the person claiming payment, and

(b) the provision of a payment schedule by the person by whom the payment is payable, and

(c) the referral of any disputed claim to an adjudicator for determination, and

(d) the payment of the progress payment so determined.

[Subs (3) am Act 133 of 2002, s 3 and Sch 1[3]]

(4) It is intended that this Act does not limit:

(a) any other entitlement that a claimant may have under a construction contract, or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

[Subs (4) subst Act 133 of 2002, s 3 and Sch 1[4]]

[S 3 am Act 133 of 2002]

SECTION 3 COMMENTARY

[SOP3.50] The original concept of adjudication

In the second reading speech, the NSW Minister for Public Works and Services said:

> With regard to the background to this Bill I remind the House that on 15 February the Premier announced the Government's intention to stamp out the un-Australian practice of not paying contractors for work they undertake on construction. It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families.
>
> The Government is determined to rid the construction industry of such totally unacceptable practices. In doing so, there is a clear recognition by this Government that any action taken does not add unnecessary cost to industry, its participants and its clients. A draft exposure Bill, on which this proposed legislation is comprehensively based, was issued for public comment by the Premier on 15 February 1999, as part of a package of reforms. Other elements of the package – namely an industry registration scheme and compulsory insolvency insurance – are under active consideration by the Government. The draft exposure Bill has received widespread support and recognition from all sectors of the industry, including bodies representing contractors, subcontractors, suppliers and property developers.
>
> …
>
> The main thrust of this Bill is to reform payment behaviour in the construction industry. … (*New South Wales Hansard Articles*, Legislative Assembly, 29 June 1999, No 16 (http://www.parliament.nsw.gov.au)).

The object of the introduction into New South Wales of the Act has been summed up in an unpublished paper by the Honourable Mr Justice Robert McDougall, *The Building & Construction Industry Security of Payment Act 1999*, (September 2004) thus:

> As construction contracts in New South Wales have long been "notorious" for their extremely tight profit margins (*Abignano Ltd v Electricity Commission (NSW)* (1986) 3 BCL 290, 297 Smart J), it is essential for the financial survival of many contractors and subcontractors that payment for services rendered be promptly made and not unreasonably withheld. To this end the *Building and Construction Industry Security of Payment Act 1999* ("the Act"), as amended by the *Building and Construction Industry Security of Payment Amendment Act 2002* ("the amending Act"), aims to ensure that any person who carries out construction work (or the supply of related goods and services) under a construction contract in this State:
>
> (a) is provided with a statutory right to progress payments in respect of that work, regardless of whether the contract is silent on the matter; and
>
> (b) has access to a "fast track" (*Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* [2003] NSWSC 1019 at [14], Einstein J) adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately without prejudice to the right of parties to have disputes ultimately determined in accordance with ordinary court or other applicable dispute resolution processes. (*Brodyn* was upset on appeal and for which see [SOP25.70] below, but not on this point.)

Campbell J (as his Honour then was) in *Amflo Constructions Pty Ltd v Jefferies* (2004) 20 BCL 452; [2003] NSWSC 856 at [25], made similar observations, where his Honour said:

> A fundamental feature of the legislation is that, apart from the fact that parties to a construction contract cannot contract out of the rights given by the legislation … nothing … affects any of the rights that parties to a construction contract have … The concern of the Act is with maintaining the cash flow of claimants, by enabling them to recover quickly amounts which the adjudication process says they are entitled to. It is possible for the person who pays the amount of money which an adjudication has found due to seek to reclaim that money, in court proceedings which decide what the ultimate legal rights of the parties are. An evident purpose of the Act is that, if there is to be such litigation, it will start from a position where the claimant has been paid the amount which the adjudication process has decided should be paid. [Specific references to the sections of the NSW Act omitted].

One finds a similar observation in regard to the Western Australian legislation by Beech J at [122] in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, where his Honour said:

> In construing the Act it is to be borne in mind that the object of the scheme created by the Act is, as described in the explanatory memorandum and the Second Reading Speech, to "keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes".

Tottle J, at [27] of *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88, cited the following passage of a judgment of K Martin J in *Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35; [2011] WASC 172 at [60]:

> It is of fundamental importance, in my view, to understand that the object of this legislation was to attempt to reform earlier unacceptable scenarios of inequality of bargaining power in the construction contract environment. Contractors were highly vulnerable to being hurt by being kept out of funds due to them by an ongoing legal dispute in circumstances where they had performed the contracted work, but had not been paid. It is easy to see how a contractor who is leveraged and pressed for funds may lack the time, opportunity or resources to press its position to a result in a drawn out fight for payment against a well resourced principal, in a protracted arbitration or contested litigation. The speedy and informal procedures delivered as reforms by the *Construction Contracts Act* do not make the adjudicator's decision on the payment of funds final (save as to the capacity to obtain and enforce payment). …

At [28] of *BGC Construction*, his Honour noted that the framework of the Western Australian Act was set out by Murphy JA in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217; at [29]-[51]. Tottle J adopted the comprehensive review of the provisions of the Western Australian Act by Murphy JA in *Perrinepod*.

See further the judgment of Tottle J in *Citygate Properties Pty Ltd v BGC Construction Pty Ltd* [2016] WASC 101.

There are also similar observations in the judgment of Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 (24 April 2009), where at [42] his Honour said:

> Campbell J also considered the contents of the second reading speech in introducing amendments to the NSW Act, the *Building and Construction Industry Security of Payment Amendment Bill 2002* (NSW): New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002, 6541 (Morris Iemma). Given the provenance of the Victorian Act, these observations of the New South Wales Minister provide useful insights into the operation of the Victorian Act: see *Interpretation of Legislation Act 1984* (Vic) s 35(b). In his speech the New South Wales Minister said:
>
> > The main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover

> progress payments. The Government wanted to stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying, or simply delaying payment. …
>
> The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid …
>
> Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act …
>
> … there will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined.
>
> Presently, when a respondent fails to pay the claimant by the due date for payment under the contract, the claimant's only recourse to enforce payment is to commence proceedings in a court. The Bill will give the claimant another option. The claimant will be able to opt to have an adjudicator determine the amount of the progress payment that is due. This is an "optional adjudication". The claimant will still be able to proceed to adjudication earlier if the respondent provides a payment schedule and the scheduled amount is less than the amount claimed. The benefit to the claimant of proceeding with an optional adjudication rather than commencing proceedings in a court is that the claimant will then be able to use the adjudication certificate to obtain judgment expeditiously and without a court hearing. The claimant will be able to initiate an optional adjudication when the respondent fails to provide a payment schedule within time and fails to pay the amount claimed, or the respondent provides a payment schedule but fails to pay the whole of the scheduled amount.

As noted by Vickery J at [45] of *Hickory*, the Act [his Honour was referring to the Victorian Act that the same observations apply across the board] places a claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights.

The same thoughts were expressed by McDougall J at [30] in *Walter Construction Group Ltd v Robbins Co* (2005) 21 BCL 236; [2004] NSWSC 549 (18 June 2004), where his Honour said:

> I do not accept that the determination on the adjudicator provides any convincing indication of the amount of the plaintiff's entitlement. In particular, I do not regard the determination as providing any convincing indication that the likely amounts of the plaintiff's claim will be much less than the sum claimed in the summons. I think that the inherent limitations in the adjudication process, and the interim nature of the procedure, mean that it could not be seen as an accurate predictor of the outcome of a fully prepared hearing.

At [51] of *Saville v Hallmarc Construction Pty Ltd* [2015] VSCA 318, Warren CJ, Tate JA (with whom Kaye JA agreed) considered what McDougall J said in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, and agreeing with it, their Honour's summarised the relevant principles as follows:

(1) it operates in a 'rough and ready' way to preserve the cash flow to a builder notwithstanding that the builder might ultimately be required to refund the money received and yet have an inability to repay;

(2) it imposes a mandatory regime regardless of the parties' contract with extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses;

(3) at each stage of the regime for enforcement of the statutory right to progress payments, it lays down clear specifications of time and other requirements to be observed, rendering it not difficult to understand 'that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation';

(4) as adjudication determinations are capable of being filed as a judgment for debt in a court of competent jurisdiction, a respondent to a payment claim should not be at risk of suffering a judgment where a temporal limitation has not been complied with by the claimant;

(5) a claimant has alternative remedies; 'even if the door to adjudication is closed, the door to judgment remains open'.

This is, with respect, a true but quite startling observation. The person called on to pay by reason of an adjudicator's determination, could be sent to the bankruptcy courts, by an adjudication determination that bears no resemblance to a determination of the correct liability if any. It will be up to that person's trustee in bankruptcy to bring an action to correct the imbalance, but the weirdness of the system dictates that it will be up to the moving party in an action or arbitration brought to challenge the adjudicator's determination to attempt to prove that the money paid pursuant to the adjudication determination was not owing. Without apparently realising this consequence, the legislature has turned the usual onus of proof on its head.

Furthermore, as pointed out at [SOP25.455], a determination has no relevance where bankruptcy proceedings are on foot. In such proceedings the party claimed against is not bound by the determination, and can raise all the defences open to it as if there were no determination.

In *Hitachi Ltd v O'Donnell Griffin Pty Ltd* [2008] QSC 135 at [6], Skoien AJ said:

> However the courts of Queensland and New South Wales (which has very similar legislation) have on a number of occasions recognised the difficulties faced by the adjudicator in more complicated cases. Thus:
>
> (a) the process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection, *Roadtek, Department of Main Roads v Davenport* [2006] QSC 47 at [16] per McKenzie J;
>
> (b) it is a somewhat pressure cooker environment in which adjudicators provide their determinations, *Shell Refining (Australia) P/L v AJ Mayr Engineering P/L* [2006] NSWSC 94 at [27] per Bergin J;
>
> (c) the Act provides those who carry out construction work [or the supply of related goods and services] under a construction contract access to a "fast track" adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately without prejudice to the right of the parties to have disputes ultimately determined in accordance with ordinary litigious procedures, *Lucas Stuart P/L v Council of the City of Sydney* [2005] NSWSC 840 at [13] per Einstein J;
>
> (d) What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. The vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in

> which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided on a full curial hearing. It is also because of the constraints imposed upon the adjudicator… and in particular by… denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of larger construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedure. That claw back route expressly includes the making of restitution orders, *Brodyn P/L v Davenport* [2003] NSWSC 1019 at [14] per Einstein J, cited with agreement by de Jersey CJ in *Intero Hospitality Projects P/L v Empire Interior (Australia) P/L* [2007] QSC 220.

In *Roadtek, Department of Main Roads v Davenport* [2006] QSC 47 at [18], Mackenzie J noted:

> Two other matters should be noted. The first is that under s 31(1) the adjudicator's certificate may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction. Section 31(4) refers to "proceedings to have the judgment set aside" and what is within the scope of such an application. In particular, no counterclaim can be brought against the claimant; no defence in relation to matters arising under the contract can be raised; and the adjudicator's decision cannot be challenged. The reference to setting the judgment aside and the limitation on what can be raised in such proceedings makes the challenge dependent on the existence of grounds for setting aside a judgment other than those enumerated.

This legislation seems to have been inspired by the same objects that were thought to be achieved in the *Housing Grants, Construction and Regeneration Act 1996* (UK), referred to for the sake of brevity as "HGCRA" and parallel Scottish legislation. Because of the substantially similar objectives between the introduction of HGCRA and the New South Wales legislation, and because the New South Wales legislation seems to have borrowed some words and phrases from the English Act, some English and Scottish authority has been cited below, notwithstanding the fact that it has been observed that, because of the substantial differences between the wording of the two legislative schemes, these authorities are of limited assistance in resolving disputed constructions of the Act, and for which see McDougall J's unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004) at p 25.

In *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 (14 April 2005) McDougall J at [10] referred to his Honour's judgment in *Musico v Davenport* [2003] NSWSC 977 in support of the view that the English authorities, because of the differences in the legislation, are of relatively little assistance. It is submitted that this principle is taken too far, as where the Australian case law is silent on any similar point, and there is English or Scottish authority that is relevant, surely that authority can and should be paid regard to, and not treated dismissively.

In *Boutique Developments Ltd v Construction & Contract Services Pty Ltd* [2007] NSWSC 1042, Construction & Contract Services provided engineering reports to Boutique Developments in aid of its litigation with CGU Insurance Pty Ltd. The services were the preparation and provision of expert reports. The question arose as to whether or not the provision of those reports fell within the definition of "construction work" or work undertaken to supply "related goods and services" in respect of both of which services a

person became entitled to a progress payment under s 8(1) of the Act. In an application for an injunction restraining Construction & Contract Services from taking any steps to obtain or enforce any adjudication determination, Gzell J held at [7] and [8] that the work claimed for was not construction work under the Act, and that to qualify as such the services had to relate to the actual construction work itself. His Honour held that the adjudicator would act outside the scope of his jurisdiction if he proceeded with the matter.

However, although the facts of the matter before him were distinguishable, Gzell J followed *Australian Remediation Services Pty Ltd* above and *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 411 in holding that the question of the adjudicator's jurisdiction was a matter for the adjudicator. In the premises, the application for an injunction was rejected.

It is respectfully submitted that this decision on this point, in keeping with the decisions in *Australian Remediation Services Pty Ltd* and *Lifestyle Retirement Products No 2* on the same issue, is wrong and should in due course attract the attention of the Court of Appeal.

Where clearly the work was neither construction work nor qualified as "related goods and services", the Court should have intervened at an interlocutory stage, and prevented the matter from proceeding further.

The history of the events leading to the enactment of the English Act has been set out by May LJ in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] All ER (D) 311 (Nov); [2004] 1 All ER 818; [2004] 1 WLR 2082.

In *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] TCLR 6; [2004] EWHC 888, Judge Toulmin CMG QC at [118] cited the speech of Lord Ackner at the report stage of the English legislation in the House of Lords. His Lordship said:

> Adjudication is a highly satisfactory process. It comes under the rubric of "pay now, argue later" which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up important contracts. (*Hansard HL* Vol 57 1 Cols 989, 990).

In *Watson Building Services Ltd, Re Application for Judicial Review* [2001] ScotCS 60 (13th March 2001), the court said at [16]:

> Counsel submitted that the decision of an adjudicator was by its nature an interim decision. The decision was always open to review by the court or the arbiter ultimately determining the merits. The intention of the 1996 Act was a quick, cheap, interim resolution procedure. If the courts were to interfere on a regular basis, the purpose of the statutory scheme would be undermined. Where an adjudicator answered the right question in the wrong way, the court should not interfere, even where the error was blatant: *Allied London & Scottish Properties plc v Riverbrae Construction Ltd* [1999] ScotCS 170; 2000 SLT 981 (12 July 1999); 2000 SLT 981; *Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd* [2000] ScotCS 330 (21 December 2000) (Lord Caplan).

In *Transgrid v Siemens Ltd* [2004] NSWSC 87 (25 February 2004) at [56], Master Macready stated that the Act set up what has been termed a "dual railroad track system" in which the statutory provisions may be triggered and supplement any contractual right in a construction contract, as defined. (This judgment was also set aside on appeal and for which see *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004), but not on this point.)

In *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* (2004) 20 Const LJ 338; [2004] EWHC 393 (Technology and Construction Court) (27 February 2004), the court at [79]–[82] said:

> [79] The original concept of adjudication was to provide a quick and interim decision in the course of a construction contract in advance of what was likely to be complex and expensive disputes. It would have the advantage that it provided a mechanism for resolving disputes in the course of a contract, and thus allowing the contract to

continue. As Lord Ackner said at the Report stage of the Bill in the House of Lords:

> What I have always understood to be required by the adjudication process was a quick enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject of arbitration or litigation. That is a highly satisfactory process. It came under the rubric of "pay now, argue later", which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts.

[80] Quickly, the construction industry realised that parliament had introduced a procedure which could also be used as an intervening provisional stage in the dispute resolution process where the contract had come to an end.

[81] Dyson J put it in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 at 97:

> Crucially it has made it clear that decisions of adjudicator are binding and are to be complied with until the dispute is finally resolved.

[82] As very complex disputes are referred to adjudicators, often years after the events which constitute the dispute, and adjudicators are expected to give decisions in such matters within a very tight timeframe, it is hardly surprising that increasing numbers of awards are being challenged for a wide variety of reasons.

In *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] 37 EG 173; [1999] BLR 93 (12 February 1999) at 97 (BLR), Dyson J said:

> [14] It is clear that parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But parliament has not abolished arbitration and litigation construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

This passage in Dyson J's judgment has been cited with approval in *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] BLR 49; [1999] EWHC Technology 182 (17 December 1999).

In *Bouygues* at [35], Dyson J observed in regard to the adjudication procedure that "[t]he potential for irremediable injustice is equally apparent" and added:

> It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.

In *Clyde Bergemann v Varley Power* [2011] NSWSC 1039, the amount involved was to the order of approximately $4m, and related to major infrastructure projects. McDougall J doubted that the legislature contemplated that the benefits of the Act would extend to very substantial payment claims.

[SOP3.60] Victoria — object of the legislation

Section 3(1)–(4) contains a fairly extensive list of objectives in terms which are identical to the relevant New South Wales comparative section.

[SOP3.70] Western Australia — object of the legislation

But for the statement of the purposes of the Act at the commencement thereof, this Act is silent in regard to the objectives which it seeks to achieve.

Judicial pronouncements concerning the objects of the Western Australian legislation are referred to in *O'Donnell Griffin Pty Ltd above; Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35 [2011] WASC 172; at [60]; *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217; at [29]-[51]; *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88 at [27], as discussed in [SOP3.50] above.

[SOP3.80] Queensland — object of the legislation

Part1, Div 3, s 7 contains the object of the Queensland Act which is in the same terms as the New South Wales Act.

[SOP3.90] Northern Territory — object of the legislation

The objects of the Act are, somewhat tersely, stated in s 3, but cover substantially the same concept as the objects set out in s 3 of the New South Wales Act above.

[SOP3.100] South Australia — object of the legislation

Part 1, s 3 contains the object of the South Australian Act. This section seeks to achieve substantially the same objectives as set out in the other States and Territories.

[SOP3.110] Tasmania — object of the legislation

Part 1, s 3 contains the object of the Tasmanian Act. This section seeks to achieve substantially the same objectives as set out in the other States and Territories.

[SOP3.120] Australian Capital Territory — object of the legislation

Section 6 of the ACT Act recites its object in terms substantially the same as the New South Wales Act.

[SOP3.130] The constitutional validity of the security of payments legislation

(a) A discussion of the constitutional validity of the security of payments legislation generally

The constitutional validity of the Queensland *Building and Construction Industry Payments Act 2004* referred to more fully below was tested in *Blue Chip Development Corporation (Cairns) Pty Ltd v Van Dieman* [2009] FCA 117 (13 February 2009). Buchanan J at [6] summed up the Motion before as follows:

> The statement of claim pleads reliance upon s 45D of the *Trade Practices Act 1974* (Cth) and also seeks to raise a constitutional matter, with respect to which, on the same day, notice was given under s 78B of the *Judiciary Act 1903* (Cth). The constitutional matter said to be raised by the proceedings in this Court is to the effect that certain provisions in the BCIP Act are invalid for reason of inconsistency with s 22 of the *Federal Court of Australia Act 1976* (Cth). Section 22 of the Federal Court of Australia Act grants to this Court power to grant all remedies to which parties appear to be entitled, so that as far as possible matters in controversy may be completely and finally determined. It is a grant of power rather than of jurisdiction (see eg *Carantinos v Magafas* [2008] FCA 1107 at [3]).

His Honour held at [8]:

> In my view, there is no sufficient foundation for this Court to interfere, at this point in time at least, with the operation of the statutory scheme established by the BCIP Act. Assuming for the purpose of this judgment that an arguable case might exist that Blue Chip Development has a claim for liquidated damages against Flea's Concreting (as to which I say nothing more than making the assumption), I am not satisfied that the

balance of convenience requires any injunctive relief.

Significantly, it cannot be said that the constitutional challenge to this legislation, which is bound to reappear, is at an end.

In *Intero Hospitality Projects Pty Ltd v Empire Interior (Aust) Pty Ltd* [2008] QCA 83 (11 April 2008) at [46]–[54] Muir JA said the following:

The purpose of the Act and the role of Adjudicators

[46] The underlying object of the Act was described in the second reading speech to the *Building and Construction Industry Payments Bill* 2004 (Qld) as being "… to provide for a dispute resolution process whereby adjudicators can quickly resolve payment disputes between parties to a construction contract on an interim basis without extinguishing a party's ordinary contractual rights to obtain a final determination of a payment dispute by a Court or tribunal of competent jurisdiction."

[47] The Act sets up a regime under which a person claiming monies under a construction contract ("the claimant") may serve a claim for payment on the person alleged to be liable to make payment under the contract ("the respondent"). The respondent may respond to the claim by serving on the claimant a payment schedule stating the amount of payment the respondent proposes to make. Where that payment is less than the claimed amount, the schedule must explain the reason for the deficiency. The Act provides for the consequences of non-payment where a payment schedule is not provided and where there is non-payment of any amount admitted to be payable under a payment schedule.

[48] Where the claim is rejected in whole or in part in a payment schedule, the claimant may apply for adjudication of the claim. The adjudication must be carried out by an adjudicator registered under the Act. Within the time period provided for by the Act, the respondent must file a response to the application. After the filing of that response the adjudicator is required to decide the application as quickly as possible and in any event within 10 business days after the earlier of the date on which the adjudicator receives the adjudication response or the date on which the adjudicator should have received the adjudication response. The parties have the right to extend time for the determination.

[49] In deciding the application, the adjudicator may consider only the matters listed in s 26(2) of the Act and the parties are not entitled to legal representation on any conference called by the adjudicator. The subsection does not contemplate the giving of oral or other evidence, apart from the provision of "relevant documentation".

[50] The respondent is required to pay the amount, if any, found by the adjudicator to be payable. In the event of default in payment there is provision for the obtaining of an adjudication certificate which may be "filed as a judgment for a debt … in a Court of competent jurisdiction".

[51] It is apparent from the foregoing that the Act is intended to provide a mechanism by which claims for payment under construction contracts can be decided quickly, on an interim basis and by which payment can be enforced even though a dispute in respect of the right to payment is being litigated or is subject to an alternative dispute resolution process. It is apparent also that in making determinations under the Act adjudicators will often lack the evidence upon which and the time within which to make fully informed considered determinations. That does not matter in the scheme of things, as adjudicators' determinations do not finally determine parties' contractual rights. That is left to the courts or to alternative dispute resolution processes agreed upon by the parties.

Consideration of the exercise of a discretion under section 48 of the Judicial Review Act 1991 (Qld)

[52] In his reasons, the primary judge referred with approval to decisions in which similar observations had been made. Other judicial observations on the nature of the Act and its counterpart in New South Wales are collected in *Altys Multi-Services Pty*

Ltd v Grandview Modular Building Services Pty Ltd and *Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Anor*. As Chesterman J remarked in the latter decision, the Act emphasises speed and informality.

[53] His Honour went on to observe that "the salutary protection afforded to subcontractors by the Act will be sadly reduced if applications are routinely reviewed on any of the grounds appearing in s 20 of the JR Act". His Honour then referred with approval to paragraph 10 of the primary judge's reasons in this case. The primary judge there said:

> [10] One very substantial limitation upon my usefully dealing with them now, is that I could not do so definitively – for want of proper evidence tested through the curial process. If I were to conclude that because of the way he went about the determination, the adjudicator erred in law, the most I could do would be to remit the matter for determination before another adjudicator. The parties' interests would much better be served were those issues left for definitive determination in properly instituted court proceedings of a comprehensive character later in the piece.

[54] Judicial review of adjudicators' decisions sits uncomfortably with the Act's purpose of providing an expeditious, interim determination. Were the application for leave to appeal and the appeal to succeed, the matter could be remitted to another adjudicator for a determination. In that event, instead of one determination contemplated by the Act there would be two determinations with an appeal interposed. There would be also the likelihood of litigation to finally determine the parties' contractual rights.

In *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCAFC 126, the plaintiff sought to restrain Houben from pursuing an adjudication application under the NSW Act. The plaintiff's principal submission was that the Act was inconsistent with the Federal jurisdiction invoked under two pieces of Commonwealth legislation, the *Admiralty Act 1988* and the Australian Consumer Law (contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth)).

Keane CJ noted at [30] that s 25(1) of the NSW Act did not deem an adjudication certificate to be a judgment of the court, but provided merely that such a certificate could be "filed as a judgment" and was "enforceable" as if it were a judgment for a debt. One may be constrained to ask whether this holding was stretching the language of s 25(1) of the NSW Act somewhat. At [68] his Honour said:

> [68] Any quantification of the entitlement of the defendant by the adjudicator under the Security of Payment Act will not be resolved as part of the matter before the Federal Court. To the extent that the underlying rights and liabilities of the parties are so resolved in the Federal Court that the quantum of the plaintiff's liability is less than the amount which the plaintiff might have paid under that Act, the Federal Court may order restitution of that amount as money had and received. I respectfully consider that the provisional and defeasible right created by the Security of Payment Act does not create an inextricable link between the liability which arises on the filing of an adjudication certificate with the Supreme Court and the final determination by the Federal Court of the underlying dispute arising from the charter of the dredge. The provisional and defeasible right arising under the s 25 judgment is manifest in the very terms of s 32. That character is quite inconsistent with the notion that the s 25 judgment is inextricably linked to the matter within federal jurisdiction. That matter, that is the matter within federal jurisdiction, can be decided without the Court entering into any consideration of that judgment and whether it should stand or be set aside. The provisions of s 32(3)(a) of the Security of Payment Act do not distract from the authority of the Federal Court to give such judgment as is just having regard to monies paid provisionally by the plaintiff to the defendant where those amounts exceed the defendant's true entitlements under the contract: see *The Commonwealth v McCormack* (1984) 155 CLR 273 at 276.

His Honour concluded at [69] that he had to answer the question of the constitutional validity of the Act in the affirmative. Buchanan J, in a separate judgment, concurred with Kean CJ.

Rares J, in a closely reasoned separate judgment, from which it is, with respect, difficult to differ, came to the opposite conclusion. In paragraphs [93]–[96], his Honour reasoned as follows:

> [93] Here, it was common ground between the parties that an adjudicator does not exercise judicial power in making an adjudication. But, the act of filing the adjudication certificate creates a "judgment for a debt in any court of competent jurisdiction and is enforceable accordingly" (s 25(1)). If a certificate is filed in the Supreme Court, the "judgment" so created by s 25(1), is a judgment, decree or order of that Court that attracts the appellate jurisdiction of the High Court under s 73 of the Constitution. The first issue that arises is what would be the subject of an appeal to the High Court against such a "judgment"? If the adjudication process was non-judicial, then what error in respect of such a judgment, or an order based on it, could the High Court correct in an appeal?
>
> [94] Secondly, by filing the certificate, depending on the controversy between the parties, the party enforcing it may create a matter in federal jurisdiction, such as, in this case, a general maritime claim and a claim under the Australian Consumer Law. This is because s 32 of the Security of Payment Act inextricably links that certified amount to the adjustment of accounts between the parties that must occur in the course of a court deciding finally the underlying dispute on the "construction contract".
>
> [95] By force of s 25(4) of the NSW Act a debtor who brings proceedings to set aside a judgment of a court made on the basis of the unpaid amount of an adjudication certificate under s 25(1) and (2) is not entitled to bring any cross claim (s 25(4)(a)(i)), raise any defence in relation to matters arising under the construction contract (s 25(4)(a)(ii)) or challenge the adjudicator's determination (s 25(4)(a)(iii)). Generally speaking, the Security of Payment Act does not permit the debtor to make any challenge to the merits of an adjudicator's determination by way of defence to its liability to pay the sum outstanding under an adjudication certificate: *Bittania* 67 NSWLR at 27 [60] per Basten JA with whom Hodgson and Tobias JJA agreed. Section 15(4) has a similar effect where the debtor does not provide a responsive payment schedule. Thus, s 25(4)(a)(ii) effectively excludes from consideration, in proceedings to set aside a judgment enforceable by reason of s 25(1), any issue that may arise under a general maritime claim in s 4(3)(f) of the Admiralty Act, and hence any issue in federal Admiralty jurisdiction. So, in proceedings under s 25(4) to set aside a judgment enforceable under s 25(1), a debtor could not argue that the contract had been fully performed and that no sum was capable of being found due by it then or in the future.
>
> [96] A judgment under s 25(1) must be recognised and given full faith and credit under s 118 of the Constitution as a judicial proceeding of a State. Although s 25(4) refers to a debtor commencing proceedings to set aside such a judgment, that section, if it is a valid law, and s 118 of the Constitution, exclude any basis on which the judgment could be challenged directly in the exercise of jurisdiction under s 4(3)(f) of the Admiralty Act or by a cross claim seeking an injunction under s 232 of the Australian Consumer Law to prevent the adjudication certificate becoming binding and enforceable as a judgment of the court in which the certificate was filed.

The matter will inevitably be the subject of a special leave application to the High Court. Until its final resolution in the High Court, the same point should be pursued in state courts if the amount is sufficient to justify that course, but without additional argument and on the basis that the party's rights are reserved.

(b) The constitutional validity of ss 16(2)(a)(i), 16(4)(b)(i) and 16(4)(b)(ii) of the Victorian Act and the impact of the decision in** Facade **below on similar sections in the Acts of the other States and Territories

It is important to note that the discussion in regard to the decision in *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 below does not impact on the principle that under s 9(b) of the New South Wales Act and the mirror provisions of the other States and Territories, the determination of value may take account of building defects.

It follows that in determining the value of the work, the cost of remedying defects can, on the authorities before, be taken into account. *Facade* does not address that issue. Its focus is on those sections of the Victorian Act that purport to prohibit cross-claims, after an adjudication determination has been made.

One is left to wonder if consideration of sections such as s 9(b) of the New South Wales Act, and the mirror provisions of the Acts of the other States and Territories would have impacted on the minds of the Judges in *Facade*, had that point been argued.

In *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, Warren CJ, Tate and McLeish JJA in a judgment that was *obiter* on this issue considered the constitutional validity of *ss 16(2)(a)(i)*, 16(4)(b)(i) and 16(4)(b)(ii) of the Victorian Act. For the sake of ease of reference, those sections are set out below:

> (2) In those circumstances, the claimant–
>
> (a) may–
>
> (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
>
> …
>
> (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt–
>
> …
>
> (b) the respondent is not, in those proceedings, entitled–
>
> (i) to bring any cross-claim against the claimant; or
>
> (ii) to raise any defence in relation to matters arising under the construction contract.

See the comparative provisions in the legislation of the other States and Territories:

Australian Capital Territory: ss 17(2)(a)(i), 17(3)(b)(i) and 17(4)(b)(ii)

New South Wales: ss 15(2)(a)(i), 15(4)(b)(i) and 15(4)(b)(ii)

Northern Territory: No specific provision

Queensland: ss 19(3)(a)(i), 19(6)(b)(i) and 19(6)(b)(ii)

South Australia: ss 15(2)(a)(i), 15(4)(b)(i) and 15(4)(b)(ii)

Tasmania: ss 19(5)(a)(i), 19(8)(a) and 19(8)(b)

Western Australia: No specific provision

The point in issue was whether the relevant sections of the Victorian Act were in conflict with s 553C of the *Corporations Act 2001* (Cth) and, as such, was unconstitutional by virtue of the provisions of s 109 of the Constitution. Section 553C of the Corporations Act provides for a set-off of mutual dealings with insolvent companies. It was noted by the Court that if ss 16(2)(a)(i) and 16(4)(b) were available to companies in liquidation, they would "alter, impair or detract from" the operation of s 553C above.

Part 5.6 of Chapter 6 of the *Corporations Act 2001* deals with the winding up of companies. For the sake of convenience, ss 553(1) and 553C are set out below:

553: Debts or claims that are provable in winding up

(1) Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.

553C: Insolvent companies - mutual credit and set-off

(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:

(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and

(b) the sum due from the one party is to be set off against any sum due from the other party; and

(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

At [139]-[152] of *Facade*, and after referring in detail to the judgments of Hodgson, Tobias and Basten JJA in *Bitannia Pty Ltd & v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238 and Einstein J in *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico* (2005) 21 BCL 266 and the authority there cited, their Honours held at [177]-[180] of *Facade* as follows:

[177] In these circumstances, we consider that the constitutional point requires, as Basten JA said in *Bitannia*, close attention to the practical effect of the BCISP Act upon rights and duties conferred under Commonwealth law. We consider that the practical effect of the summary judgment proceeding made available by s 16(2)(a)(i) of the BCISP Act on the right to a set-off conferred by s 553C, is direct and significant in that it interferes with the rights made available under the Corporations Act. This is so because the BCISP Act purports to preclude reliance upon cross-claims or defences, by reason of s 16(4)(b)(i) and s 16(4)(b)(ii), whereas that reliance is protected under Commonwealth law. Cross-claims and defences are protected, where relevant, as mutual dealings under s 553C. Without the protection afforded by s 553C, summary judgment would mean that Façade would receive from Multiplex the full amount of the sum owed under the relevant payment claims, whereas Multiplex would be left to prove in the liquidation of Façade in respect of its counterclaim. This would be similar to the circumstance recognised by Beech J in *Hamersley Iron* as sufficient to "defeat the purpose and object of s 553C".

[178] Adapting what was said by Chadwick LJ in *Bouygues*, set-off under s 553C affects substantive rights by enabling the creditor of a company in liquidation to use its indebtedness to that company as a form of security. Instead of having to prove with other creditors for the whole of its debt in the winding-up, it can set off dollar for dollar what it owes the company in liquidation and prove for or pay only the balance. If the judge here had given summary judgment under s 16(2)(a)(i), the moneys paid in execution of the summary judgment would be received by the liquidator to form part of the fund available for distribution amongst Façade's creditors. If Multiplex was not permitted to rely upon its counterclaim as a cross-claim, or by way of a defence, it would be required to prove its claim in the liquidation and receive only a dividend pro rata to the amount of its claim despite having paid the full amount it owed. That is, Multiplex might have given 100 cents in the dollar to the liquidator, yet have to be

> satisfied with a dividend of some few cents in the dollar on the whole of its counterclaim. The circumstances would give rise to the very injustice which s 553C was enacted to avoid, as recognised in *Gye v McIntyre*. [211] Multiplex would thereby have foregone the benefit of treating the sum it owes under the relevant payment claims as security for its own counterclaim. It would be deprived of the protection afforded by s 553C. In other words, as Einstein J recognised in *Grosvenor*, the summary judgment, intended under the BCISP Act to be an interim payment, would become a final payment. The full sum paid could not be recouped and Multiplex would suffer irreversible prejudice. In effect s 16(2)(a)(i), together with s 16(4)(b)(i) and s 16(4)(b)(ii), of the BCISP Act would compromise the operation of s 553C of the Corporations Act.
>
> [179] In our opinion, the test articulated in the first proposition in Victoria v Commonwealth, as affirmed in *Telstra v Worthing* [1999] HCA 12; (1999) 197 CLR 61, is satisfied, namely, that ss 16(2)(a)(i) and 16(4)(b) alter, impair or detract from the operation of s 553C of the Corporations Act. Once a company has gone into liquidation, and where there are mutual dealings so that s 553C is engaged, a payment claim cannot be enforced by means of a summary judgment under s 16(2)(a)(i) of the BCISP Act, and there is no scope for the ousting of the cross-claims or defences under s 16(4)(b) of the BCISP Act.
>
> [180] We consider that s 16(2)(a)(i) and ss 16(4)(b)(i) and 4(b)(ii) of the BCISP Act are inconsistent with s 553C of the Corporations Act and are invalid to the extent of the inconsistency.

Notwithstanding their Honours observations were *obiter*, it is submitted that the judgment should and will be followed.

[SOP3.140] Adjudication process quite different from adversarial court proceedings

At [27] of *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd* [2011] QSC 293, Daubney J thought that the analogy [submitted by the defendant in that case] was not particularly apt. His Honour said:

> The conduct of civil litigation in this Court, governed as it is by complex rules and procedures, is quite a different adversarial engagement from the adjudication process prescribed under Part 3 of [*Building and Construction Industry Payments Act 2004* (Qld)].

4 Definitions

(1) In this Act:

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable, as referred to in section 22.

adjudication application means an application referred to in section 17.

adjudication certificate means a certificate provided by an authorised nominating authority under section 24.

[Def insrt Act 133 of 2002, s 3 and Sch 1[5]]

adjudication fees means any fees or expenses charged by an authorised nominating authority, or by an adjudicator, under this Act.

[Def insrt Act 133 of 2002, s 3 and Sch 1[5]]

adjudication response means a response referred to in section 20.

adjudicator, in relation to an adjudication application, means the person appointed in accordance with this Act to determine the application.

authorised nominating authority means a person authorised by the Minister under section 28 to nominate persons to determine adjudication applications.

business day means any day other than:

(a) a Saturday, Sunday or public holiday, or

(b) 27, 28, 29, 30 or 31 December.

claimant means a person by whom a payment claim is served under section 13.

claimed amount means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 13.

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

construction work is defined in section 5.

designated trust account [Repealed]

[Def rep Act 133 of 2002, s 3 and Sch 1[6]]

due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 11.

exempt residential construction contract means a construction contract specified in section 7(2)(b) as a construction contract to which this Act does not apply.

[Def insrt Act 93 of 2013, Sch 1[1]]

exercise a function includes perform a duty.

function includes a power, authority or duty.

head contractor means the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the ***main contract***) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract.

Note: There is no head contractor when the principal contracts directly with subcontractors.

[Def insrt Act 93 of 2013, Sch 1[1]]

payment claim means a claim referred to in section 13.

payment schedule means a schedule referred to in section 14.

principal means the person for whom construction work is to be carried out or related goods and services supplied under a construction contract (the ***main contract***) and who is not themselves engaged under a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the main contract.

[Def insrt Act 93 of 2013, Sch 1[1]]

progress payment means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

[Def subst Act 133 of 2002, s 3 and Sch 1[7]]

public authority [Repealed]

[Def rep Act 133 of 2002, s 3 and Sch 1[6]]

recognised financial institution means a bank or any other person or body prescribed by the regulations for the purposes of this definition.

related goods and services is defined in section 6.

respondent means a person on whom a payment claim is served under section 13.

scheduled amount means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 14.

subcontractor means a person who is to carry out construction work or supply related goods and services under a construction contract otherwise than as head contractor.

Note: A subcontractor's contract can be with the head contractor or (when there is no head contractor) with the principal directly.

[Def insrt Act 93 of 2013, Sch 1[1]]

(2) A reference in this Act to a contract that is connected with an exempt residential construction contract is a reference to a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the exempt residential construction contract.

[Subs (2) insrt Act 93 of 2013, Sch 1[2]]

(3) Notes included in this Act do not form part of this Act.

[Subs (3) insrt Act 93 of 2013, Sch 1[2]]

[S 4 am Act 93 of 2013; Act 133 of 2002

Cross-reference: *Building and Construction Industry Security of Payment Regulation 2008*: cl 18 prescribes each person or body that is a ***body regulated by APRA*** within the meaning of *Australian Prudential Regulation Authority Act 1998* (Cth) as a ***recognised financial institution*** for the purposes of s 4.]

SECTION 4 COMMENTARY

[SOP4.50] Adjudicator – not a court

At [44] of *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 (8 November 2005), Brereton J, after referring to a number of authorities, held that an adjudicator was not a court. His Honour left open the question as to whether or not an adjudicator was a tribunal. The appeal against Brereton J's decision to the NSW Court of Appeal left Brereton J's decision on this aspect undisturbed: see *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 (28 February 2007).

See the commentary on *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 by McDougall J at [42]–[43] of *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359, where the following was said:

> [42] I should note that *Halkat* was a decision given when the grounds of review were understood to be as stated in *Brodyn Pty Ltd v Davenport*. The position is now somewhat different, having regard to the decision of the Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*. The changes that flow from the decision in *Chase* are focused more on the juristic basis on which, and the way in which, the Court grants relief than on the substance of the bases upon which relief is granted.
>
> [43] In my view, what Giles J said in *Halkat* is applicable under the *Chase* regime, at least insofar as it deals with the obligations of adjudicators to carry out the powers entrusted to them by the Act in accordance with the Act and in having regard to the purposes for which those powers are conferred.

Holmwood was cited with approval by Sackar J at [58] of *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123.

In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [5], Spigelman CJ, with Basten JA and McDougall J concurring said:

> The process of adjudication is not in any sense a consensual arbitration of the character which has often been held not to be subject to the Court's supervisory jurisdiction. Rather, it is a public, relevantly a statutory, dispute resolution process, and as a consequence is subject to the supervisory jurisdiction: (See, eg, *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 882.)

Vickery J observed at [49] of *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426:

> In my opinion, an adjudication determination is susceptible to the writ of *certiorari* because it affects rights in the relevant sense and thereby satisfies the "legal rights test". It follows that, prima facie, the determinations of adjudicators are amendable to the writ of *certiorari*. They are clothed with legal authority to make a binding determination for the purposes of the Act which affect the statutory rights or obligations of persons or individuals who are claimants for progress payments under the Act or who are respondents to such claims. A similar conclusion was arrived at by McDougall J in *Musico v Davenport* [2003] NSWSC 977 at [32] and Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [15] in considering the analogous legislation in New South Wales.

His Honour reaffirmed that holding at [17] of *Director of Housing of the State of Victoria v Structx Pty Ltd (t/a Bizibuilders)* [2011] VSC 410. His Honour noted that as such, adjudicators are amenable to *certiorari*, but an adjudicator appointed under the Act, does not constitute an inferior court within the court hierarchy. At [18], his Honour observed that an adjudicator is exposed to fall into jurisdictional error in a broader range of circumstances than a court.

[SOP4.55] New South Wales — *"... business day ..."*

McDougall J, in *PPK Willoughby v Eighty Eight Construction* [2014] NSWSC 760, addressed the meaning of "business day". His Honour held:

> [108] As I have said, I do not regard the decision as lending any support to Mr Christie's argument. It does however seem to me to make it clear that the expression in this case, "business day", is to be construed in the context of the contract within which it appears, rather than at large.
>
> [109] Nonetheless, I think, it would be wrong to equate "business day" to "working day", or to conflate the two expressions. The concept of a working day is well understood in the building and construction industry. It refers to days when work is (or should be) performed on site. But the commercial activities of building contractors and their subcontractors are not confined to work carried out on site. There are essential head office and other functions which are performed whether or not work is being performed on any particular site.
>
> [110] Further, and as a matter of plain English, the word "business" in the context of this contract suggests commercial activity undertaken for profit: the world of trade and commerce. Thus, a "business day" should be regarded as a day when, in Sydney at least, business activities, of a kind relevant to the particular contract, are generally carried on. That is of some relevance in this case, because of the time limits for assessment of progress claims, and the consequences of failure to assess in accordance with those limits. The parties intended to provide that the Superintendent (and Mr To) should have the benefit of business days, rather than days in general, to perform that task.

[111] Thus understood, the expression "business day" would not extend to Saturdays, Sundays and public holidays. It would, however, extend to days when business generally is carried on, even though, for one reason or another, work under the contract was not performed on such days.

[112] If the construction for which PPK contended were correct, one consequence would be that the expression "business day" would have an ambulatory operation according to whether Eighty Eight was (or was not) performing work under the contract. For example, a Wednesday which was not a public holiday might ordinarily be regarded as a "business day". However, if Eighty Eight had the benefit of an adjudication determination in its favour but had not been paid, it could exercise the right to suspend work under the contract (see ss 24(1)(b) and 27 of the *Building and Construction Industry Security of Payment Act 1999*). On the argument for PPK, any day during which that suspension was effective would, by virtue of the suspension, cease to be a business day.

[SOP4.60] Victoria — *"... business day ..."*

(Under the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts entered into from 30 March 2007.)

In the Victorian legislation, the definition of "business day" means a day that is not a Saturday or Sunday or a day that is wholly or partly observed as a public holiday throughout Victoria.

[SOP4.70] Western Australia — *"... business day ..."*

There does not appear to be any provision in the Act in which the phrase "business day" is employed. The Act simply refers to "day" or "days" with no definition of those words. The computation of time in this regard is to be found in s 61 of the *Interpretation Act 1984* (WA).

[SOP4.80] Queensland — *"... business day ..."*

In the Queensland Act, under s 9, reference is made to the dictionary in Sch 2, where "business day" is given the same meaning as that given in the *Acts Interpretation Act 1954*, s 36, but does not include 27, 28, 29, 30 or 31 December.

[SOP4.90] Northern Territory — *"... working day ..."*

Under the Act, the phrase "working day" instead of "business day" is used and is defined as "a day other than a Saturday or Sunday or public holiday within the meaning of the *Public Holidays Act 1981*".

[SOP4.100] South Australia— *"... business day ..."*

Under s 4 of the Act, "business day" is defined as any day other than:

(a) a Saturday, Sunday or public holiday; or

(b) 27, 28, 29, 30 or 31 December; or

(c) any other day on which there is a Statewide shut-down of the operations of the building and construction industry.

[SOP4.110] Tasmania — *"... business day ..."*

Section 4 of the Act contains a definition of "business day", as follows:

"… business day …" means any day other than a Saturday or Sunday or a statutory holiday as defined in the *Statutory Holidays Act 2000*.

[SOP4.120] Australian Capital Territory — *"... business day ..."*

Section 3 of the Act refers to a dictionary at the end of the Act, where "business day" is stated as not to include 27, 28, 29, 30 or 31 December.

[SOP4.130] *"... claimed amount ..."*

In *Kembla Coal & Coke Pty Ltd v Select Civil Pty Ltd* [2004] NSWSC 628 (23 July 2004), McDougall J at [101]–[109] focused on the meaning of the word "for" in s 4 which defines the phrase "claimed amount" as "an amount of a progress payment claimed to be due for construction work carried out … as referred to in s 13".

At [105]–[107] his Honour said:

> [105] It is apparent that Barrett J in *Quasar* considered that the word "for" should be given a narrow meaning. It is clear that his Honour regarded this conclusion as required by the language of the Act: in particular, s 13(2)(b) (which refers to "the claimed amount") and the definition in s 4 of the expression "claimed amount". However, as I have noted, s 13(2)(a) requires the identification of "the construction work … to which the progress payment relates": not "for which the progress payment is claimed". The definition of "claimed amount" in s 4 certainly uses the word "for". However, it qualifies the entire definition by the concluding words "as referred to in s 13". That seems to me to indicate that the legislature regarded the relevant connection as one that could be expressed as either "progress payment claimed for construction work" or "progress payment relating to construction work". That does not seem to me to require that the word "for" be given a narrow construction.
>
> [106] Accordingly, in the context of the Act – specifically, having regard to the objects of the Act as stated in s 3 (see [95] and [96] above) – and the recognition, through s 9(a), of the primacy of contractual quantification where that is available (see [98] above, and see also s 3(4): the Act does not limit contractual entitlements), I think that a progress payment may include an amount for preparation costs where the contract so provides. In other words, where the contractual assessment of a progress payment (to which, pursuant to s 9(a), effect is to be given) includes preparations costs as a component of the entitlement, I do not think that the Act should be construed so as to deprive the claimant of that entitlement. It would be an extraordinary result if an assessment of the claimant's rights by the Superintendent, or other appropriate person having that function under the contract, included (as the contract demands) any applicable amount of preparation costs, but if the adjudicator's determination could not.
>
> [107] I therefore conclude that, to the extent that the adjudicator did include an amount for preparation costs, he did not fall into jurisdictional error. At the risk of repetition, I stress that this conclusion applied only to an entitlement pursuant to a relevant contractual provision to which, under s 9(a), effect is to be given. It does not apply to the case where the entitlement is to be assessed under s 9(b) by reference to the factors described in s 10(1)(b). In this latter case, as I have said, I agree with the conclusion of Barrett J in *Quasar*.

McDougall J's judgment in *Kembla Coal* was affirmed by the New South Wales Court of Appeal in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288. The High Court has given leave to appeal in this matter. As at the date of the publication of this book, judgment is still reserved.

[SOP4.140] Victoria — *"... claimed amount ..."*

In the definition of "claimed amount" in s 4 of the Act, the word "for" precedes the phrase "construction work" and the phrase "related goods and services".

[SOP4.150] Western Australia — *"... amount claimed ..."*

There is no reference to the phrase "claimed amount" in the Act. However, one finds the phrase "amount claimed" in s 6(a) of the Act under the heading "Payment dispute".

[SOP4.160] Queensland — *"... claimed amount ..."*

Having regard to the definition of "claimed amount" in Sch 2 to the Queensland Act, where there is merely a cross-reference to s 17(2) thereof, the above debate appears to be irrelevant.

[SOP4.170] Northern Territory — *"... claimed amount ..."*

There is no reference to the phrase "claimed amount in this Act". However, one finds the phrase "claimed amount" in s 8 of the Act under the heading "Payment dispute".

[SOP4.180] South Australia — *"... claimed amount ..."*

The phrase "claimed amount" is defined in s 4 of the South Australian Act as meaning the amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in s 13 of the Act.

[SOP4.190] Tasmania — *"... claimed amount ..."*

The phrase "claimed amount" has a more extensive definition in the Act. Section 4(a) states that it means "an amount of a progress payment claimed, in accordance with section 17, in a payment claim, to be due for building work or construction work carried out or for building or construction related goods and services". Section 4(b) refers to "any other amount specified in the payment claim in accordance with section 17(3)".

[SOP4.200] Australian Capital Territory — *"... claimed amount ..."*

The dictionary at the end of the Act refers to s 15 for the meaning of the phrase "claimed amount". Section 15 in turn, is subdivided into six subsections. It is noted that under s 15(3), the claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under s 29(3); or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

The reference to retention moneys within the definition of the phrase "claimed amount" appears only to be found in the ACT Act, but it seems equally clear that a claim for the release of retention moneys would also qualify as "claimed amount" in the Acts of the other States and Territories.

[SOP4.210] *"... construction contract ..."*

The definition of "construction contract" in the New South Wales Act is as follows:

> … a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

Some case law on that section is as set out below. The New South Wales case law probably applies to the definition "construction contract" in the Acts of the other States and Territories.

Hodgson JA's judgment in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 was further explained by McDougall J at [75] of *Inten Constructions Pty Ltd v Refine Electrical Services Pty Ltd* [2006] NSWSC 1282 (1 December 2006):

> [75] It cannot be said that the submission stated with precision the effect of the relevant reasoning on this topic of Hodgson JA in *Hargreaves*. It might have been appropriate, for example, to refer to what his Honour said on this topic at [38] to [45]. As his Honour's analysis shows, whilst there is in effect a spectrum, ranging from claims that are clearly "for" construction work at one end to claims that are clearly not "for" construction work at the other, there is no sharp line of demarcation between them. Thus, as his Honour said at [45], under the contract in question "delay damages and interest … could be claimed to be due for construction work carried out … and … it would be for the adjudicator to determine whether or not such amounts should be included in the amount determined".

In *Fifty Property Investments Pty Ltd v O'Mara* (2007) 23 BCL 35; [2006] NSWSC 428 at [17]–[22], Brereton J held that:

> [17] The basic and essential requirements which are preconditions to a valid adjudicator's determination include "the existence of a construction contract between the claimant and the respondent, to which the Act applies (s 7 and s 8)" [*Brodyn* at [53]]. *Brodyn* thus establishes that it is an essential precondition of an adjudication that there be a construction contract between the claimant and respondent; here, between Impero and FPI. In other words, the jurisdiction of an adjudicator to make a determination is dependent upon the existence of a relevant construction contract.
>
> [18] Where jurisdiction depends on the existence of a state of facts, a decision maker's finding that the necessary facts to found jurisdiction exist can be reviewed by a court, notwithstanding that judicial review does not ordinarily extend to errors of fact, as there is an exception in the case of the "jurisdictional fact" doctrine, under which an erroneous finding of fact, the existence of which is an essential precondition upon which jurisdiction depends, is jurisdictional error, notwithstanding its factual character. Thus the inherent jurisdiction of superior courts to review decisions on the ground of jurisdictional error includes the power to consider whether there was an absence of jurisdiction because the decision maker made a wrong finding as to the existence of such an essential precondition [*Bunbury v Fuller* (1853) 9 Exch 111; 156 ER 47; *Ex parte Tooheys Ltd; re Butler* (1934) 34 SR (NSW) 277; 51 WN (NSW) 101; *Manning v Thompson* [1976] 2 NSWLR 380; affirmed [1979] 1 NSWLR 384; *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 at 177; *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] 46 NSWLR 55 at 63–65]. While a decision maker has to decide whether or not facts which are essential preconditions of jurisdiction exist [*R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 at 69–71, 90–91], he or she can not give himself or herself additional jurisdiction by making a wrong decision on the collateral question as to the existence of such facts [*Bunbury v Fuller*; *R v Judges of the Federal Court of Australia*; *Ex parte Western Australia National Football League Inc* (1979) 143 CLR 190 at 214].
>
> [19] Although there is a rule that, in the case of inferior courts, references to facts are not taken to be jurisdictional "unless the intention is clearly expressed" [*Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391], no such rule of construction applies to statutory decision makers [*Sutherland Shire Council v Finch* (1970) 71 SR (NSW) at 315, 325–326 (Mason JA)].
>
> [20] Brodyn establishes that absence of the essential and basic preconditions results in an adjudication being void. It follows that whether or not there was a construction contract is a "jurisdictional fact", and the adjudicator's finding that there was such a contract is open to review in this Court.

[21] Where the existence of an essential preliminary precondition to jurisdiction is a question of objective fact (as distinct from where it depends on the tribunal having a state of satisfaction or opinion), it is for the reviewing court to determine, on the evidence before it, whether or not the fact exists, and evidence of the existence or non-existence of the fact is admissible in the reviewing court [*R v Blakeley* at 91–92; *R v Ludeke*; *Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183–184; *DMW v CGW* (1982) 151 CLR 491, 510; *Timbarra Protection Coalition Inc v Ross Mining NL*], although courts exercise some restraint in interfering with findings with respect to the jurisdictional fact and do so only if satisfied that the decision maker's finding of the jurisdictional fact is wrong [*Parisienne Basket Shoes Pty Limited v Whyte* at 291; *Queensland v Wyvill* (1989) 25 FCR 512; 90 ALR 611 at 618, (Pincus J)].

[22] The extent to which the reviewing court gives weight to the view of the facts taken by the decision maker in determining whether a jurisdictional fact exists varies with the circumstances [*R v Blakeley*, 92–93; *Sankey v Whitlam* [1977] 1 NSWLR 333, 347; *R v Ludeke*; *R v Williams*, *Ex parte Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 153 CLR 402, 411], relevant factors including the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions, and the extent to which its decisions are supported by disclosed processes of reasoning [*Minister of Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; [1999] HCA 21 (Gummow J)]. The principle that weight may be given to the tribunal's view of the relevant jurisdictional fact applies more where the tribunal's expertise especially equips it to provide an answer, and less where the jurisdictional fact is an expression which is a matter of ordinary usage [*R v Williams, Ex parte Australian Building Construction Employees' and Builders' Labourers' Federation*, 411; *Queensland v Wyvill*].

[23] Although the qualifications and experience in the construction industry of the adjudicators appointed under the Act would give them specialist skills in determining technical construction issues, I do not think they have any claim to superior expertise, nor any position of advantage, in determining whether or not a construction contract was made. As will become apparent in this case, it is also relevant that the adjudicator's reasoning cannot be said to be supported by disclosed processes of reasoning.

Without citing Brereton J's judgment in *Fifty Property Investments Pty Ltd*, Bergin J (as her Honour then was) in *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd* [2007] NSWSC 1340, made a declaration that an adjudication determination was void, in that there was no evidence of any construction contract between the plaintiff and the defendant. For a fuller discussion of this matter, see [SOP25.70].

In *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349 at [23], Rein J observed that it was unfortunate that a party dissatisfied with an adjudication can precipitate a further examination of the issue of whether or not there was a construction contract and hence preclude the speedy outcome that the Act was designed to achieve, but it followed from the *Fifty Property* approach to *Brodyn*, which his Honour adopted, that a party was entitled to challenge the conclusion of the adjudicator that there was a construction contract within the meaning of the Act. The present status of *Brodyn* in New South Wales will be discussed in a forthcoming update. It will be seen that unlike the provisions of the English legislation, a construction contract need not be in writing to fall under the provisions of the Act.

Of significance is the phrase "or other arrangement". That phrase broadens the ambit of what is meant by a construction contract and carries with it the same notion that one finds in dealing with a similar phrase in s 105 of the *Industrial Relations Act 1996* (NSW). Some of the relevant authorities on the construction of the phrase "or other arrangement" under the *Industrial Relations Act 1996* are as follows: *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212; 124 IR 79; [2003] NSWCA 151

(13 June 2003), *Euphoric Pty Ltd v Ryledar Pty Ltd* (2002) 117 IR 1; [2002] NSWIRComm 136 and *QSR Ltd v Industrial Relations Commission (NSW)* (2004) 208 ALR 368; [2004] NSWCA 199.

In *Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd* [2005] NSWSC 45 (11 February 2005), it was submitted that the word "arrangement", having regard to the language of s 13(1), be understood as giving rise to an enforceable liability to pay the person by whom the work was carried out.

At [38]–[46], Nicholas J rejected this submission. At [40]–[41], his Honour said:

> [40] "Arrangement" is a word without precise meaning. It appears in many statutory contexts and has been given meaning in those contexts in many cases. For the purposes of this case I find assistance in the following statements:
>
> > … the word "arrangement" is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons – a plan arranged between them which may not be enforceable at law: (*Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 7).
> >
> > The expression "arrangement or understanding" in ss 45(2) and 45A requires that at least one party assume an obligation or give an assurance or undertaking that it will act in a certain way. A mere expectation that as a matter of fact a party will act in a certain way is not enough: (*Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375 per Lindgren J at 469).
> >
> > (See also, *Legal & General Assurance v Stock* [1993] 49 IR 464 at 480–481; *State Bank of NSW v Grover* (1996) 64 IR 451 at 456–457).
>
> [41] With regard to the authorities, and to its context in the Act, in my opinion the term "arrangement" in the definition is a wide one, and encompasses transactions or relationships which are not legally enforceable agreements. The distinction in the definition between "a contract" and "other arrangement" is intended by the legislature to be one of substance so that under the Act construction contracts include agreements which are legally enforceable and transactions which are not. Thus in distinguishing between these relationships I understand the legislature intends that "contract" is to be given its common law meaning and that "arrangement" means a transaction or relationship which is not enforceable at law as a contract would be. Accordingly I reject the submission for *Okaroo* that the term "arrangement" should be understood to mean an agreement which is tantamount to a contract enforceable at law.

Okaroo was distinguished by Bergin J (as her Honour then was) at [28] and [29] of her Honour's judgment in *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd* [2007] NSWSC 1340.Rein J, in *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349, referred to *Okaroo* at [26] of his judgment. His Honour, at [27], referred to the statement of Willmer J in *Re British Basic Slag Ltd's Agreement* [1963] 2 All ER 807; [1963] 1 WLR 727 at 814, and 746 (WLR) that the word "arrangement":

> … clearly contemplates that there may be arrangements which are not enforceable by legal proceedings but which create only moral obligations or obligations binding in honour … for, when each of two or more parties intentionally arouse in the others an expectation that he will act in a certain way, it seems to me that incurs at least a moral obligation to do so. An arrangement as so defined is therefore something "whereby the parties accept mutual rights and obligations."

McDougall J dealt with this issue in *Class Electrical Services v Go Electrical* [2013] NSWSC 363, and a similar situation in *Rail Corp (NSW) v Nebax Constructions* [2012] NSWSC 6 at [44]. His Honour noted at [6] of his judgment in *Class Electrical* that his judgment in *Rail Corporation* was picked up in a context similar to that which obtained in *Class Electrical* by Douglas J in *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4 at [17] and following.

In *Class Electrical* at [11], Go Electrical applied to Class Electrical for the supply of goods and equipment on credit. The agreement between the parties was reduced in writing with the relevant terms reading as following:

> 1. That the conditions of sale between the applicant(s) and Go Electrical Pty Ltd shall incorporate and be governed by the conditions of sale detailed at the end hereof as modified from time to time. It is agreed and acknowledge that the applicant(s) shall have had sufficient notification of any modification of the conditions of sale from time to time if such conditions of sale, as modified, are printed on the reverse of an invoice or pick up slip for the supply of goods or are displayed in the business premises of Go Electrical Pty Ltd.
>
> ...
>
> 7. That Go Electrical Pty Ltd may withdraw credit facilities at their discretion without prior notice.

Thereafter, from time to time, Class Electrical would request Go Electrical to supply goods and equipment. Go Electrical acceded to these requests and delivered accordingly. The deliveries were accompanied and evidenced in invoices for the goods delivered. Class Electrical submitted that the acceptance of an application for commercial credit was not a contract or an arrangement under which Go Electrical undertook to supply the related goods in question, and that the only undertakings to supply were those to be timed in the individual contracts that came into existence each time an order was placed and accepted. On the other hand, Go Electrical submitted that what the parties intended was that an over-arching arrangement encompassing both general conditions on which credit would be extended, and the particular conditions on which goods would be sold and delivered from time to time, was set out. After reanalysing his Honour's reasons in *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 and noting, as his Honour did in paragraph [30] of *Class Electrical*, that *Machkevitch* had recently been looked at in the Court of Appeal in *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2012] QCA 276, his Honour held at [33] and [34] of *Class Electrical* thus:

> [33] It seems to me that in the statutory context with which I am concerned, a person undertakes to carry out construction work, or to supply related goods and services, for or to another if the first person agrees, or accepts an obligation, or promises, to do that work or supply those goods and services.
>
> [34] In the context of the definition, the agreement or acceptance or promise need not be one having legal effect, so that there may not be a contract as the law understands that term.

McDougall J further noted at [38] of *Class Electrical*:

> For there to be an undertaking to supply related goods under an arrangement, there must be something in the arrangement which indicates that the prospective supplier in some way undertakes to make the supply. There is nothing in the arrangement on which Go Electrical relied in this case to impose that burden. On the contrary, as I have said, if anything is clear from the document, it is that any question of supply was to be negotiated later, as needs required.

At [18] of *Suprima Bakeries Pty Ltd v Australian Weighing Equipment Pty Ltd* [2016] NSWSC 998, McDougall J referred to his decision at [27], [33] to [36] of *Class Electrical Services* above. His Honour noted that in those paragraphs he dealt with what he perceived to be a distinction arising on the particular facts of that case between an agreement as to the terms on which construction work would be done, if requested, and an agreement or undertaking to carry out the construction work.

In *Maxstra NSW Pty Ltd v Blacklabel Services Pty Ltd* [2013] NSWSC 406, Rothman J, in addressing the question as to what is meant by the word "arrangement", and without referring to any of the authorities above, said:

> [6] It is difficult to envisage a situation in which work would be carried out otherwise than under a contract of some kind to which the Act would otherwise apply. Nevertheless the term "other arrangement" must be given a meaning. Ordinarily, "arrangement" is a term that includes a contract but extends well beyond it. The term "arrangement" imports "a meeting of the minds of those said to be parties to the arrangement": *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* [2000] FCA 17; (2000) 169 ALR 344 per Sackville J at [75], in which the Court said:
>
> > [75] An arrangement or understanding for the purposes of s 45(2) of the TP Act is apt to describe something less than a binding contract or agreement: *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286 (Aust Ind Ct, FC), at 290-291, per Smithers J. However, in order for there to be an arrangement or understanding for the purposes of s 45(2), there must be a meeting of the minds of those said to be parties to the arrangement or understanding. There must be a consensus as to what is to be done and not merely a hope as to what might be done or happen: *Trade Practices Commission v Email Ltd* [1980] FCA 86; (1980) 43 FLR 383 (Lockhart J), at 385; Ira Berk at 291 per Smithers J. Ordinarily, an arrangement or understanding involves communication between the parties arousing expectations in each that the other will act in a particular way: Email, at 395. There is no necessity for an element of mutual commitment between the parties to an arrangement or understanding, although in practice such an arrangement or understanding would ordinarily involve reciprocity of obligation: *Trade Practices Commission v Service Station Association Ltd* [1993] FCA 405; (1993) 44 FCR 206 at 230-231, per Lockhart J.

The difficult question as to what the word "arrangement" meant was revisited by McDougall J in *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430. His Honour held as follows:

> [38] It was common ground, I think, that the words "or other arrangement" denote something falling short of a contract as that term is known to the law. To the extent that it might not have been common ground, that proposition is in my view clearly established by the decision of Nicholas J in *Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd* [2005] NSWSC 45. I refer, in addition, to the decision of Rein J in *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349 at [25] to [28], and at [44] to [57], where his Honour considered the factual situation. I refer, further, to my own decision in *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 at [14] to [30].
>
> [39] For the reasons that I gave in Machkevitch at [28], for there to be an arrangement for the purposes of the definition of construction contract, one party to whatever the arrangement is must undertake to perform construction work for another party to that arrangement. That view is I think consistent with what Rein J had said in *Olbourne*.

In *Levadetes Pty Ltd v Iberian Artisans Pty Ltd* [2009] NSWSC 641 (15 June 2009), McDougall J discussed the requirement of an acceptance of an offer by the person to whom the offer was directed in regard to the question as to whether or not there was a contract. His Honour found that as acceptance had not been proved no contract came into existence and accordingly the adjudication determination was void. The more difficult question which arises is that it appears to be obvious from the judgment that the

adjudicator determined that there was a contract and accordingly proceeded to make a determination. Can it be said that a court can revisit this question? For a detailed discussion on this issue, see [SOP4.220].

In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228, Hodgson JA, at [38] to [45], said:

> [38] The object of the Act is stated in s 3(1) as being "to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services". The definition of "progress payment" refers to s 8, which does not limit the payment to payment for construction work and/or related goods and services; and the amount of the progress payment is dealt with in s 9, which also does not impose such a limit.
>
> [39] It is true that s 13 requires a payment claim to indicate the claimed amount, and that this expression is defined to be an amount claimed to be due for construction work carried out or for related goods and services supplied; and, pursuant to s 17, what is adjudicated is the payment claim. That gives some support to the argument that the adjudicator can only include in progress payments amounts claimed to be due for construction work carried out and/or for related goods and services supplied; but the terms of s 13 itself, in particular s 13(3), tell against it. Further, as submitted by Mr Feller SC for Hargreaves, it is by no means clear that the words "carried out" and "supplied" should be given a strict temporal connotation.
>
> [40] Further, in the case of a construction contract that provides that progress payments include certain amounts, s 9(a) strongly suggests that such amounts are to be included in progress payments required by the Act, whether or not they are for construction work or related goods and services; and in my opinion, to put it at its lowest, that in turn suggests that any requirement from s 13 and the definition of "claimed amount" that the progress payment must be for construction work carried out or for related goods and services supplied should not be given a narrow construction or effect. I do not say that it would be sufficient that an amount be "in respect of" or "in relation to" construction work carried out or related goods and services applied; but I do say that "for" should not be construed narrowly.
>
> [41] In my opinion, the circumstance that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.
>
> [42] Under the contract in this case, delay damages are payable only if an EOT is for a compensable cause, that is, in general some act or omission of the head contractor or the superintendent or the sub-contract superintendent; but nevertheless, they are not of their nature damages for breach but rather are additional amounts which may become due and payable under the contract (cl 34.9) and which are then to be included in progress payments (cl 37.1). They are therefore prima facie within s 9(a) of the Act.
>
> [43] If in substance they represent the increased cost or price of construction work actually carried out, in my opinion they are clearly for construction work carried out. If they represent the cost or price of goods or services actually supplied in connection with the construction work under the contract, they are for related goods or services supplied, even if not for construction work carried out.
>
> [44] If they represent off-site costs (such as office overheads) or other on-site costs, it may be a question of fact and degree whether they are for construction work carried out

> or for related goods and services supplied. They would in my opinion properly be regarded at least as part of the price for the totality of the construction work when completed. And it would seem artificial to say that they are excluded from the Act if they are not referable to work that has already been carried out, particularly when s 9(b) refers to the value of construction work undertaken to be carried out and related goods and services undertaken to be supplied. However, it is not necessary in this case altogether to exclude the possibility that some delay damages claimed under this contract might possibly not be for construction work carried out or related goods and services supplied within the definition of "claimed amount" in s 4; but it is certainly not obvious that this is so in relation to any of the claims in this case.
>
> [45] It follows from this discussion that delay damages and interest under this contract could be claimed to be due for construction work carried out or for related goods and services supplied; and in my opinion, even if s 13 is construed as limiting claims to claims for payment for construction work carried out or for related goods and services supplied, it would be for the adjudicator to determine whether or not such amounts should be included in the amount determined, having regard particularly to s 9(a) and other provisions of the Act and the contract. This appears to be what each adjudicator did; and I am not satisfied even that any error of law on the face of the record has been established, much less an error of the kind that could invalidate a decision.

In *Thiess Pty Ltd v Zurich Specialties London Ltd* (2009) 15 ANZ Insurance Cases 61-802; [2009] NSWCA 47, an obligation was imposed on the insured under a Construction Risks Insurance Policy to perform construction work. The relevant provisions of the Policy, clauses 18 and 19, provided:

> 18. Project Deed Compliance
>
> Insurers agree that they are aware of the obligation imposed on Insureds #1 and #3 by the project deed and other contracts for the Project that specifies that Insureds #1 and #3 must – following loss or damage to the Subject Matter Insured for Section I:
>
> (a) subject to allowing reasonable time for inspection by Insurers, take immediate steps to clear any debris and begin initial repair work;
>
> (b) promptly consult with Insured #2 and carry out such steps as are necessary to ensure the prompt repair or replacement of the Subject Matter Insured so that it complies with contractual requirements, disruption of the Project is minimised and Insureds #1 and #3 continue to comply with their contractual obligations to the greatest degree possible.
>
> Notwithstanding the above, the Insured shall take and cause to be taken all reasonable precautions to safeguard the Subject Matter Insured and to prevent loss or damage. The Insured shall also afford reasonable facilities for Insurers' representatives to examine any of the Subject Matter Insured.
>
> 19. Due Observance of Policy Terms
>
> The due observance and fulfilment of the terms, conditions and limitations of this Policy as far as they relate to anything to be done or complied with by the Insured shall be conditions precedent to any liability of the Insurers to make payment under this Policy.
>
> …
>
> General Conditions
>
> (3) Advice of Loss
>
> (a) In the event of loss or damage which may give rise to a claim under this Policy the Insured shall:
>
> (i) give advice thereof to the Insurers as soon as possible;
>
> (ii) take all reasonable steps to protect the Subject Matter Insured from further loss or damage.
>
> …

Memoranda Applicable to Section I

6. Sue and Labour

It is agreed that in the event of actual or imminent damage to the Subject Matter Insured the Insurers will pay the reasonable costs of emergency action in order to minimise or prevent damage to the Subject Matter Insured. Provided always that:

(a) Insurers shall not be expected to pay any amount in excess of that which they would reasonably have been expected to pay in settlement of actual damage had such measures not have been taken.

(b) the maximum sum payable by Insurers under this Memorandum shall not exceed $10,000,000 for any one Occurrence or such higher amount as insurers may approve. For the purposes of this Memorandum, "imminent" shall mean within fourteen (14) days of discovery.

The appellants, both at first instance and on appeal submitted that cl 18 of the Policy constituted a separate construction contract obliging them and the respondent to carry out construction work. They submitted further that the obligation under cl 18 to take all reasonable precautions to safeguard the subject matter insured and to prevent loss or damage, would, in certain circumstances, obviously require construction work to be carried out.

At first instance, Bergin J (as her Honour then was), at [15] of her Honour's judgment in the court below, (*Zurich Specialties London Ltd v Thiess Pty Ltd* [2008] NSWSC 1010) said:

> [15] The first paragraph of clause 18 is an agreement by the insurers that they are aware of the obligations imposed on the defendants by the project deed and other contracts for the Project following loss or damage. The second paragraph of clause 18 commencing "notwithstanding" imposes on the defendants the obligation to take the reasonable precautions. The clause must be read to give effect to the commercial purpose of the contract: *Legal & General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390 at 405 per McHugh JA (as his Honour then was). The commercial purpose of this Policy was to provide indemnity for the insured on the terms and conditions included in the Policy. The second paragraph of clause 18 was the imposition of a condition on the insured, which had to be satisfied prior to indemnity being available. It was not an agreement by the insured to carry out construction work for the insurer, but an agreement by the insured that in carrying out the construction work for the principals/owners they had to do so in a particular manner, that is, taking the reasonable precautions, in order to qualify for indemnity under the Policy.

The Court of Appeal accepted the correctness of that submission (*Thiess Pty Ltd v Zurich Specialties London Ltd* (2009) 15 ANZ Insurance Cases 61-802; [2009] NSWCA 47 at [12]).

As will more fully appear from the judgment of Palmer J in *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 411 (22 April 2005) above, his Honour held that it was always open to a party adversely affected by an adjudicator's determination of his/her own jurisdiction to move to set aside any judgment entered under s 25(1) of the Act on the ground that such an adjudication was a nullity because an essential ingredient (as opposed to a more detailed requirement of the Act) was absent.

In *NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd* [2013] NSWSC 842, Hammerschlag J held that a contract, as varied, was nevertheless a contract for the purposes of the Act.

Phillippides J in *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2012] QCA 276 at [56] held, in effect, that a contract or arrangement is a construction contract if it contains an undertaking of the type which is specified in the definition of "construction contract",

even though it contains other undertakings or imposes other obligations not within the definition. At [22] of *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4, Douglas J referred to this decision with approval.

At [27] of *Seabreeze Manly v Toposu* [2014] NSWSC 1097, McDougall J said:

> I returned to the topic in (among many other cases) *Class Electrical Services v Go Electrical* [2013] NSWSC 363. At [28] of those reasons, I qualified what I had said in *Machkevitch* at [27]:
>
> [25] I looked at the question in *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 at [14] and following. In that case there was on any view a construction contract, or perhaps two construction contracts, between the builder and the proprietor. The question was whether, in addition, there was a construction contract between the builder and the plaintiff. The plaintiff was a principal of the proprietor. The builder's case was that the plaintiff, Mr Machkevitch, had given an oral undertaking to ensure that the builder was paid if the proprietor did not pay it.
>
> [26] I have set out that background because on re-reading my reasons it is apparent to me that there is some lack of clarity in a particular paragraph.
>
> [27] I referred at [21] to the reasons of Nicholas J in *Okaroo*. Building on that, I said at [27] that there should be something more than a mere undertaking; there should be something which could be said to give rise to engagement although perhaps not legally enforceable between two parties; or a state of affairs under which one party undertook to do something for the other; or an arrangement to that effect:
>
> > [27] In my view, what is required is that there be something more than a mere undertaking; or something which can be said to give rise to an engagement, although not a legally enforceable engagement, between two parties; or a state of affairs under which one party undertakes to the other to do something; or an arrangement between parties to like effect.
>
> [28] The first use of the word "undertaking" seems to me now to be somewhat unfortunate, having regard to the definition of "construction contract". It was intended to pick up undertakings of the kind said to have been given by Mr Machkevitch to the builder, as I explained above. It was not intended to be "an undertaking" in a cognate sense to the verb "undertakes" as it is used in the definition of "construction contract".
>
> [29] Thus, properly understood, I do not think that anything that I said in *Machkevitch* focused on what is required to satisfy or demonstrate the concept of undertaking to do construction work or supply related goods and services. It was concerned with the existence of a contract or arrangement.

His Honour continued at [28] of *Seabreeze*:

> Further, in *Class Electrical*, I dealt at [32] to [35] with the concept of "undertakes:"
>
> [32] The verb "undertake" is capable of having numerous meanings. That can be exemplified by looking at the Oxford English Dictionary online, which gives at least six different meanings, themselves having numerous sub-meanings, for the verb in its transitive form, and further meanings and sub-meanings for the verb in its intransitive form. What is intended to be conveyed by the verb will depend on the context in which it is to be found.
>
> [33] It seems to me that in the statutory context with which I am concerned, a person undertakes to carry out construction work, or to supply related goods and services, for or to another if the first person agrees, or accepts an obligation, or promises, to do that work or supply those goods and services.

[34] In the context of the definition, the agreement or acceptance or promise need not be one having legal effect, so that there may not be a contract as the law understands that term.

[35] Nonetheless, what is important is that the undertaking be one under a contract or other arrangement. To put it the other way around, there must be a contract or other arrangement under which an undertaking of the relevant kind is given and accepted.

[SOP4.220] *"... or other arrangement ..."*

The phrase "or other arrangement" in the definition of "construction contract" in s 4 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) has been dealt with in the preceding paragraph. Because of the importance of this phrase in the determination of the applicability of the Act, it is appropriate to deal with this phrase in more detail.

In *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546, McDougall J, in [17]–[30], explained as follows:

[17] As a matter of language, it seems to be clear that the legislature intended that a "construction contract" could include both a "contract" (as that concept is known to and understood in the law) and some "other arrangements" that would not in law be regarded as contracts.

[18] It seems to me, as a simple matter of reading the legislative words, that the concept of "other arrangement" is something which goes beyond the concept of "contract".

[19] No doubt, the legislature had in mind that, from time to time, work would be done pursuant to arrangements which might not be susceptible to classification as contracts, formal or informal. Clearly, it did not intend that the entitlement to payment should depend on the degree of formality in the arrangements pursuant to which work should be done. In this respect, the legislative intention could be contrasted with the intention underlying s 10 of the *Home Building Act 1989* (NSW), under which a builder is not entitled to enforce a contract unless it is licensed, and carries out work pursuant to a written contract.

[20] The word "arrangement" may be thought to be a somewhat strange one in the context of the Act. It its primary meaning, it denotes the ordering or disposition of things (see, for example, the online editions of the Macquarie Dictionary and the Oxford English Dictionary). But the same reference sources suggest that a secondary meaning of "arrangement" denotes measures or preparations, or plans for the accomplishment of some purpose

[21] Nicholas J considered the proper construction of the definition of construction contract in *Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd* [2005] NSWSC 45. His Honour noted [at 40] that the word "arrangement" lacked precise meaning. His Honour observed that it was a word that appeared in many different statutory contexts, and that it would derive its meaning from its context. His Honour referred to what was said in *Newton v Federal Commissioner of Taxation* [1958] UKPCHCA 1; (1958) 98 CLR 1 at 7, and in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (No 8)* (1999) 165 ALR 468; [1999] FCA 954 at 469 (ALR).

[22] In the former case, the court concluded that an "arrangement" was something less than a binding contract It could be something in the nature of an understanding, or a plan not enforceable at law.

[23] In the second of those cases, the court observed that the composite expression of "arrangement or understanding" required something more than a mere expectation. It required some assumption of obligation, or assurance, or undertaking.

[24] In *Okaroo* [at 41], Nicholas J said, in my respectful opinion correctly, that in its context in the definition of "construction contract" in the Act, the word "arrangement" encompasses transactions or relationships which are not legally enforceable. Thus, his Honour said, and again in my respectful opinion correctly, that a construction contract would include both a legally enforceable agreement and other transactions which were not. He therefore concluded:

> ... that contract is to be given its common law meaning and that "arrangement" means a transaction or relationship which is not enforceable at law as a contract would be.

[25] At [42], his Honour observed that the only express limitation on the "arrangement" was that it must be one under which one party to it undertakes to carry out construction work for another party to it. I respectfully agree.

[26] Further, his Honour concluded [at 55], there was nothing either in the definition of construction contract or in the Act as a whole which supported the suggestion that an "arrangement" must have the quality of legal enforceability. Again, I respectfully agree. I add only that an "arrangement" enforceable at law, for example through the doctrine of estoppel, would nonetheless be capable of being an arrangement for the purposes of the Act.

[27] In my view, what is required is that there be something more than a mere undertaking; or something which can be said to give rise to an engagement, although not a legally enforceable engagement, between two parties; or a state of affairs under which one party undertakes to the other to do something; or an arrangement between parties to like effect.

[28] In those circumstances, the court must look for a concluded state of affairs, which is bilateral at least, which can amount to an arrangement under which one party to it undertakes to perform construction work for another party to it. It is not necessary that the arrangement be legally enforceable; but an "arrangement" which is legally enforceable may be, *a priori*, a construction contract.

[29] I do not think that much more assistance is to be gained from considering how the word "arrangement" (or its plural form) has been construed in other statutory contexts. Ultimately, the meaning to be given to the word must depend on an analysis of its place in the particular legislative scheme which is under consideration, and by reference to the context in which it appears. In my view, considerations of legislative purpose and context indicate, in the present case, that the word "arrangement" denotes some engagement, or state of affairs, or agreement (whether legally enforceable or not) under which, perhaps among other things, one party undertakes to perform construction work for another.

[30] Whether an "arrangement" in this sense imposes any obligation (whether legally enforceable or not) on one of the parties to pay for construction work depends on the terms of the engagement, or agreement, or state of affairs.

In *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430, McDougall J summed up the law on the meaning of the phrase "or other arrangement", as follows:

[38] It was common ground, I think, that the words "or other arrangement" denote something falling short of a contract as that term is known to the law. To the extent that it might not have been common ground, that proposition is in my view clearly established by the decision of Nicholas J in *Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd* [2005] NSWSC 45. I refer, in addition, to the decision of Rein J in *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349 at [25] to [28], and at [44] to [57], where his Honour considered the factual situation. I refer, further, to my own decision in *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 at [14] to [30].

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

[SOP4.230] Victoria — *"... construction contract ..."*

Section 4 of the Act contains a similar definition of the phrase "construction contract" as that in the South Australia and Tasmanian Acts.

Section 34 of the Victorian Act provides for a notice of "claim" to operate as an assignment of debt. The precise import of the assignment provisions is also somewhat obscure and will have to wait for the decision of a Victorian court in due course.

[SOP4.240] Western Australia — *"... construction contract ..."*

The definition of "construction contract" in s 3 of the Act is substantially the same as the definition of that phrase in the New South Wales legislation.

However, s 3(c) adds a further dimension, which states as follows:

> [t]o provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2).

In s 3(d) the definition continues as follows:

> [t]o provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b).

Reference should be made to s 7, which states the construction contracts to which the Act applies.

[SOP4.250] Queensland — *"... construction contract ..."*

There is authority in Queensland for the fact that the construction contract must be lawful before it can attract the provisions of the Queensland Act, see *Cant Contracting Pty Ltd v Casella* [2007] 2 Qd R 13; [2006] QCA 538 (15 December 2006). It is submitted that the same principles should obtain in regard to the Acts for all the other States and Territories and, furthermore, it should also obtain in regard to any arrangement.

In *Tagara Builders v AP & L Services* [2015] SASC 30, Mr Justice Blue followed *Cant v Casella* in South Australia. His Honour's decision supported the view expressed in this paragraph that *Cant v Casella* should be followed in the courts of the States and Territories in addition to Queensland.

The issue in *Cant* before the Court of Appeal was whether or not, by reason of the provisions of s 42(1) of the *Queensland Building Services Authority Act 1991* (Qld), which provided that a person must not carry out building work unless the appropriate building licence was held and, as such, was precluded from triggering the provisions of the *Queensland Building Services Authority Act 1991*. De Jersey CJ held that the answer was in the negative. His Honour's judgment was set aside by the Court of Appeal which held that, as the building contract was unlawful because of a failure of the builder to be licensed under the *Queensland Building Services Authority Act 1991*, the provisions of the Act could not be triggered by a payment claim followed by the adjudication process. It further

held that the point concerning the illegality was not canvassed in any payment schedule, and did not preclude the point from being taken.

Significantly, although the Queensland Court of Appeal had an opportunity to embrace *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, they did not do so, but sought to distinguish it. The present status of *Brodyn* in New South Wales will be discussed in a forthcoming update.

Where a Queensland contract is in conflict with s 55 of the *Domestic Building Contracts Act 2000* (Qld) and consequently unenforceable, similar considerations apply, see *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd* [2008] 1 Qd R 139; [2007] QSC 20 (13 February 2007). See also *On Hing Pty Ltd v Phoenix Project Development Pty Ltd* [2006] QDC 159 (8 June 2006).

Phillippides J in *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2012] QCA 276 at [56] held, in effect, that a contract or arrangement is a construction contract if it contains an undertaking of the type which is specified in the definition of "construction contract", even though it contains other undertakings or imposes other obligations not within the definition. At [22] of *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4, Douglass J referred to this decision with approval.

In *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164, Margaret Wilson J, after analysing the meaning of s 234 of the *Mineral Resources Act 1989* (Qld), held that a contract for the dismantling of certain mining plant that had been constructed on a mining lease was "construction work" under a construction contract as provided for in s 10(1)(a) and (b) of the *Building and Construction Industry Payments Act 2004* (Qld).

At [84], her Honour held:

> (a) "land" in s 10 of BCIPA does not include mining leases;
>
> (b) the plant may have formed part of the mining leases;
>
> (c) the plant did not "form part of land" within the meaning of s 10.

[SOP4.260] Northern Territory — *"... construction contract ..."*

Under its Act, the phrase "construction contract" is set out in s 5, but does not contain the phrase "or other arrangement". It follows that the definition of "construction contract" under the Northern Territory Act is much narrower than its New South Wales counterpart.

Under s 5(2) of the Act, there is a reference to Pt 3 of the Act and a statement that a construction contract includes:

> (a) a contract modified under s 13; and
>
> (b) a contract in which a provision is implied under Pt 2, Div 2.

[SOP4.270] South Australia — *"... construction contract ..."*

The phrase "construction contract" is defined in s 4 of the Act as meaning "a contract or other arrangement under which 1 party undertakes to carry out construction work, or to supply related goods and services, for another party". "Construction work" is defined in s 5, and for which see the commentary below.

[SOP4.280] Tasmania — *"... construction contract ..."*

Section 4 of the Act contains the definition of "building or construction contract" and that is in the same terms as the South Australian model.

[SOP4.290] Australian Capital Territory — *"... construction contract ..."*

The dictionary at the end of the Act defines the phrase "construction contract" in similar terms to Tasmania, Victoria and South Australia.

[SOP4.295] *"... exempt residential construction contract ..."*

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) (NSW) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

[SOP4.300] *"... for another party ..."*

At [64] of *Smith v Coastivity Pty Ltd* [2008] NSWSC 313, McDougall J dealt with the significance of the phrase in s 4 "for another party". The issue which his Honour raised, but did not decide, was whether or not a construction contract for the joint benefit of both parties to a contract fell within the definition. By his Honour's choice of language "for the joint benefit of itself and another party to that contract," his Honour obviously did not intend to refer to the benefits flowing to an employer under a construction contract, but to that type of contract, eg in the nature of a joint venture.

[SOP4.303] *"... head contractor ..."*

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

[SOP4.305] *"... principal ..."*

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

[SOP4.310] *"... progress payment ..."*

Austin J, in *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42; [2002] NSWSC 395 (7 May 2002), held that the phrase "progress payment" should be given the meaning it has under the construction contract and, on that basis, did not include a final payment, see also Santow JA's judgment in *De Martin & Gasparini Pty Ltd v Energy Australia* (2002) 55 NSWLR 577; [2002] NSWCA 330 (30 September 2002), in which Santow JA agreed with Austin J in *Jemzone*.

Following Austin J's judgment, the definition of "progress payment" was amended in 2002 (date of commencement, 3.3.2003, s 2 and *GG* No 54) to include a final payment as follows:

> **Definitions**
> ***progress payment*** means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):
>
> (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract; or
>
> (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract; or
>
> (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

Jemzone and *De Martin* (on this point) should no longer be followed.

In *Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714 (13 August 2004), McDougall J summarised the effect of the amendments above at [45]–[46]:

> [45] Some support for Clarence Street's position might be found in the judgment of Austin J in *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42; [2002] NSWSC 395 at [43] and [44]. His Honour's decision was given on s 13 as it stood prior to the amendments effected by the *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW). Before those amendments, s 13 referred only to "a person … who is entitled to a progress payment". It now refers to "a person … who is or who claims to be entitled to a progress payment". The changes to s 13 (which included no change to s 13(2)(a) but did include a significant change to s 13(2)(b)) may bear upon the proper construction to be given to s 13(2)(a) in its statutory context. But, leaving this difficult question aside, I do not think that the relevant paragraphs of the decision of Austin J in *Jemzone* can be taken as indicating anything other than that, on the facts before his Honour and by reference to the statutory scheme then in place, the relevant payment claim fell "well short" of what was required. I do not think that his Honour's reasons are capable of extension, by analogy, to a different payment claim in a revised statutory context.
>
> [46] In any event, what Austin J said in *Jemzone* was doubted by Nicholas J in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [63]–[66] and by Einstein J in *Leighton Contractors* at [52]. It might also be regarded as not entirely congruent with the approach of Palmer J in *Luikens* (see [35] above) and with the views of Davies AJA in *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20]. I express no concluded view on this because, as I have tried to indicate, I think that the question is one to be resolved by the application of s 13(2)(a) in the context of the particular contractual provisions and particular facts of each case.

Isis Projects was referred to by Hammerschlag J in *Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd* [2013] NSWSC 707 and by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

[SOP4.320] Victoria — *"... progress payment ..."*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

The definitions in the Victorian Act are contained in s 4. Here too there are quite a number of definitions which differ from those contained in the New South Wales legislation.

The amended Act follows the New South Wales definition of "progress payments" more closely.

The definition of "progress payment" in s 4 of the Victorian Act is cross-referenced to s 9. Neither s 4 nor s 9 include the provisions of subs (a), (b) and (c) of the New South Wales definition of "progress payment" above.

Part 3 of the Act sets out the procedure for recovering progress payments, but again there is no definition of that phrase in that section.

The question that then arises is whether the judgment of Austin J in *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42; [2002] NSWSC 395 that "progress payment" as the New South Wales Act then read, did not include a final payment, is of relevance in Victoria. The answer to that is probably, in the affirmative.

[SOP4.330] Western Australia — *"... progress payment ..."*

There is no definition of the phrase "progress payment" in the Act. However, s 15, with the heading "Contractor's entitlement to claim progress payments" states:

> The provisions of Schedule 1 Division 3 are implied in a construction contract that does not have a written provision about whether a contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed.

[SOP4.340] Queensland — *"... progress payment ..."*

The Queensland legislation lists the relevant definitions in a dictionary in Sch 2 to its Act. This schedule and the definitions contained in it have to be examined very carefully when applying the decisions of the New South Wales courts to the relevant sections of the Queensland legislation.

[SOP4.350] Northern Territory — *"... progress payment ..."*

The Act does not contain any definition of the phrase "progress payment". It is however provided in Pt 2, Div 2, s 18 that the provisions of Sch, Div 3 are implied in a construction contract. It does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations, under the contract, the contractor has performed.

[SOP4.360] South Australia — *"... progress payment ..."*

In s 4 of the South Australian Act, the phrase "progress payment" is defined as meaning:

> a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement) —
>
> (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract; or
>
> (b) a single or one off payment for carrying out construction work (or for supplying related goods and services) under a construction contract; or
>
> (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

[SOP4.370] Tasmania — *"... progress payment ..."*

The phrase "progress payment" in s 4 of the Act is defined as meaning a progress payment to which a person is entitled under s 12 and includes:

(a) the final payment for building work or construction work carried out, or for building or construction-related goods and services supplied, under a building or construction contract; and

(b) a single or one-off payment for carrying out building work or construction work, or supplying building or construction-related goods and services, under a building or construction contract; and

(c) a payment that is based on an event or date.

It will be noted that the phrase "a milestone payment" is not used in the Tasmanian Act.

[SOP4.380] Australian Capital Territory — *"... progress payment ..."*

In the dictionary appended to the Act, against the phrase "progess payment", it is stated "see section 10(1)".

Section 10(1)–(3) deals with the right to progress payments, not only is the phrase "milestone payment" employed in s 10(2)(c), but this in turn is defined in s 10(3) as follows:

"… milestone payment …" means a payment that is based on an event or date.

[SOP4.390] Victoria — *"... recognised financial institution ..."*

The phrase "recognised financial institution" is defined in s 4 of the Act as meaning "an authorised deposit-taking institution within the meaning of the *Bank Act 1959* of the Commonwealth".

[SOP4.400] Western Australia — *"... recognised financial institution ..."*

As is the case of the Northern Territory Act, there is no definition of "recognised financial institution" in the Act, nor is that phrase employed in s 7 of the Act, which deals with construction contracts to which the Act applies.

[SOP4.410] Queensland — *"... recognised financial institution ..."*

The phrase "recognised financial institution" is defined in the Act in the Dictionary in Sch 2 as meaning "a bank, or other financial institution prescribed under a regulation".

[SOP4.420] Northern Territory — *"... recognised financial institution ..."*

There is no definition of the phrase "recognised financial institution" in the Act, nor is there any reference to this phrase in s 9, which deals with the application of the Act.

[SOP4.430] South Australia — *"... recognised financial institution ..."*

In s 4 of the Act, the interpretation section, the definition of recognised financial institution is said to mean "…a bank or any other person or body prescribed by the regulations for the purpose of this definition".

[SOP4.440] Tasmania — *"... recognised financial institution ..."*

Section 4 of the Act contains the following definition:

"recognised financial institution" means —

(a) an authorised deposit-taking institution; or

(b) a "body regulated by APRA" within the meaning of the Australian Prudential Regulation Authority Act 1998 of the Commonwealth; or

(c) a prescribed person or body, or a member of a prescribed type of persons or bodies.

It will be noted that s 4(a) and (b) of the definition differ from all the other States and Territories.

[SOP4.450] Australian Capital Territory — *"... recognised financial institution ..."*

The phrase "recognised financial institution" is defined in the dictionary appended to the Act as meaning "a bank or any other person or body prescribed by regulation for this

definition". Notionally, the ACT Regulations may contain a provision different from that defining this phrase in the other States and Territories.

[SOP4.460] *"... subcontractor ..."*

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

[SOP4.1000] Retrospective application of definitions inserted by the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW)

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

5 Definition of "construction work"

(1) In this Act, ***construction work*** means any of the following work:

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,

(d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,

(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including:

(i) site clearance, earth-moving, excavation, tunnelling and boring, and

(ii) the laying of foundations, and

(iii) the erection, maintenance or dismantling of scaffolding, and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and

(v) site restoration, landscaping and the provision of roadways and other access works,

(f) the painting or decorating of the internal or external surfaces of any building, structure or works,

(g) any other work of a kind prescribed by the regulations for the purposes of this subsection.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[8] and [9]]

(2) Despite subsection (1), ***construction work*** does not include any of the following work:

(a) the drilling for, or extraction of, oil or natural gas,

(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose,

(c) any other work of a kind prescribed by the regulations for the purposes of this subsection.

[S 5 am Act 133 of 2002]

SECTION 5 COMMENTARY

[SOP5.50] *"... prefabrication ..."*

Prefabricated items are part of construction work, and as such are part of the construction contract. Under s 10(2)(b)(iv) prefabricated items would not form part of what has to be valued by the adjudicator, unless such items are or on payment will be the property of the party on whose behalf the construction work is being carried out.

[SOP5.60] Application of the Act in New South Wales

The application of the Act is very wide, and was intended to be so: *New South Wales Hansard Articles*, Legislative Assembly, 29 June 1999, No 16, http://www.parliament.nsw.gov.au.

[SOP5.70] Exceptions to the application of the Act in New South Wales

There are, however, certain exclusions, the most important of which are:

(a) The Act does not apply to a construction contract that "forms part of" a loan agreement, contract of guarantee, or contract of insurance: s 7(2)(a).

(b) Similarly, the Act does not apply to a construction contract to the extent that it contains provisions under which a party undertakes to carry out construction work as a condition of a loan agreement, guarantee, or contract of indemnity: s 7(3)(b) and (c).

The exceptions to the definition of "construction work" are discussed in the commentary to s 7 in this service, but some of the case law is referred to and discussed below.

[SOP5.80] Loan agreement – as impacted on by provisions of New South Wales Act

In *ACA Developments Pty Ltd v Sullivan* (2004) 21 BCL 71; [2004] NSWSC 304 (21 April 2004) a "builder's side deed" was executed between the proprietor, the builder, and the bank which provided the loan. It was submitted that as a consequence, the Act did not apply. McDougall J rejected the submission that the construction contract formed part of the loan agreement because of that fact.

His Honour, at [16], reaffirmed the view which he had earlier expressed in *Consolidated Constructions Pty Ltd v Ettamogah Pub* [2004] NSWSC 110 (11 March 2004), viz, that the applicable test was that of the incorporation according to the general principles of contract law. But he clarified the application of the incorporation principle by holding at [17] that s 7(2)(a) applied, where to hold to the contrary would provide a claimant with "concurrent rights, in respect of one progress claim, against both the proprietor and the financier". His Honour held, at [31]–[34], that although the three agreements, the subject matter of the case, were "associated", the builder was not a party to the loan agreement, on the one hand, and the bank was not a party to the construction contract, on the other, and that which was of critical significance, was that the builder had acquired no independent rights against the bank.

[SOP5.90] Extension of time, delay disruption, damages

In *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* (2004) 20 BCL 276; [2004] NSWSC 116 (4 March 2004), Barrett J considered the question as to whether or not claims for an extension of time, delay or disruption and/or a claim for damages can form a proper part of a payment claim. At [31]–[34], his Honour said:

> [31] The claim that "a person who has undertaken to carry out construction work under the contract" (to adopt the s 8(1)(a) description) is, under s 13, a claim for what becomes a "claimed amount", that is, according to the s 4 definition of that term, "an amount of a progress payment claimed to be due for construction work carried out …". Such a claim must, in accordance with s 13(2), identify not only the amount of the progress payment claimed to be due but also "the construction work … to which the progress payment relates". The words "for construction work" describe the necessary link between work and payment.
>
> [32] There has been some discussion in earlier cases of the question whether inclusion in a payment claim of an element for extension of time, delay or disruption invalidates the payment claim because the subject matter of such items does not bear the relationship to construction work envisaged by the word "for" in s 13(2). The decision

has been that, because of the nature of a payment claim as a statement of the claimant's demands and contentions, it would not be correct to regard it as invalid because of the inclusion of matter arguably beyond its permitted scope: see, in particular, *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 and *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2003] NSWSC 869.

[33] As Bergin J pointed out in the last-mentioned case, however, it is quite another thing to say that an element on account of extension of time, delay, disruption or any other perceived wrong can properly be taken into account in an adjudication, as distinct from a payment claim. Referring specifically to the matter of damages for repudiation, her Honour said:

> I am not satisfied that Nicholas J's judgment [in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266] is authority for the proposition for which the defendant also contends that the claim for damages for wrongful repudiation of the contract is a matter that the adjudicator can determine. His Honour was considering a claim in respect of services provided under a construction contract that specifically dealt with an entitlement in the subcontractor to an amount for such costs. That is a very different matter to a claim for damages for wrongful repudiation of a contract. The adjudicator will decide what amount, if any, the plaintiff is to pay the defendant having regard to the matters he is obliged to consider pursuant to s 22 of the Act.

[34] The clear message throughout the Act is, in my opinion, that any "progress payment", including one within para (a), (b) or (c) of the definition of "progress payment", can only have that character if it is "for" work done or, where some element of advance payment has been agreed, "for" work undertaken to be done. The relevant concepts do not extend to damages for breach of contract, including damages for the loss of an opportunity to receive in full a contracted lump sum price. Compensation of that kind does not bear to actual work the relationship upon which the "progress payment" concept is founded.

At [35] of Barrett J's judgment, his Honour summed up the matter thus:

> In this case, it is necessary to decide whether the applicable regime is the regime under ss 8(2)(a), 9(a) and 10(1)(a) or that under ss 8(2)(b), 9(b) and 10(1)(b). Because the parties' contract did not make provision for any system of progress payments in the ordinary sense and having regard to the conclusions as to the meaning of "progress payment" for the purpose of ss 8(2)(a) and 9(a) expressed at [21] above, the case must be governed by the latter set of provisions rather than the former. The task the adjudicator was required by s 22(1) to undertake therefore involved calculation of the value of the construction work carried out or undertaken to be carried out by the first defendant under the contract, being a calculation made in accordance with s 10(1)(b) and involving a value arrived at having regard to the matters specified in subparas (i) to (iv) of s 10(1)(b). The adjudicator did not embark upon any such determination. Instead, he calculated (subject only to agreed adjustments) what would have been payable to the first defendant had the contract in its entirety been performed by completion (or, perhaps, substantial completion) of all specified work. It follows, in my opinion, that the adjudicator undertook a task and performed a function foreign and irrelevant to those required of him by the Act. Jurisdictional error of the kind grounding relief in the nature of *certiorari* has therefore been shown.

J. McDougall, in his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004), at pp 17–18, comments as follows:

> Barrett J's analysis was undertaken in the context of the statutory scheme. His Honour's conclusion (at [34]) that "[t]he clear message throughout the Act is … that any 'progress payment" … can only have that character if it is "for" work done or, where some element of advance payment has been agreed, "for work undertaken to be done" needs to be understood in that context. So too does his Honour's observation, in

> the same paragraph, that "[t]he relevant concepts do not extend to damages for breach of contract, including damages for the loss of an opportunity to receive in full a contracted lump sum price".

Barrett J's judgment above, was distinguished by McDougall J in *Kembla Coal & Coke Pty Ltd v Select Civil Pty Ltd* [2004] NSWSC 628 (23 July 2004). In *Kembla* there was a specific provision for the quantification of a progress payment which, according to the contract, might include an amount for the costs of the preparation of the claim and an amount for delay costs.

McDougall J, at [101]–[109], analysed the meaning of the word "for" in the definition of "claimed amount" in s 4 of the Act.

At [116]–[117], his Honour indicated that "… there can be no hard and fast rule that a delay claim must always be a claim for damages. The precise nature of the claim will require consideration of the relevant terms of the contract".

At [124]–[136], his Honour analysed the submission that the adjudicator's award of compound interest was one which exceeded his jurisdiction. At [136], his Honour thought the adjudicator had erred and exceeded his jurisdiction in allowing a claim for compound interest.

McDougall J's judgment in *Kembla Coal* was affirmed by the New South Wales Court of Appeal in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288. The High Court has given leave to appeal in this matter. As at the date of the publication of this book, judgment is still reserved.

The debate continued in the case of *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 21 BCL 312; [2005] NSWSC 77, discussed at [SOP5.90] and [SOP22.160]. On appeal to the Court of Appeal, *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 (13 July 2005), it was submitted by the appellant that a claim for delayed damages was not a claim for construction work.

At [40]–[41] of the Court of Appeal's judgment, it said the following:

> [40] Further, in the case of a construction contract that provides that progress payments include certain amounts, s 9(a) strongly suggests that such amounts are to be included in progress payments required by the Act, whether or not they are for construction work or related goods and services; and in my opinion, to put it at its lowest, that in turn suggests that any requirement from s 13 and the definition of "claimed amount" that the progress payment must be for construction work carried out or for related goods and services supplied should not be given a narrow construction or effect. I do not say that it would be sufficient that an amount be "in respect of" or "in relation to" construction work carried out or related goods and services applied; but I do say that "for" should not be construed narrowly.
>
> [41] In my opinion, the circumstance that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.

In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 21 BCL 312; [2005] NSWSC 77 (22 February 2005) two questions arose. The first of these was, unless it can be positively established that the delay cost component claimed is included in the value of the variation (as defined in the sub-contract) works, is it in the nature of damages and not properly claimable. The second question was whether or not delay costs

claimed arise as part of the valuation of variation of works as defined in the sub-contract, and should have been rejected by the adjudicator.

These issues were in substance decided by McDougall J in *Kembla Coal & Coke Pty Ltd v Select Civil Pty Ltd* [2004] NSWSC 628, and were also referred to in the Court of Appeal in *De Martin & Gasparini Pty Ltd v Energy Australia* (2002) 55 NSWLR 577; [2002] NSWCA 330.

Each of the issues above involved two questions:

(1) Was it open to the adjudicators to include in their determination of the amount of the progress payment an amount of delay damages as provided in the contract between the parties?

(2) If it was not open to them to do so then, because in each case they did, is their determination void?

McDougall J assumed, for the purpose of his judgment, that the answer to the first question was in the negative. But in regard to the second question his Honour at [49] said:

> [49] It must follow that there can be a payment claim for the purposes of the Act (so that, by its service on the respondent, the second basic and essential requirement identified by Hodgson JA in *Brodyn* at [53] is satisfied) even if the payment claim is comprised entirely of, or includes, an amount that is not "for" construction work. A person may be found not to be entitled to a claimed progress payment, or part, for any number of reasons. The work may not have been done (and there may be no contractual entitlement to payment in advance); the work may have been done defectively and there may be a valid set-off for the cost of rectification; the work may be overvalued; there may be a valid set-off for liquidated or other damages; the claim may not be "for" construction work (or the supply of related goods and services) at all; or there may be other disqualifying features. However, the payment claim will be effective, for the purposes of the Act, by reason of the claimed entitlement. The process that the Act contemplates is that the respondent will submit a payment schedule answering the claim. If the claimant and the respondent cannot agree, then the claimant may submit the payment claim to adjudication. I cannot see how a claim that is invalid because the amount claimed is not "for" construction work is different in principle to a claim that is invalid because it is grossly overvalued. In each case (and in the case of all the other possible defences to which I have referred) the adjudicator may determine the validity of the claim. That is simply a consequence of the exercise by the adjudicator in the particular case of the powers and duties entrusted to her or him by the Act.

At [53] of his judgment, his Honour concluded:

> I therefore conclude that if (assuming but not deciding) it was not open to Mr Parnell or Mr Sarlos to include, in the adjudicated amount of the respective progress payments, an amount for delay damages under cl 34.9 or interest under cl 37.5, the fact that they included such amounts in the adjudicated amount does not render their determinations void.

The concept of there being basic and essential requirements identified by Hodgson JA in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 can no longer be regarded as the law in New South Wales. For a further discussion on this aspect, see below.

If the result of the case is correct, it is, with respect, quite startling. It would mean, that if an adjudicator included sums of money in a determination, that fell neither under ss 5 and/or 6, the aggrieved respondent would have to live with the result, and would have no recourse until after the determination by proceeding under s 25. There is no viable anti-suit injunction to preclude an adjudicator from making a determination where there is a clear case that there is no jurisdiction to do so.

Equally startling is the finding at [51] where his Honour held that:

> It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process.

Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd (2005) 21 BCL 312; [2005] NSWSC 77 has been decided on appeal *sub nom Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228.

It was hoped that the Court of Appeal would restore some balance in the application of this draconian piece of legislation, but regrettably they did not. The appeal was dismissed with costs.

Bergin J (as her Honour then was) in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWSC 312 (13 April 2005) held at [39] that:

> The contract in this case required the defendant to provide this related service, and permitted payment for the provision of labour even whilst there was no construction work to actually carry out. This is seen in the regime for extensions of time under cl 34, the capacity to claim delay damages under cll 41 and 34.9 and the entitlement to include such amount in progress claims under cl 37.1. Thus there is a proper basis for the allowance of the extension of time claims per se as a "related service" under the Act and irrespective of whether they were variations.

One would be forgiven if one thought that if the adjudicator had no jurisdiction because the amount claimed did not fall into either ss 5 and/or 6, that would be so fundamental, that that point could be raised at any stage of the proceedings.

But this is not the current state of authorities in New South Wales. On the current state of authorities in New South Wales, in most, if not all aspects, an adjudicator can determine his or her own jurisdiction.It would appear, however, that a challenge to the adjudicator's jurisdiction can be taken in an application to set aside any judgment obtained under s 25(1) by the filing of an adjudication certificate in a court of competent jurisdiction, on the ground that the adjudication was in truth a nullity, because an essential ingredient of jurisdiction was absent.

It took the English courts, possibly over 100 years, to come to the conclusion that arbitrators can, in certain limited circumstances, determine their own jurisdiction.

The principle of Kompetenz-Kompetenz is a fairly recent one. It took the New South Wales courts, possibly less than 100 minutes, to find that adjudicators, who do not even have the quasi judicial status of arbitrators, can determine their own jurisdiction. It must be borne in mind that in New South Wales adjudicators are not obliged to be registered or have any qualifications. Most of them are not legally trained. There is no provision in the Act for a court to be approached to determine a point of law. In the light of all those circumstances, there can be absolutely no warrant for holding that adjudicators have power to, even on a provisional basis, determine their own jurisdiction. Can it be correct that they can have the awesome power of determining their own jurisdiction? The logic of waiting until the damage is done by a judgment being taken pursuant to the provisions of s 25(1), and execution probably levied thereon, even in the light of the apparent legislative philosophy, to arrive at a speedy determination of an adjudication, is difficult to follow. The same time that the challenge will take in the beginning, will probably be taken at the end.

No provision is made for the recovery of the costs payable to an adjudicator where ultimately it is found that he has no jurisdiction. This merely adds a further element of unfairness.

The Act obviously does not apply where the relevant contract does not relate to construction work as defined, cf *Homer Burgess Ltd v Chirex (Annan) Ltd* [1999] ScotCS 264; [2000] BLR 124 (10 November 1999). But in the light of the above the aggrieved respondent may have no remedy.

In *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd* [2001] BLR 407, it was held at [15] in regard to the comparative English Act that shopfitting does not amount to "construction operations" unless it is "construction … of … structures forming or to form, part of the land whether permanent or not" or "installation in any building or structure of fittings forming part of the land".

It is doubtful whether shopfitting per se would constitute "construction work" under the Act. Furthermore, at [22] of *Gibson* it was held that the phrase "whether permanent or not" related to buildings or structures being constructed as opposed to the works.

A curious set of facts came together in *Pioneer Sugar Mills Pty Ltd v United Group Infrastructure Pty Ltd* [2006] 1 Qd R 535; [2005] QSC 354 (25 November 2005) where the construction contract was concluded prior to the Queensland Act coming into force, but there were subsequent variations which were agreed to and carried out after the Act came into force.

Byrne J held that the Act did not apply to variations standing on their own. Obviously, the position would have been different had the entire contract concluded subsequent to the coming into effect of the Queensland Act, in which event, the variations would have been part and parcel of the construction contract and the Queensland Act would have applied thereto.

In *ACN 060 559 971 v O'Brien* [2008] 2 Qd R 396; (2007) 23 BCL 421; [2007] QSC 91 at 422 (BCL), Mullins J, relying on *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151 and *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798, distinguished between the value of construction work contained in a progress claim and the quantum of a progress claim.

Significantly, his Honour relied on *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 for the proposition that the Act (the NSW Act and Queensland Act) did not give a right to claim costs for delay and disruption in the absence of a contractual right.

In *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61 at [34], Brereton J held a s 27(2A) claim for loss and/or damages following a suspension of the work, was specifically authorised by the provisions of s 13(3)(a) of the NSW Act.

It is respectfully submitted that Barrett J in *Quasar* was correct, and that his reasoning is to be preferred to that of McDougall J in *Kembla*.

In *Siemens v Tolco Pty Ltd* [2007] NSWSC 257, Macready AsJ referred to the decisions in *Coordinated Construction* above together with *Kembla* and *Quasar*.

[SOP5.100] Victoria — *"... construction work ..."*

The word definition of "construction work" is contained in s 5 of the Act. In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [69], Vickery J held that a claim for prolongation costs fell under the heading "construction work carried out or for related goods and services" under the earlier Victorian Act.

It is submitted that his Honour's observations are equally of force under the current Victorian Act.

In *Maxstra Constructions Pty Ltd v Gilbert* [2013] VSC 243, Vickery J resolved the apparent conflict between s 10B(2)(c) and s 11(1)(b)(iv) of the Victorian Act by the application of statutory construction principles.

At [53], his Honour noted that s 10B(2)(c) provided that "excluded amounts" must not be taken into account in calculating the amount of a progress claim. These excluded amounts were *inter alia*:

> (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

At [54], Vickery J pointed out that s 11(1)(b)(iv) provided that in valuing construction work for the purpose of calculating a progress payment, regard must be had to a number of things including:

> (iv) if any work is defective, the estimated cost of rectifying the defect.

In resolving the apparent conflict, his Honour held at [59]–[62] as follows:

> [59] The concept of "damages" has a particular meaning at law where there is a failure to discharge a contractual obligation. The objective in contract law is to place the party who has suffered loss caused by the breach in the position which he or she would have occupied had the other party performed the obligation breached. In *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, Mason, Wilson and Dawson JJ, in the context of considering the appropriate approach to the assessment of damages under the *Trade Practices Act 1974* (Cth), said this about damages in contract (at 11-12):
>
> > In contract damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss).
> >
> > [...] For breach of warranty [in a claim for damages recoverable for a breach of contractual warranty on a purchase of goods] the plaintiff is prima facie entitled to recover the difference between the real value of the goods and the value of the goods as warranted.
>
> [60] The same principles apply in relation to damages resulting from the breach of a construction contract. Commonly, damages are awarded arising from a breach of the contractual warranty of "good workmanship". With the object of placing the principal in the position in which it would have been had the contract been performed, damages may include an award for rectification of the defective work. However, consequential losses, for example arising from delay in contract completion and losses arising from liabilities incurred to third parties arising from such delay, may also be the subject of damages for breach of a contract.
>
> [61] On the other hand, the compensation in contemplation in s 11(1)(b)(iv) of the Act is of quite a different character. It is a purely statutory concept, providing that, in the event of any work being defective, the estimated cost of rectifying the defect is to be taken into account in valuing the construction work. Two elements serve to differentiate the statutory concept from a "claim for damages" within the purview of s 10B(2)(c). The first is that under s 11(1)(b)(iv) it is only the "cost of rectifying the defect" which is to be taken into account. Other elements which may be included in a claim for damages arising from breach of a contractual warranty or a fundamental failure to perform the contract as a whole, such as compensation for consequential losses arising from delay, do not fall within s 11(1)(b)(iv). Second, the appointed decision-maker in considering the application of s 11(1)(b)(iv), is only required to undertake an "estimate" of the costs of the rectification, and this can only be done by an Adjudicator considering the matters defined in s 23(2) of the Act, and no other matters. The assessment of a claim for damages is quite different. Damages are not amenable to a determination based upon a mere "estimate". Rather, they are founded upon a claimant for damages proving its case to the usual civil standard, on the balance of probabilities based on the admissible evidence adduced.
>
> [62] The construction I have placed on s 10B(2)(c) and s 11(1)(b)(iv) of the Act resolves the apparent conflict between the provisions. They both have quite

> different tasks to perform. Claims for "damages" under s 10B(2)(c) are quite rightly treated as "excluded amounts", and are to be disregarded in calculating the amount of a progress payment. The forensic enquiry involved in assessing damages, and the potentially wide scope of any such claim is avoided, thereby reinforcing the limited ambit of the adjudication process contemplated under the Act and its objective of expedition. On the other hand, the enquiry to be conducted under s 11(1)(b)(iv) of the Act, properly confined as it is, as I have found it to be, would not be likely to defeat the objectives of the Act.

Under s 7 of the Victorian Act, the application of the Act is provided for in detail.

Under s 7(2)(b), which was inserted by s 8 of Act No 42 of 2006, it is provided that:

> (b) a construction contract which is a domestic building contract within the meaning of the *Domestic Building Contracts Act 1995* between a builder and a building owner (within the meaning of that Act), for the carrying out of domestic building work (within the meaning of that Act), other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business; …

The County Court of Victoria, in *JG King Pty Ltd v Adiel Property Holdings Pty Ltd* [2015] VCC 1600, analysed the relevant authorities on the meaning of the phrase "where the building owner is in the business of building residences …".

At [19] of *J G King*, Anderson J stated that in order for the Act to apply, the following questions must be answered:

a. Is there a *"construction contract"*?

b. Is the construction contract *"a domestic building contract … between a builder and a building owner … for the carrying out of domestic building work …?*

c. Is the building owner *"in the business of building residences"*?

[SOP5.110] Western Australia — *"... construction work ..."*

One of the issues to be determined by the Tribunal in *Alliance Contracting Pty Ltd and Tenix SDR Pty Ltd* [2014] WASAT 136 was whether or not the exclusion set out in s 4(3)(c) of the Western Australian Act applied. At [51] et seq, the Tribunal analysed relevant cases which included *Re Graham Anstee-Brook; Ex parte Karara Mining Ltd* (2012) WASC 129; *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* [2012] WASAT 13.

At [62], it was stated:

> … conclude that the exclusion in s 4(3)(c) of the CC Act does not apply to the subcontract works because, although the subcontract works are work constructing a plant, the purpose of the wastewater treatment plant is not to extract or process any mineral or other substance for the purpose of s 4(3)(c) of the Act.

Reference should be made to s 4(1) of the Act for a definition of "civil works". It is to be noted that the definition of "civil works" relates only to a site in Western Australia. This means a site in Western Australia, whether on land or off-shore. Similar provisions are not found in the comparative Acts of the other States and Territories.

It is noted that the Western Australian Act contains a substantially expanded definition of "construction work" in s 4(2).

Western Australian practitioners, or those who are involved in a claim under its legislation, should be aware of the substantial differences before taking any action under its Act.

The practitioner should make him/herself fully cognisant with the relevant definition.

Under s 4(4), and unlike any of the other Acts, there is an express statement that "construction work" does not include "constructing the whole or part of any watercraft".

[SOP5.120] Queensland — *"... construction work ..."*

The definition of "construction work" is in s 10 of the Queensland Act.

The significant differences between s 10 of the Queensland Act and the New South Wales Act are:

(a) In s 10(1)(g) of the Queensland Act, the definition also means "carrying out the testing of soils and road making materials during the construction and maintenance of roads".

(b) In s 10(2), there is the following provision:

> To remove doubt, it is declared that "construction work" includes building work within the meaning of the *Queensland Building Services Authority Act 1991*.

The Queensland Act contains a number of provisions not found in the New South Wales Act.

Byrne J in *Pioneer Sugar Mills Pty Ltd v United Group Infrastructure Pty Ltd* [2006] 1 Qd R 535; [2005] QSC 354 held that a variation contract brought into existence on 14 October 2004, a fortnight after the material date, and which expanded the scope of the work of a contract entered into prior to the material date, but was not intended to replace it, was not subject to the Queensland Act.

The Queensland Act includes installation in any building or structure of fittings, heating, lighting etc as construction when carried out on works referred to in s 5(1)(b).

In *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2011] QSC 345, Fryberg J held that coal was a mineral, but concluded at [40]–[49] that none of the work performed by the first respondent, Warren (in that case), was the extraction of a mineral.

At [42] of *Thiess*, Fryberg J said:

> I accept that the work performed by Warren was a necessary part of opening the coal mines. But that is not the issue. The exemption given by s 10(3)(b) is not expressed to apply to work done for the purpose of opening or as preparatory to operating a mine. The words used are much more limited than that. They focus purely on the process of extraction. In my judgment the ordinary meaning of the word, considered in isolation, does not apply to the work done by Warren.

At [13] of *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2012] QSC 4, Douglas J agreed with the reasoning of Fryberg J in *Thiess*.

HM Hire Pty Ltd was ultimately decided by the Court of Appeal of Queensland *sub nom HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2013] QCA 6. At [15]–[16], the Court of Appeal per Margaret McMurdo P, Fraser and Gotterson JJA, held:

> [15] Having regard to the oblique and general terms of Mr Kemp's affidavit evidence, and HM Hire's failure to adduce any evidence in reply to Mr Spotswood's very clear evidence, including of his observations on the site, the inferences upon which that conclusion was founded could more confidently be drawn. I am not persuaded that the primary judge erred in finding that HM Hire's work comprehended "works forming ... part of land including ... roadworks" within the meaning of s 10(1)(b) of the Act.
>
> [16] As to whether the construction of drains described in the subcontract amounted to "construction work" it is probably sufficient to observe that Fryberg J's conclusion in *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2011] QSC 345 at [13], [20], [28], [29], [79]; [2012] QCA 276 at [2], [6], [30], [50], [71], that the excavation of a channel through the earth to construct drains was "construction work", was affirmed on appeal. Nonetheless, I will discuss HM Hire's arguments on this topic.

At [22], their Honours concluded "... that the work described in the subcontract included a substantial component of 'construction work' being 'the construction ... of any works forming, or to form, part of land, including ... installations for land drainage ...'".

The next question the Court of Appeal was required to deal with was, having regard to the definition of "construction contract" together with a definition of "related goods and services" in s 11(1)(a)(ii) of the Act, whether or not a rental agreement under which NPE undertook to supply plant "for use in connection with a carrying out of construction work" fell under the provisions of the Act. At [24]–[25] of their judgment, their Honours held:

> [24] Reading the definition "construction contract" together with the definition "related goods and services" in s 11(1)(a)(ii) of the Act, the question is whether under the rental agreement NPE undertook to supply plant "for use in connection with the carrying out of construction work". In expressing the question in that way I have preferred the view that the expression in the introductory text of s 11(1) "in relation to construction work" does not introduce as a criterion of a "construction contract" that the goods or services are in fact supplied under the contract (See *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2011] QSC 345 at [70]–[72]). In *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* Fryberg J held that "for use in connection with" was not satisfied upon proof only that the plant or materials supplied were in fact used in connection with the carrying out of the construction work; the word "for" was a word of wide denotation which, in the present context, had a purposive meaning; the requirement must be satisfied before the plant or materials are used; and evidence of their use might support an inference as to the purpose which they were intended to be used at the time of the transaction but that evidence could not satisfy the requirement without such an inference. His Honour also held that the relevant contract or arrangement would supply important evidence, but not the only relevant evidence, for the identification of the proposed use of the plant or materials (at [74], [76]). For the purpose of the case before Fryberg J, his Honour regarded as an adequate test the question whether "... one party undertook to supply the plant with the object or purpose of use in connection with the carrying out of construction work by the other party"; the object or purpose of supply is "... an objective construct to be determined by the court" by reference to what a reasonable person in the position of the parties would conclude as to the object or the purpose of the contract having regard to what its terms provided as to what the party had undertaken to carry out, the surrounding circumstances known to the parties (including the nature of the plant hired), and evidence of the genesis, background, context and market in which the parties were operating (at [68], [76]).
>
> [25] In this case, as in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* (at [57]), whilst the rental agreement contained no provision identifying the purpose of the hire, it should be inferred that the parties to it envisaged that it would be used for the purpose of performing the hirer's obligations under its own contract (HM Hire's subcontract, which required the carrying out of substantial quantities of "construction work"). Fryberg J reached that conclusion at least in part because the rental agreement in that case referred to the head contract between Thiess and Warren. Whilst the rental agreement in this case did not refer to the HM Hire subcontract, it did identify the site at which the equipment was to be used as the Burton coal mine, Mr Kemp deposed that his dealings with NPE were "in connection with" the HM Hire subcontract and that HM Hire "... required to dry hire from a third party such as NPE, some further equipment for the purposes of the initial stages of the Contract with Thiess, whilst [HM Hire] was still reconditioning and upgrading some of its own equipment", Mr Spotswood swore that he was

> aware that the equipment was to be used by HM Hire in the work it was undertaking for Thiess at the Burton coal mine, and on 12 April 2011 HM Hire's accountants and taxation advisors, Kern Group, wrote to NPE's solicitor that NPE's equipment was hired by HM Hire "... to assist with an earthworks contract that HM Hire Pty Ltd has with Theiss [sic] Burton ...".

The issue before Margaret Wilson J in *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164 was whether a contract for the dismantling of mining plant consisted of structures or "works" forming part of the land within the meaning of s 10(1)(a)–(b) of the Queensland Act, and hence was construction work.

Her Honour held:

> [72] In my respectful opinion, the High Court's analysis should be applied to the mining leases issued under the *Mineral Resources Act 1989* (Qld). The minerals vested in the Crown, rather than in the owner of the land the subject of the mining leases. The leaseholder was entitled to remove the minerals, but did not acquire any estate or interest in the land the subject of the mining leases. Thus, the mining leases were not "land" within the definition in the *Acts Interpretation Act 1954* (Qld) or in accordance with common law principles.
>
> [73] The mining plant was brought on to that land for the purposes of the mining leases. In so far as it was physically attached to the land, I infer that this was to stabilise it and allow its efficient operation, rather than to add some additional feature to the land on which it rested. It had to be removed before the expiry of the mining leases. In the circumstances the common law requirements for the mining plant to become part of the land the subject of the mining leases (that is, fixtures) were not satisfied.

Her Honour summed up her findings thus:

> [84] In summary –
>
> (a) "land" in s 10 of the Queensland Act does not include mining leases;
>
> (b) the plant may have formed part of the mining leases;
>
> (c) the plant did not "form part of land" within the meaning of s 10.
>
> [85] It follows that the dismantling of the plant was not "construction work" under a "construction contract". The adjudication decision was void for want of jurisdiction.

However, in the Queensland Court of Appeal in the matter of *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2013] QCA 406, the judgment of Margaret Wilson J above was set aside. Holmes JA, Applegarth and Boddice JJ held as follows:

> [26] The common law rules relate to ascertaining intention, which may be inferred from a matter such as the degree of annexation. The fact that phrases similar to "forming, or to form, part of land" can be found in authorities such as *Holland v Hodgson* (1872) LR 7 CP 328 at 334 (which used the expression "becomes part of the land") dealing with ownership of land and fixtures does not justify the importation of common law rules in relation to fixtures into s 10. The meaning of "forming, or to form, part of land" in s 10(1) must be determined in its statutory context.
>
> [27] The immediate context of the words suggest that common law rules were not imported. Subsection 10(1)(a) refers to "buildings or structures, whether permanent or not, forming, or to form, part of land" (emphasis added). The inclusion of the words "whether permanent or not" would be unnecessary if the expression "forming, or to form, part of land" imported common law rules about fixtures. As the primary judge noted, the common law doctrine of fixtures does not require permanence. It is sufficient if the thing is placed on the land for an indefinite or substantial period rather than temporarily (*Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164 at

> [55]). By contrast, the statute's reference to "whether permanent or not" allows the provision to apply to a temporary building or structure, provided it forms part of land. The respondent submits that the inclusion of the words "whether permanent or not" confirms that "forming part of land" is to be understood in the general law sense in which permanence is not required. I disagree. The words permit a temporary building or structure to be the subject of construction work. This is inconsistent with common law rules. The inclusion of the words "whether permanent or not" counts against the importation of the common law doctrine of fixtures.
>
> [28] In addition to their immediate context, the words "forming, or to form, part of land" need to be construed in the context of the statute as a whole. As already stated, it is not apparent why rules that apply in the context of real property law in determining questions of ownership should be imported into a statute which deals with contractual relations between parties who may own no interest in the land or the thing that is constructed upon it.

In *Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd* [2013] QSC 254, Daubney J held as follows in regard to the issue of whether road construction constituted "building work" under the *Queensland Building Sevices Authority Act 1991* (Qld). At [44], his Honour said:

> Section 5 of the Act has the effect of excluding road construction works from the ambit of "building work" under the *Queensland Building Sevices Authority Act 1991* (Qld) if the work is on land "dedicated, notified or declared to be a road for public use". In my view, the words "dedicated", "notified" and "declared" are terms of art in connection with the creation of roads, and ought be understood according to their received meanings. It is, I think, no accident that the definition of "road" in s5 of the Act is identical to the definition of "road" in s93 of the Act. That section defines the meaning of the term "road" for the purposes of Chapter 3 Part 2 of the *Land Act 1994* (Qld). There are specific provisions of the *Land Act 1994* (Qld) which regulate the dedication of roads – see, for example, s 94. The legislation also makes provision for the relevant Minister to make declarations with respect to roads – see, for example, s 96(3). Section 95 of the Act provides to the effect that the land in all roads dedicated and opened for public use under repealed Land Act legislation remain vested in the State. The concepts of dedication, notification and declaration in connection with the creation of roads were expressly taken up by s 362(1) of the Land Act 1962 (as amended), which provided:
>
> > The Minister, with the approval of the Governor in Council, may by **notification** published in the Gazette, **declare** any Crown land open as a road for public use and such land shall thereby be **dedicated** as a road accordingly. (emphasis added)

In *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Expert Terminal Pty Ltd* [2015] QSC 160, Philip McMurdo J held that a temporary road was not a fixture and accordingly not construction work in Queensland.

At [54], his Honour said:

> … According to my reasoning in para [31], this road did not make the Contract a building contract because it is not proved that it was constructed for the purpose of remaining on the land as a fixed structure after the performance of the Contract. Another contractor is now constructing a permanent road in the place of this temporary road. It is far from demonstrated that the contractual intention was to produce a structure, in the form of the dirt road, which was to remain intact after the performance of the Contract. Alternatively, I would accept the arguments for WICET that it was within item 19. It is unnecessary to express a view as to item 32 in this respect, but it may be noted that the work involved went beyond earthmoving and excavating by including drainage works.

[SOP5.130] Northern Territory — *"... construction work ..."*

The definition of "construction work" is found in s 4 of the Act in the definition section contained in Pt 1 Div 2.

The provisions of this section are to be read with s 5 which defines "construction contract" and s 6 wherein there is an extensive definition of "construction work". The detail contained therein differs from the New South Wales Act, and its provisions must be considered very carefully before drafting a Northern Territory construction contract or making a payment claim in that Territory. Section 7, in turn identifies what is meant by "Goods and services related to construction work".

[SOP5.140] South Australia — *"... construction work ..."*

"Construction work" is defined in s 5(1) of the Act, and follows the New South Wales model.

[SOP5.150] Tasmania — *"... construction work ..."*

Section 5(1)(a) and (b) of the Act defines "building work" or "construction work". The definitions provided for in s 5(1)(b) are far more extensive that the New South Wales model, and include items such as road infrastructure (s 5(1)(b)(ii)); energy infrastructure (s 5(1)(b)(iii)); aviation landing facilities and railway infrastructure (s 5(1)(b)(iv)); marine infrastructure, water and sewerage infrastructure (s 5(1)(b)(v)); structures such as poles, wires and netting, erected to support or protect agricultural, horticultural or forestry projects (s 5(1)(b)(vi)); structures (other than underground structures constructed to enable access to minerals) to enable persons to gain access to places on which agricultural, horticultural, forest, tourist or mining activities are being, or are to be, carried out (s 5(1)(b)(vii)).

[SOP5.160] Australian Capital Territory — *"... construction work ..."*

The definition of "construction work" is to be found in Pt 2, Div 2.1, s 7(1) and (2) of the Act. A significant difference between the definition of "construction work" in the ACT Act and the New South Wales Act is the inclusion of the word "includes" in each one of s 7(1)(a)–(g). The definition therefore of "construction work" in the ACT Act is probably much wider than that, for example, in the New South Wales Act.

Section 7(1)(g) states that "construction work" includes "building work" within the meaning of the *Building Act 2004* (ACT).

6 Definition of "related goods and services"

(1) In this Act, ***related goods and services***, in relation to construction work, means any of the following goods and services:

(a) goods of the following kind:

(i) materials and components to form part of any building, structure or work arising from construction work,

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,

(b) services of the following kind:

(i) the provision of labour to carry out construction work,

(ii) architectural, design, surveying or quantity surveying services in relation to construction work,

(iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,

(c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), ***related goods and services*** does not include any goods or services of a kind prescribed by the regulations for the purposes of this subsection.

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

[Subs (3) insrt Act 133 of 2002, s 3 and Sch 1[10]]

[S 6 am Act 133 of 2002]

SECTION 6 COMMENTARY

[SOP6.50] Adjudicator's jurisdiction to determine

For a discussion of the adjudicator's jurisdiction to determine the issue of related goods and services, see [SOP6.60]ff.

[SOP6.60] Victoria — *"... related goods and services ..."*

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts entered into from 30 March 2007.)

Section 7 of the amendment Act inserts a new s 6(3) in the principal Act in regard to the definition of "related goods and services".

[SOP6.70] Western Australia — *"... related goods and services ..."*

The relevant section of the Western Australian Act is s 5. There are some similarities but also differences in the definition of related goods and services.

Even the heading of the section is different, ie "Goods and services related to construction work".

Some of the major differences are:

(a) s 5(1)(b), there is a reference to "any fittings referred to in section 4(2)(d) (whether pre-fabricated or not)";

(b) s 5(2), there is a far more extensive definition of professional services that are related to construction work; and

(c) s 5(3), there is a separate sub-section devoted to on-site services.

[SOP6.80] Queensland — *"... related goods and services ..."*

Under s 11(b)(iv) of its Act, the definition of "related goods and services" includes "Soil testing services relating to construction work".

[SOP6.90] Northern Territory — *"... related goods and services ..."*

Section 7 of the Northern Territory Act sets out the parameters of "Goods and services related to construction work". Under s 7(2), there is an extensive list of professional services which fall within this category.

[SOP6.100] South Australia — *"... related goods and services ..."*

Section 6 of the Act substantially follows the New South Wales Act.

[SOP6.110] Tasmania — *"... related goods and services ..."*

Section 6 of the Act refers to "building or construction – related goods and services".

Section 6(1)(b)(iii) is more expansive than the provisions of s 6(1)(b)(iii) of the New South Wales Act, and includes, for example, the "inspections, reporting or advisory services" provided in respect of buildings, building systems and services, energy and sustainability systems and services, geotechnical and geotechnical engineering.

[SOP6.120] Australian Capital Territory — *"... related goods and services ..."*

Section 8 of the Act substantially follows the New South Wales Act.

See the commentary on *Bauen Constructions v Westwood Interiors* by McDougall J at [42]–[43] of *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 at [SOP11.50].

7 Application of Act

(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.

(2) This Act does not apply to:

(a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes:

(i) to lend money or to repay money lent, or

(ii) to guarantee payment of money owing or repayment of money lent, or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract, or

(b) a construction contract for the carrying out of residential building work (within the meaning of the *Home Building Act 1989*) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in, or

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

(3) This Act does not apply to a construction contract to the extent to which it contains:

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee (within the meaning of the *Industrial Relations Act 1996*) of the party for whom the work is to be carried out or the related goods and services are to be supplied, or

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution, or

(c) provisions under which a party undertakes:

(i) to lend money or to repay money lent, or

(ii) to guarantee payment of money owing or repayment of money lent, or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

(4) This Act does not apply to a construction contract to the extent to which it deals with:

(a) construction work carried out outside New South Wales, and

(b) related goods and services supplied in respect of construction work carried out outside New South Wales.

(5) This Act does not apply to any construction contract, or class of construction contracts, prescribed by the regulations for the purposes of this section.

[**Cross-reference:** *Building and Construction Industry Security of Payment Regulation 2008*: cl 20 exempts a person from the operation of Div 2A of Pt 3 in the person's capacity as a principal contractor under a s 7(2)(b) construction contract.]

SECTION 7 COMMENTARY

[SOP7.10] The application of the Act where the claimant is in liquidation

In *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, Warren CJ, Tate and McLeishJJA considered the applicability of the Victorian Act where the claimant was in liquidation. At [56](1), their Honours summarised the issue as follows:

> First, we consider the scope of the BCISP Act and the grounds raised by Multiplex's notice of contention, in accordance with the general precept that questions of the construction and operation of legislation should be resolved first before constitutional validity. The text, context and purpose of the BCISP Act provide a number of indications that the entitlement to progress payments under s 9(1) of the Act is only available to persons who have undertaken to, and are capable of, carrying out construction work and/or supplying related goods and services. Consequently, we conclude that s 9(1), and therefore pt 3 of the BCISP Act, is not available to persons in liquidation.

At [73] of *Facade*, their Honours referred to the judgments of Young CJ in Eq in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1230 in some detail, at [88] to McDougall J'cDougall J in *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering [No 3]* [2007] NSWSC 459, and at [155] to Beech J in *Hamersley Iron Pty Ltd v James* [2015] WASC 10. Their Honours concluded that the Victorian Act applied only to claimants that were going concerns, and did not apply to claimants who were in liquidation. At [78]-[82], their Honours held:

> [78] Therefore, it is open to interpret s 9(1) in two ways. The first is that it is available to any person who has undertaken to carry out construction work or supply related goods and services under a construction contract. The second is that it is only available to a person who not only has undertaken to carry out construction work or supply related goods and services, but also continues to perform such activities.
>
> [79] Interpreting s 9(1) in the latter manner would have flow-on effects for the availability of the pt 3 procedure for recovering progress payments. Section 14, which provides for the service of payment claims, is available to "[a] person referred to in section 9(1) who is or who claims to be entitled to a progress payment". Such a person is defined as "the claimant". The term "the claimant" is then subsequently used throughout pt 3. Thus, a respondent who fails to provide a payment schedule to "the claimant" may become liable to pay the claimed amount to "the claimant" under s 15(4); and "the claimant" may then, pursuant to s 16(2), recover the unpaid amount in a court or make an adjudication application. Adopting the narrower interpretation of s 9(1) would mean that the term "the claimant" is only apt to cover persons who still carry out construction work or who still supply related goods and services pursuant to the construction contract. Consequently, once a winding-up order is made in respect of a builder, such that it only continues to exist for the purpose of being wound up, it would cease to be a claimant for the purposes of pt 3 of the BCISP Act. It would therefore lose the right to issue payment claims under s 14, or recover unpaid amounts pursuant to s 16(2).
>
> [80] There are a number of factors that favour the narrower interpretation of s 9(1), an interpretation which we adopt. We have already referred to s 1, which focuses on persons acting pursuant to a construction contract. A similar focus is evident in s 16(2)(b). Under that provision, where a respondent has failed to provide a payment schedule and thereby becomes liable to pay the claimed amount, the claimant may serve notice on the respondent of its intention to suspend construction work or the supply of related goods and services. Section 16(2)(b) therefore contemplates a claimant who is still carrying out construction work or supplying goods and services.
>
> [81] As has been observed by the courts on numerous occasions, pt 3 of the BCISP Act (or its interstate equivalents) is intended to create an interim payment regime. Section 47(1) of the BCISP Act provides that the regime instituted by pt 3 does not affect the rights of the parties under the construction contract. Courts or tribunals deciding matters under the construction contract must allow for any amount paid pursuant to pt 3, and may make orders for the restitution of any such amount paid. The BCISP Act therefore envisages that a respondent making a payment pursuant to pt 3 may be entitled to claw back some or all of that payment in the future. However, as Multiplex submitted, in the case where the claimant is in liquidation, any payment made by the respondent pursuant to the BCISP Act would enter the general pool for distribution to the claimant's creditors. The respondent would be unlikely to see much if any of the amount returned, even if the respondent is vindicated in future legal proceedings. In that sense, if pt 3 of the BCISP Act was held to compel payment to a builder in liquidation, such a payment would become final in effect, rather than provisional as intended by the BCISP Act. We consider that these considerations are also powerful ones in the context of the constitutional issue.
>
> [82] The answer to the proper interpretation of the scope of s 9(1) lies in the text. We note, however, that, the textual interpretation we have arrived at finds support in the

> extrinsic materials. The second reading speeches for both the BCISP Act and for the NSW Act on which the BCISP Act was modelled indicate that a driving concern underpinning the introduction of the respective Acts was cash flow problems within the construction industry. In the second reading speech for the BCISP Bill, the Minister for Planning referred to "[a]ccounts of small businesses and companies failing due to larger companies going broke or refusing to pay, and issues relating to cash flow problems". In the second reading speech for the NSW Bill, the Minister for Public Works and Services referred to "[h]undreds of subcontractors in New South Wales [who] struggle to survive when they do not receive money owed to them for work undertaken. They do not have the cash flow allowing them to keep on working while waiting for payment." Of course, cash flow problems cease to be a concern when a company enters into liquidation.

At [84], their Honours went on to conclude on this issue, determined in the judgment, as follows:

> In our view, therefore, s 9(1) creates an entitlement to progress payments only for persons who have undertaken to, and continue to, carry out construction work or supply related goods and services. The term "the claimant" used throughout pt 3 is commensurately limited. Consequently, the payment regime in pt 3 of the BCISP Act is not available to companies in liquidation, since such companies cannot carry out construction work or supply goods and services, and thus do not satisfy the requirements for "a claimant".

[SOP7.50] Background — application of Act to any construction contract

It will be noted that the New South Wales Act applies to any construction contract, whether written or oral, or partly written and partly oral, even if there is a clause in the contract that it is governed by a law of a jurisdiction other than New South Wales.

All the Acts here discussed provide that they apply even if the relevant contract contains a clause that the law of a jurisdiction other than that of that State is the proper law of that contract.

The phrase "construction work under the contract" is to be found in the Acts of New South Wales (s 8), Victoria (s 9) and South Australia (s 8).

[SOP7.60] *"... forms part of a loan agreement ..."*

In *Consolidated Constructions Pty Ltd v Ettamogah Pub* [2004] NSWSC 110 (11 March 2004), McDougall J held at [33] that the phrase "forms part of" in s 7(2)(a) of the New South Wales Act should be read "in accordance with their ordinary English meaning, and in a way that recognises their well understood meaning in the discourse of contracts".

At [14]–[16] of *Consolidated* his Honour held as follows:

> [14] As a matter of ordinary English usage, something may be said to "form part of" another if the first thing is included or incorporated within the second. The first thing may form part of the second as a result of some natural process or as a result of some artificial process (for example, a process of manufacture). In general terms, the words "forms part of" seem to me to connote something akin to inclusion, as opposed to association. In a particular case, however, it may be difficult to discern the point at which association changes to inclusion: that is to say, the point at which one thing may be said to form part of, rather than merely to be associated with, another.
>
> [15] In legal usage, it is often asked whether certain terms form part of a contract. They may form part of it expressly: because they are expressly acknowledged by the parties to form part of the terms of their bargain. They may form part of it by incorporation: because the parties expressly, or by conduct, agree that they shall be incorporated into, and thereby form part of, their bargain. Or they may form part of it by implication: because they are implied in fact, or implied by law, or implied by statute, or implied by custom or usage. See, generally, Carter and Harland, *Contract Law in Australia*

> (LexisNexis, 4th edition, 2002) Ch 6. But in each case, as in the world outside the area of legal usage, one thing, – the term – is said to form part of the other – the contract – by, or as the outcome of, whatever is the relevant process.
>
> [16] In both ordinary English usage and legal usage, the words "forms part of" therefore seem to indicate a relationship that is more than ancillary or associative. It is not enough to say only that the two things in questions are in some way connected, for example because the one bears in some way on the other. The point at which connection becomes inclusion – at which ancillary becomes integral – may not be easy to discern, and will in any event depend upon the facts of the particular case and the terms of the particular documents.

McDougall J revisited the meaning of this phrase in *ACA Developments Pty Ltd v Sullivan* (2004) 21 BCL 71; [2004] NSWSC 304 (21 April 2004), where, at [13], his Honour referred to his judgment in *Consolidated* and affirmed it, but added:

> However, as I observed in those paragraphs [[14]–[16] and [29]–[33] of *Consolidated*], it may be difficult in any given case to determine the point at which association changes to inclusion, or at which one thing ceases to be merely ancillary to, and comes to form part of, another.

At [17] of *ACA* his Honour said:

> But to state that the legislature wished to avoid a dual system of progress claim entitlements does not resolve the question. The system of progress claim entitlements that the Act creates is a system which gives the entitlement to the builder. Unless s 7(2) applies, that entitlement will exist against the proprietor. Section 7(2) is intended to ensure that the builder does not have concurrent rights, in respect of the one progress claim, against both the proprietor and the financier. It must follow that the prohibition in s 7(2) was not intended to apply unless, in its absence, the builder would have such concurrent rights. In other words, unless the process that is comprehended by the words "forms part of" is such as to give the builder rights, not only against the proprietor (with whom it has the construction contract) but also against the proprietor's financier, the mischief at which s 7(2) is aimed would not exist. So far from supporting the construction for which ACA contends, I think that the assigned legislative purpose tells strongly against it. First, it would suggest that the words "forms part of" should be construed in the way that I have indicated in my earlier decisions. Second, it would suggest that wide construction, of the kind advocated by ACA, would mean that many cases quite outside the ambit of the legislative intention would, nonetheless, be excluded from the Act by s 7(2).

In *Austruc Constructions Ltd v ACA Developments Pty Ltd* (2005) 21 BCL 191; [2004] NSWSC 131 (11 March 2004) there was a side deed, the provisions of which McDougall J summarised at [54]:

> (1) It shows that ACA charged (among other things) its interest under the contract to Westpac; and it records Austruc's consent to that charge.
>
> (2) Austruc undertook direct obligations to the bank in respect of Austruc's performance of the contract.
>
> (3) Austruc's rights under the contract were limited in certain respects (eg, as to substantial variations).
>
> (4) Austruc's exercise of its rights on default by ACA were qualified by the obligation to give notice to Westpac and the opportunity of Westpac thereon to remedy the default.
>
> (5) The builder's side deed gave Austruc the right to request ACA to instruct Westpac to issue a bank cheque in favour of Austruc for payment of progress claims, and obliged Westpac to act on that request if it would otherwise be obliged to make a payment to ACA.
>
> (6) It regulated the position that would arise (and, in so doing, again restricted Austruc's rights) if Westpac went into possession.

(7) It provided for the assignability of subcontracts, supply agreements and warranties.

(8) Finally, and significantly, it provided for Westpac to have the right, but not the obligation, to give a payment schedule in response to any payment claim made by Austruc under the Act (Austruc having accepted an obligation to give copies of any such payment claim to Westpac at the same time as it gave them to ACA); and provided that Westpac could pay direct to Austruc any amount admitted to be owed pursuant to such a payment schedule; and provided who was to be "the agreed authorised nominating authority for the purpose of" the Act.

As the matter before McDougall J was interlocutory, although he held it was arguable that the construction contract formed part of the loan agreement for the purpose of s 7(2)(a), his Honour found it unnecessary to arrive at a firm conclusion.

In a final hearing *sub nom*, *ACA Developments Pty Ltd v Sullivan* (2004) 21 BCL 71; [2004] NSWSC 304 (21 April 2004), his Honour concluded at [30]–[34]:

> [30] It may be accepted that the purpose of the loan agreement was to provide a source of funds that would enable ACA to meet its obligations to Austruc under the contract. It may be accepted that, if the contract came to an end, Westpac would no longer provide funds under the loan agreement (at least, in its present form). It may be accepted that, even if the contract did not come to an end, Westpac would not (or might not) provide funds under the loan agreement if ACA did not do all the things, in relation to the contract, that the loan agreement required it to do. In short, it may be accepted that the loan agreement was associated with the contract, and that in at least some senses performance under the loan agreement depended on performance under the contract. But I do not think that it follows, from the extent of the association between the loan agreement and the contract that was demonstrated in submissions, that the contract formed part of the loan agreement.
>
> [31] Nor do I think that this result is achieved through the operation of the builder's side deed. The effect of that deed, stated broadly, is to give Westpac rights against Austruc in relation to the contract, and to restrict the exercise by Austruc (and by ACA) of some of their respective rights under the contract. However, nothing in the builder's side deed gives Austruc any immediate or independent right against Westpac. It is left entirely to the discretion of Westpac whether, if the relevant circumstances arise, it will assume any direct obligation to Austruc.
>
> [32] The contractual relationships created by the contract, the builder's side deed and the loan agreement can be summarised, relevantly for present purposes, as follows:
>
> (1) Austruc is not a party to, and has no rights arising out of the terms of, the loan agreement.
>
> (2) Westpac is not a party to, and has no rights arising out of the terms of, the contract.
>
> (3) Under the builder's side deed – the only contractual document to which ACA, Austruc and Westpac are all parties – Westpac acquires rights as against ACA and as against Austruc; ACA and Austruc each assumes obligations to Westpac; but, (relevantly for present purposes), Austruc acquires no rights against Westpac.
>
> (4) Performance by Westpac of its obligations under the loan agreement is, in some ways, conditional upon:
>
> - performance by ACA of obligations (assumed under the loan agreement) relating to the contract; and
> - more generally, the continued existence of, and performance under, the contract.

(5) But performance by ACA and Austruc of their obligations under the contract is not dependent upon, or in any legal way affected by, the performance by Westpac of its obligations under the loan agreement.

(6) In no way do the agreements, read individually or together, give Austruc alternative and concurrent rights, against both ACA and Westpac, in respect of any one progress claim.

[33] As a matter of construction of the various contractual documents, the contract continues as a source of enforceable rights and obligations regardless of the existence, or enforceability, of the loan agreement. I do not understand how, once this is understood, it can be said that the contract forms part of the loan agreement.

[34] Accordingly, on the view that I take as to the proper construction of s 7(2)(a), the contract between ACA and Austruc does not form part of the loan agreement between ACA and Westpac.

In *Corbett Court Pty Ltd v Quasar Constructions* [2004] NSWSC 1174 (25 November 2004, revised 30 November 2004), at [12] cl 9.4 of the building contract read as follows:

9.4 **Payments under Building Contract**

The Builder and the Borrower acknowledge that:

(a) at the Borrower's direction, the Bank may make progress payments due to the Builder under the Building Contract out of funds which would otherwise be available to the Borrower under the Facility Agreement; and

(b) as between the Borrower and the Builder, the provisions of the Building Contract apply mutatis mutandis to any such payments as if they had been made by the Borrower; and

(c) as between the Borrower and the Bank, the provisions of the Facility Agreement apply mutatis mutandis to any such payments as if they had been made to the Borrower under the Facility Agreement.

Counsel for Corbett submitted that the deed containing the clause above was a loan agreement under which Quasar obtained rights. Counsel for Quasar submitted that cl 9.4 was, at the highest, permissive, and that Quasar neither acquired rights against the bank, nor gave up rights against Corbett.

At [16] of the judgment, McDougall J said:

In my judgment, the submissions for Quasar should be accepted. The deed is not an agreement under which the bank undertakes to lend money. It is, at its highest, an agreement that:

(1) Provides that a particular application of money (payment by the bank direct to Quasar) will be a loan under an independent agreement (the facility agreement) to which Quasar is not a party; and

(2) Regulates the consequences of payments so made.

At [19], his Honour continued thus:

There is nothing in the deed that imposes any obligation on the bank to lend. What the deed does (relevantly to this issue) is regulate, in certain ways, the consequences where the bank lends money under the facility agreement by paying the amount of a certified claim direct to Quasar at the request of Corbett Court. There is nothing in the deed that imposes any obligation on the bank to do so, and nothing that gives Quasar any right to require the bank to do so. Nor is there anything in the deed that creates rights or obligations between Quasar and the bank under the facility agreement.

In his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* at p 7, the Honourable Mr Justice McDougall noted that the construction and application of s 7(2)(a) cannot be regarded as finally settled. This section is a difficult one to construe, and requires further analysis in different factual and documentary settings.

[SOP7.70] *"... a recognised financial institution ..."*

In *Over Fifty Mutual Friendly Society Ltd v Smithies* [2007] NSWSC 291, Einstein J, at [21], held that to come within the phrase a "recognised financial institution", the onus lay on the institution to adduce evidence in support of that contention. Einstein J, at [22], also referred to the judgment of McDougall J in *Consolidated Constructions Pty Ltd v Ettamogah Pub* [2004] NSWSC 110 at [48].

The question as to whether or not a party comes within the meaning of that phrase is a matter for the adjudicator — see the discussion about the use of this phrase in the Acts of all the other States and Territories at [SOP4.390]–[SOP4.450].

[SOP7.80] *"... resides in or proposes to reside ..."*

Section 7(2)(b) does not cater for all possible situations and leaves a lot to be desired. What is the position of a husband and wife who are separated or about to become separated, and the husband contracts for the construction of a residential dwelling for his wife and children to live in?

What is the position of a family who, for estate planning reasons, enters into a contract for the building of a duly qualifying residential premises, but the land is put in the name of a company as trustee for a trust with the wife and children as beneficiaries? The Trust, a fictional entity, obviously cannot reside in the premises.

In *David Hurst Constructions Pty Ltd v Shorten* [2008] NSWSC 164, it was contended that s 7(2)(b), properly construed, was triggered where the contract included residential work on any part of the premises where the party resided or proposed to reside. In making that submission, the defendant acknowledged that it did not accord with the legislature's intention as stated in the Second Reading Speech.

At [19]–[25] Nicholas J said:

> [19] In construing the legislation a construction promoting its purpose or object is to be preferred to a construction that would not promote that purpose or object (eg *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191, at [53]). This is the approach required by the *Interpretation Act 1987*, s 33. Context is also an important consideration (*CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, p 408). Ultimately, in every case, statutory construction is a text-based activity (*Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14; (2004) 218 CLR 273, at [87], [89]).
>
> [20] The purpose of s 7(2)(b), read in context, is to define a category of construction contract to which the Act does not apply. It follows that parties to such contracts are not subject to the statutory regime whereby any person who undertakes to carry out construction work is entitled to claim and recover progress payments in relation to that work.
>
> [21] In deciding whether a construction contract is within s 7(2)(b), the only matter for consideration is whether it is one "… for the carrying out of residential building work … on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in". There is no other requirement or qualification which is expressly or by implication included in the definition to be satisfied. It may be safely assumed that had the legislature intended any additional requirement or qualification it would have included it in the definition.
>
> [22] In my opinion, the natural and ordinary meaning of the words of the provision is fairly plain, and must be understood to confine the contract to one which, in substance, is for the residential building work it specifies, namely work on such part of any premises as the party for whom it is carried out resides in, or proposes to reside in. That is to say, by the use of the phrase "on such part of any premises" the scope of the work to be done is confined to work at the particular place where the party resides, or proposes to reside. I find nothing in the language of the provision to support a

conclusion that a contract which is for residential building work on the premises in addition to work of the kind specified should fall within its ambit. In other words, in my opinion, it does not operate to exclude from the application of the Act a contract which is for some residential building work which fits the description, and is also for some residential building work which does not.

[23] It follows, in my opinion, that the only relevant issue is whether, in substance, the contract is limited to the carrying out of the work specified by s 7(2)(b). If the contract extends to the carrying out of additional residential building work on other parts of the premises it would be a contract for something more than that envisaged, and therefore one to which the Act would apply.

[24] This conclusion accords with the underlying purpose of the Act. As the plaintiff submitted, if the wide construction for which the defendants contended was correct, it would be simple indeed for a developer to enter into a construction contract which avoided the application of the Act by proposing to reside in a part of the premises on which the residential building work was carried out. Such a situation is an example of the very mischief referred to in the Second Reading Speech, which the enactment of s 7(2)(b) was intended to overcome. Because such a construction would negate the statutory purpose it should be rejected.

[25] Accordingly, the plaintiff's submissions on the construction issue generally should be accepted.

This decision was upheld by the New South Wales Court of Appeal in *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211; (2009) 25 BCL 399; [2008] NSWCA 134 (18 June 2008).

Shorten was explained by McDougall J in *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53, where his Honour at [32]–[35] explained as follows:

The proper construction of s (2)(b) was considered by the Court of Appeal in *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211; (2009) 25 BCL 399; [2008] NSWCA 134. In that case, Basten JA (who agreed with the majority) dealt with the proper construction of s 7(2)(b) at [28] and following. His Honour concluded at [29] that the exclusion for which s 7(2)(b) provides is limited to premises in which the respondent proposes to or does reside:

> It is tolerably clear from the terms of s 7(2)(b) that its primary purpose is to exclude from the operation of the Security of Payment Act construction contracts for the carrying out of residential building work on premises in which the contracting party is or proposes to be resident. If a construction contract relates to a larger development, including dwellings other than the one in which a party proposes to reside, Parliament needed to decide whether the Act should apply to such a construction contract in accordance with its general operation. The question was: should the exclusion operate in relation to a contract limited to premises in which the other party sought to reside, or should the proposed residence of a party in one of a number of dwellings on the premises be sufficient to attract the exclusion? It is reasonably clear that the Parliament opted for the former (broader) application of the Act. It limited the exclusion to a construction contract for carrying out work "on such part of" the premises in which the party proposed to reside. (Grammatically, reference to "that part" might have been more felicitous, but the meaning would not be affected.) A construction contract to carry out work on the whole of the premises in circumstances where the party does not propose to reside in the whole of the premises is not within the exclusion.

Bell JA, with whom Hodgson JA agreed, said at [53] that the words "such part of any premises" which are to be found in s 7(2)(b) serve to identify the scope of the works that are the subject of the contract. It followed, her Honour said, that:

> ... [a] contract for the construction of 10 residential units, one of which is the proposed residence of the party for whom the work is carried out, is not a contract

> for the carrying out of residential building work on such part of any premises as the party proposes to reside in. This construction does not require reading the word "only" into the provision.
>
> Accepting as I do that the reasons of Bell JA provide the reasoning of the court on the point, I think, nonetheless, that guidance can be drawn also, from the reasons of Basten JA. In substance, the essence of their Honours' reasoning is that on the proper construction of s 7(2)(b), the construction contract (if the Act is not to apply to it) must be one for the carrying out of residential building work only on that part of any premises in which the respondent resides or proposes to reside. I accept of course, that Bell JA said that it was not necessary to read the word "only" into the provision. Nonetheless, if I may say so respectfully, putting it in the way I have makes the operation relatively clear.
>
> Thus, where in Shorten the contract was one for the construction of 10 separate strata title units, and the respondent proposed to live only in one, s 7(2)(b) did not take the contract outside the operation of the Act.

In *Advance Earthmovers Pty Ltd v Fubew Pty Ltd* [2009] NSWCA 337, Tobias JA, Young JA and Sackville AJA addressed the question as to whether or not a corporation can contract for "residential building work" as defined in s 7(2)(b) of the New South Wales Act.

After an extensive overview of the authorities, and a discussion of similar concepts in the *Consumer, Trader and Tenancy Tribunal Act 2001* s 5(2), 21(1), 22(3), 22(6), 22(7), 23, and the *Home Building Act 1989* s 3, 48A, 48I, 48J, 48K and 48L, it was held at [69] that "residential work performed for a corporation cannot fall within s 7(2)(b) of the Act".

Sackville AJA at [106] said:

> The SOP Act applies to any "construction contract": s 7(1) (see the definition in s 4, [76] above). Section 7(2) provides that the SOP Act does not apply to certain construction contracts, including (s 7(2)(b)) "a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on such part of any premises as the party for whom the work is carried out resides or proposes to reside in".
>
> The issue that arises under s 7(2)(b) (leaving aside the question of when the issue can be said to arise) is not whether Earthmovers *supplied services* to Fubew *for or in connection with the carrying out of residential building work*. It is whether the *construction contract* between Fubew and Earthmovers answered the description in s 7(2)(b) of the SOP Act. That description incorporates several elements, including a requirement that *the construction contract be "for the carrying out of residential building work"*.

[SOP7.90] *"... on the residential premises of the party for whom the work is carried out ..."*

Given its literal meaning, this exclusion in s 7(2)(b) may mean that an owner of a block of apartments in the course of construction, may escape the provisions of the Act in regard to the construction of the entire block even if he/she does not intend to reside in any of them or only to reside in part of them.

At [41] of *Cardiacos v Cooper Consulting & Construction Services (Aust) Pty Ltd* [2009] NSWSC 938, White J referred to *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211; (2009) 25 BCL 399; [2008] NSWCA 134. His Honour noted that although the Court of Appeal did not decide the point, it certainly did not endorse the proposition that the intention of the party for whom the building work was done to reside in the premises, required communication to the builder (at [33] and [56] of *Shorten*).

White J held that there was no such requirement in s 7(2)(b) of the NSW Act in order to establish residence or proposed residence.

[SOP7.100] *"... otherwise than by reference to the value of the work carried out ..."*

In *Biseja Pty Ltd v NSI Group Pty Ltd* [2006] NSWSC 835 (4 August 2006), the project manager's services were paid for by the transfer of certain units in the building about to be constructed.

The adjudicator addressed this issue in [39] of his determination and for which see [9] of *Biseja* as follows:

> In particular, the fact that the parties agreed that the fee may be paid by the transfer of units in the North Entrance [Stage 2] Project does not mean that the consideration payable is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied (see s 7(2)(c) of the Act).

It was contended that the adjudication was void having regard to the provisions of s 7(2)(c) of the Act which provides that the Act does not apply to "[a] construction contract under which it is agreed that the consideration payable for … related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of … the related goods and services supplied".

McDougall J dealt with this submission at [20]–[27], and for the reasons therein stated, he rejected it.

At [59] of *Smith v Coastivity Pty Ltd* [2008] NSWSC 313, McDougall J had no reason to think that the legislature intended that "value", as set out in s 7, should differ from the concept of value as described in s 10.

At [66], his Honour pointed out that for whatever reason, the legislature chose a significantly different formula from that used by the Minister in the Second Reading Speech in s 7(2)(c).

In *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd (t/as Domus Homes)* [2011] NSWSC 604, the contract between the parties provided for part of the bonus payable to Domus Homes to be determined in accordance with the savings effected to the contract price, after taking into account a number of adjustments.

H M Australia submitted that the Act, by virtue of the provisions of s 7(2)(c), was excluded.

Einstein J held as follows:

> [73] At [62] [of *Brian Leigh Smith v Coastivity Pty Ltd* [2008] NSWSC 313] McDougall J explained, "the notion of an entitlement to share in profit is fundamentally inconsistent with the concept of value, or valuation, as it used in the relevant sections of the Act".
>
> [74] On the facts of this case, it is clear that the terms of the agreement between the owner and the developer made no effort to value the developer's work with reference to the value of the services it carried out. Rather, the consideration was calculated with reference to profit or loss, a determination driven by a multitude of variables other than the value of Coastivity's services. This is the exact category of contract that section 7(2)(c) seeks to exclude.

This holding was challenged in the Supreme Court of New South Wales Court of Appeal by *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31.

Bathurst CJ, with whom McColl JA and Tobias AJA agreed, upheld the appeal, holding on this point that s 7(2)(c) does not apply to the contract:

> [47] … Section 7(2)(c) applies to exclude contracts where that mechanism cannot have application; that is where the consideration cannot be determined by reference to the terms of the contract or the mechanisms in s 10(2)(b).

From an analysis of the judgment of the Court of Appeal on this point, it would appear as if the conclusion to which they arrived was based on the fact that it was possible to determine the ultimate amount of the bonus by an application of the contract terms.

It would appear as if the Court of Appeal has elided the concept of "value" with the concept of an ability to determine the consideration by an application of the terms of the contract dealing with that aspect. Their Honours seems to have overlooked the authorities referred to at [SOP22.690] to the effect that an adjudicator in determining value is not required to following the determination thereof provided by a certifier under the terms of the agreement.

It follows from that that the decision of the Court of Appeal in *Edelbrand* above on this issue is in apparent conflict with the decisions referred to in [SOP22.690].

[SOP7.110] *"... by reference to the value of the work carried out ..."*

In *Brambles Australia Ltd v Davenport* [2004] NSWSC 120 the consideration provided in a sub-contract was partly for money and partly to be satisfied by the sale of ferrous scrap metal and other materials salvaged from the demolition site.

It was submitted that the consideration payable to the builder was "[b]y reference otherwise than to the value of the work carried out", and hence this triggered the exclusion in s 7(2)(c).

Einstein J held, at [31], that the mere fact that payment was not wholly in money did not result, without more, that the provisions of s 7(2)(c) were triggered. A point left open by his Honour, at [34], was "whether the sub-section was concerned *only* with contracts in which the consideration is entire and indivisible".

[SOP7.120] *"... as an employee ..." — Industrial Relations Act 1996* (NSW)

Section 7(3) seems to add a further dimension to the meaning of the word "employee". The relevant section of the *Industrial Relations Act 1996* (NSW) defining "employee" is s 5, and which reads as follows:

Section 5 Definition of employee

(1) General definition In this Act, "employee" means:
  (a) a person employed in any industry, whether on salary or wages or piece-work rates; or
  (b) any person taken to be an employee by subsection (3).

(2) A person is not prevented from being an employee only because:
  (a) the person is working under a contract for labour only, or substantially for labour only; or
  (b) the person works part-time or on a casual basis; or
  (c) the person is the lessee of any tools or other implements of production; or
  (d) the person is an outworker; or
  (e) the person is paid wholly or partly by commission (such as a person working in the capacity of salesperson, commercial traveller or insurance agent).

(3) Deemed employees: The persons described in Schedule 1 are taken to be employees for the purposes of this Act. Any person described in that Schedule as the employer of such an employee is taken to be the employer.

(4) Exclusion: A person employed or engaged by his or her spouse or parent is not an employee for the purposes of this Act.

Under its provisions certain sub-contractors fall within the definition of employees. This sub-section also embraces "related goods and services".

The Act has no application to the services which a superintendent employed by the building owner may render.

The Act does not apply to a construction contract for residential building work, within the meaning of the *Home Building Act 1989* (NSW), on the residential premises of the party for whom the work is carried out: s 7(2)(b).

[SOP7.130] ***"... construction work carried out outside New South Wales ..."***

What is the position if, say, a New South Wales construction firm signs a contract with a Victorian company for the construction of a commercial building in Victoria, but there are related goods and services sent from and manufactured in New South Wales?

Section 7(4) excludes the operation of the New South Wales Act to the extent to which it deals with construction work carried out outside New South Wales.

Section 3(4) of the Queensland Act provides: "This Act does not apply to a construction contract to the extent it deals with construction work carried on outside Queensland or related goods and services supplied for construction work outside Queensland."

It will be noticed that in the New South Wales Act the phrase "or related goods and services supplied for construction work outside New South Wales" is in the sub-section immediately following: s 4(b).

What is the position where related goods and services are manufactured or provided in New South Wales, for construction work in Queensland?

Would a New South Wales adjudicator have jurisdiction in regard to a progress claim made by the New South Wales manufacturer or provider of services eg a New South Wales consultant for the Queensland construction work, in competition with a Queensland adjudicator?

In the light of the provisions of subs (b) below, the answer is probably in the negative.

The question may be of substantial importance, as different State courts may take different views as to the various similar sections of the legislation, more particularly the difficult problem of curial review of an adjudicator's adjudication.

There may be a greater advantage to an employer of expanded curial review rights of an adjudicator's decision under the proposed Western Australian Act than that in any other jurisdiction.

Davenport, in *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at pp 25–26 provides the following observations:

> But if a Queensland builder was carrying out building work in NSW, the builder could lodge a payment claim against the owner provided that the owner had an address in NSW for service (see s 31 for place for service). The Queensland builder could also make a payment claim under the Act in respect of prefabrication and supply of building materials and components, whether in Queensland or NSW, providing that the materials or components are for the building in NSW.
>
> A NSW brick manufacturer manufacturing and supplying bricks in NSW to a builder who is building a wall in Queensland could not make a payment claim under the Act. However, a brick manufacturer who supplied and delivered bricks in Queensland to a NSW builder who intended to bring them into NSW to build a particular wall could make a claim. A mere sale of bricks is not sufficient. The sale must be for bricks intended for use in identifiable construction in NSW.

But the learned author has elided two concepts, viz that of the domicilium citandi, and that of jurisdiction. It is to be doubted that the courts will agree with his analysis. Intention seems to be a quite irrelevant consideration.

Clearly the courts will have to fashion a solution to the problem.

In *Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd* [2006] NSWSC 94, Bergin J (as her Honour then was), at [55]–[56], summed up the argument thus:

> [55] During submissions I indicated that it was my view that the transporting of the modules to Victoria could be characterised as the provision of goods and services in

> relation to construction work that was carried out in New South Wales, thus not offending s 7(4) of the Act. In a supplementary submission the plaintiff acknowledged the force of that view but submitted that it does not dispose of the question as to whether the Act applies to related goods and services supplied outside New South Wales. It was submitted that s 7(4)(b) has as its starting point construction work carried out outside New South Wales and that goods and services in respect of that construction work are excluded. However it was submitted that the Act is silent as to the specific application of the Act to related goods and services supplied outside New South Wales in respect of construction work carried out in New South Wales.
>
> [56] It was submitted that the existence of s 7(4) is insufficient to rebut the presumption summarised in *Halsbury's Laws of Australia* (vol 24, Statutes), at [385–315] as follows:
>
> **Presumption not to give extra territorial effect**. It is always assumed as a common law rule of construction that a legislature must clearly show the necessary intention for a statute to have extra territorial effect. However, this does not mean that the legislature has the necessary authority to enact a statute with such effect.

At [82], her Honour was not satisfied that the adjudicator committed a jurisdictional error in allowing the claim. The decision in Shell [2006] NSWSC 94 was cited with approval by Brereton J in *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61 at [34].

Under s 4(1), the phrase "site in WA" means a site in Western Australia, whether on land or off-shore.

Under s 4(2), the phrase "construction work" is defined as meaning the work set out in that section on a site in WA.

[SOP7.140] Regulations – New South Wales Act

For regulations see *Building and Construction Industry Security of Payment Regulation 2008* (NSW), cl 1 in the Legislation section of the book.

[SOP7.150] Onus of proof that the Act does not apply

The party who contends that the Act does not apply by virtue of any of the provisions of s 7(2) carries the onus of proof: *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 (9 April 2003), Nicholas J (at [70]–[77]).

Nicholas J, at [76], explained that "the intention of the legislature is that the Act applies to any construction contract, s 7(1) being a statement of general application".

It followed from that, that the provisions of s 7(2), "are exceptions to the general rule [such] that if a party wishes to avoid its application it must demonstrate that the contract is within an excepted class".

Einstein J, in *Brambles Australia Ltd v Davenport* [2004] NSWSC 120 (12 March 2004), followed this line of reasoning and the conclusion arrived at by Nicholas J. Nicholas J reiterated his holding in regard to the onus of proof at [13] of *David Hurst Constructions Pty Ltd v Shorten* [2008] NSWSC 164. This decision has been confirmed on appeal *sub nom Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211; (2009) 25 BCL 399; [2008] NSWCA 134.

[SOP7.160] Victoria — *"... application of the Act ..."*

(a) General

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts entered into from 30 March 2007.)

Section 8 of the Act relates to construction contracts in Victoria entered into from 30 March 2007, s 7(2)(b) of the Act.

Unlike reference in the New South Wales Act to the *Home Building Act 1989*, the Victorian counterpart refers to the *Domestic Building Contracts Act 1995*.

What is excluded under s 8 of the Act, which amends s 7(2)(ba)(i) and (ii), are the following:

(i) a contract where the person for whom the work is, or is to be, carried out is a person who is in the business of building residences and the contract is entered into in the course of, or in connection with, that business; or

(ii) a contract where the work carried out, or to be carried out, under the contract is, or is part of or is incidental to work to be carried out under another construction contract.

The phrase "in the business of building residences …" was considered and defined by Vickery J in *Director of Housing of the State of Victoria v Structx Pty Ltd (t/a Bizibuilders)* [2011] VSC 410, and for which see [27] et seq.

At [43], his Honour concluded thus:

> However, in my opinion, the text of s 7(2)(b) of the Act, considered in its context, does not warrant any extension of the concept "in the business of building residences" as the phrase is properly construed, to embrace a building owner which is not accustomed to undertake work of that description. Such an exercise would involve re-writing the legislation as it is currently drawn.

For authority on the question as to what is a domestic building contract under the *Domestic Building Contracts Act 1995* (Vic), see *Director of Housing of the State of Victoria v Structx Pty Ltd (t/a Bizibuilders)* [2011] VSC 410; *Republic of Turkey v Mackie Pty Ltd* [2012] VSC 309.

(b) "… claimable variations …" - excluded amounts

The heading to s 10 is "Amount of progress payment". The significant provision is s 10(1)(b), which provides that if a contract makes no express provision with respect to a matter, the amount calculated is on the basis of the value of the construction work, on the one hand, or the related goods and services, on the other.

Section 10 and s 11 of the Act, which took effect from 30 March 2007, make provision for "claimable variations" to be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

The phrase "claimable variations" is provided for *in extenso* in s 10A covering four subsections with an example appended at the end of s 10A(4).

Under the newly inserted s 10A, the following example is provided in the amendment Act:

> A building contractor enters into a construction contract. The consideration (contract sum) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the new claim) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (disputed variation). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350,000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150,000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act.

Two classes of variations are detailed under the heading of "claimable variations" in the new s 10A and s 10B which are inserted into the principal Act by s 11 of the amendment Act.

Section 10A provides as follows:

Claimable variations

(1) This section sets out the classes of variation to a construction contract (the ***claimable variations***) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(2) The first class of variation is a variation where the parties to the construction contract agree–

(a) that work has been carried out or goods and services have been supplied; and

(b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and

(c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and

(d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

(e) as to the value of that amount or the method of valuing that amount; and

(f) as to the time for payment of that amount.

(3) The second class of variation is a variation where –

(a) the work has been carried out or the goods and services have been supplied under the construction contract; and

(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following–

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into–

(i) is $5,000,000 or less; or

(ii) exceeds $5,000,000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to ″$5,000,000″ were a reference to ″$150,000″.

(5) The phrase "claimable variations" is provided for *in extenso* in s 10A covering four subsections with an example appended at the end of s 10A(4).

(6) Under the newly inserted s 10A, the following example is provided in the amendment Act:

(7) A building contractor enters into a construction contract. The consideration (contract sum) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the new claim) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (disputed variation). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350,000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150,000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act.

(c) The impact on progress claims

Section 12 of the amendment Act refers to s 11 of the principal Act and substitutes a new s 11(1)(b)(iii), which reads:

> if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and …

The effect of the new sections 11(1)(b)(iii) and 12 is to create two classes of variations that may be taken into account in claims submitted under the Victorian Act when calculating the amount of a progress payment, ie:

(a) agreed variations; and

(b) a select class of disputed variations.

There is a limit imposed in regard to disputed variations so that a disputed variation will only be claimable in a progress claim where the original contract price is less than $5,000,000 or where it is over $5,000,000 and the relevant contract does not contain a dispute resolution clause, presumably an arbitration clause or a clause providing for expert determination.

There is a cap on the aggregate value of disputed variations, viz 10% of the original contract sum. If the aggregate value of all disputed variations exceeds this cap, a disputed variation will only fall into the category of a claimable variation if the original contract price is $150,000 or less, or the original contract price exceeds $150,000 and the contract does not contain a dispute resolution clause.

All disputed variations over and above this cap can only be claimed under the dispute resolution regime provided for in the relevant contract. The excluded amounts cannot be claimed in a progress claim that forms the basis of an adjudication determination. "Excluded variations" are those which result from the happening of an event, including latent conditions, time-related costs, changes in legislative regulatory requirements and damages for breach of contract or otherwise, or some other entitlement outside the construction contract.

Section 10A divides "claimable variations" into two classes. The first class is listed in s 10A(2), and relates to variation where the parties to the construction contract agree on the matters listed in s 10A(2)(a) – (f). It will noted that the word "agree" is in the present tense, and must obviously relate to the time when the payment claim is on foot. Section 10(2) does not provide and answer where say the construction contract provided for an agreed variation mechanism, but at the time of the payment claim, the items listed in s 10A(2)(a) – (f) are in dispute.

The second class of "claimable variations" is listed in s 10A(3)(a) – (d), and is where the parties are not in agreement as to the matters referred to s 10A(3)(c)(i) – (iv).

In *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, SSC sought curial review of the adjudicator's purported determination on two main grounds.

The first round was that the adjudicator made a jurisdictional error, or an error of law on the face of the record, in concluding that the contract did not provide "a method of resolving disputes under the contract" within the meaning of s 10A of the Act.

The second ground was that the adjudicator erred by failing lawfully to value the relevant work in accordance with ss 10 and 11 of the Act. SSC contended that the adjudicator had been bound to adopt the values for work fixed by the superintendent under the contract.

At [33] of *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* Vickery J, following the decision of *Branlin Pty Ltd v Totaro* [2014] VSC 492, held that the phrase "method for resolving disputes" in s 10A(3)(d)(ii) involved the following basic requirements:

a. process which could be described as a "method" of dispute resolution;
b. process which is capable of resulting in a binding resolution of the dispute; and
c. process which the contract makes it a binding obligation for the parties to enter upon and participate in.

At [41], Vickery J, after noting the dispute resolution mechanisms referred to in a number of constructions contracts, concluded that they all have an element in common, viz that there are mandatory steps prescribed in their relevant clauses which would result in the production of a binding decision by a third party appointed under the contract to resolve the dispute.

At [44], his Honour noted that, in accordance with the Second Reading Speech, an intention was demonstrated to limit the interim payment regime dispute variations in large contracts. His Honour quoted from a paragraph in the Second Reading Speech, which provided:

> Disputed variations on large contracts, initiated by building owners and big contractors will be exempt from the scheme. This addresses the concern that such disputes on major contracts should not be subject to the security of payment scheme and the normal contract methods of dispute resolution should continue to apply.

At [45] of his Honour's judgment, he found support for the conclusion to which he came to at [42] of his judgment, viz:

> On the other hand, a contractual provision such as that provided in the present Construction Contract, which merely mandates attendance of the parties at mediation, without more, is not a "method of resolving disputes" for the purposes of s 10A(3)(d)(ii).

Vickery J held at [52] that cl 42 of the contract did not provide a "method of resolving disputes" under the contract within the meaning of s 10A(3)(d)(ii) of the Act. The clause as set out below provided for mediation which "without more, at best provides an opportunity for resolving disputes".

> A compulsory mediation may be part of the dispute resolution process prescribed in a [construction] contract, and often is. However, without additional mandatory steps being prescribed involving the production of a binding decision by a third party appointed under the construction contract, … a dispute resolution process which stops at mediation, will not be a method for resolving disputes for the purposes of s 10A(3)(d)(ii).

Vickery J also considered whether a contractual provision which states in effect that a progress claim is to be made in accordance with a superintendent's certification clothes the

certificate, when issued, with the status of a means to determine value for the purposes of s 11(1)(a) of the Act, which an adjudicator is in turn obliged to adopt.

His Honour concluded that it was not open to the adjudicator merely to accept an invitation to adopt the certificate of the superintendent. Vickery J said at [115]:

> An invitation for an adjudicator to merely adopt a superintendent's certificate, without more, is not a contractual provision of the kind contemplated by s 11(1)(a) of the Act. It does not provide any means or basis upon which an adjudicator may independently undertake the valuation exercise, but rather delegates that task *ex post facto* to the contractually appointed superintendent. Vickery J's judgment in *SSC Plenty Road* above was referred to with approval by McDougall J in *Suprima Bakeries Pty Ltd v Australian Weighing Equipment Pty Ltd* [2016] NSWSC 998.

In an appeal against Vickery J's judgment *sub nom SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119, the Victorian Court of Appeal summarised the provisions of s 10A as follows at [9]:

> Section 10A of the Act provides that certain classes of variations may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of a construction contract. Where the parties agree that the work has been done, but do not agree that the doing of the work constitutes a variation of the contract, the variation is generally claimable in the case of a contract where the consideration exceeds $5,000,000 and the contract "does not provide a method of resolving disputes under the contract": s 10A(3)(d)(ii) of the Act. It follows that, in determining the amount of a progress payment, an adjudicator cannot take into account a variation to a high-value construction contract (consideration exceeding $5 million) in which the parties have agreed to a method of resolving disputes under the contract.

At [54], the Court of Appeal concluded as follows:

> By itself, the expression "dispute resolution" may be understood to be confined to methods that result in the determination (by a third party) of a dispute. The phrase "alternative dispute resolution" is a broader term, which is commonly understood to include mediation, as well as arbitration. However, that is not the phrase used in the statute. The language used in the statute refers to a "method of resolving disputes under the contract". In our opinion, the meaning of "method of resolving disputes" requires a method that will result in an actual resolution of the dispute, rather than just offering a forum for the discussion of the controversies between the parties, which may or may not lead to their resolution. The word used is "resolving", not "addressing".

Under s 10B of the Act, the following is provided:

Excluded amounts

(1) This section sets out the classes of amounts (**excluded amounts**) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The excluded amounts are —

(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to —

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract; and

(e) any amount of a class prescribed by the regulations as an excluded amount.

The new s 10B above lists the excluded variations which do not fall under the heading of "claimable variations".

A fairly unique provision is contained in s 10B which deals with excluded amounts. Significantly, s 10B(2)(a) – (e) provides for the following exclusions:

(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to –

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

These provisions, summarised above, are unique to Victoria. Vickery J, in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, dealt at length with ss 10B(2)(b) and 10B(2)(c) at [107]–[128], in which his Honour held that under these sections of the Victorian legislation:

(a) "excluded amounts" referred to in s 10B(2) apply to both the claimant and the respondent; and

(b) the liquidated damages against Galvin should be treated as an "excluded amount".

At [34] of the judgment in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* above the following was stated:

The rationale behind limiting the types of claims which may be made for variations under the Act, lies in the fact that money claims for variations to construction contracts are commonly the subject of dispute. No doubt for this reason, it was considered by the Legislature to be desirable for such claims to be excluded from progress claims made under the Act. In this way, the central object of maintaining an efficient flow of funds to contractors on a project could be optimized by eliminating potential "log jams" to payment claims arising from disputes over variations. Such issues, if they arise, are intended to be deferred to later dispute resolution processes or litigation.

At [67] of *APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd (No 1)* [2014] VSC 596, Vickery J said:

> APN submitted that the value of the work, for the purposes of s 7(2)(c) is not the cost of the work, saying that it is the value to the principal or third party, not the cost to the contractor in carrying out the work, which is critical.

His Honour at [68] added:

> Reference was made to the decision of McDougall J in *Brian Leigh Smith & Anor v Coactivity Pty Ltd* [2008] NSWSC 313. where the relationship between s 7(2)(c) and the valuation of the construction work provided for in s 10 of the *Building and Construction Industry Security of Payment Act 1999* ("the NSW Act") was considered (New South Wales Act's equivalent of section 11(1)(b) of the Victorian Act is s 10(1)(b) of the NSW Act). His Honour said at [59]:
>
> > Some indication of what the legislature had in mind when it referred to the concept of value is to be found in s 10 [s 11 in Victoria]: specifically, as to related goods and

> services, in ss (2). Section 10 makes reference to the kinds of matters that one would ordinarily expect to be considered in valuing construction work (ss(1)) or related goods and services (ss (2)). Although s 7 appears in Part 1 of the Act and s 10 appears in Part 2, there is no reason to think that the legislature intended that value, for the purposes of s 7, should be anything different to the concept of value described in s 10. Section 10, after all, state how construction work and related goods and services are to be valued; and the value of construction work or related goods and services is one of the referents in s 7(2)(c).

Vickery J, in *Maxstra Constructions Pty Ltd v Gilbert* [2013] VSC 243, considered the apparent conflict between s 10B(2)(c) above with the provisions of s 11(1)(b)(iv) of the Act, and which section provides that in the valuing of construction work for the purpose of calculating a progress claim, regard must be had to a number of things, including:

> (iv) if any work is defective, the estimated cost of rectifying the defect.

At [59] of his Honour's judgment, Vickery J noted that the concept of damages "has a particular meaning at law where there is a failure to discharge a contractual obligation."

At [61], his Honour said:

> On the other hand, the compensation in contemplation in s 11(1)(b)(iv) of the Act is of quite a different character. It is a purely statutory concept, providing that, in the event of any work being defective, the estimated cost of rectifying the defect is to be taken into account in valuing the construction work. Two elements serve to differentiate the statutory concept from a "claim for damages" within the purview of s 10B(2)(c). The first is that under s 11(1)(b)(iv) it is only the "cost of rectifying the defect" which is to be taken into account. Other elements which may be included in a claim for damages arising from breach of a contractual warranty or a fundamental failure to perform the contract as a whole, such as compensation for consequential losses arising from delay, do not fall within s 11(1)(b)(iv). Second, the appointed decision-maker in considering the application of s 11(1)(b)(iv), is only required to undertake an "estimate" of the costs of the rectification, and this can only be done by an Adjudicator considering the matters defined in s 23(2) of the Act, and no other matters. The assessment of a claim for damages is quite different. Damages are not amenable to a determination based upon a mere "estimate". Rather, they are founded upon a claimant for damages proving its case to the usual civil standard, on the balance of probabilities based on the admissible evidence adduced.

Vickery J continued at [62] as follows:

> The construction I have placed on s 10B(2)(c) and s 11(1)(b)(iv) resolves the apparent conflict between the provisions. They both have quite different tasks to perform. Claims for "damages" under s 10B(2)(c) are quite rightly treated as "excluded amounts", and are to be disregarded in calculating the amount of a progress payment. The forensic enquiry involved in assessing damages, and the potentially wide scope of any such claim is avoided, thereby reinforcing the limited ambit of the adjudication process contemplated under the Act and its objective of expedition. On the other hand, the enquiry to be conducted under s 11(1)(b)(iv) of the Act, properly confined as it is, as I have found it to be, would not be likely to defeat the objectives of the Act.

Under s 10(2), it is provided that despite the provisions of s 10(1) and anything to the contrary in a construction contract, a claimable variation may be taken in to account in calculating the amount of a progress payment.

[SOP7.170] Western Australia — *"... application of the Act ..."*

Under s 4(1), the phrase "site in WA" means a site in Western Australia, whether on land or off-shore.

Under s 4(2), the phrase "construction work" is defined as meaning the work set out in that section on a site in WA.

Under s 7, there is an extensive list of construction contracts to which the Act applies. It is to be noted that because of the legislative regime in Western Australia, which is entirely different from that of all of the other States and Territories, excepting the Northern Territory, and by virtue of which there are terms implied in a construction contract, unless it contains written terms to the contrary, certain portions of the Act will not apply to contracts which have written provisions to the contrary.

Under s 7(3) it is provided that the Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods and services that are related to construction work, as an employee, as defined in s 7 of the *Industrial Relations Act 1979* (WA), of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

Unlike the provisions in most States and Territories which follow the East Coast model, such as in s 7(3)(b) of the New South Wales Act, the phrase "recognised financial institution" is not contained in the Act.

[SOP7.180] Queensland — *"... application of the Act ..."*

It is to be noted that under the Queensland legislation contracts for the drilling for excavation of oil, gas and minerals, are also excluded.

Under the *Building and Construction Industry Payments Act 2004* (Qld), s 3(5), there is a definition of "resident owner" with reference to the *Domestic Building Services Act 2000* (Qld):

s 3(5)(b) The Act does not apply to a construction contract to the extent that a party undertakes by it to carry out construction work as an employee of the person for whom the work is to be carried out: s 7(3)(a).

The application and operation of the Queensland Act is provided for in an extensive s 3. Under s 3(2)(b), it is provided that the Act does not apply to a construction contract for the purpose of carrying out domestic building work if a resident owner is a party to the contract, to the extent that the contract relates to a building or part of a building where the resident owner resides or intends to reside.

Under s 3(5), the phrase "resident owner" is defined as a resident owner under the *Domestic Building Services Act 2000*, Sch 2, but does not include a person:

(a) who holds, or should hold, an owner-builder permit under the *Queensland Building Services Authority Act 1991* relating to the work; or

(b) who is a building contractor within the meaning of the *Queensland Building Services Authority Act 1991*.

In Queensland under s 4, subcontractors must choose between the Act and the *Subcontractors' Charges Act 1974* (Qld).

In *Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd* [2013] QSC 254, Daubney J declared an adjudication determination void where, following *Cant Contracting Pty Ltd v Casella* [2007] 2 Qd R 13; [2006] QCA 538; it was held that, because s 42(3) of the *Queensland Building Services Authority Act 1991* (Qld) provided that an unlicensed contractor was not entitled to any monetary or other consideration for doing work pursuant to the contract, such a contractor could not have any entitlement to progress payments pursuant to ss 7, 12 and 17 of the *Building and Construction Industry Payments Act 2004* (Qld).

In arriving at the finding that the work, the subject matter of the adjudication determination was "building work" as defined in Sch 2, ie in the dictionary to the *Queensland Building Services Authority Act 1991*, Daubney J analysed all of the relevant decided Queensland cases on this point. It is beyond the scope of this service to deal with those findings of his Honour.

It is noted that the adjudicator's construction of the relevant sections of the *Queensland Building Services Authority Act 1991* led to the opposite conclusion. Consequently, at the highest, the adjudicator erred in law.

It is for this reason that Daubney J's decision, centred as it is on Queensland legislation, has any relevance in any other State or Territory, should a similar situation arise there.

The decision in *Cant Contracting Pty Ltd v Casella* [2007] 2 Qd R 13; [2006] QCA 538 has been referred to by Daubney J in *Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd* [2013] QSC 254 with approval.

At [31] of *Ooralea*, Daubney J summarised the question before his Honour, and that is whether the formation, metalling and construction of a road fell within the definition of "building work" under the *Queensland Building Services Authority Act 1991* namely the construction, decoration, alteration or repair of any building or other structure upon land.

See further *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd* [2012] QSC 158; *National Vegetation Management Solutions Pty Ltd v Shekar Plant Hire Pty Ltd* [2010] QSC 3.

At [33], his Honour held:

> The Contract in this case expressly provided that the works consisted of, *inter alia*, "the construction of ... stormwater drainage, sewer and water reticulation ...". For my part, I see no reason why each of these objects, when constructed and attached to the ground so as to be regarded in law as "fixed", ought not be regarded as "fixed structures" and therefore within the QBSA Act definition of the word "building". A structure does not have to resemble in any way a building (in the traditional sense). The question is whether the object has been constructed. As Gibbs J (as he then was) said in *R v Rose* [1965] QWN 42 at 43.

Daubney J also held, at [35]–[36], that the adjudicator erred in holding that water, sewer and drainage systems were not "building work where there is no building" under the definition above.

At [61] of *Cant Contracting* above, McMurdo J said:

> It is unlikely the Act was intended to benefit builders who cannot enforce the payment provisions of their contracts ... In my view, the Payments Act operates only when there is a construction contract of which the terms as to payment are enforceable by the builder.

[SOP7.190] Northern Territory — *"... application of the Act ..."*

Under s 6(1), construction work is constituted by the work set out in s 6 "on a site in the Territory".

Under s 9(3) of the Northern Territory Act, it is provided that the Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods or services that are related to construction work, as a prescribed employee of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

There are no provisions in s 7(2)(b) of the Northern Territory legislation similar to those contained in s 7(2)(b) of the New South Wales Act.

Section 9 provides a definition of the construction contracts to which the Act applies.

It is to be noted that the legislative regime in Northern Territory is entirely different from that of all of the other States and Territories, excepting Western Australia, and by virtue of which there are certain terms implied in a construction contract, unless such contract contains written terms to the contrary.

An interesting question arises by virtue of s 10 "No contracting out". Section 10(1) states:

> A provision in an agreement or arrangement (whether a construction contract or not and whether in writing or not) that purports to exclude, modify or restrict the operation of this Act has no effect.

It would therefore appear as if one cannot contract out of the provisions of the Schedule which excludes certain implied terms if there are written terms in the contract to the contrary.

Unlike the provisions in most States and Territories which follow the East Coast model, such as in s 7(3)(b) of the New South Wales Act, the phrase "recognised financial institution" is not contained in the Act.

[SOP7.200] South Australia — *"... application of the Act ..."*

Under s 7(4)(a) and s (b) of the South Australian Act, construction work carried out outside South Australia and related goods and services supplied in respect of such construction work are excluded from the provisions of the Act.

Section 7(2) of the South Australian Act excludes construction work or related goods and services from the application of the South Australian Act where the consideration for such items is calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

Unlike s 7(2)(b) of the Act, there is no exclusion to the carrying out of residential building work within the meaning of any legislation such as the *Home Building Act 1989*. Section 7(1)–(5) of the Act contains details of the application of the South Australian Act. In regard to the exceptions to the application, it is noted that under s 7(3)(a), the Act does not apply to a construction contract to the extent that it contains a provision under which a party undertakes to carry out construction work or supply related goods and services as an employee within the meaning of the *Fair Work Act 1994* (SA).

The "loan agreement" provision in s 7(2) of the Act does not appear in the South Australian Act.

Section 7(3)(a) of the South Australian Act does not apply to a construction contract to the extent to which a party undertakes to carry out construction work or supply goods and services as an employee within the meaning of the *Fair Work Act 1994* (SA).

The reference in s 7(3)(a) of the Act to the *Industrial Relations Act 1996* (NSW) has as its counterpart in the South Australian Act, a reference in s 7(3)(a) to the *Fair Work Act 1994* (SA).

Instead, s 7(3)(b) of the South Australian Act contains differently worded provisions concerning a "construction contract" to the extent to which it contains:

> provisions under which a party undertakes –
>
> (i) to lend money or to repay money lent; or
>
> (ii) to guarantee payment of money owing or repayment of money lent; or
>
> (iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

It is noted that unlike the provisions in the Acts following the East Coast model, there is no reference to the phrase "recognised financial institution" in this Act.

[SOP7.210] Tasmania — *"... application of the Act ..."*

Under s 7(2) of the *Building and Construction Industry Security of Payment Act 2009* (Tas), a building or construction contract outside of Tasmania does not attract the provisions of the Tasmanian Act. However, under s 7(3), it is provided that the Act applies to any building or construction contract insofar as the contract relates to the supply by a person in Tasmania of building or construction related goods and services, even though the goods and services were supplied in respect of building work or construction work carried

out outside Tasmania. However under s 7(4), it is stated that nothing in the Act is to be taken as entitling a person to a payment if a claim for that payment has been made under the law of another jurisdiction.

It would appear therefore as if the determinant for the application of the Tasmanian Act under this section is whether or not a claim has been made under the provisions of an Act of some other State or Territory at the time that claim is purportedly made in Tasmania. The question that immediately springs to mind is whether the date upon which a claim is made is a matter for the court or the adjudicator. The Tasmanian Act is silent on this point.

Section 7(3) of the Tasmanian Act applies to "goods and services" even though they are supplied in respect of "building work" or "construction work" carried out outside Tasmania.

The provisions in s 7(3)(c) of the New South Wales Act, which state that the provisions of the New South Wales Act do not apply where a party undertakes to lend money etc, applies only in the Tasmanian Act (s 7(5)) to a loan etc by a recognised financial institution.

Section 7(4) excludes the provisions of the Tasmanian Act if a claim for payment has been made under the law of some jurisdiction other than Tasmania.

Section 7(5)(b) of the Act contains a mirror provision of the New South Wales Act, where the consideration payable for building work or construction work carried out under the contract, or for building or construction–related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out, or the value of the goods and services supplied.

Under s 7(6) of the Tasmanian Act, it is provided that the Act does not apply where the party undertakes to carry out the building work or supply the construction–related goods and services, does so as an employee of the party for whom the work is carried out, or the goods and services were to be supplied.

[SOP7.220] Australian Capital Territory — *"... application of the Act ..."*

Section 9 of the Act provides for its application.

The exclusion of the application in regard to residential building work is contained in s 9(2)(b). That section, which requires the resident owner to be a party to the contract, and relates to a building or part of a building where the resident owner lives or intends to live, is to be contrasted with the provisions of s 7(2)(b) of the Act, which does not make ownership a prerequisite for the exclusion of the provisions of the Act.

Section 9(2)(c) of the Act also excludes the application of the Act to construction work or related goods and services where the consideration for such items is calculated otherwise than by reference to the value of the work carried out, or the value of the goods and services supplied.

Under s 9(3)(a), it is provided that the ACT Act does not apply to the extent to which it contains provisions under which a party undertakes to carry out construction work or supply related goods and services as an employee of the party for whom the work is carried out, or for whom the related goods and services are supplied.

Section 9(4)(a) and (b) provides that the Act does not apply to a construction contract to the extent to which it deals with construction work carried out outside the ACT, or related goods and services supplied in respect of construction work carried out outside the ACT.

Section 9(7) of the ACT Act defines "residential building work" as having the same meaning as that phrase in the *Building Act 2004* (ACT). It defines "resident owner" as a person who is or should be licensed as an owner-builder under the *Construction Occupations (Licensing) Act 2004* (ACT).

PART 2 – RIGHTS TO PROGRESS PAYMENTS

8 Rights to progress payments

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[11]]

(2) In this section, ***reference date***, in relation to a construction contract, means:

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

[Subs (2) subst Act 133 of 2002, s 3 and Sch 1[12]]

[S 8 am Act 133 of 2002]

SECTION 8 COMMENTARY

[SOP8.20] *"… progress payment …"* – the definition of – New South Wales

In s 4 of the New South Wales Act, one finds the following definition of the phrase "progress payment":

progress payment means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

Where applicable and for comparative purposes, a list of the State and Territory Acts containing a definition of "progress payment" is set out below:

Australian Capital Territory – s 10(2)

Queensland – Sch 2

South Australia - s 4

Tasmania – s 4

Victoria – s 4

[SOP8.40] *" … construction work under the contract …"* – New South Wales

It is an undeniable jurisdictional fact that an adjudicator has no jurisdiction unless there is a statutory right to receive progress payments pursuant to a construction contract.

A timely reminder of this consideration appears from a judgment of Cosgrave J in the *County Court of Victoria in Baron Forge Contractors v Vaughan Constructions Pty Ltd* [2015] VCC 1424, where his Honour said:

> [30] The leading judgment was delivered by McDougall J [in *Grave v Blazevic Holdings Pty Ltd* (2010) 79 NSWLR 132; [2010] NSWCA 324], a recognised expert in the field of building and construction law. McDougall J held that the primary judge's finding was wrong, because he did not pay attention to the words "under the construction contract concerned". His Honour noted that the object of the legislation was limited to operating between those who are parties to a construction contract. Section 8 of the New South Wales Act was the source of the statutory right to receive progress payments. It said who was entitled to be paid, namely, a party to the construction contract; someone who undertakes to carry out construction work. His Honour noted that while the legislation did not say in terms who was liable to make the payment, he thought it implicit that the liability is one that is created against the other party to the construction contract. His Honour noted that section 15 of the New South Wales Act provides for alternative ways of enforcing a statutory liability which might arise under section 14(4). If the alternative of litigation were chosen, the rights of the respondent were limited by section 15(4)(b). He noted that in sub paragraph (ii) the words "under the construction contract" are used. He said it followed from section 15(4)(b)(ii) that the statutory liability created by section 14(4) may be defeated by a defence that does not arise under the construction contract.
>
> [31] His Honour said further:
>
> > "In this case...the words 'arising under the construction contract' must be construed having regard to their statutory context and the object of the legislation in which they appear. The statutory object does not extend to imposing obligations on those who are not parties to construction contracts. The context of section 13 makes it clear that the liability that is enforced through the mechanism of the judgment is one of which the starting point is, again, 'arising under a construction contract'.
> >
> > The alternative construction – that it is sufficient that the person be named as a respondent and not supply a payment schedule, so as to be susceptible to judgment – has consequences which render it unlikely."
>
> His Honour then went on to detail these consequences.

[SOP8.50] *"... reference date ..."* – New South Wales

As stressed by McDougall J in *Broadview Windows Pty Ltd v Arch* [2015] NSWSC 955, a "reference date" is first to be determined under s 8(2)(a) "by or in accordance with the terms of the contract" or secondly, under s 8(2)(b), where the contract "makes no express provision with respect to the matter - the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month."

In *Fyntray Constructions Pty Ltd v Macind Drainage and Hydraulic Services Pty Ltd* (2002) 18 BCL 402; [2002] NSWCA 238, it was held that the definition of "reference date" contemplated an entitlement to a progress payment both under the provisions therefor in the contract and also by reason of the date in the above section, "by reference to which the amount of the progress payment is to be calculated" under the contract. Thus the contractor need not wait until the date on which the contract provides that it is entitled to a progress payment, but can claim under the Act as soon as the period for which the amount to be claimed is to be calculated has arrived.

In *Torpey Vander Have Pty Ltd v Mass Constructions Pty Ltd* (2002) 55 IPR 542; (2003) 19 BCL 288; [2002] NSWCA 263 (13 August 2002) the Court of Appeal noted that under cl 42.1 of the subcontract, the subcontractor was entitled to make progress claims on the 25th day of each month and the main contractor was required to pay the amount due to the subcontractor at the end of the following month.

The Court of Appeal held that under s 8(2)(a)(i) of the Act, a subcontractor became entitled to a progress payment in accordance with the provisions of the Act from the 25th day of each month.

The Court of Appeal further noted that cl 42.1 of the subcontract obliged the subcontractor to make a claim each month and to include in it "all amounts then due". However, the court held that cl 42.2 made it clear that the amounts due include those referable to earlier months because the amount due was "the value of the work in performance of the subcontract to that time, not just in that month".

Accordingly, the court held that, on a true construction of the Act, it is permissible for a subcontractor to serve a payment claim on the head contractor even though the claim relates to work done in periods prior to the month in which the payment claim is served. For these reasons, the subcontractor's payment claim was held to be valid.

In *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905 (24 September 2004), McDougall J held that a payment claim purportedly made under the Act was invalid because of the termination of the contract and the cessation of the work under it resulted in there being only one reference date in respect of which only one final payment could be made.

This issue was revisited in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004), where the Court of Appeal, at [62]–[66], said:

> [62] Brodyn's submission was that the payment claim served on 28 September 2003 was not a valid payment claim under the Act, because the termination of the contract and cessation of the work under it meant that there was thereafter only one reference date, in respect of which only one final payment claim could be made. This submission was supported by the decision of McDougall J in *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905.
>
> [63] However, s 8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s 8(2)(a) if the contract so provides but not otherwise; while s 8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s 13(4): reference dates cannot support the serving of any payment claims outside these limits.
>
> [64] In my opinion, as submitted by Mr Fisher for Dasein, this view is supported by s 13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s 13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s 27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s 13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively.

> [65] There is a possible point of distinction between the present case and *Holdmark*, in that in *Holdmark* it was common ground that the contract was at an end, whereas in the present case Dasein did not concede this. However, in circumstances where the document provided by Dasein on 27 June 2003 referred to its "final claim", it seems strongly arguable that, if Brodyn was not entitled to terminate, Dasein did by this document accept the repudiation that the purported termination would in these circumstances constitute. In any event, in my opinion *Holdmark* was wrongly decided, and it is not necessary to distinguish it.
>
> [66] There is also a question whether this point could in any event lead to a conclusion that the determination was void. If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this.

In *Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd* [2008] NSWSC 1405 at [19], McDougall J noted that in the light of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at 443 [62]–[66], his Honour's earlier decision in *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905 to the opposite effect can no longer be regarded as the law in New South Wales. The decision of the Court of Appeal of New South Wales in *Brodyn* has been superseded by *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

As noted by McDougall J in *Broadview Windows* above, *Chase Oyster Bar* did not have any impact on any other aspect of *Brodyn* but for the principle that the Supreme Court could intervene by way of declaratory and injunctive relief for breach of what Hodgson JA in *Brodyn* at [53] called "the basic and essential requirements", which were "laid down for the existence of an adjudicator's determination".

It should be noted that under s 11 the due date for payment of a progress claim is stated.

At [19] of *Draybi One Pty Ltd v Norms Carpentry Joinery Pty Ltd* [2013] NSWSC 1676, Stevenson J, with reference to the phrase "reference date" in s 8(2) of the New South Wales Act, said that despite the fact that its definition in that section is qualified by the phrase "in this section", his opinion was that on a proper construction of the Act, "reference date" has the same meaning wherever referred to in the Act. His Honour relied on *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571 at [15].

In McDougall J's view at [33] of *Broadview Windows*, Stevenson J in *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571:

> … overlooked the operation of s 21 of the *Interpretation Act 1987* (NSW). That definition section provides, relevantly, that a "named month" "means January, February, March, April, May, June, July, August, September, October, November or December" when used in any Act or instrument.

At [34], his Honour expressed the view that:

> … when the expression "named month" is used in s 8(2)(b), it is to be given its statutorily defined meaning. Darke J considered the matter in *Veer Build Pty Ltd v TCA Electrical and Communication Pty Ltd* [2015] NSWSC 864. His Honour came to the conclusion at [42], with which, as will be seen, I respectfully agree, that the words "named month" are to be given their statutory meaning, as it appears from the *Interpretation Act*.

At [35] of *Broadview*, McDougall J added:

> Thus, as it seems to me, the reasons of Stevenson J in *Grid Projects* are affected by what, in my respectful opinion, was a failure to give that meaning to the expression "named month". It was because his Honour considered that the "named month" must be the month in which the work was undertaken, as named in the claim for a progress payment, that he came to the conclusion that he did. I should make it perfectly clear that, on the basis of this (as I see it) erroneous meaning given to "named month", the conclusion that his Honour came to follows naturally.

However, McDougall J acknowledged at [36]-[39] that his Honour was bound by the dicta to the contrary in *Brodyn* above and noted that sitting as a single judge, it would be inappropriate for him to ignore those dicta, whether or not they were obiter.

Also see [17] of *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334, where this judgment was cited with approval by Meagher JA [sitting in Equity].

Ball J in *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413 was concerned with the correct construction of s 8 of the New South Wales Act above.

At [26] of Ball J's judgment, his Honour noted that "[u]nder s 8(2), the parties are free to choose reference dates on and from which progress payments are to be made. However, if they do not do so ... then s 8(2)(b) itself fixes one or more reference dates."

His Honour stated at [28]:

> Third, it is accepted that the reference dates provided by the contract and those provided by the Security of Payment Act are mutually exclusive: *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* (2004) 20 BCL 276; [2004] NSWSC 116 at [18], [21] per Barrett J. That is, if the contract provides one or more reference dates in respect of particular construction work or the supply of related goods and services, then s 8(2)(b) does not apply. However, that does not mean that, in certain circumstances, the two subsections cannot operate in respect of the same contract. If, for example, a contract provided reference dates in respect of part of the construction work to be performed under the contract but not all of it, then the contractual provisions would apply to the construction work to which they were expressed to apply, but s 8(2)(b) would apply to other construction work in respect of which no contractual right to a progress payment was provided for. Generally, a principal cannot avoid the obligation to make progress payments in respect of some construction work by failing to specify a reference date in respect of it.

Ball J added at [29]:

> Fourth, it is accepted that the reference dates provided for under s 8(2)(b) continue notwithstanding termination of the contract. On the other hand, reference dates provided by the contract may cease following termination. Hodgson JA (with whom Mason P and Giles JA agreed) explained the position in these terms in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421 at [63]:
>
> > [Section] 8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s 8(2)(a) if the contract so provides but not otherwise; while s 8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s 13(4): reference dates cannot support the serving of any payment claims outside these limits.

See also *Allpro Building Services v C & V Engineering Services* [2009] NSWSC 1247 at [10] per McDougall J.

See further [48] of *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Limited* [2015] NSWSC 502, where Ball J relied *inter alia* on *Photo Production Ltd v*

Securicor Transport Ltd [1980] AC 827; [1980] 1 All ER 556; [1980] UKHL 2. The High Court has given leave to appeal in this matter. As at the date of the publication of this book, judgment is still reserved.

At [33] of *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288, Ward JA, noting what Ball J said at in *Patrick Stevedore Operations No 2* above, said:

> First, it submits that the reference to a "progress payment" in s 13(1) must be a reference to a progress payment under s 8; and hence that a person claiming that a reference date has arisen is a person claiming to be entitled "under s 8". In oral argument it was accepted by Counsel for Lewence that to read into s 8 the definition of "progress payment" contained in s 4 of the Act would involve some circularity, as recognised by Ball J in *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413 at [30], since that definition makes clear that a payment is still a progress payment for the purposes of s 13 even if it is a claim for a final payment, a single payment or a milestone payment. Nevertheless, he points to this as a feature providing some support for Lewence's construction.

At [38] of *Omega House Pty Ltd v Khouzame* [2014] NSWSC 1837, Darke J cited [63] of *Brodyn inter alia* for the principle that s 8(2) of the Act does not provide that a reference date ceases on termination of work. However, that it may be the case under s 8(2)(a) if the contract so provides, but not otherwise. Darke J added, again based on [63] of, that whilst s 8(2)(b) provided a starting reference date, it did not provide a concluding one. Darke J also noted that at [63] of , Hodgson JA (with whom Mason P and Giles JA agreed) said that he was of the opinion that the only non-contractual limit to the occurrence of a reference date was that which in effect flowed from those limits set out in s 13(4), and that reference dates cannot support the serving of any payment claim made outside those limits.

In his Honour's view, expressed at [30] of *Patrick*, the fact that the phrase "progress payment" is a defined expression in the Act, it is doubtful because of the provisions of s6 of the *Interpretation Act 1987* that it was intended to pick up that definition through s 8.

His Honour, at [37] of *Patrick*, and relying on *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; [1980] 1 All ER 556; [1980] UKHL 2, accepted *Patrick's* submission that whether for not a contractual term operates after the termination of the contract was a question of construction.

Ball J revisited the question above in *Southern Han*. Southern Han submitted that since an adjudicator can only adjudicate a payment claim and that a payment claim must *inter alia* be made by a person referred to in s 8(1), such a person is a person who has or claims to be entitled to a progress claim from a reference date under the construction contract.

Lewence, on the other hand, submitted that a payment claim must meet the conditions set out in s 13 of the Act and that such a claim was valid if relevantly it was made by a person referred to in s 8(1), viz who is *"or claims to be"* entitled to a progress payment. (emphasis added)

At [30] of the judgment, Ball J noted that the expression:

> "[a] person referred to in section 8(1)"" as used in s 13(1) is ambiguous. It may mean any person who meets the requirements set out in either s 8(1)(a) or s 8(1)(b) – that is, any person who has undertaken to carry out construction work under a construction contract or to supply related goods and services under such a contract. Alternatively, it may mean a person who satisfies all the requirements of s 8(1) – that is, a person who has undertaken to carry out construction work under a construction contract (or supply related goods and services) in respect of which a reference date has arisen.

At [34], his Honour dealt with the words "or who claims to be", and noted that they were introduced to the Act by the *Building and Construction Industry Security of Payment*

Amendment Act 2002 (NSW)B. His Honour noted at [35] that it was apparent from the introduction of the words "[a] person referred to in section 8(1)" was not intended to permit all persons who claim to be entitled to payment to make a claim, but only those identified in s 8(1).

Please see the discussion on the impact of more than one payment claim in respect of the same reference date at [SOP25.70].

See further the discussion by Darke J at [37] et seq of *Omega House Pty Ltd v Khouzame* [2014] NSWSC 1837 concerning payment claims subsequent to the termination of a contract.

Once a payment claim has been made based on a reference date that right has been exercised, and cannot be repeated in a subsequent payment claim. See further [50] of *Southern Han* above.

McDougall J noted in *Broadview*:

> [40] The Court of Appeal returned to the question of s 8(2)(b) after *Brodyn*, but before *Dualcorp*, in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2006) 23 BCLR 292. In that case, Hodgson JA (with whom, on this point, the other members of the Court agreed) dealt with s 13 briefly at [36]. His Honour repeated the view expressed by him in *Brodyn*.
>
> [41] The decision in *Falgat*, on this particular point, was considered by Hammerschlag J in *Olympia Group Pty Ltd v Tyrenian Group Pty Ltd* [2010] NSWSC 319. His Honour said at [32]:
>
> > So far as abuse of process point is concerned, I propose to follow what was said by the Court of Appeal in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* [2006] NSWCA 259. In the judgment of Hodgson JA at para 36 his Honour held that the Act permits successive payment claims to be made for the same work. This disposes of the first plaintiff's submission.

McDougall J's conclusion in *Broadview* (and which it is submitted will be followed, not only in New South Wales but in the other States and Territories where there is mirror legislation) is as follows:

> [49] In the present case, it is submitted for APS that, because of the view expressed by Hodgson JA in *Brodyn* and in *Falgat* as to the proper operation of s 8(2)(b), there were successive "reference dates" under the contract notwithstanding that work had finished. In my view, that submission must be correct. Hodgson JA expressly contemplated that reference dates did not necessarily cease "on termination of a contract or cessation of work": at least, for the purposes of s 8(2)(b).
>
> [50] It follows, in my view, that even though no work was done under the construction contract in this case from, at the latest, 31 August 2014, reference dates continued to accrue under s 8(2)(b).
>
> [51] In the present case, the first payment claim nominated as its reference date 31 October 2014, and the second payment claim nominated as its reference date 31 January 2015. On the face of the documents, they were not both referable to the one reference date. And as I have said, applying the reasoning of the Court of Appeal in *Brodyn* and *Falgat* in relation to s 8(2)(b), it cannot be the case that reference dates "stopped"″ simply because no further construction work was done.
>
> [52] In those circumstances, the only relevant limitation is that set out in s 13(4)(b). That prohibition does not arise in this case.

Also see a discussion on this point in a slightly different context in **(f)** of [SOP13.100].

A provision in a contract that makes the occurrence of a reference date conditional upon the provisions of a statutory declaration or true statutory declaration concerning payment of other amounts owed by the subcontractor, is contrary to the provisions of s 34 of the

New South Wales Act, and for which see [SOP34.50] below, where there is a discussion of the judgment of Ball J in *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126 on this point.

See the discussion in regard to Queensland authority on the aspect of contractual provisions such as the requirement of a statutory declaration and the accrual of the statutory "reference" date in [SOP8.100]. It is submitted that this line of reasoning should be followed in all the States and Territories.

[SOP8.60] Victoria — *"... reference date ..."*

Under s 9(a) and (b) of the amendment Act, certain amendments are brought about to s 9(2) of the earlier Act. Under s 9(c) of the amendment Act, new ss 9(2)(c) and (d) are inserted. These contain detailed provisions in respect of a single or one-off payment where there is no express provision made in the contract and also contain detailed provisions in regard to the case of a final payment.

Under s 9(d)(iii), it is provided:

> (iii) if neither sub-paragraph (i) nor sub-paragraph (ii) applies, the day that –
>
> (A) construction work was last carried out under the contract; or
>
> (B) related goods and services were last supplied under the contract.

[SOP8.70] *"... no express provision with respect to the matter ..."*

The meaning of this phrase was left undecided in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391. The Court of Appeal, at [48], said:

> Barrett J suggested in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* (2004) 20 BCL 276; [2004] NSWSC 116 at [18] that this use of "*express provision*" indicates that "*terms of the contract*" refers to and is confined to express terms. A wider view is open (cf *Rose v Hvric* (1963) 108 CLR 353 at 358), but it is unnecessary to resolve that issue in the present case. Even the wider view would require clear textual support for a necessary implication that the contract has provided an answer to the particular problem.

Clarence Street was referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376.

This subsection brings into sharp focus the absolute necessity to have a schedule of rates, eliminate as many provisional sum items as possible, and have as much certainty built into the contract as possible in regard to the valuation of work and related services, otherwise one may be thrown back on the tender mercies of the adjudicator.

[SOP8.80] Victoria — *"... rights to progress payments ..."*

Section 9 of the Act makes provision for the rights to progress payments.

There are substantial differences between s 9 of the Victorian Act and s 8 of the Act. Some of the more important differences are the following:

(a) Section 9(2)(b) of the Victorian Act makes provision for a specific item of construction work or a specific item of related goods and services to have as their *reference date*:

> … the date occurring 20 business days after –
>
> (i) construction work was first carried out under the contract; or
>
> (ii) related goods and services were first supplied under the contract;
>
> …

(b) Under s 9(2)(c) there is provision for where the contract provides for a single or one off payment, but makes no provision in regard to the applicable reference date. That section provides:

(c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that –

(i) construction work was last carried out under the contract; or

(ii) related goods and services were last supplied under the contract; …

(c) Under s 9(2)(d)(i)–(iii) it is provided that:

(d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following –

(i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or

(ii) the issue under the contract of a certificate specifying the final amount payable under the contract a final certificate; or

(iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that –

(A) construction work was last carried out under the contract; or

(B) related goods and services were last supplied under the contract.

[SOP8.90] Western Australia — *"... rights to progress payments ..."*

Section 16 of the Western Australian Act, under the heading "Making claims for payment", provides as follows:

> The provisions in Schedule 1 Division 4 are implied in a construction contract that does not have a written provision about how a party is to make a claim to another party for payment.

Schedule 1, Div 3 of the Act, under the heading "When claims for progress payments can be made", in turn, provides as follows:

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making any other claim for moneys payable to the contractor under or in connection with this contract.

It will be noted that this clause does not make the right to a progress payment dependent upon any reference date.

It is to be noted that Sch 1 lists the terms which are implied in a construction contract unless, under s 15, the contract contains a written provision dealing with this aspect.

[SOP8.100] Queensland — *"... rights to progress payments ..."*

Section 12 of the Queensland Act contains provisions which are substantially different to the New South Wales model.

Section 12 of the Queensland Act provides:

> From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.

The relevant Queensland decisions on this issue are in [SOP8.50], and to which reference should be paid.

In *Queensland v T & M Buckley Pty Ltd* [2012] QSC 265 relevantly, the contract provided:

42 CERTIFICATES AND PAYMENTS

42.1 Payment Claims, Certificates, Calculations and Time for Payment

Subject to the prior receipt by the Superintendent of the information required by Clause 43.2, at the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. (Emphasis added).

...

43.2 Prior to the making of a payment claim:

(a) the Contractor must deliver to the Superintendent a statutory declaration in the form attached to these Conditions by the Contractor, or where the Contractor is a corporation, by the representative of the Contractor who is in a position to know the facts attested to that:

(i) all subcontractors and any sub subcontractors performing work under the Contract have been approved by the Superintendent in accordance with Clause 9.2; and

(ii) all subcontractors of the Contractor have been paid all that is due and payable to such subcontractors up to the date of submission by the Contractor of a progress claim in respect of the work under the Contract; and

(iii) ...

(iv) ...

(v) ...; and

if requested in writing, reasonable supporting documentary evidence thereof.

The applicant failed to provide a statutory declaration under clause 42.3 at or prior to the delivery of the April payment claim. As summarised by Margaret Wilson J at [11] of her Honour's judgment in *Buckley*:

> In the applicant's submission, the consequence is that:
>
> (a) no reference date accrued pursuant to BCIPA which entitled the first respondent to make the April payment claim;
>
> (b) the payment claim delivered by the first respondent was, therefore, invalid;
>
> (c) consequently, the adjudication decision was void, because of the absence of a valid payment claim.

The adjudicator rejected that submission.

At [21] of *Buckley*, her Honour held that the effect of clauses 42.1 and 43.2 is that a contractual claim for a progress payment may not be made unless the statutory declaration has already been delivered.

> [24] In *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* Coastal Dredging (which I shall refer to as "the subcontractor") served a payment claim on John Holland (which I shall refer to as "the principal"). An adjudicator held that the subcontractor was entitled to payment of a certain sum. The principal contended that the adjudication decision was void because the subcontractor's payment claim was not made from a valid "reference date" as required by s 12 of the Act.
>
> [25] Under the subcontract "Reference Date" was defined as meaning –
>
> ...the date when the Subcontractor may submit a Payment Claim to John Holland in accordance with clause 12.6 and Schedule A, and has the same meaning as defined in [*BCIPA*].

"Payment Claim" was defined in such a way that it meant a claim under the contract rather than a claim under BCIPA. Schedule A provided, relevantly, that "Reference Date" meant the 28th of each month.

[26] Clause 12.6 of the subcontract provided that the subcontractor might submit a payment claim to the principal "only on each Reference Date" and the subcontractor warranted that the payment claim would be in the format required by the principal (which included a statutory declaration that (*inter alia*) subcontractors and employed workers had been paid). The subcontractor warranted that if the payment claim did not comply, it would be void and the reference date would be the reference date for the next month. "Payment claim" was defined as a claim for payment of the subcontract sum submitted by the subcontractor to the principal strictly in accordance with the subcontract, and "reference date" was defined as having the same meaning as it has under the Act.

Her Honour pointed out at [27] of *Buckley* that Fraser JA at [17]–[18] of *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] QCA 150 identified the crucial questions thus:

[17] In considering that issue, the object of the Act expressed in s 7, and how that object is to be achieved, expressed in s 8, must be borne in mind. An interpretation of the Act which best achieves its purpose is to be preferred to any other interpretation (Acts Interpretation Act, s 14A(1)). Relevantly, s 8 makes it clear that the purpose of the Act is not merely to give statutory force to a contractual entitlement to progress payments. Rather, the fundamental object of ensuring an entitlement to progress payments is to be achieved by granting a statutory entitlement to progress payments even where the contract itself makes provision for progress payments. The extent to which those separate contractual and statutory entitlements coincide must be derived from the operative provisions of the Act.

[18] Section 12 confers upon a person who has undertaken to carry out construction work a statutory entitlement to recover a progress payment from each "reference date under a construction contract", which is defined to mean, so far as is presently relevant, "a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, ...under the contract...". Accordingly, the contractual provisions to which reference may be made for the purpose of ascertaining the "reference date" are those which state, or provide for the working out of, the date on which a progress payment claim "may be made". The latter expression refers to an entitlement to make a progress claim. It does not comprehend reference to warranties which concern the form and content of progress claims or the consequences of breaching warranties about the form and content of progress claims.

Her Honour continued at [29]–[30] to point out that Fraser JA held that cl 12.6 of the contract was void by reason of s 99(2)(b) of the *Building and Construction Industry Payments Act 2004*. That section precludes contracting out. The relevant subcll of 12.6 of that contract are set out below:

...The subcontractor warrants and represents that if a Payment Claim does not comply with the conditions set out in this clause 12.6:

...

(h) the Payment Claim is void; and

(i) the Reference Date for the purposes of [*BCIPA*] shall be the same day on the following month.

...

Her Honour then went on to analyse *Simcorp Developments & Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162, in which Douglas J said:

> [25] Here it seems clear to me that the Act contemplates that the contract may contain provisions for working out a period for service of a payment claim intended to be used in fixing when such a claim may be made. This contract contains such provisions. Its terms are not inconsistent with the provisions of the Act and do not attract the effect of s 99.
>
> [26] Failure to adhere strictly to the statutory regime for the recovery of claims has been held to preclude reliance on the special statutory rights available under the Act (*FK Gardner & Sons Pty Ltd v Dimin Pty Ltd [2007] 1 Qd R 10, 15* at [24]; *Tailored Projects Pty Ltd v Jedfire Pty Ltd [2009] 2 Qd R 172*, 176 at [18] and 178 at [21]; *Baxbex Pty Ltd v Bickle [2009] QSC 194* at [17]; *Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd [2009] QSC 345* at [21] and [24]; *Walter Construction Group Ltd v CPL (Surrey Hills) Pty Ltd [2003] NSWSC 266* at [59] and *Gemzone Pty Ltd v Trytan Pty Ltd (2002) 42 ACSR 42*, 50 at [41].) It has also been held that the Act does not override the contractual provisions and stresses adherence to their terms (*Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd [2009] QSC 345* at [13] – [14]). Consequently claim 13 should have been treated by Simcorp simply as a progress claim and not as a payment claim under the Act.
>
> ...
>
> [29] Here, the Act clearly stipulates that the date a progress payment under a contract becomes payable depends on the day on which the payment becomes payable under the contractual provision; see s 15(1)(a). There was no argument that the provision for reference to the superintendent was void under the sections of the *Queensland Building Services Authority Act 1991* referred to in s 15(1)(a). Nor was it a provision to the contrary of the provisions of the Act for the purposes of s 99.
>
> [30] In this case under this legislation and this contract it seems to me that the issuing or deemed issuing of a progress certificate by the superintendent is a necessary precondition to the delivery of a payment claim under s 17 of the Act. If there were no provision in the contract fixing a date for delivery of a payment claim or deeming that a superintendent's certificate had issued within a certain period after the delivery of a progress claim my conclusion would be different but that is not the case here.

At [40]–[43] of *Buckley*, her Honour concluded thus:

> [40] In *Simcorp Developments* the right to deliver a payment claim was held not to accrue until a progress certificate was issued or deemed to be issued. Because the time for payment claims in Item 28 was calculable by reference to the delivery of the progress claim, and not the progress certificate, it seems to me arguably incorrect that the issue of the progress certificate was a pre-condition to the accrual of the statutory reference date. In any event, I agree with counsel for the first respondent that that decision should be confined to its own facts.
>
> [41] In the present case, the right to deliver a contractual claim on the date stated in the Annexure is conditional upon the prior delivery of the statutory declaration. The condition affects the right to deliver the contractual claim, but not the date on which it may be delivered once there is an entitlement to do so.
>
> [42] The statutory reference date is the date worked out under the subcontract on which a claim for a progress payment may be made. That date is the monthly anniversary of the commencement of the work, regardless of whether the subcontractor has delivered the statutory declaration required by clause 43.2

of the subcontract. In other words, accrual of the statutory reference date is not conditional upon the prior delivery of the statutory declaration.

[43] In the circumstances, the question of whether the pre-condition is void under s 99 does not arise.

At [24] of *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269, Applegarth J held:

> The use of the expression "under a construction contract" in s 12 of the Act supports the general proposition that a reference date is unlikely to arise for the purposes of the Act once the contract has been terminated unless the contract makes express provision for a reference date to arise after termination (as to the limited circumstances in which legislation of this kind might permit a progress payment to be served after termination see *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [171]–[175] in respect of earlier Victorian legislation).

Peter Lyons J, at [41]–[44] of *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2011] QSC 67, summarised his Honour's view in regard to this issue thus:

> [41] Thus, s 8(2) of the New South Wales Act commences, "reference date, in relation to a construction contract ...". The definition in the BCIP Act commences, "reference date, under a construction contract ...". Further, paragraph (b) of s 8(2) of the New South Wales Act commences with the words "if the contract makes no express provision with respect to the matter"; whereas paragraph (b) of the definition in the BCIP Act uses a different expression, as noted, relating to whether the contract "provide(s) for the matter".
>
> [42] The use of the expression "under a construction contract" found in the Queensland definition makes it somewhat more difficult to conclude that a reference date occurs after termination. There is then no longer a contract "under" which there might be a reference date. (In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, Vickery J appears to have adopted similar reasoning in relation to the operation of the relevant Victorian statutory provisions: see [171], [175]). The conclusion that a reference date does not occur after termination of a contract is, in my view, also consistent with the general nature of the payments for which provision is made by the BCIP Act, that is to say, payments which are of a provisional nature, made over the life of the contract: *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [17]; cited in Gantley at [172].
>
> [43] The second difference which I have noted between the two definitions is also of significance. The language used in the BCIP Act gives greater primacy to the provisions of the contract dealing with the making of a claim for a progress payment than does the language of the New South Wales Act.
>
> [44] For these reasons, I am not prepared to adopt the statement from the judgment of Hodgson JA in *Brodyn* as reflecting the effect of the definition of the expression "reference date" in the BCIP Act.

At [9] of *Kellett Street Partners Pty Ltd v Pacific Rim Trading Co Pty Ltd* [2013] QSC 298, Douglas J cited the above paragraphs from *Walton Construction*.

At [10], Douglas J said:

> The Chief Justice followed his Honour's decision in *McNab NQ Pty Ltd v Walkrete Pty Ltd* [2013] QSC 128 at [28]–[34]. See also Applegarth J's decision in *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269 at [21]–[24]. *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* has recently been distinguished in different factual circumstances by Mullins J in *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd* [2013] QSC

293 at [15]–[18]. In that case there had been a payment claim that related to an outstanding reference date in respect of which the claimant had not previously made a payment claim.

[SOP8.110] Northern Territory — *"... rights to progress payments ..."*

Section 18 of the Northern Territory Act picks up the provisions in the Schedule, Div 3 to that Act, and implies them in a construction contract, but does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations made under the contract, that the contractor has performed. Clauses 3 and 4 of that Division state that a contractor is entitled to make one or more claims for a progress payment, at any time after the contractor has performed any of its obligations, and that the making of a progress claim does not prevent the contractor from making another claim. It must be noted that as with the position in Western Australia, terms to this effect are implied in a construction contract, unless there is a written provision to the contrary. The draftsperson of a construction contract in both Western Australia and the Northern Territory should, obviously, cater for progress payments in drafting any construction contract.

As is the case in Western Australia, there is no provision for a "reference date". The same observations as made above in regard to Western Australia, viz, that it would be an anomalous position if a contractor could harass the person liable to make payment, by making repeated progress claims, at any time, and without any limitations.

[SOP8.120] South Australia — *"... rights to progress payments ..."*

The phrase "reference date" is defined in s 4 of the Act as follows:

> *reference date* in relation to a construction contract, means —
>
> (a) a date detemined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract; or
>
> (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month;

[SOP8.130] Tasmania — *"... rights to progress payments ..."*

Section 4 of the Act contains a definition for "reference date". It states that if the contract does not expressly provide for a reference date then one has regard to the last day of each month in which the work was done, or the building or construction-related goods and services are supplied.

The question of course is whether the determination of the date on which the goods were supplied is a matter for the court or the adjudicator. There is no indication of what is meant by the words "are supplied". If the building or construction-related goods and services are defective, the question is whether such building or construction-related goods and services were supplied under the contract.

[SOP8.140] Australian Capital Territory — *"... rights to progress payments ..."*

Section 10(1)(a) and (b) of the Act follows the New South Wales model precisely.

9 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

(a) the amount calculated in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

[S 9 am Act 133 of 2002, s 3 and Sch 1[13] and [14]]

SECTION 9 COMMENTARY

[SOP9.50] *"... calculated in accordance with the terms of the contract ..."*

In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [53], Hodgson JA held that the phrase "calculated in accordance with the terms of the contract" in s 9(a) did not engage contract mechanisms determining what was due under the contract, independently of calculations referable to the work performed. See the further discussion at [SOP10.50], [SOP22.690] and [SOP25.70].

See further the discussion in [SOP22.690] on the decision of McDougall J in *PPK Willoughby v Eighty Eight Construction* [2014] NSWSC 760.

[SOP9.55] Retention moneys – bank guarantees and payment claims

A payment claim may include retentions sums and sums guaranteed by a bank guarantee in lieu thereof: *Feenix Queensland Pty Ltd v Grocon Constructions (QLD) Pty Ltd* [2012] QDC 346; *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399.

[SOP9.57] Set off in determining the value of the relevant work

At [57] of *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126, Ball J held:

> In my opinion, there is merit in Glavcom's interpretation of s 9. Section 9(b) says nothing about a setoff. It says that the amount of a progress payment is to be determined by the value of the relevant work. It is difficult to see how a right of setoff can be implied in the face of the clear language of the section. There is nothing inherently uncommercial or absurd in a provision which does not permit Hutchinson to setoff amounts due to it against amounts due to Glavcom for the work that it has done. If the parties had wanted to allow for a right of setoff, they were free to do so by specifically providing in the contract for the calculation of a progress payment which included a right of setoff. The parties did not do that in this case.

It is respectfully submitted that his Honour's judgment in this regard may lead to an unjust result. In the light of his Honour's judgment, it is important, with respect, to have an appropriate set off clause in the building contract so that in the event of there being a claim for set off it may be contended that the claimant's claim must be calculated in accordance with the terms of the contract, and that in itself makes provision for setoff.

[SOP9.60] *"... no express provision with respect to the matter ..."*

The meaning of this phrase was left undecided in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391. The Court of Appeal, at [48], said:

> Barrett J suggested in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* (2004) 20 BCL 276; [2004] NSWSC 116 at [18] that this use of "express provision" indicates that "terms of the contract" refers to and is confined to express terms. A wider view is open (cf *Rose v Hvric* (1963) 108 CLR 353 at 358), but it is unnecessary to resolve that issue in the present case. Even the wider view would require clear textual support for a necessary implication that the contract has provided an answer to the particular problem.

Clarence Street was referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376.

[SOP9.70] Victoria — *"... amount of progress payment ..."*

Section 10(1) of the Act substantially follows s 9 of the New South Wales Act, however, under s 10(2), it is provided that despite the provisions of s 10(1) and anything to the contrary in a construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that contract.

Under s 10(3), it is specifically provided that an excluded amount must not be taken into account in calculating the amount of a progress payment. Section 10A details the claimable variations that may be included in a payment claim and reads as follows:

> (1) This section sets out the classes of variation to a construction contract (the claimable variations) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.
>
> (2) The first class of variation is a variation where the parties to the construction contract agree –
>
> (a) that work has been carried out or goods and services have been supplied; and
>
> (b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and
>
> (c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and
>
> (d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and
>
> (e) as to the value of that amount or the method of valuing that amount; and
>
> (f) as to the time for payment of that amount.
>
> (3) The second class of variation is a variation where –
>
> (a) the work has been carried out or the goods and services have been supplied under the construction contract; and
>
> (b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the

construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following –

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iiii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into –

(i) is $5 000 000 or less; or

(ii) exceeds $5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to "$5 000 000" were a reference to "$150 000".

Example: A building contractor enters into a construction contract. The consideration (contract sum) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the new claim) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (disputed variation). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350 000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150 000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act.

Section 10B relates to excluded amounts, and reads as follows:

(1) This section sets out the classes of amounts (excluded amounts) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The excluded amounts are –

(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to –

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

[SOP9.80] Western Australia — *"... amount of progress payment ..."*

Under the heading "Contractor's entitlement to be paid", s 14 of the Act refers to the provisions in Sch 1, Div 2 the content whereof is implied in a construction contract that does not have a written provision about the amount of the progress claim, or the means of determining the amount, that the contractor is entitled to be paid for the obligations the contractor has performed. The reference to Sch 1, Div 2 appended to the Act, states as follows:

(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.

(2) Subclause (1) applies whether or not the contractor performs all of its obligations.

It is to be noted that this provision is not followed in the legislation of the East Coast States or the Australian Capital Territory, and has its only mirror provision in the Northern Territory.

In summary, it is provided as an implied term of the contract that the contractor is entitled to be paid a reasonable amount for performing its obligations. It would appear that wherever there is no specific provision in a Western Australian construction contract for valuing the contractor's work, the contractor is entitled to a quantum meruit, whether within the context of invoking the other provisions of the Western Australian Act, or not.

There is no reference to defective work in this Act. Presumably, the provision in the Western Australian Act, Sch 1, Div 2, cl 2, entitling the contractor to be paid a reasonable amount for the performance of his obligations, compels the adjudicator to take into account the question as to whether or not the work is defective and the cost of rectification. A similar provision is to be found in Div 1, cl 2 of the Schedule to the Northern Territory Act.

[SOP9.90] Queensland — *"... amount of progress payment ..."*

Section 13 of the Act makes the following provisions:

> The amount of a progress payment to which a person is entitled in relation to a construction contract is –
>
> (a) the amount calculated under the contract; or
>
> (b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract.

[SOP9.100] Northern Territory — *"... amount of progress payment ..."*

The Northern Territory Act, in Div 2, cl 2 of the Schedule, contains provisions similar to that of the Western Australian Act in Sch 1, Div 2, a radical departure from the provisions of the New South Wales, Queensland, Victorian and other East Coast States, and that of the Australian Capital Territory.

Under this Act, there is no reference to defective work. Presumably, the provision in Northern Territory Act in Div 1, cl 2 of the Schedule, entitling the contractor to be paid a reasonable amount for the performance of his obligations, compels the adjudicator to take

into account the question as to whether or not the work is defective and the cost of rectification. A similar provision is to be found in the Act in Div 2, cl 2 of the Schedule.

Section 16 of the Act picks up the provisions in Div 1 of the Schedule, which are implied where there is no written provision to the contrary. This provides that the contractor is not bound to perform any variations, unless there has been an agreement as to the nature and extent thereof, the amount, or a way of calculating the amount that the principal must pay the contractor therefor. It is noted that the agreement need not be in writing.

Section 19 of the Act states that the provisions of the Act in the Schedule, Div 4, are implied in a construction contract that does not have a written provision as to the making of a payment claim.

Division 4 of the Schedule to the Act provides:

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making another claim for an amount payable to the contractor under or in connection with this contract.

[SOP9.110] South Australia — *"... amount of progress payment ..."*

Section 9 of the Act follows the East Coast model.

[SOP9.120] Tasmania — *"... amount of progress payment ..."*

Section 13 of the Act provides for how the value of building work or construction work etc is to be determined. Under s 13(1), there is emphasis on the provisions of the terms of the contract.

Under s 13(2), if there is no express provision, then the value of the building work etc is to be determined in accordance with the following provisions:

(a) the contract price for the work, including any GST that may be payable in relation to the work; and

(b) any other rates or prices set out in the contract; and

(c) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and

(d) if any of the work is defective, the estimated cost of rectifying the defect.

Under s 13(3)–(4), there are repeat provisions in respect of the value of construction-related goods and services. There is a unique provision in s 13(5) in respect of materials and components that are to form part of a building structure or work. Under s 13(5), the Act states the following in that regard:

> If building or construction-related goods and services consist of materials and components that are to form part of any building, structure, or work, arising from building work or construction work, the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom the building work or construction work is being carried out.

[SOP9.130] Australian Capital Territory — *"... amount of progress payment ..."*

Section 10 of the Act provides for the right to progress payments. The amount of a progress payment follows s 9 of the New South Wales Act, but the word "calculated" in s 9(a) has been substituted with the words "worked out" in s 11 of the ACT Act.

10 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the work, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[15]]

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the goods and services, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the goods are defective, the estimated cost of rectifying the defect,

and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[16]]

[S 10 am Act 133 of 2002]

ss 8-12A

SECTION 10 COMMENTARY

[SOP10.50] *"... in accordance with the terms of the contract including a precondition for the provision of certain declarations ..."*

The parties to a contract clearly have it in their power to provide a contractual mechanism for the basis of the valuation of work and related services. Accordingly each and every such contract should have an agreed schedule of rates, a detailed specification (in the case of a building contract), and should eliminate as many provisional sums as is possible. The question as to whether or not a contractual provision for certification of value is binding on the adjudicator, has in New South Wales, as will be seen from [SOP22.690], been decided in the negative.

In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [53], the Court held that the phrase "calculated in accordance with the terms of the contact" in s 9(a) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) does not engage contract mechanisms determining what is due under the contract, independently of calculations referable to the work performed: *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395; *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19, applied.

In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 (31 October 2008), Hodgson JA at [53] and [54] held that the phrase "calculated in accordance with the terms of the contract" in 9(a) did not engage contract mechanisms determining what was due under the contract, independently of calculations referable to the work performed. The relevant paragraphs state:

> [53] I adhere to the view I expressed in *Transgrid v Siemens Ltd* [2004] NSWCA 395, (2004) 61 NSWLR 521 at [35] and *John Holland Pty Ltd v Road and Traffic Authority of New South Wales* (2007) 23 BCL 205; [2007] NSWCA 19 at [38], to the effect that "calculated in accordance with the terms of the contract" in s 9(a) of the *Building and Construction Industry Security of Payment Act 1999* (the Act) does not engage contract mechanisms determining what is due under the contract, independently of calculations referrable to the work performed.
>
> [54] This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as the obtaining of a superintendent's certificate, has not been satisfied; and it means equally that contractors are not *ipso facto* entitled to payment because of the operation of a deeming provision such as cl 37(2) of the contract in this case.

Mullins J, in *BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd* [2012] QSC 214, was concerned with a submission that the adjudication determination was beyond jurisdiction, with regard to a clause in the contract, as follows:

> (d) A progress claim, including a final progress claim, shall:
>
> (ii) provide copies of tax invoices for any outlays claimed; and

(iii) a declaration in the form in Schedule Three, each of which shall be a precondition to payment and if not provided or incomplete or false the Contractor may withhold payment until received.

and that no such declaration was provided.

The respondent in the adjudication determination submitted that nothing in the Act overrode the contractual provisions, and in this regard it relied on *Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd* [2011] 1 Qd R 28 at [24].

On the other hand, as set out in [13] of Mullins J's judgment in *BHW*, his Honour noted that the applicant relied on the approach in *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] QCA 150 in which the issue was "the effect of clauses in the subcontract requiring a statutory declaration to be included in the payment claim as to payments having been made to subcontractors and employed workers and providing for a warranty by the subcontractor that, if the payment claim did not comply with conditions" (including the provisions of the statutory declaration), the payment claim was void and the reference date for the purposes of the Act would become the same day on the following month."

At [17], Mullins J, in rejecting the submission of the respondent in the adjudication determination, said:

> Clause 7(d) of the respondent's standard terms and conditions is concerned with how to make a "progress claim" under the contract, and is not concerned with regulating a payment claim under the Act. Section 17 of the Act regulates the form of a payment claim under the Act for the purpose of pursuing the statutory entitlement to a progress payment from each reference date under the construction contract where the claimant has carried out construction work under the contract. There is no requirement in the Act for payment claims to be accompanied by such a declaration. The applicant's payment claims in this matter are therefore not invalid in the absence of a declaration under clause 7(d)(iii).

In *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941 at [93], Hammerschlag J held that an adjudicator was not bound by any contractual regime for entitlements to be dependent upon progress certificates.

See the further discussion at [SOP9.50], [SOP22.690] and [SOP25.70].

See further the discussion in [SOP22.690] on the decision of McDougall J in *PPK Willoughby v Eighty Eight Construction* [2014] NSWSC 760.

In *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31, the New South Wales Court of Appeal considered the question of the value of construction work and the value of related goods and services. It is noted that there are similar provisions found in s 11 of the Victorian Act.

Bathurst CJ (with whom McColl and JA and Tobias AJA agreed) set out his Honour's view in regard to the determination of value where the consideration dictated by the construction contract provided for a fixed price management fee plus a bonus. His Honour said:

> …
>
> Section 10(2) of the Act provides that related goods and services are to be valued in accordance with the terms of the contract or, if there is no express provision, in accordance with the mechanisms set out in s 10(2)(b). This provision appears in Pt 2 of the Act which deals with the rights to progress payments. Section 7(2)(c) applies to exclude contracts where that mechanism cannot have application; that is where the consideration cannot be determined by reference to the terms of the contract or the mechanisms in s 10(2)(b).
>
> In the present case the agreement provided for a fixed payment of $130,000. That payment was payable by six instalments of $21,666.67 at the time set out in steps 1, 5,

> 6, 9, 10 and 11. The relevant reference date for those payments are the events specified in each of those steps. The amount payable is the amount calculated in accordance with the terms of the contract (see s 9(a)). For the purpose of s 7(2)(c) these amounts are not calculated other than by reference to the value of the services supplied as they are calculated in accordance with the contract price consistent with s 10(2)(b)(i).
>
> Step 12 of the agreement provides that the bonus payment is payable within seven days of an invoice after direct reconciliation following occupation and/or building completion. Thus, the reference date for the payment of the bonus can be ascertained in accordance with s 8(2)(a) of the Act.
>
> Further, the bonus amount is calculated in accordance with the terms of the contract consistently with s 9(a). For the purposes of s 7(2)(c) and s 10(2)(a), the contract provides how the amount is to be valued, namely 50% of savings below at targeted budget.
>
> Accordingly, s 7(2)(c) does not apply. As I have pointed out, the date of any payment due and its value can be determined in accordance with the contract as required by the Act. It is immaterial in my view that the amount of the bonus payment cannot be calculated until completion of the contract. What is of importance is that the contract provided the mechanism for its calculation at the reference date provided for by s 8(2)(a). The fact that no bonus may be payable when the reconciliation is done is immaterial. The contractor retains $130,000 which has been paid. It simply does not get a bonus.

At [74] of *APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd (No 1)* [2014] VSC 596, Vickery J noted that this approach was consistent with the decision of McDougall J in *Biseja Pty Ltd v NSI Group Pty Ltd* [2006] NSWSC 835, where it was agreed that Biseja would perform the building work at cost and agreed separately to provide a project management service for a certain percentage of the cost of the building works.

In *Biseja*, McDougall J, rejected the submission that the Act did not apply to the agreement for the provision of project management services by reason of the provisions of s 7(2)(c) of the *Building and Construction Industry Security of Payment Act 1999* (NSW). His Honour said:

> [21] In my view, it is plain that the adjudicator found that the project management fee (ie, the consideration for the related goods and services) was to be quantified at 10% of the construction cost. That is apparent from what he said in para 36(1) and (6). Thus, when he said in para 39 "that the parties agreed that the fee may be paid by the transfer of units", he was using the word "paid" to mean discharged or acquitted. The fee was not anything other than the 10%; the three units that might constitute its acquittal (in whole or in part) were the discharge of the obligation, not its quantification.
>
> [22] In other words, I think, para 39 is to be read in the first of the senses suggested by Mr Corsaro, as referred to above.
>
> [23] If that is a correct reading of para 39, then it follows inevitably that the adjudicator was correct in concluding that the agreement for provision of project management services was not caught by s 7(2)(c) of the Act. That is because the parties agreed that the value of those project management services was 10% of the cost of the building works. It matters not that they agreed that this value could be paid in a particular way.

[SOP10.55] Sections 459G and 459H of the *Corporations Act 2001* (Cth) and interrelationship thereof with s 10 of the *Building and Construction Industry Security of Payment Act 1999* (NSW)

Robb J addressed the interrelationship between ss 459G and 459H of the *Corporations Act 2001* (Cth) and s 10 of the *Building and Construction Industry Security of Payment Act*

1999 (NSW) in the case of *J Group Constructions Pty Ltd* [2015] NSWSC 1607. The issue addressed by his Honour is important, and therefore the full extract of his Honour's commentary on this issue is set out below:

> [115] Section 10 may therefore, in some cases, create conceptual difficulties when the court comes to try to work out, in an application by the respondent under s 459G of the Corporations Act that relies upon s 459H, what is a dispute as to the existence of the relevant debt, and what is an offsetting claim. Speaking generally, where the claimant's claim to a progress claim is dealt with entirely under the contract, it should in theory be possible to analyse the terms of the contract to determine whether the respondent's challenge to the claimant's claim contests the existence of the debt, or accepts the debt and is an offsetting claim in the nature, for example, of a claim for defective work or breach of some other term of the contract. The fact that the work is defective, or some other term of the contract is breached, may not have the technical effect of depriving the claimant of an entitlement to payment of the debt. However, at least in cases where the amount of the progress claims depends upon the value of the work, and the contract does not make express provision for the determination of that value, one of the things that must be taken into account in determining the value is the estimated cost of rectifying any defective work. That may have the effect of collapsing the distinction between debts and offsetting claims. The amount of the progress claim that is determined may be a debt reduced by an allowance for an offsetting claim.
>
> [116] Section 13 of the Security of Payment Act deals with the service by a claimant of a payment claim on the respondent. The claim must identify the construction work to which the progress payment relates as well as the amount of the progress payment that is claimed.
>
> [117] It may not always be the case that the amount claimed is the amount of a contractual debt under the contract, without any adjustment. The claimant may recognise that some allowance must be made for the cost of rectifying defective work, or for some other breach of the contract by the claimant; even in cases where s 10(1)(b)(iv) is not directly applicable. The claim amount may be calculated on a basis that attempts to allow for an offsetting claim available to the respondent.

[SOP10.60] *"... no express provision with respect to the matter ..."*

See the discussion in [SOP9.60].

[SOP10.70] Necessity to keep records of variations

Both parties should keep carefully recorded details of any agreed variations.

[SOP10.80] Defective work – adjudicator's function where there is a claim for

The adjudicator's function in regard to defective work under s 10(1)(b)(iv), is set out at [74] of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004), where Hodgson JA said the following:

> In my opinion, the adjudicator was correct in so far as he held that, under s 10(1)(b), regard is not to be had to a cross-claim for damages for delay; but in so far as a cross-claim for damages may rely on defective or incomplete work, plainly this is to be taken into account under s 10(1)(b). Only the work completed is to be valued, and regard is to be had to the estimated cost of rectifying defects. It appears that the adjudicator did not have any regard to Brodyn's claim that there were deficiencies and defects requiring something in the order of about $90,000.00 in all to rectify.

Hodgson J, in the paragraph of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, added the phrase "or incomplete work". It is

surprising that a failure by an adjudicator to take into account defective or incomplete work may result in an injustice, and that the aggrieved party is then left without any immediate remedy.

It is to be noted that an adjudicator's obligation to take into account defective work does not arise where s 10(1)(a) applies, viz, that is where the terms of the contract determine value.

The decision in *Brodyn* has for all intents and purposes been replaced by a completely different set of principles, as set out in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190. However, this aspect of the *Brodyn* judgment was not relevant to the *Chase Oyster Bar* decision, and probably remains good law in New South Wales.

[SOP10.90] *"... defective goods ..."*

In regard to defective goods, see the commentary at [SOP10.80].

[SOP10.100] Victoria — *"... valuation of construction work and related goods and services ..."*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 10 and s 11 of the Act, which took effect from 30 March 2007, make provision for "claimable variations" to be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract. Two classes of variations are detailed under the heading of "claimable variations" in the new s 10A and s 10B which are inserted into the principal Act by s 11 of the amendment Act.

The Act deals with the valuation of construction work and related goods and services in ss 10, 10A, 10B and 11.

The heading to s 10 is "Amount of progress payment". The significant provision is s 10(1)(b), which provides that if a contract makes no express provision with respect to a matter, the amount calculated is on the basis of the value of the construction work, on the one hand, or the related goods and services, on the other.

Under s 10(2), it is provided that despite the provisions of s 10(1) and anything to the contrary in a construction contract, a claimable variation may be taken in to account in calculating the amount of a progress payment.

The phrase "claimable variations" is provided for *in extenso* in s 10A covering four subsections with an example appended at the end of s 10A(4).

Section 10A divides "claimable variations" into two classes. The first class is listed in s 10A(2), and relates to variation where the parties to the construction contract agree on the matters listed in s 10A(2)(a)–(f). It will noted that the word "agree" is in the present tense, and must obviously relate to the time when the payment claim is on foot. Section 10(2) does not provide and answer where say the construction contract provided for an agreed variation mechanism, but at the time of the payment claim, the items listed in s 10A(2)(a)–(f) are in dispute.

The second class of "claimable variations" is listed in s 10A(3)(a)–(d), and is where the parties are not in agreement as to the matters referred to s 10A(3)(c)(i)–(iv).

At [33] of *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, Vickery J, following the decision of *Branlin Pty Ltd v Totaro* [2014] VSC 492, held that the phrase "method for resolving disputes" in s 10A(3)(d)(ii) involved the following basic requirements:

a. a process which could be described as a "method" of dispute resolution;
b. a process which is capable of resulting in a binding resolution of the dispute; and

c. a process which the contract makes it a binding obligation for the parties to enter upon and participate in.

At [41], Vickery J, after noting the dispute resolution mechanisms referred to in a number of constructions contracts, concluded that they all have an element in common, viz that there are mandatory steps prescribed in their relevant clauses which would result in the production of a binding decision by a third party appointed under the contract to resolve the dispute.

At [44], his Honour noted that, in accordance with the Second Reading Speech, an intention was demonstrated to limit the interim payment regime dispute variations in large contracts. His Honour quoted from a paragraph in the Second Reading Speech, which provided:

> Disputed variations on large contracts, initiated by building owners and big contractors will be exempt from the scheme. This addresses the concern that such disputes on major contracts should not be subject to the security of payment scheme and the normal contract methods of dispute resolution should continue to apply.

At [45] of his Honour's judgment, he found support for the conclusion to which he came to at [42] of his judgment, viz:

> On the other hand, a contractual provision such as that provided in the present Construction Contract, which merely mandates attendance of the parties at mediation, without more, is not a "method of resolving disputes" for the purposes of s 10A(3)(d)(ii).

At [34] of the judgment in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, the following was stated:

> The rationale behind limiting the types of claims which may be made for variations under the Act, lies in the fact that money claims for variations to construction contracts are commonly the subject of dispute. No doubt for this reason, it was considered by the Legislature to be desirable for such claims to be excluded from progress claims made under the Act. In this way, the central object of maintaining an efficient flow of funds to contractors on a project could be optimized by eliminating potential "log jams" to payment claims arising from disputes over variations. Such issues, if they arise, are intended to be deferred to later dispute resolution processes or litigation.

[SOP10.105] Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007

Under the newly inserted s 10A, the following example is provided in the amendment Act:

> A building contractor enters into a construction contract. The consideration (contract sum) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the new claim) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (disputed variation). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350 000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150 000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act.

The new s 10B lists the excluded variations which do not fall under the heading of "Claimable Variations".

A fairly unique provision is contained in s 10B which deals with excluded amounts. Significantly, s 10B(2)(a) – (e) provides for the following exclusions:

(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to –

(i.) latent conditions; and

(ii.) time-related costs; and

(iii.) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

Section 11 of the Act inserts s 10A in regard to "claimable variations" and s 10B in regard to "excluded amounts" into the principal Act.

Section 12 of the amendment Act inserts additional material and substitutes certain of the provisions of s 11 of the principal Act so as to, *inter alia*, accommodate for claimable variations being taken into account in the valuation of construction work and related goods and services.

Section 12 of the amendment Act refers to s 11 of the principal Act and substitutes a new s 11(b)(iii), which reads:

(f) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and …

The effect of these new sections is to create two classes of variations that may be taken into account in claims submitted under the Victorian Act when calculating the amount of a progress payment, ie:

(g) agreed variations; and

(h) a select class of disputed variations.

There is a limit imposed in regard to disputed variations so that a disputed variation will only be claimable in a progress claim where the original contract price is less than $5,000,000 or where it is over $5,000,000 and the relevant contract does not contain a dispute resolution clause, presumably an arbitration clause or a clause providing for expert determination.

There is a cap on the aggregate value of disputed variations, viz 10% of the original contract sum. If the aggregate value of all disputed variations exceeds this cap, a disputed variation will only fall into the category of a claimable variation if the original contract price is $150,000 or less, or the original contract price exceeds $150,000 and the contract does not contain a dispute resolution clause.

All disputed variations over and above this cap can only be claimed under the dispute resolution regime provided for in the relevant contract. The excluded amounts cannot be claimed in a progress claim that forms the basis of an adjudication determination. "Excluded variations" are those which result from the happening of an event, including latent conditions, time-related costs, changes in legislative regulatory requirements and damages for breach of contract or otherwise, or some other entitlement outside the construction contract.

These provisions, summarised above, are unique to Victoria. Vickery J, in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, dealt at length with ss 10B(2)(b) and 10B(2)(c) at [107]–[128], in which his Honour held that under these sections of the Victorian legislation:

(i) "excluded amounts" referred to in s 10B(2) apply to both the claimant and the respondent; and

(ii) the liquidated damages against Galvin should be treated as an "excluded amount".

Vickery J, in *Maxstra Constructions Pty Ltd v Gilbert* [2013] VSC 243, reconciled the apparent conflicts between ss s 11(1)(b)(iv) of the Victorian Act and 10B(2)(c) thereof. For a fuller discussion on this aspect, see [SOP7.160] above.

At [67] of *APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd (No 1)* [2014] VSC 596, Vickery J said:

> APN submitted that the value of the work, for the purposes of s 7(2)(c) is not the cost of the work, saying that it is the value to the principal or third party, not the cost to the contractor in carrying out the work, which is critical.

His Honour at [68] added:

> Reference was made to the decision of McDougall J in *Brian Leigh Smith & Anor v Coactivity Pty Ltd* [2008] NSWSC 313. where the relationship between s 7(2)(c) and the valuation of the construction work provided for in s 10 of the *Building and Construction Industry Security of Payment Act 1999* ("the NSW Act") was considered (New South Wales Act's equivalent of section 11(1)(b) of the Victorian Act is s 10(1)(b) of the NSW Act). His Honour said at [59]:
>
> > Some indication of what the legislature had in mind when it referred to the concept of value is to be found in s 10 [s 11 in Victoria]: specifically, as to related goods and services, in ss(2). Section 10 makes reference to the kinds of matters that one would ordinarily expect to be considered in valuing construction work (ss(1)) or related goods and services (ss(2)). Although s 7 appears in Part 1 of the Act and s 10 appears in Part 2, there is no reason to think that the legislature intended that value, for the purposes of s 7, should be anything different to the concept of value described in s 10. Section 10, after all, state how construction work and related goods and services are to be valued; and the value of construction work or related goods and services is one of the referents in s 7(2)(c).

[SOP10.110] Western Australia — *"... valuation of construction work and related goods and services ..."*

The Western Australian Act, as emphasised elsewhere in this work, does not follow the East Coast model. Section 15 of the Act states that the provisions in Sch 1, Div 3 are implied in a construction contract that does not have written provisions about whether or not the contractor is able to make a claim to the principal for the obligations the contractor has performed. In Sch 1, Div1, cl 1 it is provided that variations must be agreed, both in regard to the nature and extent thereof, and the amount, or a means of calculating the amount, that the principal is to pay the contractor in respect thereof. In Sch 1, Div 2, cl 2, it is provided in subcl (1) that the contractor is entitled to be paid a reasonable amount for performings its obligations. Subclause (2) states that the provisions of subcl (1) apply whether or not the contractor performs all of its obligations.

In other words, the amount of a progress claim is determined by any provision of the contract and/or agreement in regard to variations, and failing which, but only in regard to the work which a contractor has done other than variation work, the amount the subject of a progress claim is limited to that which is reasonable.

[SOP10.120] Queensland — *"... valuation of construction work and related goods and services ..."*

Section 14 of the Act substantially follows s 10 of the Act.

At [39] of *Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd* [2013] 2 Qd R 1; [2012] QSC 388, Jackson J, considered the judgment of Bathurst CJ in *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31, where Bathurst

CJ said:

> In the present case, the legislation in question is remedial legislation. In these circumstances the words in the definition of related goods and services in s 6 of the Act should be given a liberal interpretation, within the confines of the actual language employed and what is fairly open on the words used: *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638. In *IW v The City of Perth* (1997) 191 CLR 1 at 12, Brennan CJ and McHugh J put the position in the following terms (citations omitted):
>
> > ... beneficial and remedial legislation, like the Act, is to be given a liberal construction. It is to be given "a fair, large at [sic] liberal" interpretation rather than one which is "literal or technical". Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural.
>
> See also Gummow J at 39.

However at [40] – [42] of *Capricorn*, Jackson J went on to say that it was not obvious to him, for the reasons stated in those paragraphs, that the principle of statutory interpretation above obtained to the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA).

At [44], Jackson J, referred to the judgment of de Jersey J (as his Honour then was) in *Stumann v Spansteel Engineering Pty Ltd* [1986] 2 Qd R 471 at 477, where de Jersey J said:

> It remains to mention the appellant's argument that the Act, being remedial, should be construed beneficially to the sub-contractor. Views within the Court have differed as to whether that is so: cf *Ex parte Peter Fardoulys Pty Ltd* [1983] 1 Qd R 345, 348 and *Ex parte Pavex Constructions* [1979] Qd R 318, 327. The question arising in this case is resolved by adopting a natural construction of the Act. It must be remembered, however, that the Act confers special rights and privileges, the enforcement of which depends on strict compliance with its terms; where the requirements of the Act are not complied with, the Court has no jurisdiction to enforce them: re *Queensland Tiling Service Pty Ltd* [1962] QWN 46.

In the circumstances, as set out at [45] of *Capricorn*, Jackson J preferred an approach which seeks to extend the operation of the BCIPA by a liberal interpretation:

> ... to be engaged in with the purpose of increasing the width of the class of persons who are entitled to the benefit of a payment claim and correspondingly increasing the width of the class of persons who are subject to BCIPA's restriction and obligations.

At [49], his Honour adopted the following passage in a judgment of Fryberg J in *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2011] QSC 345 at [73]; affirmed in *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2012] QCA 276, in which it was said:

> In my judgment, "for use in connection with" is not satisfied simply by proving that the plant or materials supplied were used in connection with the carrying out of construction work ... "For" is a word of wide denotation. In the present context it carries a purposive meaning. It suggests that the phrase must be satisfied at the outset of the transaction, before the plant or materials are used. Evidence of the use to which the plant or materials were put may support an inference as to the purpose for which they were at that time to be used ...
>
> That conclusion is supported by the manner in which "related goods and services" is used in the Act. The most important use is in the definition of construction contract, a definition which relevantly refers to a "contract, agreement or other arrangement". As noted above, in most other contexts in which the expression is used it is to refer to related goods and services supplied under a construction contract. That suggests that the contract or arrangement will supply an important part of the evidence by which the

> proposed use of the plant or material is to be identified. The use must be able to be identified at the time of the contract or arrangement ...

At [56] – [57], of *Capricorn*, Jackson J dealt specifically with the existence of a chain of supplies creating a possible question as to the operation of s 11(1)(a)(i) and (ii) of the Queensland Act.

At [56], his Honour held:

> In the text of subparagraph (i), part of the answer lies in the requirement that the materials must be "to form part of" a relevant "building, structure or work". Thus, if the things undertaken to be supplied constitute materials which, as supplied, are capable of forming part of a building, structure or work, they are capable of constituting related goods. That would not be the case where, as supplied, the things are not yet in a state of production which is capable of forming part of the building structure or work.

At [57], his Honour went on to hold that where the things comprising the relevant materials are so capable, there was still a question as to whether each of a succession or string of supplies would meet the requirements of s 11(1)(a)(i) of the Queensland Act. In this regard, Jackson J went on to hold:

> Part of the definitional requirement is that the things are "to" form part of any building, structure or work. The operation of subparagraph (i) will be affected by whether, in context, "to" is satisfied by the fact that the things are of a kind which either can be used only or most likely by incorporation into a building, structure or work. If that operation lies within the reach of the definition of "related goods and services" [which includes a reference to related goods or services: s 11(2)], the manufacturer of building products who supplies them over a period to a wholesaler under an arrangement and the wholesaler who supplies building products over a period to a retailer under an arrangement will be entitled to a payment claim, without any contract or arrangement for construction work being in sight. The text of BCIPA does not assist greatly in the resolution of the question of that seemingly counter-intuitive, but possible, operation.

In the result, his Honour issued a declaration that the adjudication was void.

Capricorn was referred to and cited with approval by Margaret Wilson J in *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164.

[SOP10.130] Northern Territory — *"... valuation of construction work and related goods and services ..."*

The following clauses in the schedule of implied provisions at the end of the Act are relevant to the valuation of construction work and related goods and services.

Under Sch 1, Div 1, cl 1 "Variations must be agreed", it is provided that a contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on:

(a) the nature and extent of the variation of the obligations; and

(b) the amount, or a way of calculating the amount, that the principal must pay the contractor in relation to the variation of the obligations.

Under Sch 1, Div 2, cl 2 "Contractor's entitlement to be paid," it is provided that the contractor is entitled to be paid a reasonable amount for performing its obligations. Under cl 2(2) it is provided that subcl (1) applies whether or not the contractor performs all of its obligations.

It will be seen that these provisions differ substantially from those contained in the States which follow the East Coast model, and are in keeping with the Western Australia model.

Under Div 1, cl 1, which provides, as stated above, for variations to be agreed, nothing is said as to whether or not, if the variations are undertaken by the contractor without any such agreement, the amount calculated under Div 2, cl 2(1) in regard to the contractor's

entitlement to a reasonable amount is impacted upon in any way whatsoever. In other words, if the contractor, without securing any agreement as set out in Div 1, cl 1, and performs the variations, does that mean the contractor is disentitled to have the value of those variations taken into account in determining a reasonable amount under Div 2, cl 2(1).

Significantly, in the Second Reading Speech, the responsible Minister said *inter alia*:

> The legislation supports privacy of contract between the parties. A party commissioned construction work must pay for the work. The obligation to pay cannot be made contingent upon the party with that obligation being paid first under some separate contract. The legislation prohibits pay, if paid, or pay when paid clauses in construction contracts. Apart from prohibiting these particular practices, the bill does not unduly restrict the normal commercial operation of the industry. The parties to a construction contract will continue to be free to set the range and actual terms, so long as they put those terms in writing and do not include these prohibited terms.

[SOP10.140] South Australia — *"... valuation of construction work and related goods and services ..."*

Section 10 of the Act follows s 10 of the Act.

[SOP10.150] Tasmania — *"... valuation of construction work and related goods and services ..."*

The valuation of construction work and related goods and services in the Act is to be found in s 13 which, although worded differently from s 10 of the Act, substantially follows the same concept set out therein. There is specific provision for GST in s 13(2)(a).

[SOP10.160] Australian Capital Terrritory — *"… valuation of construction work and related goods and services …"*

Section 12 of the Act provides for the valuation of construction work and related goods and services. This section follows s 10 of the Act.

11 Due date for payment

(1) Subject to this section and any other law, a progress payment to be made under a construction contract is payable in accordance with the applicable terms of the contract.

[Subs (1) subst Act 93 of 2013, Sch 1[3]; am Act 133 of 2002, s 3 and Sch 1[17]]

(1A) A progress payment to be made by a principal to a head contractor under a construction contract becomes due and payable on:

(a) the date occurring 15 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or

(b) an earlier date as provided in accordance with the terms of the contract.

Note: This Act does not apply to a progress payment to be made by a principal to a head contractor under an exempt residential construction contract. (See section 7(2)(b).) Subsection (1C) applies to progress payments under a construction contract that is connected with an exempt residential construction contract.

[Subs (1A) insrt Act 93 of 2013, Sch 1[3]]

(1B) A progress payment to be made to a subcontractor under a construction contract (other than a construction contract that is connected with an exempt residential construction contract) becomes due and payable on:

(a) the date occurring 30 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or

(b) an earlier date as provided in accordance with the terms of the contract.

[Subs (1B) insrt Act 93 of 2013, Sch 1[3]]

(1C) A progress payment to be made under a construction contract that is connected with an exempt residential construction contract becomes due and payable:

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

[Subs (1C) insrt Act 93 of 2013, Sch 1[3]]

(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate:

(a) prescribed under section 101 of the *Civil Procedure Act 2005*, or

(b) specified under the construction contract,

whichever is the greater.

[Subs (2) am Act 62 of 2008, s 3 and Sch 2.4; insrt Act 133 of 2002, s 3 and Sch 1[18]]

(3) If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.

[Subs (3) insrt Act 133 of 2002, s 3 and Sch 1[18]]

(4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[18]]

(5) Subsection (3) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[18]]

(6) Except as otherwise provided by this section, the rules and principles of the common law and equity apply to the determination of priorities between a lien under subsection (3) over any unfixed plant and materials and any other interest in the plant and materials.

[Subs (6) insrt Act 57 of 2010, Sch 1.1]

(7) Section 73(2) of the *Personal Property Securities Act 2009* of the Commonwealth is declared to apply to liens under subsection (3).

[Subs (7) insrt Act 57 of 2010, Sch 1.1]

(8) A provision in a construction contract has no effect to the extent it allows for payment of a progress payment later than the relevant date it becomes due and payable under subsection (1A) or (1B).

[Subs (8) insrt Act 93 of 2013, Sch 1[4]]

[S 11 am Act 93 of 2013; Act 57 of 2010; Act 62 of 2008; Act 133 of 2002]

ss 8-12A

Former provision (prior to 21 April 2014)

Subsection 11(1) was substituted by the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW). The amending Act commenced on 21 April 2014. Prior to the proclamation of the amending Act, subs 11(1) read as follows:

11. **Due date for payment**

(1) A progress payment under a construction contract becomes due and payable:

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment

The old section applies to all construction contracts entered into before the commencement of the amendments on 21 April 2014.

SECTION 11 COMMENTARY

[SOP11.40] Retrospective application of definitions inserted by the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW)

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

[SOP11.50] *"... payable in accordance with the applicable terms of the contract …"*

In *Fyntray Constructions Pty Ltd v Macind Drainage and Hydraulic Services Pty Ltd* (2002) 18 BCL 402; [2002] NSWCA 238 (26 July 2002), the Court of Appeal noted at [51], that under cl 42.1 of the sub-contract, the subcontractor was obliged in its monthly claim to include "all amounts then due". The court further noted that under cl 42.2, it was clear that such amounts included amounts allegedly owing and referable to earlier months because the amount due is "… the value of the work … in performance in the Subcontract to that time, not just in that month".

[SOP11.60] *"... becomes due and payable ..."*

Davenport, in *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at p 10, says that this section applies even if the claimant has not made a progress claim under the Act. This is a possible construction of this sub-section. He notes that:

> This has important implications for many construction contracts which prescribe a lower rate of interest. Since the interest provision was only inserted by the 2002 amending Act, the minimum rate of interest only applies to progress claims served on the respondent after 2 March 2003 (Sch 2.3.3). But a progress claim served after 2 March 2003 should include all money due at that date. Consequently, interest at the minimum rate is payable on all amounts due under a construction contract as at 3 March 2003, provided that the claimant includes the amounts in a progress claim made after 2 March 2003 under the Act.

The *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) substituted the existing s 11(1) and inserted the new subss s 11(1A), s 11(1B) and s 11(1C). Under the new subss s 11(1), s 11(1A), s 11(1B) and s 11(1C), deadlines for progress payments have been inserted into the Act. The period from within which a progress payment is to be made, as it will be seen from the aforesaid sections varies depending on the contractual relationship between the party liable to make payment and the payee. It will be seen that under s 11(1), payment must be made in accordance with the provisions of the applicable terms of the contract.

Section 11(1A) fixes a deadline for payment made by a "principal" as defined in the definition of that word. Please refer to s 4 – Definitions and [SOP4.305]. A different regime is set out under s 11(1B) for a deadline within which to make progress payments to a subcontractor other than under a construction contract that is connected with an exempted residential construction contract.

Yet a further payment regime setting a deadline for progress payments is provided for in subs s 11(1C) in relation to a construction contract that is connected with an exempted residential contract.

The lien in this subsection is predicated on certain jurisdictional facts, viz a progress payment being due and payable. Its provisions are circular in that a dispute may arise as to whether a progress claim matures into a progress payment that becomes due and payable. When does the lien arise, when a claimant as defined in s 4 submits a progress claim either under the contract or under the Act, or when there is a judgment or an adjudication holding that a sum is in fact due and payable?

The payment regimes for each of the States and Territories differ. For reference purposes, a list of the sections for the States and Territories in regard to this issue, is set out below:

Australian Capital Territory – s 13

Northern Territory – No specific provision, see Schedule – implied provisions

Queensland – s 15

South Australia – s 11

Tasmania – s 15

Victoria – s 12

Western Australia – No specific provision, see Schedule 1

[SOP11.70] Relevant provisions of Acts must be referred to, to determine rate of interest

The relevant provisions of each Act must be referred to, to determine the rate of interest.

The section of the NSW Act commenced on 3 March 2003, but applies retroactively to construction contracts entered into on or after 26 March 2000.

[SOP11.90] Victoria — *"... due date for payment ..."*

Section 12(1) of the Victorian Act provides that the due date for payment is the date provided for in the contract or, if it makes no express provision, on a date occurring 10 business days after a payment claim is made in respect of that payment.

[SOP11.100] Western Australia — *"... due date for payment ..."*

Under s 10 of the Act, to be found in Pt 2 Div 1, it is provided that a provision in a contract that purports to require payment to be made more than 50 days after the payment is claimed, is to be read as being amended so as to require payment to be made within 50 days after it is claimed.

[SOP11.110] Queensland — *"... due date for payment ..."*

Under s 15 of the Act, the due date for payment is as provided for in the contract, unless that provision is a void pay when paid provision as set out in s 16, or under the provisions of s 67U or 67W of the *Queensland Building Services Authority Act 1991* (Qld). If there is no valid provision in regard to the due date for payment in the contract, s 15(b) requires payment within 10 business days after a payment claim.

[SOP11.120] Northern Territory — *"... due date for payment ..."*

Under s 13 of the Act, a provision in a construction contract that requires payment to be made more than 50 days after payment is claimed, is to be read as to require payment to be made within 28 days after it is claimed.

[SOP11.130] South Australia — *"... due date for payment ..."*

Under s 11(1)(a) or s 11(1)(b) of the Act, the due date for payment is either as provided for in the contract or, failing any express provision defining that date, 15 business days after the payment claim.

[SOP11.140] Tasmania — *"... due date for payment ..."*

Under s 15 of the Act, the due date for payment of a progress claim is as provided for in the contract, failing which a date determined in accordance with the provisions of s 19(3). Under the provisions of s 19(3)(a), the due date for payment is 20 business days after the payment claim is served, if:

(i) the claim relates to a residential structure to be built on land; and

(ii) the respondent is the owner of the land; and

(iii) the respondent is not a building practitioner.

Under s 19(3)(b), the time for payment of a payment claim, in any other case, is 10 business days after the payment claim is served.

[SOP11.150] Australian Capital Territory — *"... due date for payment ..."*

Under the Act, the due date for payment is provided for in s 13(1)(a)–(b) and which follows s 11(1)(a)–(b) of the New South Wales Act.

12 Effect of "pay when paid" provisions

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

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[19]]

(2) In this section:

money owing, in relation to a construction contract, means money owing for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract.

[Def am Act 133 of 2002, s 3 and Sch 1[20]]

pay when paid provision of a construction contract means a provision of the contract:

(a) that makes the liability of one party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or any part of that money, or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party, or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

[Def am Act 133 of 2002, s 3 and Sch 1[21]]

[S 12 am Act 133 of 2002]

SECTION 12 COMMENTARY

[SOP12.50] *"... pay when paid ..."*

A "pay when paid" provision is void.

As stated by the Honourable Mr Justice Robert McDougall in his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004) at pp 3–4:

> Finally, subsidiary to its progress payment and adjudication procedure but consistent with its general object of "reforming payment behaviour" in the construction industry, s 12 of the Act abrogates the effect of "pay when paid" and "pay if paid" clauses in respect of the carrying out of construction work or the supply of related goods and services under construction contracts to which the Act applies. Such clauses operate either to delay the payment of a subcontractor until such time as the head contractor receives payment from the principal ("pay when paid"), or to limit the payment of a subcontractor to such amount as the head contractor receives from the principal in the event of a dispute arising in respect of the latter contract ("pay if paid"). In the opinion of the government, contractual clauses to this effect warranted abolition because of their "inequitable and unfair nature", *New South Wales Hansard Articles*, Legislative Assembly, 29 June 1999, No 16 (http://www.parliament.nsw.gov.au).

[SOP12.60] Victoria — *"... pay when paid ..."*

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Under s 15 of the amendment Act, a new s 13(1) and s 13(2)(c) were inserted in the principal Act. Under s 13(1), a pay when paid provision in a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out under the contract or for related goods and services supplied under the construction contract. Section 13(2)(a)–(c) reads as follows:

"pay when paid provision" of a construction contract means a provision of the contract —

(a) that makes the liability of one party (the first party) to pay money owing to another party (the second party) contingent on payment to the first party by a further party (the third party) of the whole or any part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

[SOP12.70] Western Australia — *"... pay if paid/when paid ..."*

Section 9 of the Western Australian Act has a similar provision. It is to be noted that ss 9–12 in Pt 2 Div 1 of the Act, contain a list of prohibited provisions, not found in any other similar legislation. In ss 13–23 in Pt 2, Div 2 of the Act, there is a list of provisions implied in a construction contract, which is not found in any other similar legislative provision in any of the other States or in the Northern Territory Act. Under s 9, it is stated that a provision in a construction contract has no effect if it purports to make the liability of a party to pay money under a contract to another party contingent, whether directly or indirectly, on that party being paid money by another person (whether or not a party).

[SOP12.80] Queensland — *"... pay when paid ..."*

Section 16 of the Act follows the Victorian model.

Section 16(1) of the Act states that a pay when paid provision of a construction contract has no effect.

In s 16(2), the phrase "pay when paid provision" means:

(a) that makes the liability of one party (the first party) to pay an amount owing to another party (the second party) contingent on payment to the first party by a further party (the third party) of the whole or any part of that amount; or

(b) that makes the due date for payment of an amount owing by the first party to the second party dependent on the date on which payment of the whole or any part of that amount is made to the first party by the third party; or

(c) that otherwise makes the liability to pay an amount owing, or the due date for payment of an amount owing, contingent or dependent on the operation of another contract.

[SOP12.90] Northern Territory — *"... pay when paid ..."*

Section 12 of the Northern Territory Act, although differently worded, contains a similar provision to that contained in s 12(1) of the Act.

[SOP12.100] South Australia — *"... pay when paid ..."*

Under s 12(1) and the relevant portion of s 12(2) of the Act, the pay when paid provision accords with the Victorian model.

[SOP12.110] Tasmania — *"... pay when paid ..."*

Under s 16(1) of the Act, there is an extensive definition of the phrase "pay-when-paid". In (b) of the definition, it is stated that the pay-when-paid provision also means the provision

that makes the due date for payment of money owing under a construction contract dependent on the date on which payment of the whole or part of that money is made by a third party.

[SOP12.120] Australian Capital Territory — *"... pay when paid ..."*

Section 14(1)(a)–(b) and the relevant part of s 14(2) of the Act are in the same terms as the provision in the Victorian Act.

12A Trust account requirements for retention money

(1) The regulations may make provision for or with respect to requiring retention money to be held in trust for the subcontractor entitled to the money and requiring the head contractor who holds retention money to pay the money into a trust account (a ***retention money trust account***) established and operated in accordance with the regulations.

(2) The regulations may provide for the trust account into which retention money is to be paid to be a trust account established with a financial institution by the head contractor or a trust account established and operated by the Small Business Commissioner.

(3) Without limitation, the regulations under this section may include provision for or with respect to the following:

(a) the procedures to be followed in connection with the authorisation of payments out of a retention money trust account,

(b) the keeping of records in connection with the operation of a retention money trust account and the inspection of those records by the Small Business Commissioner,

(c) the resolution of disputes in connection with the operation of a retention money trust account.

(4) A regulation may create an offence punishable by a penalty not exceeding 200 penalty units for any failure to comply with the requirements of the regulations under this section.

(5) In this section, ***retention money*** means money retained by a head contractor out of money payable by the head contractor to a subcontractor under a construction contract, as security for the performance of obligations of the subcontractor under the contract.

[S 12A insrt Act 93 of 2013, Sch 1[5]]

SECTION 12A COMMENTARY

[SOP12A.50] *"... retention money trust account ..."*

It will be noticed that s 12A, inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), relates merely to retention money retained by a head contractor (as security for the performance of the obligations of the subcontractor under the contract) out of moneys payable by the head contractor to a subcontractor under a construction contract.

Moneys retained for any other purpose are not covered by s 12A.

The position may well arise that the head contractor may never retain funds in trust or otherwise for the benefit of a subcontractor, but as soon as moneys are paid to the head contractor by the principal, the head contractor may apply such moneys for its own purposes.

Section 12A is, with respect, inadequately and obscurely drawn if the legislature's intention was to require a head contractor, who is paid any retention moneys by a principal, to earmark a portion thereof for the subcontractor's work.

It is respectfully submitted that s 12A should be repealed and replaced by a clear and meaningful section designed to achieve the legislative purpose. Section 12A will undoubtedly attract substantial litigation.

Under s 12A(1), it is provided that the regs may make provision for or with respect to requiring retention money to be held in trust for the subcontractor entitled to the money. The subcontractor does not become entitled to the money (in the ordinary course of events) until the subcontractor has completed its obligations.

In some instances, it may be difficult to determine who the head contractor is, particularly in a multilayered construction contract. The provisions in the amending legislation as to the identity of the head contractor are obscure and will probably give rise to much contention.

Reference should be made, in any attempt to understand s 12A, to the Second Reading Speeches to the *Building and Construction Industry Security of Payment Amendment Bill 2013*, reproduced at [SOPND10.300] and [SOPND10.400] respectively.

[SOP12A.100] Retrospective application of definitions inserted by the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW)

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) (NSW) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

Under s 4(2) of Sch 1 to the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), it is provided:

> (2) A reference in this Act to a contract that is connected with an exempt residential construction contract is a reference to a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the exempt residential construction contract.

PART 3 – PROCEDURE FOR RECOVERING PROGRESS PAYMENTS

DIVISION 1 – PAYMENT CLAIMS AND PAYMENT SCHEDULES

13 Payment claims

(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

[Subs (1) subst Act 133 of 2002, s 3 and Sch 1[22]]

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***), and

(c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.

[Subs (2) am Act 93 of 2013, Sch 1[6]; Act 133 of 2002, s 3 and Sch 1[23]]

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27(2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

[Subs (3) insrt Act 133 of 2002, s 3 and Sch 1[24]]

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[24]]

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[24]]

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

[Subs (6) insrt Act 133 of 2002, s 3 and Sch 1[24]]

(7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

Maximum penalty: 200 penalty units.

[Subs (7) insrt Act 93 of 2013, Sch 1[7]]

(8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.

[Subs (8) insrt Act 93 of 2013, Sch 1[7]]

(9) In this section:

supporting statement means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

[Subs (9) insrt Act 93 of 2013, Sch 1[7]]

[S 13 am Act 93 of 2013; Act 133 of 2002

Cross-reference: *Building and Construction Industry Security of Payment Regulation 2008*: cl 19 prescribes a form (contained in Sch 1) for supporting statements relating to payment claims made under s 13.]

Former provision (prior to 21 April 2014)

Subsection 13(2)(c) was substituted by the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW). The amending Act commenced on 21 April 2014. Prior to the proclamation of the amending Act, subs 13(2)(c) read as follows:

13. **Payment claims**

(2) ...

(c) must state that it is made under this Act.

SECTION 13 COMMENTARY

[SOP13.20] Subsections 13(7) and (9) of the New South Wales Act – requirement of payment claim submitted by head contractor – supporting statement

Section 13 of the New South Wales Act provides that a head contractor, as defined in s 4 of the *Building and Construction Industry Security of Payment Act 1999*, must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim. The Act provides a maximum penalty of 200 penalty units for a contravention of this section but remains silent as to the consequences of a failure to comply with it. Presumably, the same principles set out in [SOP13.100] apply to the payment claim. What is to be emphasised is the supporting statement that has merely to indicate that it relates to that payment claim. The employment of the word "indicate" certainly points to a far less onerous requirement than a detailed statement. Subsection 13(7) is not retrospective and relates only to such payment claims arising from a construction contract entered into on or subsequent to 21 April 2014, the commencement date of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW).

As set out above, this section provides that a head contractor, as defined in s 4 of the New South Wales Act, must not serve a payment claim on the "principal" unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim. The Act provides a maximum penalty of 200 penalty units for a contravention of this section but remains silent as to the consequences of a failure to comply with it. Presumably, the same set out in [SOP13.100] applies to the payment claim. What is to be emphasised is the supporting statement that has merely to indicate that it relates to that payment claim. The employment of the word "indicate" certainly points to a far less onerous requirement than a detailed statement: see the commentary on the word "indicate" at [SOP13.100]. Section 13(7) is not retrospective and relates only to such payment claims arising from a construction contract entered into on or subsequent to the commencement date of the amendment.

In some instances, it may be difficult to determine who the head contractor is, particularly in a multilayered construction contract. The provisions in the amending legislation as to the identity of the head contractor are obscure and will probably give rise to much contention.

Under s 13(9), the phrase "supporting statement" is defined to mean:

> …means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any have been paid all amounts that have become due and payable in relation to the construction work concerned.

As at the date of this update no regulations have been promulgated.

The section imposes a maximum penalty of 200 penalty units for its breach, but says nothing as to the validity of a payment claim above that does not contain the requisite supporting statement. It would have been so easy fot the legislature to have spelt out clearly the consequences of a failure to comply with this requirement.

Prima facie, the words "must not serve a payment claim" seems to indicate that it was the legislative intention not only to impose a criminal sanction for a breach of the subsection, but further that the payment claim would be invalid.

It is to be noted that there are no mirror provisions in the other States and Territories.

[SOP13.25] *"… supporting statement …"*

Under subs 13(9) of the New South Wales Act, the phrase "supporting statement" is defined to mean:

> … a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

The *Building and Construction Industry Security of Payment Amendment (Supporting Statement) Regulation 2014* commenced on 21 April 2014, on the same day as the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW). The amending regulations insert the new cl 4A – Supporting statements into the *Building and Construction Industry Security of Payment Regulation 2008*. Clause 4A prescribes a form contained in Sch 1 of the regs for supporting statements relating to payment claims made under s 13 of the *Building and Construction Industry Security of Payment Act 1999*.

The *Building and Construction Industry Security of Payment Amendment (Supporting Statement) Regulation 2014* is reproduced in full in this service.

Section 13 imposes a maximum penalty of 200 penalty units for its breach, but says nothing as to the validity of a payment claim that does not contain the requisite supporting statement. It would have been so easy for the legislature to have spelt out clearly the consequences of a failure to comply with this requirement.

Prima facie, the words "must not serve a payment claim" seem to indicate that it was the legislative intention not only to impose a criminal sanction for a breach of the subsection, but further that the payment claim would be invalid.

At [37] of *BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QSC 218, Applegarth J noted that there were was no such provision in the Queensland Act. His Honour said:

> The Queensland Parliament may be taken to have made the legislative judgment that such a provision is unnecessary to achieve the purposes of the Act, or that such a provision is inconsistent with the purposes of the Act.

At [38], his Honour added:

> The question remains whether the Queensland Parliament has accorded the freedom to parties to a construction contract to impose such a restriction on the payment of a statutory progress payment entitlement in circumstances in which the Parliament chose not to impose such a condition as part of the statutory scheme. For the reasons already given, and for the reasons which follow, I consider that the Queensland Act does not accord parties such a freedom in respect of constraints on the payment of statutory progress payments, as distinct from progress payments to which there is a contractual entitlement.

[SOP13.30] Subsection 13(8) of the New South Wales Act – the requirement that head contractor not to serve payment claim on principal knowing it was false or misleading in material respect

A head contractor, as defined in s 4 of the *Building and Construction Industry Security of Payment Act 1999*, must not serve a payment claim on the principal accompanied by a supporting statement, knowing that the statement is false or misleading in a material particular in the particular circumstances. This section provides that for a breach of its provisions, there is a maximum penalty of 200 penalty units or 3 months imprisonment, or both. This section is not retrospective and relates only to such payment claims arising from a construction contract entered into on or subsequent to 21 April 2014, the commencement

date of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW). As at 21 April 2014, there is no mirror provision in the Acts of the other States or Territories.

Note the comments in relation to s 13(7) of the New South Wales Act above as to whether a payment claim in breach of this provision is invalid or merely attracts a criminal penalty.

In some instances, it may be difficult to determine who the head contractor is, particularly in a multilayered construction contract. The provisions in the amending legislation as to the identity of the head contractor are obscure and will probably give rise to much contention.

[SOP13.50] *"... person referred to in s 8(1) ..."*

In *Grave v Blazevic Holdings Pty Ltd* (2010) 79 NSWLR 132; [2010] NSWCA 324 at [35], Macfarlan JA noted that the opening words of s 13(1) of the New South Wales Act (NSW) gave the right to serve a payment claim only to a "person referred to in s 8(1)".

Section 8(1), in turn, confers a right to a progress payment only upon somebody who has undertaken to carry out work under a "construction contract".

His Honour pointed out that it was implicit in that section that that must be a construction contract to which the person liable to make the progress payments is a party.

[SOP13.60] *"... or who claims to be ..."*

At [22] of *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801 (5 August 2005), McDougall J pointed out that the words "or who claims to be" in s 13(1) were inserted by an amendment to overcome the effect of the decision of the Court of Appeal in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576; [2003] NSWCA 4.

In *Energetech* it was contended that that phrase had to be read down in the sense that the question of the service of a payment claim, called up the requirement of s 13(4) and that if it was not served within the period determined by or in accordance with the terms of the construction contract, it was not a valid payment claim and there was no service of it within s 13(1). That submission was rejected by McDougall J.

In *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288, Ward JA, noting what Ball J said at in *Patrick Stevedore Operations No 2* above, said:

> [33] First, it submits that the reference to a "progress payment" in s 13(1) must be a reference to a progress payment under s 8; and hence that a person claiming that a reference date has arisen is a person claiming to be entitled "under s 8". In oral argument it was accepted by Counsel for Lewence that to read into s 8 the definition of "progress payment" contained in s 4 of the Act would involve some circularity, as recognised by Ball J in *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413 at [30], since that definition makes clear that a payment is still a progress payment for the purposes of s 13 even if it is a claim for a final payment, a single payment or a milestone payment. Nevertheless, he points to this as a feature providing some support for Lewence's construction.
>
> [34] Second, Lewence notes that s 13(1) directs attention, relevantly, to a person who claims to be "entitled" to a progress payment (under s 8). Lewence contends that s 8(1) identifies two classes of person: a person who has undertaken to carry out construction work under the contract (s 8(1)(a)) and a person who has undertaken to supply related goods and services under the contract (s 8(1)(b)); and that the person identified in s 13 is someone falling within one or both of those classes and who is or claims to be entitled to a progress payment under s 8(1). Lewence's argument in this context is that where such a person's claimed entitlement depends on whether a reference

> date has arisen under the contract, that person nevertheless satisfies the description in s 13(1) even if its contention as to an available reference date is ultimately determined (by the adjudicator) to be incorrect.

The High Court has given leave to appeal in this matter. As at the date of the publication of this book, judgment is still reserved.

[SOP13.70] *"... who, under the construction contract concerned, is or may be liable to make the payment ..."*

At [26] of *Grave v Blazevic Holdings Pty Ltd* (2010) 79 NSWLR 132; [2010] NSWCA 324, the Court of Appeal per Allsop P, McDougall J and Macfarlan JA said:

> The person on whom the progress claim may be served is someone who, under the construction contract concerned, is or may be liable to make the payment. The words "is or may be liable" may be capable of referring, for example, to primary or secondary liability (the latter, for example, as guarantor). They may be capable of encompassing disputes as to quantification; and indeed, disputes as to whether, on the proper construction of the contract and the *Security of Payment Act*, any payment is due at all. However, whatever is the nature and amount of the liability sought to be enforced, it must be a liability "under the construction contract concerned". If the proposed recipient of the payment claim is not a party to or liable under the construction contract, then it falls outside that statutory description.

Accordingly, this phrase does not exclude the court's jurisdiction to determine whether or not there ever was a construction contract which may give rise to a payment claim.

[SOP13.80] *"... may serve ..."*

At [50] of *Fyntray Constructions Pty Ltd v Macind Drainage and Hydraulic Services Pty Ltd* (2002) 18 BCL 402; [2002] NSWCA 238 (26 July 2002), it was held that under s 13 a progress claim may include entitlements to more than one progress payment.

There may be parallel progress claims under the Act and under the contract, *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 (3 December 2003) per Einstein J at [65].

In [51] of *Fyntray* it was held:

> Fourthly, the two limbs of that part of the definition of "reference date" appearing in s 8(2)(a) reveal a legislative intention to permit payment claims to be made either by reference to a contractual date for making a claim (ie under cl 42.1) or by reference to a contractual date by reference to which the amount of the progress payment is to be calculated (ie taking into account cl 42.2). An entitlement to a progress payment resting on recourse to the latter date is not precluded by the fact that there was an earlier entitlement to a progress payment resting on a recourse to the former date. And if recourse is had to the latter date, the statutory entitlement to a progress payment created by s 8(1) includes a entitlement to sums owing from periods anterior to the month at the end of which the latest contractual claim is made. While cl 42.1 obliges the Subcontractor to make a claim each month, and to include in it "all amounts then due", cl 42.2 makes it clear that the amounts due include those referable to earlier months, because the "amount due" is "the value of the work … in performance of the Subcontract to that time", not just in that month. While cl 42.1 compels monthly claims, s 8 contemplates entitlements to progress payments arising not only by reason of the dates for making claims under cl 42.1, but by reason of a date by reference to which the amount of the progress payment is to be calculated under cl 42.2, and the latter date includes periods which may be greater than the preceding month.

In *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576; [2003] NSWCA 4 (17 February 2003), the Court of Appeal held that there had to be compliance with the contractual pre-conditions, for a valid payment claim under the contract.

[SOP13.90] Final payment – validity of payment claim for

In *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42; [2002] NSWSC 395 (7 May 2002), Austin J at [37] said:

> The definition of "progress payment" is unhelpful, because s 8 confers an entitlement to payment only for a "progress payment", without further defining or explaining those words. In my opinion the words "progress payment" when used in s 8 and other parts of the Act should therefore be given the meaning that they have under the construction contract. That accords with the structure of the Act itself, which generally leaves it to the construction contract to define the rights of the parties but makes "default provisions" to fill in the contractual gaps (see Second Reading Speech, at 1013). It also accords with the stated object of the Act. If the Act was intended to apply in the case of the final payment on practical completion, it would have been a simple matter for the drafter of the statement of the object of the Act in s 3(1) to refer to the entitlement to receive all payments due under the construction contract, rather than only "specified progress payments". The Minister's concern with the cash-flow of subcontractors (Second Reading Speech, at 1012 and 1013) also suggests that attention was focused on progress payment rather than the final balancing of account between the contracting parties.

In *Fernandes Constructions v Tahmoor Coal (t/as Centennial Coal)* [2007] NSWSC 381, Fernandes sent Centennial a document described as "tax invoice 05". The invoice stated that it was "prepared under" the Act. Centennial did not provide a payment schedule. Fernandes then sought judgment for the amount claimed, and the only issue between the parties was whether the tax invoice was a payment claim which complied with the provisions of s 13(2)(c) of the Act. McDougall J addressed this question from [27]–[41] of the judgment, and held as follows:

> [37] In my view, the approach to construction of a document purporting (or alleged) to be a payment claim under the Act should reflect in substance the approach to the construction of commercial contracts that has been laid down by decisions of the highest authority. I refer to the observation of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* [1932] UKHL 2; (1932) 147 LT 503 at 514, that the courts should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects". Barwick CJ expressed a similar view in *The Council of the Upper Hunter County District v Australian Chilling and Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429 at 437: in searching for the parties' intention, "no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements".
>
> [38] Thus, the question is whether, taking a fair but broad approach, without being pedantic or astute to find defects, the document in question would convey to its recipient that the claimant intended by the document to engage the operation of the Act. As I have said before, that question is to be resolved objectively, having regard to all relevant matters of context.
>
> [39] When the question is stated thus, I think that the issue in the present case must be resolved in favour of Fernandes. Clearly, the tax invoice was a claim made by Fernandes for the consideration of Centennial. The statement that the tax invoice is "prepared under" the Act should be taken to mean that in considering the claim, Centennial should be aware that it was made under the Act. As I have noted, the relevant context includes the fact that the Act applied to the contract. The Act created rights and obligations in respect of the performance of construction work under that contract. The parties must have been aware of those matters; and the statement to which I have referred reminded Centennial of the relevance of the Act.
>
> [40] Once it is accepted that Fernandes sought to achieve something by the sentence appearing at the foot of tax invoice 05, it is very difficult to understand what that "something" should have been except a notification that Fernandes sought by the

> document to engage the operation of the Act. Although the verb "prepare" is not entirely apt for this purpose, it is not so inapt that its use should be held to defeat the evident purpose of the sentence.
>
> [41] In other words, I think that the sentence in question, read fairly and not pedantically, would convey to a reasonable reader apprised of the relevant factual context that Fernandes was seeking by the service of the document to engage the operation of the Act. Since that is what s 13(2)(c) seeks to achieve (as Austin J in *Jemzone* and Einstein J in *Leighton* made clear), it follows that the present document complies sufficiently with the requirements of s 13(2)(c) and is, on the only issue argued by the parties, a valid payment claim.

A failure to comply with each and every provision of s 13(2)(a) of the (or indeed any other such statutory requirement) does not necessarily result in a payment claim being invalid.

That interpretation persuaded Austin J to exclude a claim for a final payment.

This judgment led to an amendment of ss 4 and 8 of the Act, and for which see the discussion at [SOP4.310]. The amendments included:

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

[SOP13.93] The necessary endorsement under the unamended Act still effective in regard to construction contracts entered into prior to 21 April 2014 (the commencement date of the amending legislation in the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW))

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), subs 13(2)(c) of the principal Act has been substituted. The new subs 13(2)(c) reads:

> A payment claim:
>
> …
>
> (c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.
>
> …

The effect of this amendment is that it is no longer necessary, in respect of contracts entered into subsequent to the commencement date of the amendment, to contain the endorsement referred to in subparagraph (b) herein, excepting in regard to construction contracts which are connected with an exempt residential construction contract.

It is submitted that in that regard the same issues raised in subparagraph (b) herein obtain.

[SOP13.95] The status of *"... a payment claim ..."* – does not constitute a representation

A payment claim is no more than a claim and does not constitute a representation. *New South Wales Netball Association Ltd v Probuild Construction (Aust) Pty Ltd* [2015] NSWSC 1401, Stevenson J reminded one that:

> [60] As Mason P (with whom Giles and Santow JJA agreed) said in *Clarence Street Pty Ltd v ISIS Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391 at [31] (albeit not in the context of a claim of misleading or deceptive conduct), "a 'payment claim' is no more than a claim".
>
> [61] Similarly, in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* (2005) 226 ALR 362; [2005] NSWSC 1143, Campbell J (as his Honour then was) said at [48]:

> "[T]he Second Payment Claim does not purport to be a statement of anything more than what the defendant claims it is owed by the plaintiff. The defendant really does claim that it is owed the amount of money referred to in the Second Payment Claim."

[62] There is no reason to doubt that, at the time it served Payment Claim 24, Probuild "really [did] claim" that it was owed the amount referred to in it. Netball made no submission to the contrary.

[SOP13.100] A discussion of the criteria in regard to the validity of a payment claim

(a) An invalid payment claim (a document purporting to be a payment claim that … is not a payment claim under the Act, and does not attract the statutory regime of the Act) is void

A payment claim which is invalid is void, and any adjudication determination which follows a void payment claim is in itself void.

In *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 at [71]–[72], McDougall J said:

> [71] Neither the judgments in *Dualcorp* nor the judgments at first instance that adopt and apply *Dualcorp* consider, in terms, whether an adjudication determination of an "invalid" payment claim is void. In this context, by "invalid", I mean to pick up the language of Allsop P in *Dualcorp* at [14], as describing "a document purporting to be a payment claim that … is not a payment claim under the Act and does not attract the statutory regime of the Act". His Honour's choice of words echoes the words of Hodgson JA in *Brodyn* at 441 [52], where his Honour considered what were the essential conditions for there to be a determination which would "have the strong legal effect provided by the Act".
>
> [72] If a payment claim is not a valid payment claim, capable of attracting the statutory regime of the Act, then it might seem to follow that it is not a valid payment claim capable of satisfying the second of the basic and essential conditions set out in *Brodyn* at 441 [53].

At [86]–[87], his Honour added:

> [86] In my view, there are two possible categories of payment claims that could be described as "invalid" in the sense given at [71] above:
>
> (1) first, that described by Allsop P in *Dualcorp* at [14]: a repetitious payment claim, being no more than the same claim for the same completed works, resubmitted after work under the construction contract in question had ceased, and resubmitted purely for the purpose of "creating" a fresh reference date. On his Honour's reasoning, this would be outside the permission given by ss 8(2)(b) and 13(6) of the Act.
>
> (2) The second is a payment claim claiming an amount that has been the subject of a prior payment claim and adjudication thereon, in circumstances where the prior adjudicator has determined that there is nothing due by the respondent to the claimant. That might occur in circumstances where (as Macfarlan JA postulated at [71] of *Dualcorp*) the prior adjudicator had rejected the claim for want of evidence, without considering on its merits. It could also occur where (as here) the prior adjudicator rejected the claim because he concluded that the claimant had not made out any legal entitlement to it, or had not put the claim on a basis that was capable of being the subject of an adjudicator's determination.
>
> [87] The case for invalidity is, I think, stronger where the earlier adjudicator has determined that there is no entitlement to the amount of the payment claim (or to a severable portion of the amount claimed by that payment claim). I say that because s 22(4) deals with the situation where, entitlement having been found, the prior

> adjudicator determines the value of the work that is the subject of the payment claim, and thus avoids the evil of inconsistent outcomes. But, for the reasons that I gave in *Rothnere* and *John Goss*, s 22(4) has no operation where the prior adjudicator determined the fate of the payment claim on the basis that the claimant had made out no entitlement to be paid. In those circumstances – where there is no question of abiding by the previous valuation (or of showing that the value of the work has changed) and no question of a cumulative payment claim where work is ongoing, it is easier to see why mere resubmission might be regarded as outside the scheme of the Act, and in particular outside whatever permission to resubmit can be implied from ss 8(2)(b) and 13(6). If there is some freestanding doctrine of invalidity, separate from issue estoppel and abuse of process, then that may well define its sphere of operation. It is however difficult to see how the operation of any such principle of invalidity could add anything to the operation of issue estoppel or abuse of process.

At [90], McDougall J held that for the reasons which he gave in *Urban Traders* at [26], it is his view that the ratio of *Dualcorp* is to be found in the views of Macfarlan JA and Handley AJA that the prior adjudicator's determination gave rise to an issue estoppel. His Honour went on to consider whether the claiming of sums in a payment claim that had already been the subject of an adjudication constituted an abuse, and at [97] his Honour said:

> A relationship between issue estoppel and abuse of process was noted by Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257. His Lordship said that:
>
> > res judicata … is not confined to the issues which the court is actually asked to decide but … covers issues or facts which are so clearly part of the subject–matter of the litigation and so clearly could have been raised that it be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

McDougall J reaffirmed his decision in Watpac at [54] of *Rail Corp (NSW) v Nebax Constructions* [2012] NSWSC 6.

A payment claim must adequately contain explanatory information to enable the adjudicator to perform his/her statutory function of valuing the work which was the subject of the payment claim, and if the party seeking adjudication fails in this regard, the resultant determination may be void: see [45] of *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300.

At [47] of *Asian Pacific*, Vickery J said *inter alia*:

> … The adjudicator's sole source of information will be the material submitted as part of the adjudication process. Accordingly, the material submitted must provide sufficient information, supported by explanatory submissions presented in a sufficiently straightforward manner, so as to enable the adjudicator to undertake the statutory tasks of assessing whether the work (or goods and services) claimed for has been completed (or supplied) and then valuing the work done (or the goods and services supplied).

(b) "… must state …" – amended subs 13(2)(c) of the New South Wales Act

In *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42; [2002] NSWSC 395, Austin J at [45] and [46], referring to the phrase "under the Act" in this subsection, said:

> [45] Section 13(2)(c) requires the payment claim to state that it is made under the Act. The document in question states:
>
> > This invoice is subject to the *Building and Construction Industry Security of Payment Act 1999*, No 46.
>
> [46] This is not a statement that the document is a payment claim made under the Act. I do not accept the submission by the plaintiff that a payment claim should expressly draw the recipient's attention to the Act and the provisions concerning the issuing of a payment schedule. Section 13(2) makes no such requirement. Since, however, the issuing of a proper payment claim has the serious consequences for the recipient of requiring full payment regardless of any genuine dispute or offsetting claim, unless a

payment schedule is lodged within time, it must be clear on the face of the document that it purports to be a payment claim made under the Act. The defect on the face of the document is not overcome by evidence that the recipient was not misled. The requirement was not satisfied in the present case.

Under the amended subs 13(2)(c), it is provided that if a construction contract is connected with an exempt residential construction contract, it "must state that it is made under the Act", ie the requirement is that the construction contract requires a statement that it is made under the Act, in order to attract the provisions of the Act.

The phrase "must state" is clear and unambiguous in its terms and accordingly, unless the aforesaid construction contract has that phrase in it, the provisions of the New South Wales Act will not be attracted.

With respect to the unamended subs 13(2)(c) as to the requirement of an endorsement that the payment claim is made under the Act, under the amended section, it is no longer a requirement.

As pointed out by McDougall J at [60] of *Consolidated Constructions Pty Ltd v Ettamogah Pub* [2004] NSWSC 110 (11 March 2004), the changes to s 13(1) by Act No 133 of 2002 (NSW), meant that the reasoning of Austin J in *Jemzone* was no longer applicable, but it does not appear as if the above passage in Austin J's judgment was affected by the legislative change. For the legislative change see [SOP13.180].

Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 said:

> [33] Consistently with the reasoning of Basten JA in *Climatech*, Hodgson JA in *Nepean* concluded that a payment claim cannot be treated as a nullity for failure to comply with s 13(2)(a) of the Act *"unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made"*: *Nepean* at para 36. The corollary of this proposition is that a payment claim can be treated as a nullity if it does not on its face reasonably purport to comply with s 13(2)(a).
>
> ...
>
> [41] The law as to compliance with s 13(2) of the Act as it emerges from *Brodyn* and *Nepean*, may be summarised thus:
>
> (i) a payment claim which is never served on the respondent under s 13(1) cannot set in motion the machinery of Pt 3 so that any purported adjudication of that payment claim and any other enforcement procedures in Pt 3 founded upon that payment claim must be a nullity;
>
> (ii) there are some non-compliances with the requirements of s 13(2) of the Act which will result in the nullity of a payment claim for all purposes under the Act; there are other non-compliances which will not produce that result;
>
> (iii) a payment claim which does not, on its face, purport in a reasonable way to:
>
> – identify the construction work to which the claim relates; or
>
> – indicate the amount claimed; or
>
> – state that it is made under the Act
>
> fails to comply with an essential and mandatory requirement of s 13(2) so that it is a nullity for the purposes of the Act;
>
> (iv) a payment claim which, on its face, purports reasonably to comply with the requirements of s 13(2) will not be a nullity for the purposes of engaging the adjudication and enforcement procedures of Pt 3 of the Act;

(v) in the case of a payment claim which purports reasonably on its face to comply with s 13(2):
- if the respondent wishes to object that it does not in fact comply so that it is a nullity for the purposes of the Act, the respondent must serve a payment schedule under s 14(4) and an adjudication response under s 20, in which that objection is taken;
- if the respondent does not serve a payment schedule within the time limited under the Act and the claimant ultimately seeks the entry of judgment under s 15(4), the respondent may not resist summary judgment on the ground that the payment claim was not a valid payment claim by reason of non-compliance with the requirements of s 13: the respondent has only one chance to take that objection, namely, in a timeously served payment schedule;

(vi) in the case of a payment claim which was never served on the respondent or which does not purport reasonably on its face to comply with the requirements of s 13(2):
- the payment claim is a nullity for the purposes of the Act;
- an adjudication founded upon that payment claim is a nullity, regardless of whether the objection to the validity of the payment claim was taken in a timeously served payment schedule;
- an application under s 15(4) for judgment for the statutory debt created by s 14(4) may be defeated on the ground that there was no payment claim in existence for the purposes of s 15(1)(b).

This line of reasoning was referred to with approval by Lyons J in *GW Enterprises Pty Ltd v Xentex Industries Pty Ltd* [2006] QSC 399.

(d) Taking into account the history of the project and any issues which may have arisen between the parties concerning payment

One is entitled to rely on the context of the matter in order to determine whether sufficient detail has been provided in a payment claim: *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [11]-[12].

At [53] of *Krongold Constructions (Aust) v SR & RS Wales* [2016] VSC 94, Vickery J referred to the fact that *Protectavale* was cited with approval in his Honour's judgment in *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [51]. For further discussion on sufficiency of a payment claim, see [13.120].

At [22] of *Pittwater Council v Keystone Projects Group Pty Ltd* [2014] NSWSC 1791, Hallen J said:

> … The terms of this document [the Payment Claim] must make clear that that it contains the required information: *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, at [82]. But the terms must be read in context, remembering that "Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context".

(e) "… may include …" in s 13(3) of the NSW Act, and similar mirror sections in other States and Territories

Only sums of money may be included in what can be claimed.

(f) "… in accordance with the terms of the construction work …" — service of payment claims

McDougall J in *Zebicon Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 1408 at [33] held that it was at least arguable from s 13(4)(a) that a payment claim must be served in accordance with the relevant provisions of the applicable construction contract.

(g) "… period of 12 months after the construction work to which the claim relates …" in s 13(4)(b)

At [16] of *Barclay Mowlem Construction Ltd v Estate Property Holdings Pty Ltd* [2004] NSWSC 649 (19 July 2004), Einstein J had the following to say about this awkwardly worded subsection:

> Construction work involves as the norm, work which may be expected to be carried out over a period of time. The laying of foundations is an example. This is unlikely to take one hour and may take days or weeks or even longer. Presumably the same may be said in relation to the provision of related goods and services. The legislature appears to have had to cope with these realities in determining how to describe the period of time within which a payment claim could be served. By definition or real world practice it would be likely that a payment claim would cover disparate forms of construction work carried out over the same or different periods/brackets of time and would similarly likely cover the provision of related goods and services over the same or different periods/brackets of time. It would seem unlikely that the legislature would have intended that a payment claim in respect of any particular item of construction work [as for example the laying of a particular brick] could only be served within the period of 12 months after completion of the work comprising that particular item. Possibly the same may also be said in relation to it being unlikely that the legislature would have intended that a payment claim in respect of a particular *unit* of construction work [as for example the laying of a brick course or concourse] could only be served within the period of 12 months after completion of the work comprising that unit of construction work. On the other hand perhaps it is arguable that the legislature may have so intended.
>
> The legislature in fact enacted s 13(4) in the following terms:
>
> A payment claim may be served only within …
>
> (b) the period of 12 months after the construction work to which the claim relates was *last* carried out (or the related good and services to which the claim relates were last supplied) …
>
> To my mind properly construed the subsection in its reference to "the construction work to which the claim relates" should be regarded as referring in a general way to the construction work or to the related goods and services. Hence as long as any item of construction work to which the claim *relates* [in that general sense], was carried on during the 12 month period prior to the service of a payment claim, that payment claim could also, unexceptionally, include items of construction work carried on prior to that 12 month period.
>
> The same proposition would hold good in terms of the supply of related goods and services.

His Honour then addressed the question of when the work "was last carried out", dealing with this difficult question at [18]–[24] of his judgment, in which he considered three possible constructions of the phrase "was last carried out".

At [18], his Honour said:

> *Construction 1*
>
> The subsection should be read as follows:
>
> A payment claim may be served only within …
>
> (b) the period of 12 months after *any* construction work *under the contract* to which the claim relates was *last* carried out …

This reading would mean that the payment claim would be valid as long as any work had been performed under the contract within 12 months prior to the payment claim being made [and as long as the claim otherwise accorded with the legislation]. During argument, Construction 1 was referred to as "the one nail" construction: that is to say, the payment claim would be valid if it otherwise accorded with the legislation, as long as the last moment [as for example the hammering in of the last nail] of *any work* carried out under the contract took place within 12 months prior to the payment claim being made.

In *Estate Property Holdings Pty Ltd v Barclay Mowlem Construction Ltd* (2004) 61 NSWLR 515; [2004] NSWCA 393 (3 November 2004), the Court of Appeal, at [11], noted that the primary judge considered three possible constructions of s 13(4)(b):

> [F]irst, as requiring only that some work under the construction contract had been performed in the twelve month period; second, as requiring that some work for which payment was claimed in the payment claim had been performed in the twelve months period; and third, as requiring, in respect of each item for which payment was claimed, that some work had been performed in the twelve month period.

The Court of Appeal noted, at [12], that the primary judge accepted the first of these propositions consistent with his previous decision in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 (3 December 2003).

At [17]–[21], Hodgson JA, with whom Mason P and Giles JA concurred, held as follows:

> [17] In my opinion, s 13(2)(a) of the Act requires that a payment claim identify the construction work for which payment is claimed in the claim, not merely the construction work as a whole that is being carried out under the relevant construction contract. I think this is indicated by the words "construction work … to which the progress payment relates"; and strongly confirmed by the consideration that, unless a progress claim identified the particular work for which payment was claimed, it would be impossible for a respondent to provide a meaningful payment schedule supported by reasons. This in turn would make wholly unreasonable s 20(2B) of the Act, which prevents a respondent relying, in an adjudication of a payment claim, on reasons not included in the payment schedule.
>
> [18] Consistently with this, in my opinion "construction work … to which the claim relates" in s 13(4)(b) is also the construction work for which payment is claimed in the claim; and accordingly, the requirement of s 13(4)(b) is that some of that construction work be carried out in the relevant twelve month period. Accordingly, in my opinion, the primary judge's acceptance of the first of the three interpretations of s 13(4)(b) which he identified, both in this case and in *Leighton*, was incorrect.
>
> [19] However, in my opinion ss 13–15 of the Act do not provide any basis for dividing up the construction work to which the claim relates into items which may be considered discrete, and asking in respect of each such item whether some work was carried out in the twelve month period. Section 13(2)(b) refers to "the amount" of the progress payment, s 14(4) refers to liability to pay "the claimed amount", and s 15(4) refers to "the unpaid portion of the claimed amount": these provisions weigh against the idea that separate consideration should be given to individual items that make up the claimed amount.
>
> [20] Further, the distinction between discrete items of construction work and continuous processes of construction is not clear-cut. The piling work in this case could be considered clearly distinct from other items of construction work; but many other examples can be given where this would be far from clear. For example, is brickwork a distinct item, or part of a continuous process that extends to completing the external fabric of a building? In my opinion, there is no good reason to introduce an unclear distinction of this kind into the operation of the Act.
>
> [21] Accordingly, in my opinion the third of the three interpretations referred to by the primary judge is incorrect, and the second is correct. This is further confirmed by s 13(6), which suggests that items more than twelve months old may be included in a

> payment claim, when they have been included in previous claims, so long as the payment claim does relate to some work carried out within the twelve month period.

Section 17(4)(b) of the Queensland Act is no more enlightening in regard to the meaning of the 12 months cut-off period. The apparent answer given in the Victorian Act is to have no cut-off period at all, see the omission of any reference to this in s 14 of the Victorian Act.

At [SOP7.130] there is a discussion about possible competing adjudications in different jurisdictions. In Victoria a contractor who has an old claim going back more than 12 months may be at an advantage, and the employer at a disadvantage of having to face stale claims.

In a somewhat far reaching judgment, Campbell J in *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 705 (11 July 2005) held that the requirements of s 13(4) of the Act did not constitute one of the "essential basic requirements", and that the adjudicator who had determined that the claim was made in time had the luxury to get it wrong.

In *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801 (5 August 2005), McDougall J, at [27], held that the determination of the question as to whether or not the payment claim was served within the period determined by or in accordance with the terms of the construction contract was a matter for the adjudicator to determine. His Honour added:

> If it is a matter for the adjudicator to determine, then, consistent with the approach indicated in *Brodyn* at 441 [54], it is a matter that, prima facie does not fall within the "basic and essential requirement".

The statement of law by McDougall J in *Energetech*, more particularly his Honour's reasoning at [20]–[24], may well have to be revisited in the light of the judgment of the Court of Appeal in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 (23 November 2005), as explained by the judgment of Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1. For a discussion on those cases and their impact on *Brodyn*, see below. When McDougall J made the statement quoted above, he was obviously constrained by the principles set out in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394. Those principles, insofar as they relate to the matter presently under discretion, no longer stand in New South Wales, see *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

In *Lanskey Constructions Pty Ltd v Noxequin Pty Ltd (in liq)* [2005] NSWSC 963 (3 November 2005), one of the questions before Associate Justice Macready was whether or not the claimant's claim was barred, in that, it had not provided any construction work within the preceding 12 months.

At [29] of his Honour's judgment, his Honour said:

> The suggestion by the adjudicator that in the preceding 12 months the claimant at least provided some services is not based upon evidence and does not deal with the argument that the parties had presented to him for his resolution. The argument that the parties presented to him was whether the work ceased as contended for by the plaintiff on 15 March 2004 or as contended for by the first defendant on 6 April 2004.

In the succeeding paragraphs of his Honour's judgment, he dealt with the question as to whether or not evidence was presented by the adjudicator so that he could have properly determined this issue.

At [36], his Honour continued thus:

> It is then for the respondent in the payment schedule to take any point about that lack of entitlement. A lack of entitlement is based upon non-compliance with s 13. In order to demonstrate non-compliance it would be up to the respondent in the payment

schedule to suggest that neither of the alternatives have been satisfied. It did not do this and has only raised a matter concerning one of the requirements. It could only justify such a defence if it suggested that both requirements were not met.

Nowhere in his Honour's judgment is there any reference to the decision of Campbell J in *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 705 (11 July 2005) or the decision of McDougall J in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801 (5 August 2005).

It would appear as if his Honour's judgment on this issue is inconsistent with those judgments and, for that reason alone, should the matter proceed to appeal, his Honour's judgment may be vulnerable. In *Roads & Traffic Authority (NSW) v John Holland Pty Ltd* [2006] NSWSC 567 (3 July 2006), Associate Justice Macready held at [48] that, under the scheme of the Act, a defence in bar to a payment claim, pursuant to s 13(4) or (5) "… must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s 15(4) of the Act".

Jackson J, in *South East Civil & Drainage Contractors Pty Ltd v AMGW Pty Ltd* [2013] 2 Qd R 189; [2013] QSC 45, has correctly, with respect, not followed McDougall J's reasoning in *Energetech* above, nor has his Honour followed Palmer J's judgment in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1. It will be recalled that McDougall J, in *Energetech*, held that the determination of the question as to whether or not the payment claim was served within the period determined by, or in accordance with the terms of the contract, was a matter for the Adjudicator to determine. It would appear from the judgment of Jackson J above that his Honour had no difficulty in determining whether a payment claim was served with the period of 12 months after the construction work to which the claim related was carried out.

Further, it will be recalled that in *Brookhollow*, Palmer J held that if the point was to be taken as a defence to a payment claim that it was served outside the period of 12 months referred to in s 13(4) or (5) of the New South Wales Act, it would have to be specifically taken in a payment schedule.

At [31]–[35] of his Honour's judgment in *South East Civil*, Jackson J reasoned as follows:

> [31] The present case seems to fall between the circumstances considered in *Brookhollow* on one side and *G W Enterprises* on the other. It cannot be said, in the present case, that the date when the goods were last supplied was not before the adjudicator. The material properly before the adjudicator as to that date was AMGW's own submission. It clearly disclosed that the last supply was more than 12 months before the service of the payment claim.
>
> [32] On the other hand, Palmer J's reasoning in *Brookhollow*, as set out above, is not confined to whether or not it was apparent to the adjudicator that the payment claim was served out of time. On the contrary, Palmer J treated the proper construction of the equivalent section of the New South Wales Act as operating in a way that requires a respondent who wishes to rely upon s 17(4) to raise it in a validly served payment schedule, or the point is gone.
>
> [33] Palmer J's reasoning was considered in *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 at [36]. However, that case did not decide the question which is presented on the facts of the present case, nor did it directly endorse or criticise Palmer J's reasoning, as it would apply to this case.
>
> [34] However, *Neumann* has some significance, in my view. Where a payment claim is served on a respondent who does not serve a payment schedule in response, the claimant has the option of either suing in a court on the debt created under s 19(2)(a)(i) or making an adjudication application under s

21(1)(b). If the claimant chooses to sue on the debt, *Neumann* is authority that if there is a real prospect that the respondent may defend on the basis that the debt is not owing because the payment claim was invalid because of non-compliance with a provision of BCIPA, even though that point was not taken in a validly served payment schedule.

[35] If, in those circumstances, a respondent is entitled to raise non-compliance with s 17(4), it might be seen as inconsistent that a respondent could not do so if the claimant chooses the alternative pathway of making an adjudication application. Against that, it can be said that a respondent has the ability to raise the point in its second opportunity to serve a payment schedule under s 21(2)(b) of BCIPA. However, there does not seem to be any obvious contextual reason to conclude that it was intended that non-compliance leading to invalidity can be relied on in the curial pathway under s 19(2)(a)(i) but not on the adjudication application pathway made under s 19(2)(a)(ii) and s 21, where the point of invalidity is not taken in a payment schedule in either case.

At [45], Jackson J concluded:

The conclusion to which I would come, uninstructed by authority, is that a respondent's failure to take the point of non-compliance with s 17(4) in a payment schedule does not authorise an adjudicator to ignore the point, where it is apparent on the face of the material which the adjudicator is obliged to consider under s 26(2).

At [49]–[51], his Honour added:

[49] On that reasoning, non-compliance with s 17(4), as one of the "detailed requirements", might not make a payment claim void. But that view was expressed as obiter dicta and was not expressed specifically in relation to the requirement under s 17(4) (as was observed by Spigelman CJ in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [25]). Moreover, it is difficult, in my view, to comprehend why Parliament enacted a requirement that a payment claim must be served – "only" – within a particular time period but did not intend that failure to do so would be a failure to comply with a "basic requirement" of the right to recover a payment on that payment claim.

[50] I prefer the approach Spigelman CJ adopted in relation to the time limit for bringing an adjudication application in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (at 35-47):

> ... Similarly, an "integer or element of the right" ... is its exercise by application made within the time specified. (*David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277) ...
>
> This detailed series of time provisions is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry. The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. It is commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value.

[51] The conclusion to which I have come in this case is that the payment claim as made was invalid because of non-compliance with s 17(4) and, since that matter was apparent on the face of the claimant's submissions validly made to the adjudicator, and he was aware of the point, he was obliged to consider the operation of s 17(4) in making his adjudication decision. It is unnecessary to consider any wider question, and I do not do so.

As will appear from [31] of the judgment in *GW Enterprises Pty Ltd v Xentex Industries Pty Ltd* [2006] QSC 399, Lyons J, was not satisfied, in the circumstances of the case, that the payment claim was a nullity on the ground that it should have been apparent on the face of it that it was out of time.

In *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119, the Queensland Court of Appeal per Holmes, Muir and Chesterman JJA at [45] said:

> The above review of the authorities provides some support for the primary judge's approach but its vice in my opinion is that it fails to consider sufficiently the statutory prescription. It is essential, in my respectful opinion, to have regard to the words of s 19(4) in determining whether or not it prevents a defence being raised. It prohibits a respondent to a payment claim, who has failed to duly serve a payment schedule, from bringing a counterclaim against the claimant, or from raising "any defence in relation to matters arising under the construction contract". The prohibition is not against the raising of any defence whatsoever.

It is noted that *Neumann* also refers to and discusses the following authorities: *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472; [2001] FCA 1549; *Beckford Nominees Pty Ltd v Shell Co of Australia Ltd* (1987) 73 ALR 373; *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238; *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641; *Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542; [1996] NSWSC 314; *Keen v Holland* [1984] 1 All ER 75; [1984] 1 WLR 251; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409; *Northside Projects Pty Ltd v Trad* [2009] QSC 264; *Rich v CGU Insurance Ltd* (2005) 79 ALJR 856; [2005] HCA 16; *Rimar Pty Ltd v Pappas* (1986) 160 CLR 133; 60 ALJR 309; 64 ALR 9; *Commonwealth v Verwayen* (1990) 170 CLR 394; 64 ALJR 540; 95 ALR 321; [1990] Aust Torts Reports 67,952 (81-036); [1990] ANZ ConvR 600; *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72; [2003] NTCA 5; *Thompson v Palmer* (1933) 49 CLR 507; [1933] HCA 61; *Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34; *Yaxley v Gotts* [2000] Ch 162; *Zebicon Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 1408.

See also *Fernandes Constructions v Tahmoor Coal (t/as Centennial Coal)* [2007] NSWSC 381; *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* (2001) 163 FLR 18; [2001] NSWSC 815; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1; *Roads & Traffic Authority (NSW) v John Holland Pty Ltd* [2006] NSWSC 567.

It will be seen therefore that some of the authorities above cast doubt on that aspect of Palmer J's judgment in *Brookhollow*, in which his Honour held that a defence that a payment claim was served outside the statutory period could not be pursued, unless it was specifically raised in a payment schedule.

The law on this point, at present, is uncertain. It is however submitted that the qualifications expressed in the Queensland authorities above in regard to the *Brookhollow* judgment, should now be followed in New South Wales and the other States and Territories.

See the further discussion in [SOP13.100] *(m)*, more particularly the judgment of Basten JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229.

(h) An abuse of process – repetitious and impermissible use of the adjudication process

In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, the adjudication determination was set aside for reasons that did not go to the substance of the claim made by Halkat against Holmwood.

Halkat, thereafter, submitted a new claim for adjudication and, purporting to act under s 13(c), included a claim for the amounts that were dealt with by the adjudicator in the adjudication determination that failed.

At the same time, Halkat commenced appeal proceedings to the Court of Appeal against the judgment in terms of which the adjudication was declared void. Holmwood, in an application to strike out the appeal as an abuse of the process of court, argued that Halkat was pursuing inconsistent remedies in such a way so as to impose an entirely unjustified and unreasonable burden on it.

It was submitted on behalf of Holmwood that Halkat could have taken one of two courses, namely, either appeal or include the work the subject of the first payment claim, in a further payment claim, but it was impermissible to do both. Hodgson JA, at [18] and [19], rejected this submission and said:

> [18] The adjudication response raised two "jurisdictional" issues and five other grounds for withholding payment. The so-called jurisdictional issues were:
>
> - That there was no construction contract between the parties, because in the contract the principal was named not as Holmwood but "Homewood"; and
> - That the payment claim was not validly served, because it was served by the claimant's solicitor and not by the claimant personally.
>
> [19] The five grounds for withholding payment were as follows:
>
> - Holmwood alleged that Halkat had received payment in excess for the work it had done, asserting the value of the work completed to be $59,376 (before deduction of "contra charges" of $90,707), whereas Halkat claimed the value of the work completed to be $152,000;
> - Holmwood contended that Halkat had repudiated the contract and that the repudiation had been accepted and the contract terminated by Holmwood;
> - Holmwood claimed that it had cost it more to complete the contract work than it would have cost had Halkat completed it under the contract, and asserted a set-off for the difference;
> - Holmwood sought to set-off against the amount of any progress payment "the negative variations and liquidated damages"; and
> - Holmwood claimed that defects in Halkat's work were rectified by another contractor following termination.

Holmwood was cited with approval by Sackar J at [58] of *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123.

In *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168, one of the grounds for challenging the adjudicator's determination (as set out at [1] of the judgment) was as follows:

> … (1) the payment claim that was the subject of the second defendant's adjudication (the December payment claim) included a claim for payment of $844,375.00 for what were called variations 1 to 8. Those variations had been the subject of an earlier adjudication determination (the November determination) made by another adjudicator (the first adjudicator) in which the first adjudicator had determined that Austin had no entitlement, as claimed, to be paid for those variations; …

At [2] of *Watpac*, McDougall J summarised the essential issues for decision as being:

> (1) Was the December payment claim a valid payment claim for the purposes of the Act?

(2) Did the November determination create an issue estoppel in respect of variations 1 to 8?

(3) Was it an abuse of process for Austin to reagitate the claim for variations 1 to 8 in the December payment claim, and to press those in the adjudication application (the January application) that led to the February determination?

(4) Did the second adjudicator deal with the claimed set-off for backcharges in a way that constituted a substantial denial of the measure of justice that Watpac was entitled to receive?

At [3] of his Honour's judgment, McDougall J said:

> In substance, the first three issues arise out of the decision of the Court of Appeal in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69, as explained and applied in subsequent cases including *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems* [2009] NSWSC 416, *The University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635 and *Urban Traders v Paul Michael* [2009] NSW[2009] NSWSC 1072.

After considering the impact of the authority cited at [3] of his Honour's judgment in *Watpac* above, and in particular Allsop P's approach in *Dualcorp*, and considering the relevant provisions of the Act, McDougall J proceeded to address each one of the issues as follows:

> [57] Allsop P drew a distinction between:
>
> (1) (at [8]), a situation where successive payment claims were served, based on successive reference dates, but later payment claims included work the subject of earlier payment claims; and
>
> (2) (at [13]), a situation where, once works were complete, a fresh reference date was "created" by the service of a repetitious payment claim ("the same claim for the same completed works").
>
> [58] It follows from his Honour's analysis that there is no necessary vice in submitting payment claims, incorporating claims for work that were made in earlier payment claims, on fresh reference dates where work is continuing under the contract. The vice arises (if at all) only where work has been completed, and the claimant takes advantage of the 12 month period referred to in s 13(4)(b) to "create" a reference date by serving, as a fresh payment claim, a claim that has been the subject of an earlier payment claim.

In *CC No 1 Pty Ltd v Reed Constructions Australia Pty Ltd* [2010] NSWSC 294 at [31] and [32], Macready AsJ held that:

> [31] The proper construction of the Act must accommodate the purpose of s 13(5) and s 13(6). The February payment claim had a new reference date even though the construction work was completed towards the end of 2009. This is permitted under the Act: see s 13(4)(b). As has been frequently said it is not simply a repetition by itself which leads to an abuse. There must be something in all the circumstances for the abuse to arise. Here it is plain that the additional amounts now sought to be recovered in respect of variations which were the subject of the earlier claims is for a different amount. The amount is a distinct item of cost which was not claimed in the earlier claims. Although in an expansive use of the word there is some "reagitation" of the factual background there has been no "reagitation" of the entitlement to the earlier claimed amount.
>
> [32] It is plain that in the ordinary case where a claim is made to a completed piece of work the owner might justifiably feel entitled to regard the claim as the totality of the claim. In the present circumstance it is clear that there was an accidental omission of the claim for preliminaries. There is no suggestion of misleading or deceptive conduct in respect of the omission and what it is sought to rectify is said to be a clear entitlement to some payment of an additional amount by the contractor in respect of the same item of work. It obviously would have been more expedient if the claim had been

made earlier so that the owner could have considered it at the time of the earlier claim. Although there will be more work because of the contractor's default in this regard I do not think that this is a sufficient reason to conclude that there is an abuse of process.

In *Olympia Group Pty Ltd v Tyrenian Group Pty Ltd* [2010] NSWSC 319, Hammerschlag J said the following at [32]–[33]:

> [32] So far as abuse of process point is concerned, I propose to follow what was said by the Court of Appeal in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2007) 23 BCL 292; [2006] NSWCA 259. In the judgment of Hodgson JA at par 36 his Honour held that the Act permits successive payment claims to be made for the same work. This disposes of the first plaintiff's submission.
>
> [33] There is authority, (see eg *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69), that an abuse of process occurs when repeated claims are made where the first claim has gone to adjudication. That is not this case.

At [38] of *NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd* [2013] NSWSC 842, Hammerschlag J held that s 13(5) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) was directed to the vice of their being in existence at any one time more than one payment claim in respect of each reference date under the construction contract, where in the circumstances a payment claim was issued and withdrawn and a second one substituted for it, his Honour held that there was no contravention of s 13(5).

At [29] of *Hill v Halo Architectural Design Services Pty Ltd* [2013] NSWSC 865, Stevenson J accepted that it was clear under s 13(5) of the NSW Act that it was not possible for a party to "bank" reference dates and serve multiple payment claims following one reference date.

At [30] of his judgment, Stevenson J noted the observations of McDougall J in *Rail Corp (NSW) v Nebax Constructions* [2012] NSWSC 6, where McDougall J said:

> [43] Nonetheless, it seems to me, when one considers the structure of the Act as a whole, it is reasonably clear that there should be one only application for adjudication of any one payment claim. Section 8(1) gives the right to a progress payment. Section 13 of the Act gives to a person claiming an entitlement to a progress claim the right to serve a payment claim. Section 14 provides for a response, through a payment schedule.Section 17 provides for "adjudication of a payment claim" where, among other things, a payment schedule is provided under which the scheduled amount is less than the claimed amount. ...
>
> [44] It seems to me that, because s 13(5) prevents (with a presently irrelevant exception for which subs (6) provides) the service of more than one payment claim per reference date per construction contract, and because the right to adjudication "of a payment claim" is clearly referable to a payment claim that complies with the various requirements of s 13, there can only be one adjudication application for any particular payment claim for any particular contract.

Stevenson J noted at [31] that McDougall J's reference to s 13(5) preventing service of more than one payment claim per "reference date" was "consistent with my conclusion at [26]" [the *Hill* case].

See further Stevenson J's judgment in *Draybi One Pty Ltd v Norms Carpentry Joinery Pty Ltd* [2013] NSWSC 1676.

In *Veer Build Pty Ltd v TCA Electrical and Communication Pty Ltd* [2015] NSWSC 864, Darke J made the following observations:

> [37] It is next necessary to consider whether the payment claim served on 7 January 2015 is itself a payment claim served in respect of the reference date 30 November 2014. If it is, then it was served contrary to the prohibition contained in s 13(5) of the Act, and is invalid (see *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; (2009) 74 NSWLR 190 at [13]- [14]; *The Trustees of the Roman Catholic*

Church for Diocese of Lismore v T F Woollam and Son [2012] NSWSC 1559 at [49]; *Kitchen Xchange v Formacon Building Services* (supra) at [21]-[22]).

Also see [17] of *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334, where this judgment was cited with approval by Meagher JA [sitting in Equity].

Also see a discussion on this point in a slightly different context at [SOP8.50].

(i) Claimant need not have bona fide belief in entitlements claimed for a valid payment claim

In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238 (28 August 2006), the Court of Appeal held that the validity of a payment claim was not dependent upon a *bona fide* belief by the claimant that the claimant was entitled to the sum claimed.

In [73]–[75] of the judgment, Basten JA, with whom Hodgson JA and Tobias JA concurred, said:

> [73] In these circumstances, I would not imply an additional requirement for a valid payment claim, namely that the claimant had an actual bona fide belief in the truth of the facts asserted, or at least did not believe that the claims were entirely meritless.
>
> [74] One may add that the language of a "bona fide" claim is slightly curious. Apart from modern requirements as to vertification of factual assertions in pleadings, the beliefs or motivations of the plaintiff in proceedings have generally been treated as irrelevant, unless they reach the stage of an improper purpose. Thus, in *Williams v Spautz* (1992) 174 CLR 509, the High Court held that proceedings would constitute an abuse of process, where brought, not to prosecute them to a conclusion, but to use them as a means of obtaining some advantage extraneous to the legal process: see *Williams v Spautz* (1992) 174 CLR 509 at 526–527. Nor is such a claim of abuse, in bringing proceedings for an improper purpose, dependent upon a finding that the claims were themselves without merit: ibid at 522. However, that was not the form of abuse relied upon in the present case and has no direct bearing on the argument that a claimant should have a bona fide belief in the soundness of the claim.
>
> [75] By contrast, there is good reason to suppose that the powers conferred on an adjudicator must be exercised in good faith and for the purposes for which they are conferred. The case law in favour of that proposition is discussed in the decisions of this Court referred to above and with expansive treatment by Brereton J in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [63]–[117]. It is possible that the language of "good faith" has been imported from this separate situation to that of the eseential preconditions to a valid claim. However, and with respect to the views of Santow and Ipp JJA (to the extent that they are to the contrary) there is, in my view, no separate precondition to the making of a valid payment claim under s 13 of the *Building Payment Act*, requiring, as a precondition to enforcement action under s 15, proof that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed.

The decisions of Santow and Ipp JJA referred to above were in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409. Basten J, at [69] of *Bittania*, referred to those judgments and noted that they expressed differing conclusions, were obiter, and without explanation. It would be appropriate to quote from [68]–[73] of *Bittania*, where Basten JA said:

> [68] This is, in effect, the statement of a conclusion, rather than a process of reasoning. Repetition of the statutory language does not necessarily explain the conclusion reached. The dispute as to the proper construction identifies an ambiguity in the clause "who claims to be" entitled. Indeed, the words encompass a range of meanings across a spectrum from the holding of a certain belief based on reasonable grounds, to a genuine belief which lacks reasonable support, through various degrees of uncertainty

as to whether a claim can be upheld, to the case where a person makes a "claim", but in the certain conviction that it is without merit.

[69] In contrast to the view held by Einstein J, two members of this Court in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 expressed different conclusions, though each appears to be obiter and also without explanation. Thus, at [49] Santow J stated:

> I should note at the outset that there was no suggestion that the payment claim was not made in good faith and in purported compliance with s 13(2) of the Act, both minimal requirements of the Act

[70] To similar effect, at [76], Ipp JA stated:

> Provided that a payment claim is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the question whether the claim complies with s 13(2), is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15. In particular, if no adjudication is sought summary judgment cannot be resisted on grounds that could have been raised by way of a payment schedule leading to adjudication.

[71] This last statement invites closer attention to what is meant by a lack of good faith on the part of the claimant. At the very least it would appear to involve two elements, namely that the claim was without merit and that the claimant knew it. But the merit (or lack of merit) of a claim is, as Ipp JA expressly accepted, a matter for determination by the adjudicator. Similarly, his Honour accepted that the express elements of a valid claim set out in s 13(2) are matters for the adjudicator. As suggested in *Coordinated Construction Pty Ltd v Climatech*, at [43]–[46] (a passage cited without disagreement by Hodgson JA in *Nepean Engineering* at [32]–[34]) determination of the existence of essential preconditions to a valid claim are matters for the adjudicator, not for objective determination by a Court. If the express requirements of the Act are to be so treated, it is difficult to see why some unexpressed precondition should have a different status. Even more is that the case when, as has been noted, a key element in the supposed condition of "good faith" is that the claim is without merit, a matter indisputably within the powers of the adjudicator to determine.

[72] The Appellants then observe, no doubt correctly, that the question whether the claimant knew or believed that the claim was without merit would be a matter beyond either the special expertise, or the procedural powers of the adjudicator to determine with any degree of reliability. However, unlike the well-known example of civil proceedings in a court, the Building Payment Act contains no requirement that a claimant must verify by affidavit that the claim has reasonable prospects of success. Nor is there any requirement, as appears in some standard forms of building contract, for an affidavit verifying that sub-contractors have been paid amounts claimed in relation to their work: see, eg, *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340.

[73] In these circumstances, I would not imply an additional requirement for a valid payment claim, namely that the claimant had an actual bona fide belief in the truth of the facts asserted, or at least did not believe that the claims were entirely meritless.

It is respectfully submitted if by Basten JA's observations above he meant to hold that a fraudulent claim could nevertheless give rise to a valid adjudication determination, his judgment was clearly misdirected.

Nor could it possibly be that Basten JA intended to hold that there was not a duty of full and frank disclosure, and for which see the discussion below.

Reference should be made to the Queensland authority and, in particular, *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119.

The State Administrative Tribunal, in *GRC Group Pty Ltd and Kestell* [2015] WASAT 11, undertook an exhaustive analysis of the question as to whether or not a payment claim to

be valid had to be *bona fide*. The decision of the Tribunal has been dealt with and discussed in the following paragraphs below, and to which reference should be made: [SOP13.120]; [SOP13.140].

In essence, the Tribunal followed the judgment of Vickery J in *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235, where his Honour said:

> [43] In my opinion there is no warrant for implying into the Act an obligation of good faith on the part of a claimant in preparing and submitting a payment claim. Following the service of a payment claim the Act provides mechanisms for the claim to be reviewed by the respondent and, if necessary, part rejected or wholly rejected by the serving of a payment schedule. It is at this point that a spurious claim lacking any proper foundation can be addressed. The Act also provides for a process of adjudication. Upon appointment, the adjudicator is in a position to addresses and determine the merits of the parties' dispute as articulated in the payment claim and payment schedule.
>
> [44] No enquiry into the bona fides of a claimant is necessary for the effective functioning of these processes. Nor is any such enquiry desirable, given the important objective of providing expedition in the determination of the interim rights of the parties in relation to the recovery of progress claims under a construction contract. It would fly in the face of this purpose of the Act, and the robust determination of disputes under the statutory adjudication process, to import an element of good faith as an issue to be considered and determined for a valid payment claim, in addition to the s 14 requirements.

Vickery J concluded his discussion by stating:

> [46] In the light of the authorities I have cited in these reasons, which were not referred to the Court in *Metacorp*, on reflection and with the benefit of full argument on the matter, I am persuaded that I was wrong insofar as it is said in that case that a payment claim, whether served prematurely before the due reference date or served on and from each reference date, must be made bona fide in order to be valid, and I decline to follow myself.
>
> [47] There is no implied precondition to the making of a valid payment claim under s 14 of the Act that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed or that otherwise the claim is made in good faith.

See further [55] of Vickery J's judgment in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500.

(j) How far must a payment claim mirror a particularised pleading in the Supreme Court?

In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003), Palmer J held, at [76], that it was not necessary that a payment claim should mirror precise and particularised pleadings in the Supreme Court. His Honour pointed out that, in most cases, payment claims are exchanged between parties experienced in the building industry and who have a history of familiarity with a particular contract, and the disputes or differences which have arisen. His Honour emphasised that the necessity to draft payment claims, in a short space of time, and that, in many instances, they were "in an abbreviated form which will be meaningless to the uninformed reader [but which] will be understood by the parties themselves". His Honour cautioned, however, that there was a need for "precision and particularity … to a degree reasonably sufficient to apprise the parties of the real issues in the dispute".

Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

Multiplex v Luikens was referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v*

Luikens was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

On a day before the *Multiplex* judgment, Einstein J handed down his judgment in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 (3 December 2003). In that matter the progress claim defined the work in generic terms. The Campbelltown Catholic Club contended that it was not possible by reference to the payment claim to ascertain what Leighton alleged the club had paid and the items of work for which it had not paid.

Einstein J, at [50] of the judgment, summed up one of the club's contentions thus:

> It is simply not possible for the reasonable reader of the alleged payment claim to discern, let alone make any informed decision about, just what construction work it is to which this specific claimed progress payment relates. The use of such generic terms as "electrical", "external works" and the like compound the problem. The alleged payment claim is not a payment claim under s 13 of the Act.

Einstein J, at [51], held that the payment claim does not fail to comply with s 13(2)(a) simply because it was prepared on this basis. At [52], his Honour adopted what Nicholas J held at [63]–[66] in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 (9 April 2003) that it was sufficient if the claim document merely identified the construction work in terms of the contract and location with respect to which it was undertaken.

At [54] and [55], Einstein J continued thus:

> [54] I am further in agreement with the following view taken by Davies AJA in *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 (9 May 2002) at [20]:
>
> > However, subs (2) of s 13 of the Act should not be approached in an unduly technical manner keeping in mind the considerations to which counsel pointed. The terms used in subs (2) of s 13 are well understood words of the English language. They should be given their normal and natural meanings. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner.
>
> [55] To the extent that the authorities disclose a difference of approach in this regard, my view is that the analyses and expressions of opinion by Nicholas J in both *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 ("Walter") at [63]–[66]; [81]–[85], and in *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365 ("Parist") at [27]–[29] adopted by Bergin J in *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2003] NSWSC 869 at [30]–[34], should be preferred to the views expressed as obiter by Austin J in *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42; [2002] NSWSC 395 ("Jemzone"), generally for the reasons set out above.

His Honour, at [58] cited the judgment of Nicholas J in *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365 (5 May 2003) with approval, where it was said at [28]:

> The principles relevant to the question of compliance with s 13(2) were discussed in *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20]; *Beckhaus Civil Pty Ltd v Brewarrina Council* [2002] NSWSC 960 at [73]–[76]; *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [63]–[65]; [81]–[85]. It must be clear on the face of the document(s) which constitute the statutory payment claim that the information conveyed meets the requirements of s 13(2). "The test is an objective one. In deciding the meaning conveyed by a notice a court will ask whether a reasonable person who had considered the notice as a whole and given fair and proper consideration would be left in any doubt as to its meaning" [*Walter Construction Group Pty Ltd* at [82]].

(k) The payment claim defines the jurisdiction of the adjudicator – the identification of the dispute

Care must be taken in drafting a payment claim as its contents will inevitably determine the jurisdiction of the adjudicator. See *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365 at [33], where Nicholas J said:

> From reading ss 13, 14, 17(2), 20(2), 21, 22(2)(c) and 22(2)(d) of the Act it is evident that, as the Minister said, the payment claim and the payment schedule serve to delimit the issues to which the submissions of the claimant and a respondent may refer.

In *Reitsma Constructions Pty Ltd v Davies Engineering Pty Ltd t/as In City Steel* [2015] NSWSC 343, Ball J said:

> **Did the question involve a jurisdictional fact?**
>
> [4] In relation to the first question, it is difficult to see how the question whether the payment claim the subject of the determination was a second payment claim in respect of the same reference date does not raise a jurisdictional fact. Section 13(5) of the Act states:
>
> > A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

His Honour added:

> [5] That section must mean that any purported payment claim other than the first in respect of a reference date is not a payment claim for the purposes of the Act. As McDougall J pointed out in *Trustees of Roman Catholic Church for Diocese of Lismore v TF Woollam & Son* [2012] NSWSC 1559 at [49] "[A]ny other approach would set at naught the statutory prohibition".

Also see [17] of *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334, where this judgment was cited with approval by Meagher JA [sitting in Equity].

In *David McLean Housing Contractors Ltd v Swansea Housing Assn Ltd* [2002] BLR 125 (27 July 2001), Judge Lloyd QC followed what was said in *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168 by his Honour Judge Thornton QC at 176:

> During the course of a construction contract, many claims, issues, contentions, and causes of action will arise. Many of these will be collectively, or individually disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the referring party first intimates an adjudication reference. In other words, the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties.

However, following *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 (23 November 2005), Palmer J, in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 (30 January 2006), seems to have altered the view which he took in regard to the requirements for the validity of a payment claim in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, when his Honour, at [44] and [45] said:

> [44] A payment claim under the Act is, in many respects, like a statement of claim in litigation. In pleading a statement of claim, the plaintiff sets out only the facts and circumstances required to establish entitlement to the relief sought; the statement of claim does not attempt to negative in advance all possible defences to the claim. It is for the defendant to decide which defences to raise; the plaintiff, in a reply, answers only those defences which the defendant has pleaded.
>
> [45] In my opinion, a payment claim under the Act works the same way. If it purports reasonably on its face to state what s 13(2)(a) and (b) require it to state, it will have disclosed the critical elements of the claimant's claim. It is then for the respondent either to admit the claim or to decide what defences to raise.

Nepean Engineering was cited with approval in *Baxbex Pty Ltd v Bickle* [2009] QSC 194.

In *Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714, McDougall J addressed the sufficiency of a progress claim at [36] and [37].

At [37], his Honour said:

> In principle, I think, the requirement in s 13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:
>
> (1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;
>
> (2) that reference is supplemented by a single line item description of the work;
>
> (3) particulars are given of the amount previously completed and claimed and the amount now said to be complete;
>
> (4) there is a summary that pulls all the details together and states the amount claimed.

This decision and the judgment of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 on the sufficiency of a payment claim were endorsed by the Court of Appeal in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391, and in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 at [24]–[25]. Palmer J's judgment in *Multiplex* was referred to by Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 with approval. Consequently, the same considerations would apply in Victoria. *Clarence Street*, *Protectavale*, *Baxbex Pty Ltd*, *Brookhollow* and *Multiplex Constructions* were referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

Multiplex v Luikens was referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v Luikens* was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

Protectavale was cited with approval by Blow J in the *Supreme Court of Tasmania in Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd* [2013] TASSC 3.

(l) A payment claim need not be comprehensible in terms of the supporting material

In *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 (20 April 2004), Einstein J was required to consider whether, as a matter of procedural fairness, a similar restriction to that contained in s 20(2B) was implied in s 17(3) above. At [21], Einstein J said:

> Ultimately it seems to me that the accepted principles of statutory construction simply do not permit the court to take the further step of holding that in order to be valid, a payment claim must be comprehensible by the respondent in terms of its supporting materials (cf especially the abovementioned citation from McHugh J in *Newcastle City Council v GIO General* (1997) 191 CLR 85; 149 ALR 623; 72 ALJR 97).

On p 24 of his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004), McDougall J commented thus:

> Einstein J dealt with the problem in a different way. He said that when an adjudication application put a claim on a basis that had not been advanced in the payment claim, the adjudicator, as a matter of jurisdiction, could not deal with it; and there would also be denial of natural justice (at [41]). That was because (as his Honour explained at [40]), s 20(2B) would prevent the respondent from including in its adjudication response any reasons relating to the new claim; but it could not deal with a new claim except by doing that which was prevented by s 20(2B). To determine such a new claim upon a basis that the respondent could not answer was, his Honour said, a denial of natural justice. Presumably, it amounted also to jurisdictional error because the Act, on its proper construction, does not permit adjudicators to determine adjudication applications without affording natural justice to the respondent.
>
> In some cases, the point will be clear. For example, the particular challenge in *John Holland* was clearly grounded because the claimant, for the first time in its adjudication application, raised an alternative contractual basis for a particular entitlement. But in other cases, as Einstein J pointed out, there will be questions of fact and degree involved: for example, when no new basis is advanced for a claim but further documentation or other material is relied upon in support of it. The test would appear to be whether s 20(2B) would prevent the respondent from dealing with that new material; and, if it did, whether that would amount to a denial of natural justice (see, for example, at [30], [31] and [47]).

(m) Misdescription will not invalidate a payment claim

In *Barclay Mowlem Construction Ltd v Estate Property Holdings Pty Ltd* [2004] NSWSC 649 (19 July 2004), the payment claim incorrectly described the Act as the *Building and Construction Industry Security for Payments Act 1999* instead of the *Building and Construction Industry Security of Payment Act 1999* (NSW).

Einstein J, at [5], said:

> Such a misdescription would not invalidate the claim: see *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* (2001) 163 FLR 18; [2001] NSWSC 815 in which Windeyer J (at [8]) rejected an argument that because the payment claim in that case abbreviated the name of the Act that it did not fulfil the statutory requirements of the Act.

Barclay Mowlem Construction Ltd v Estate Property Holdings Pty Ltd [2004] NSWSC 649 went on appeal to the Court of Appeal, New South Wales; see *Estate Property Holdings Pty Ltd v Barclay Mowlem Construction Ltd* (2004) 61 NSWLR 515; [2004] NSWCA 393. Einstein J's decision on the above issue was not challenged on appeal.

(n) The inclusion in a payment claim of a disputed component on the ground that such item cannot be categorised as either work or goods and services within the meaning of s 5 or 6 respectively

The submission that a "payment claim" was invalid in that it contained an item that was disputed as either work or goods and services within the meaning of s 5 or 6 respectively of the Act was rejected by Nicholas J at [67] and [68] of *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 (9 April 2003). This submission met the same fate in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 (3 December 2003) and [16] of Einstein J's judgment in *Barclay Mowlem Construction Ltd v Estate Property Holdings Pty Ltd* [2004] NSWSC 649 (19 July 2004), see further the reasoning of Bergin J (as her Honour then was) in [67] and [68] of *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2003] NSWSC 869 (25 September 2003), where her Honour said:

> [67] To demonstrate compliance with s 13(2)(a) it is irrelevant, in my opinion, that an item which is a component of a payment claim may be disputed, albeit on the ground

that such item cannot be categorised as either work or goods and services within the meaning of s 5 or s 6 respectively. Inclusion of a disputed item does not render a payment claim invalid. The statutory requirement for provision of payment schedules and the scheme for adjudication allow for the ventilation and determination of disputes following service of a payment claim under s 13. The Minister made this clear in his second reading speech when he said:

> Under Pt 3, when a payment claim is made, and the other party, called the respondent, does not intend to pay the full amount of the payment claim, it must issue a payment schedule stating the amount, if any, of the payment claim which will be paid and the reasons for not paying the amount claimed. The time for issue of the payment schedule is 10 business days after receipt of the payment claim. The payment schedule alerts the claimant to the existence of a dispute over payment and allows the claimant to immediately commence the adjudication process available under the legislation. This is a critical element of the bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full.

[68] In a challenge which raises the question of compliance with s 13(2)(a) the question is not whether an item of the payment claim relates to construction work or related goods and services within s 5 and s 6 respectively, but whether the payment claim adequately identifies such work or goods and services. In this case the payment claim of 20 December 2002 clearly did so.

(o) The detail that nevertheless should find its way into a payment claim

The payment claim must identify the construction work for which payment is claimed in the claim, not merely the construction work as a whole that is being carried out under the relevant construction contract, otherwise it would be impossible for a respondent to provide a meaningful payment schedule supported by reason: *Estate Property Holdings Pty Ltd v Barclay Mowlem Construction Ltd* (2004) 61 NSWLR 515; [2004] NSWCA 393 at [17]. If the detail in a payment claim is lacking so that the respondent cannot verify or reject it, it cannot remedy the situation by including such detail/fact in its adjudication application, for the reason that the respondent, not having dealt therewith in its payment schedule, is precluded by s 20(2B) from traversing that material in its adjudication response.

This may result in the adjudication being aborted, see Einstein J in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258.

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004] NSWSC 823 (13 September 2004) McDougall J seemed to soften the approach taken by Einstein J in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258.

His Honour said:

> [56] Section 20(2B) of the Act prevents a respondent from including in its adjudication response any reasons for withholding payment that were not included in the payment schedule provided to the claimant. There is no equivalent limitation, in the case of adjudication applications, in s 17 of the Act; and, as Einstein J held in *John Holland* at [21], no such limitation could be implied by any process of statutory construction.
>
> [57] What Einstein J said in *John Holland* was that a claimant that did not provide sufficient details in its payment claim to enable the respondent to verify or reject (ie assess) the claim could not include the missing details in its adjudication application. That was because, since the respondent was barred by s 20(2B) from replying to those details (ie of responding in its adjudication response in a way that did deal with the merits of the claim) the result "may indeed be to abort any determination": at [23]. His

> Honour said, alternatively, that an adjudicator did not have power to consider materials supplied by a claimant in its adjudication application which went outside the materials provided in the payment: at [24]. Materials would go outside what had already been provided if they fell outside the ambit or scope of that earlier material.
>
> [58] The Minister does not suggest, in this case, that Contrax failed to supply sufficient details to enable its payment claim to be assessed. He does not suggest that Contrax supplied further details in its adjudication application. The submission was simply that, in relying on s 34 to answer an argument raised by the Minister himself in his payment schedule, Contrax was raising a "new issue".
>
> …
>
> [60] It would be quite extraordinary if the statutory regime, on its proper construction, prevented an applicant for adjudication from dealing with issues raised by the respondent to adjudication in its payment schedule. Such a construction would mean, in effect, that the applicant would be required to anticipate in its payment claim, and deal with at length, every possible argument that the respondent might rely upon. That would have the effect of increasing enormously the complexity and expense of the statutory procedure: something quite at odds with the statutory objects set out in s 3 and reinforced in the Second Reading Speech. It would also mean that, notwithstanding the best attempts of the applicant to foresee and answer all possible arguments, it might be defeated if the ingenuity of the respondent or its lawyers turned up yet further arguments.

It is submitted that Einstein J's approach is the correct one, and that there is no warrant to water it down.

At [25] of *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 (13 July 2005), Hodgson JA, in referring to the sufficiency of a payment claim said:

> [25] … In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim; and in the case of "delay damages" of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates.

At [26], Hodgson JA continued thus:

> [26] In my opinion, failure adequately to set out in a payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant adequately set out the basis of the claim in submissions put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material (because of the provisions of s 20(2B) and s 22(2)(c) of the Act), he or she is not appropriately satisfied of the claimant's entitlement. Generally however, in my opinion, it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim, and if not, whether on this ground a relevant amount claim should be excluded from the amount of the progress payment determined under s 22(1).

It will be seen that in Hodgson JA's view, with whom Ipp and Basten JJA concurred, the sufficiency of the payment claim is a matter for the adjudicator and cannot be challenged through the courts.

It is respectfully submitted that this holding reposes far too great a power in the adjudicator, who very often is a lay person with no legal training.

It is just as well to set out here the observations of Basten JA in *Coordinated Construction*. His Honour said at [43]–[44]:

> [43] The next question is whether the existence of a valid payment claim, which complies with s 13(2) is an essential precondition to a valid determination. A related question is whether, even if there is a valid claim, a determination which appears to go beyond the parameters of the claim is itself a valid determination: see [24] and [26] above.
>
> [44] For reasons explained in *Hargreaves* at [72]–[77], it is not possible to construe s 13(2) as doing otherwise than imposing mandatory requirements with respect to the making of payment claims. However, it does not follow that the court should set aside a determination in circumstances where, in its view, the claim does not satisfy those requirements, or the determination goes beyond the parameters of the claim, properly understood. Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard: see *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391; [1938] ALR 119; (1938) 11 ALJR 525 (Dixon J). A factor favouring that approach is "the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact": *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 72; (1999) 102 LGERA 52 (Spigelman CJ).

Basten JA in [46]–[47] of *Coordinated Construction* also said:

> [46] In my view the omission of reference to s 13(2) in the list of mandatory requirements identified in *Brodyn*, should be understood as giving effect to these principles.
>
> [47] It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; [1999] HCA 21 at [133], was to the following effect:
>
> > If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.
>
> Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that it must be undertaken in good faith, but that is not a sufficient condition of validity.

For all intents and purposes the principles set out in *Brodyn* can no longer be regarded as the law in New South Wales in the light of the decision by the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190. Nevertheless, it may still be said that the task of the adjudicator must be undertaken in good faith, and the failure to do so will probably now be categorised as the failure to comply with a jurisdictional fact, resulting in an adjudication determination which falls foul of the obligation to act in good faith being void.

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 (17 March 2005), the Minister submitted that the primary judge's decision was wrong in holding that *Contrax* was entitled to rely on s 34 when that matter had not been raised in its payment claim. The Minister based this contention on *John Holland Pty Ltd v Cardno*

MBK (NSW) Pty Ltd [2004] NSWSC 258, and on a suggested anomaly arising from the prohibition in s 20(2B) on a respondent relying on reasons not included in its payment schedule.

At [34]–[37], Hodgson JA, with whom Bryson JA and Brownie AJA concurred, said:

> [34] In my opinion, this suggested anomaly loses force when one considers the true effect of s 22(2). It is true that para (d) of s 22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration *under that paragraph*, reasons included in the adjudication response that were not included in the payment schedule.
>
> [35] However, paras (a) and (b) of s 22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paras (a) and (b), even if they cannot be considered under para (d).
>
> [36] Similarly, in my opinion, an adjudicator could take into account a contention of an applicant that a term of the contract is void by reason of s 34, when considering matters under paras (a) and (b), even if that contention could not be taken into account under para (c).
>
> [37] However, I agree with the primary judge that the circumstance that s 34 was not mentioned in the payment claim, and was mentioned for the first time in the adjudication application, does not have the consequence that it cannot be considered under para (c) of s 22(2). I agree with the primary judge that this is not an addition to the payment claim or a departure from it that could be affected by the considerations given weight to in *John Holland*.

In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 (23 November 2005), Hodgson JA, Santow JA and Ipp JA stated their views on the requirements of a payment claim and when the failure to satisfy those requirements rendered a payment claim a nullity. The Court of Appeal unanimously held that the documents served by the claimant in *Nepean* sufficiently identified the construction work to which the claim related, however, as pointed at by Palmer J, at [30] of his judgment in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 (30 January 2006), the members of the Court of Appeal differed as to what would have been the consequences if the payment claim failed to satisfy the requirements of s 13(2)(a). The lack of clarity in the drafting of the legislation is brought into sharp focus by the fact that Palmer J, in *Brookhollow*, had to devote some 19 paragraphs of his Honour's judgment to bring all the threads in *Nepean* together.

At [31]–[49], his Honour said:

> [31] In the course of his judgment, Hodgson JA referred at [29] to the passage of his judgment in *Brodyn* which I have set out above and elaborated upon what he had there said. His Honour noted a view which he had expressed in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [26] to the effect that failure adequately to set out in a payment claim the basis of the claim could be a ground upon which an adjudicator could exclude a relevant amount from the determination; however, that was a matter for the adjudicator to decide – it did not deprive the adjudicator of the capacity to make the determination.

[32] Hodgson JA then noted a possibly contrary view expressed by Basten JA in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 and in *Climatech*. In *Climatech*, Basten JA, at [23], directly confronted the question whether the existence of a "valid" payment claim, ie one which complied with the requirements of s 13(2), is an essential precondition to a valid determination by an adjudicator under the Act. His Honour said that although s 13(2) imposed mandatory requirements on the making of a progress claim under the Act, failure to comply with those requirements did not necessarily produce the result that the court would set aside a consequent adjudication determination: "Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine": [44]. Basten JA was of the opinion that the latter position was correct: [45]–[46].

[33] Consistently with the reasoning of Basten JA in *Climatech*, Hodgson JA in *Nepean* concluded that a payment claim cannot be treated as a nullity for failure to comply with s 13(2)(a) of the Act "unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made": *Nepean* at [36]. The corollary of this proposition is that a payment claim can be treated as a nullity if it does not on its face reasonably purport to comply with s 13(2)(a).

[34] It would follow that an adjudication founded on a payment claim which was a nullity for the purposes of the Act is itself a nullity. It would also follow that it would be a defence to an application for judgment under s 15(4) that the payment claim said to give rise to the statutory debt by virtue of s 14(4) was a nullity.

[35] Santow JA in *Nepean* did not agree with Hodgson JA that a payment claim cannot be treated as a nullity unless the failure to comply with s 13(2) is patent on its face: [47]. At [73], Santow JA said:

> It could not be the case that the question whether the claim complies with s 13(2) is a matter solely for adjudication under s 17. If it were solely a matter for the adjudicator to determine, there would then be no means of resolving compliance with s 13(2) if there were no payment schedule and therefore no adjudication. I consider summary judgment under s 15 can in an appropriate case be resisted on that basis and resolved in such proceedings provided argument perhaps even of an extensive kind is capable of doing so.

[36] I gather from this passage that in his Honour's view, non-compliance with the mandatory requirements of s 13(2) will result in the payment claim being a nullity and that that ground of invalidity may be taken before the adjudicator as well as in any court of competent jurisdiction, whether the court is entertaining an application for summary judgment under s 15(2)(a) of the Act or an application to enjoin the taking of any step to enforce an adjudication determination, as in the present case.

[37] The third member of the Court of Appeal in *Nepean*, Ipp JA, agreed with the reasons of Hodgson JA. Ipp JA, summarised the fundamental proposition thus:

> [F]or the reasons given by Hodgson JA I would construe [the Act] as follows. Provided that a payment claim is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the question whether the claim complies with s 13(2), is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15. In particular, if no adjudication is sought summary judgment cannot be resisted on grounds that could have been raised by way of a payment schedule leading to adjudication.

[38] As I read this passage, his Honour is saying that the validity of a payment claim, in terms of its compliance with s 13(2), is a matter for the adjudicator to determine provided that the payment claim is made "in good faith and purports to comply with s 13(2)".

[39] Leaving aside what is meant by the making of a payment claim in good faith, I take his Honour to be saying that if a payment claim does not purport to comply with s 13(2), then its validity is not a matter for adjudication: the payment claim is a nullity for the purposes of the Act. The second proposition which his Honour enunciates concerning the question of summary judgment is prefaced by the words "in particular", which indicate that what his Honour there says is an elaboration of the prior proposition and, like the prior proposition, is subject to the proviso that the payment claim must purport to comply with s 13(2).

[40] In other words, if the payment claim does not purport to comply with s 13(2), his Honour would conclude that the nullity of the payment claim could be set up as a defence to an application for summary judgment under s 15(4).

[41] The law as to compliance with s 13(2) of the Act as it emerges from *Brodyn* and *Nepean*, may be summarised thus:

(i) a payment claim which is never served on the respondent under s 13(1) cannot set in motion the machinery of Pt 3 so that any purported adjudication of that payment claim and any other enforcement procedures in Pt 3 founded upon that payment claim must be a nullity;

(ii) there are some non-compliances with the requirements of s 13(2) of the Act which will result in the nullity of a payment claim for all purposes under the Act; there are other non-compliances which will not produce that result;

(iii) a payment claim which does not, on its face, purport in a reasonable way to:

– identify the construction work to which the claim relates; or

– indicate the amount claimed; or

– state that it is made under the Act

fails to comply with an essential and mandatory requirement of s 13(2) so that it is a nullity for the purposes of the Act;

(iv) a payment claim which, on its face, purports reasonably to comply with the requirements of s 13(2) will not be a nullity for the purposes of engaging the adjudication and enforcement procedures of Pt 3 of the Act;

(v) in the case of a payment claim which purports reasonably on its face to comply with s 13(2):

- if the respondent wishes to object that it does not in fact comply so that it is a nullity for the purposes of the Act, the respondent must serve a payment schedule under s 14(4) and an adjudication response under s 20, in which that objection is taken;
- if the respondent does not serve a payment schedule within the time limited under the Act and the claimant ultimately seeks the entry of judgment under s 15(4), the respondent may not resist summary judgment on the ground that the payment claim was not a valid payment claim by reason of non-compliance with the requirements of s 13: the respondent has only one chance to take that objection, namely, in a timeously served payment schedule;

(vi) in the case of a payment claim which was never served on the respondent or which does not purport reasonably on its face to comply with the requirements of s 13(2):

- the payment claim is a nullity for the purposes of the Act;

- an adjudication founded upon that payment claim is a nullity, regardless of whether the objection to the validity of the payment claim was taken in a timeously served payment schedule;
- an application under s 15(4) for judgment for the statutory debt created by s 14(4) may be defeated on the ground that there was no payment claim in existence for the purposes of s 15(1)(b).

[42] As a result of the decision in *Nepean*, it may be that a number of prior judicial interpretations of the requirements of s 13(2) of the Act founded upon *Brodyn* alone will have to be revisited and modified: see eg *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801 at [20]–[24]; *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* (2005) 226 ALR 362; [2005] NSWSC 1143 at [86]–[90].

The remarks in *Nepean*at [42] were perhaps prophetic, *Brodyn* no longer stands for the principal principles set out therein. See *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190. It may now be said with confidence that the failure to comply with s 13(2) of the Act would constitute a failure to comply with a jurisdictional fact leading to the invalidity of the adjudication determination.

In McDougall J's view, as set out at [27] of his Honour's judgment in *Fernandes Constructions v Tahmoor Coal (t/as Centennial Coal)* [2007] NSWSC 381 (27 April 2007), the approach to be taken to the sufficiency of a payment claim is as follows:

[27] In my view, the approach to be taken can be summarised as follows:

(1) For a document to be a valid payment claim under the Act, it must, among other things, be a "payment claim" and state that it is made under the Act.

(2) The test is objective.

(3) In applying the test, the document should be considered as a whole and in context. The context may include not only all the terms of the document but also (as for example was the case in *Leighton*) the terms of any covering letter, or facsimile transmission sheet, pursuant to which the document was sent to its recipient.

(4) Further, the context may extend beyond the terms of the document and any covering note to the "factual matrix"– at least, insofar as that matrix is one that is (or should be) known to both parties, and therefore to the hypothetical reasonable observer by whom the analysis of the document is undertaken.

[43] The proposition of the majority in *Nepean* that a payment claim is valid if it purports reasonably on its face to comply with the requirements of the Act is readily understandable when invalidity is said to arise from non-compliance with what s 13(2) requires a payment claim to contain. However, whether service of a payment claim is prohibited by s 13(4) or (5) is not something which s 13 expressly requires the payment claim itself to demonstrate. Does the reasoning of the majority in *Nepean* mean that a valid payment claim must now purport reasonably not only to demonstrate on its face that it complies with s 13(2) but that it has negatived the possibility of prohibition under s 13(4) or (5)? I do not think so.

[44] A payment claim under the Act is, in many respects, like a statement of claim in litigation. In pleading a statement of claim, the plaintiff sets out only the facts and circumstances required to establish entitlement to the relief sought; the statement of claim does not attempt to negative in advance all possible defences to the claim. It is for the defendant to decide which defences to raise; the plaintiff, in a reply, answers only those defences which the defendant has pleaded.

[45] In my opinion, a payment claim under the Act works the same way. If it purports reasonably on its face to state what s 13(2)(a) and (b) require it to state, it will have

> disclosed the critical elements of the claimant's claim. It is then for the respondent either to admit the claim or to decide what defences to raise.
>
> [46] An assertion that service of a payment claim is prohibited under s 13(4) or (5) is like a defence in bar. For example, in the case of an action at law or in equity founded upon an oral contract for an interest in land it is open to a defendant to elect whether to raise a defence in bar founded on the Statute of Frauds. Similarly, it would be open to a respondent served with a payment claim under the Act to elect whether to raise a defence in bar that service of the claim is prohibited by s 13(4) or (5). A respondent to a payment claim may have a reason for electing not to raise such a defence: the payment claim may raise for determination an issue which will inevitably have to be determined in subsequent payment claims and the respondent may wish the issue to be resolved sooner rather than later.
>
> [47] However, if the respondent does elect to raise a defence in bar founded on s 13(4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.
>
> [48] In my opinion, the scheme of the Act in general and of ss 13 and 14 in particular requires that a defence in bar to a payment claim founded on s 13(4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s 15(4) of the Act.
>
> [49] In my opinion, these conclusions are consistent with, and are inherent in, the reasoning in *Brodyn* and they are not contrary to the majority decision in *Nepean*. They are also in conformity with the general approach to the determination of invalidity of a payment claim under s 13(4) and (5) taken by McDougall J in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801, at [25], by Campbell J in *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 705 at [19], and by Campbell J in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* (2005) 226 ALR 362; [2005] NSWSC 1143 at [87]–[90].

In *Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd* [2010] QSC 7, Fryberg J held that the inclusion of a delay claim, which his Honour held was too remote, in a payment claim, would not invalidate the whole of the payment claim. His Honour said:

> However, it does not seem to me that the inclusion of one aspect of a claim incorrectly in the claim is sufficient to invalidate the whole claim. The requirements for a valid claim are set out in s 17(2) of the Act, and in my judgment the erroneous inclusion of the amount to which I have just been discussing, is not sufficient to take the claim outside the statutory description.

A detailed discussion, particularly of the Queensland cases, in which *Energetech* and *Brookhollow* are discussed and referred to, appears at [SOP13.100] *(e)*.

In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157, the New South Wales Court of Appeal revisited the question of the sufficiency of a payment schedule. The same observations made by the Court of Appeal in *Perform* in regard to payment schedules are apposite in regard to payment claims.

(p) Delay in challenging the payment claim

In *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365, Nicholas J at [35] referred to the fact that the plaintiff in that case, who sought to set aside the adjudication determination, had availed itself of the benefit of the statutory process for speedy determination of the dispute which, had it been successful, would have relieved the plaintiff of any liability to pay the amount claimed. The plaintiff's conduct, in participating

in the adjudication process and its submissions to the jurisdiction of the adjudicator to determine the amount, if any, payable under the payment claim, precluded it from taking the point that the payment claim was invalid.

At [37] of that judgment, Nicholas J said:

> It seems to me wrong in principle that in these circumstances and where, after communication of the determination, the plaintiff failed to comply with the requirement of either s 23(1)(a) or (b) of the Act it should be open to it to assert that the payment claim was invalid as a ground for refusal of summary judgment in these proceedings.

At [47]–[48] of *Brookhollow*, Palmer J said the following in regard to the necessity of promptness in raising a defence in bar founded on s 13(4) or (5). In those paragraphs, his Honour said:

> [47] However, if the respondent does elect to raise a defence in bar founded on s 13(4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.
>
> [48] In my opinion, the scheme of the Act in general and of s 13 and s 14 in particular requires that a defence in bar to a payment claim founded on s 13(4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s 15(4) of the Act.

Brookhollow Pty Ltd v R & R Consultants Pty Ltd [2006] NSWSC 1 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

(q) Consequences of failure to comply with s 13(2)(a) of the NSW Act viz identification of construction work

In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409, Hodgson JA, with whom Santow JA and Ipp JA concurred, addressed the consequences of a failure to comply with the statutory requirements of a payment claim. At [30], his Honour reiterated what he had said at [26] of *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229, where the following appears:

> In my opinion, failure adequately to set out in a payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant adequately set out the basis of the claim in submissions put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material (because of the provisions of s 20(2B) and s 22(2)(c) of the Act), he or she is not appropriately satisfied of the claimant's entitlement. Generally however, in my opinion, it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim, and if not, whether on this ground a relevant amount claim should be excluded from the amount of the progress payment determined under s 22(1).

However, at [31], his Honour pointed to a possible contrary view expressed by Basten JA at [42] of *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228.

It can now be said with confidence that the principal principles extracted from *Brodyn* no longer represent the law in New South Wales in the light of the decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

It cannot any longer be said that it is for the adjudicator to determine whether the basis of the claim is adequately set out in the payment claim. The adjudicator has no function or power under the Act to do so.

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229 and *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 have been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [36], Spigelman CJ, with Basten JA and McDougall J concurring, said:

> The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

(r) Several invoices in one payment claim

In *Alan Conolly & Co v Commercial Indemnity Pty Ltd* [2005] NSWSC 339 (29 April 2005), Master Macready (now Macready AJ) held that the sending of three invoices in the same facsimile can constitute one payment claim but, in any event, Master Macready held at [24]–[25] that, even if that was wrong, *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004), did not justify curial review. He held further at [35] that the fact of sending three invoices under one payment claim was not unlawful and therefore did not give rise to injunctive relief.

In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, Beech J held that a payment claim consisting of a number of subsidiary claims was in fact one claim which, if rejected, gave rise to a single payment dispute: see [79] of his Honour's judgment.

(s) Taking into account, in particular factual circumstances, the background knowledge of the parties

At [70] of *Leighton v Arogan* [2012] NSWSC 1323, McDougall J said:

> In this context, it may well be appropriate to take into account, in particular factual circumstances, the background knowledge of the parties as shown (for example) by correspondence passing between them before and at the time the payment claim and payment schedule were exchanged. That material might enable the Court to have a more informed understanding of the way that the parties would have perceived, and understood, the real issues sought to be raised.

(t) Claimant not to change basis of its claim as set out in payment claim in the adjudication application

In *Leighton v Arogan*, McDougall J held that on the undisputed facts, the basis of one of the major claims of *Arogan* was altered from that stated in its payment claim on the hand, to that which was set out in its adjudication application, and for which see [SOP17.50].

At [81]–[88], McDougall J held:

> [81] Thus, in my view, Arogen did change the basis of its claim, in a significant way, for the last three variations, and for V03 insofar as it relates to the period 10 to 29 February 2012. It follows that Leighton's submission to that effect, both in its adjudication response and before me, should be (and should have been) accepted.

[82] In *Parkview Constructions Pty Ltd & Anor v Sydney Civil Excavations Pty Ltd*, Brereton J said at [22] that it was established "that an applicant may not rely on, and an adjudicator may not consider, material that is included in an adjudication application which is outside the scope or ambit of the claim described in the payment claim". His Honour referred to the decision of Einstein J in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* at [22] to [25]. Brereton J also referred to my decision in *Minister for Commerce v Contrax Plumbing & Ors* at [49], [50], [56] and [57]. I repeat what I said in the last two of those paragraphs, as explaining the reasoning of Einstein J in the earlier case:

> [56] Section 20(2B) of the Act prevents a respondent from including in its adjudication response any reasons for withholding payment that were not included in the payment schedule provided to the claimant. There is no equivalent limitation, in the case of adjudication applications, in s 17 of the Act; and, as Einstein J held in *John Holland* at [21], no such limitation could be implied by any process of statutory construction.
>
> [57] What Einstein J said in *John Holland* was that a claimant that did not provide sufficient details in its payment claim to enable the respondent to verify or reject (ie, assess) the claim could not include the missing details in its adjudication application. That was because, since the respondent was barred by s 20(2B) from replying to those details (ie, of responding in its adjudication response in a way that did deal with the merits of the claim) the result "may indeed be to abort any determination": at [23]. His Honour said, alternatively, that an adjudicator did not have power to consider materials supplied by a claimant in its adjudication application which went outside the materials provided in the payment: at [24]. Materials would go outside what had already been provided if they fell outside the ambit or scope of that earlier material.

[83] There is no doubt that, in general, the question of whether a submission has been "duly made" is one for the adjudicator to determine. See Giles JA in *Downer Construction (Aust) Pty Ltd v Energy Australia* at [86] to [88]. (I note that Santow and Tobias JJA agreed with his Honour: and reference may be made as well to the cases cited by his Honour in the paragraphs in question.)

[84] Accepting that this is so, nonetheless, the consequence of an invalid application of s 20(2B), with the effect (as here) that the respondent is prevented from advancing reasons because the payment claim that is advanced in the adjudication application is different to the one that was advanced in the payment claim and answered in the payment schedule, is to deny the respondent natural justice.

[85] There is, in my view, another way of approaching the same question. Section 22 of the Act deals with the topic of the "adjudicator's determination". By subs (2), the adjudicator is commanded to "consider the following matters only": namely, the matters listed in paras (a) to (e). One of those matters (para (c)) is:

> ... the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim...

[86] In this case, in my view, the submissions that were made by Arogen in the adjudication application, in support of the variations in question, could not be

regarded as having been "duly made" in support of those aspects of its payment claim. That is because, on its fair and obvious reading, the payment claim referred to a basis of claim that was quite different to that advanced in the submissions. As I have said already, I have no doubt that the way in which this part of the adjudication application is framed reflects a clear appreciation by Arogen of the strength of Leighton's response to the claims, insofar as it relates to V03 from and after 10 February 2012, and V16, V19 and V21.

[87] Thus, in my view, the adjudicator failed to comply, to the extent indicated, with the mandatory requirements of s 22(2)(c). He failed to comply because he considered submissions that should not be regarded as "duly made... in support of the claim". For that reason, he did not make his determination (in respect of the relevant variations) in accordance with a condition of, or within the limits of, the jurisdiction given by the Act.

[88] Further, and in any event, by approaching the matter in this way, the adjudicator denied natural justice to Leighton, because he permitted Arogen to advance its claim in a way that Leighton was not able to answer (on the adjudicator's application of s 20(2B)).

(u) The construction of payment claims

In *Fernandes Constructions v Tahmoor Coal (t/as Centennial Coal)* [2007] NSWSC 381, McDougall J suggested that the approach to the construction of a document purporting to be a payment claim should in substance reflect the approach to the construction of commercial contracts.

At [16] of *South East Civil & Drainage Contractors Pty Ltd v AMGW Pty Ltd* [2013] 2 Qd R 189; [2013] QSC 45, Jackson J correctly, with respect, noted:

> I do not need to opine on the question whether that approach is apt to the interpretation of a statute, particularly one which confers rights of the kind which BCIPA confers and which has, in other contexts, been described as "draconian" in its effect. It is enough to decide this case that I do not think that a reader of the endorsement on tax invoice number 357 is left in any doubt that AMGW asserted that tax invoice number 357 was a claim under BCIPA. I conclude that the endorsement was sufficient to satisfy the requirement that a payment claim must state that it is made under that Act.

(v) Impermissible for a payment claim to cover more than one contract or arrangement

At [37] of *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4, Douglas J confirmed that a payment claim was invalid if it covered payments allegedly due under more than one contract and/or arrangement.

(w) Jurisdiction to determine payment claims – only if objectively complies with provisions of Act

At [64] of *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84, Blue J said:

> I reject Tali's contention. For the reasons set out below, the adjudicator only has jurisdiction if the payment claim objectively complies with section 13. It is not sufficient merely that the adjudicator forms an opinion that the payment claim complies with section 13.

(x) A payment claim in defiance of s 13(5) of the New South Wales Act – "… a claimant cannot serve …"

At [25] of *Broadview Windows Pty Ltd v Arch* [2015] NSWSC 955, McDougall J dealt with the construction of s 13(5) of the Act. For the sake of ease of reference, that subsection states:

> A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

His Honour, after a detailed analysis at [25]-[30] of his judgment, in which he referred *inter alia* to the decision of Allsop P in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69; and his Honour's own decision in *The Trustees of the Roman Catholic Church for the Diocese of Lismore v T F Woollam & Son* [2012] NSWSC 1559, asked the fundamental question:

> [26] …in terms of s 13(5) is whether a claimant has served more than one payment claim in respect of each "reference date" under the construction contract. Allsop P came to the view in *Dualcorp*, that the claimant in that case, Dualcorp, had done precisely that. This is apparent from what his Honour said at [12]. The full content of that paragraph, I set out in context (in this case, from [8] to [14]):
>
> > [8] As can be seen from the Act, s 13(5) a claimant is limited to one payment claim in respect of each reference date. Section 13(6) permits, however, inclusion in another payment claim (necessarily by reference to another reference date) of an amount that has been the subject of a previous claim. Amongst other usual and uncontroversial examples, this permits the submission of cumulative payment claims by reference to later reference dates, which include an amount the subject of a previous claim. In such circumstances, if there has been an adjudication, s 22(4) will apply to require the same value to be given to such work, subject to the qualification in that subsection.
> >
> > [9] Here, Dualcorp, after undertaking the works, left the site in November 2007. It claimed to have substantially completed the works under the contract in November 2007.
> >
> > [10] A payment claim was made on 29 January 2008 attaching six invoices, four of which were dated 24 January 2008 and two of which were dated 29 January 2008. The relevant reference date was not identified on the claim or invoices.
> >
> > [11] On 3 March 2008, Dualcorp purported to serve a second payment claim annexing the same invoices and claiming the same amount. Again, no reference date was identified on the documentation.
> >
> > [12] Whether or not this was a final claim or a progress claim does not matter. The claim represented by the six invoices must have been in respect of only one reference date – either 15 December 2007 or 15 January 2008, if pursuant to Annexure A, Item 11 or the reference date pursuant to the operation of cl 8.13, if a final payment claim. In either case, there must have been one reference date under the contract or the last day of the month as provided for by the Act, s 8(2)(b).
> >
> > [13] I see no warrant under either the contract or the Act, s 8 for permitting a party in Dualcorp's position to create fresh reference dates by lodging the same claim for the same completed works in successive payment claims. That is not the intended operation of the last phrase of s 8(2)(b) ("and the last day of each subsequent named month").
> >
> > [14] Here, the work had been done; Dualcorp, the subcontractor, had left the site; it claimed payment by six invoices; six weeks later it repeated that claim by reference to the same invoices and, in my view, in respect of the same reference date. Dualcorp was prevented from serving the second payment claim. The terms of s 13(5) are a prohibition. The words "cannot serve more than one payment claim" are a sufficiently clear statutory indication that a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment.

His Honour, after this analysis, noted his firm view conclusion that a payment claim served in defiance of the provisions of s 13(5) was void.

Also see [17] of *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334, where this judgment was cited with approval by Meagher JA [sitting in Equity].

(y) Comparative list of the provisions in the other States and Territories in regard to the prohibition on the part of a claimant to serve more than one payment claim in respect of each reference date under the construction contract

Certain of the other States and Territories have a comparative provision to s 13(5) of the New South Wales Act:

Australian Capital Territory – s 15(5)
South Australia – s 13(5)
Queensland – s 17(4)
Tasmania – s 17(4)
Victoria – s 14(8)

It would appear that s 17(4) of the Queensland Act above is clearer than that of the provisions in the other States and Territories.

[SOP13.110] A premature payment claim in New South Wales

In *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, Nicholas J held that a payment claim which was served before time was invalid.

In *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141; [2010] VSC 199, Vickery J in Victoria distinguished Nicholas J's judgment above, his Honour reasoned as follows:

> [101] In contrast, under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons "who claim to be entitled" to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.
>
> [102] A payment claim which is delivered shortly prior to its reference date, even a few days before, would not, in the usual case, evidence lack of bona fides on the part of the person making the claim because the work carried out in respect of which the claim is made in all likelihood would have been done, or substantially completed.

Vickery J further observed:

> [107] In my opinion, time does not begin to run against a respondent for the purposes of s 15(4) from the date when a payment claim is physically delivered to it, if this occurs prior to the relevant reference date. This is so because the entitlement to payment, which is conferred by s 9 upon a claimant, only arises "on and from each reference date under a construction contract". In the case of the premature delivery of a payment claim prior to the reference date to which the claim relates, rights under the Act only become enlivened upon the arrival of the relevant reference date. Until then, although delivery of the relevant document may have been undertaken in a physical sense, the service of the document is incapable of having any legal effect under the Act until the occurrence of the reference date. The payment claim at the time of service is not strictly a payment claim. It is a prospective claim for payment. It does not become a payment claim for the purposes of s 15(4) until the arrival of the reference date. On that date the earlier physical delivery of the document will result in the document becoming a valid payment on the reference date. In this event, time will commence to run under the Act from the reference date.

In *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 at [134], Vickery J again pointed to the differences between the texts of s 13(1) of the NSW Act and

s 14(1) of the Victorian Act, and added:

> On this basis, the observations made by Nicholas J in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 to the effect that a payment claim which is served before time is invalid, were able to be distinguished.

Vickery J in *Seabay* at [136] referred to *FK Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2007] 1 Qd R 10, in which Lyons J came to a conclusion which differed from Vickery J's on this point, even though the relevant legislation was in the same form as it is in Victoria.

[SOP13.120] Victoria — *"... payment claims ..."*

(Under the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Under s 9 of the amendment Act, s 9(2) of the principal Act has been amended. The new provisions expand the application of the Act to a wider range of payments which now include final payments, single payments and milestone payments.

Under s 16 of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic), s 14 of the principal Victorian Act dealing with payment claims is to be deleted and a new s 14 inserted in its place.

Under s 14(2)(a)–(e) and 14(3)(a)–(b), the following is provided:

> (2) A payment claim –
>
> (a) must be in the relevant prescribed form (if any); and
>
> (b) must contain the prescribed information (if any); and
>
> (c) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (d) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"); and
>
> (e) must state that it is made under this Act.
>
> (3) The claimed amount –
>
> (a) may include any amount that the respondent is liable to pay the claimant under section 29(4);
>
> (b) must not include any excluded amount.
>
> *Note*
>
> Section 10(3) provides that a progress payment must not include an excluded amount.

It is to be noted that s 14(2)(e) of the Victorian Act is identical to s 13(2)(c) of the New South Wales Act and, accordingly, the New South Wales authority in regard to s 13(2)(c) of the New South Wales Act should be a persuasive force in Victoria.

The question arises as to whether or not a payment claim which includes any excluded amount is nevertheless valid.

The Act does not make this clear.

The probable result would be merely to ignore the excluded amount rather than have the whole of the payment claim struck down.

Under the new s 14(4), there are detailed provisions in regard to a final single or one-off payment.

In *AMD Formwork Pty Ltd v Yarraman Construction Group Pty Ltd* (unreported, Vic Cty Ct, Shelton J, 3 August 2004) (County Court Victoria), Shelton J stated:

> A requirement of a payment claim is that it identifies the works in respect of which it is made to a sufficient degree to enable the recipient, if it wishes, to dispute the claim and provide a payment schedule under s 15 of the Act.

The Victorian Act does not contain provisions similar to s 13(3)–(4) of the New South Wales Act.

Section 16 of the amendment Act substitutes s 14 of the principal Act by its provisions. The new s 14(8) provides:

> (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, Vickery J, at [31]–[53], discussed the sufficiency of the identification of the work for which a claim is put forward in a payment claim. At [51], his Honour said:

> What is necessary is an identification of the work which is sufficient to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is not an overly exacting exercise. It is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively, that is from the perspective of a reasonable party who is in the position of then recipient. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.

One of the leading authorities on the issue as to whether or not a payment claim must be *bona fide* and made in good faith for it to be valid is to be found in the judgment of Vickery J in *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235, where his Honour said:

> [43] In my opinion there is no warrant for implying into the Act an obligation of good faith on the part of a claimant in preparing and submitting a payment claim. Following the service of a payment claim the Act provides mechanisms for the claim to be reviewed by the respondent and, if necessary, part rejected or wholly rejected by the serving of a payment schedule. It is at this point that a spurious claim lacking any proper foundation can be addressed. The Act also provides for a process of adjudication. Upon appointment, the adjudicator is in a position to addresses and determine the merits of the parties' dispute as articulated in the payment claim and payment schedule.
>
> [44] No enquiry into the bona fides of a claimant is necessary for the effective functioning of these processes. Nor is any such enquiry desirable, given the important objective of providing expedition in the determination of the interim rights of the parties in relation to the recovery of progress claims under a construction contract. It would fly in the face of this purpose of the Act, and the robust determination of disputes under the statutory adjudication process, to import an element of good faith as an issue to be considered and determined for a valid payment claim, in addition to the s 14 requirements.

470 St Kilda, together with all the other authorities on the point, was considered in detail by the State Administrative Tribunal of Western Australia in *GRC Group Pty Ltd and Kestell* [2015] WASAT 11: viz *Beba Enterprises Pty Ltd v Elle Pty Ltd* [2014] WASC 141; *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304; *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd* [2014] NTSC 20; *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409; *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123; [2008] NTSC 42.

The Tribunal concluded that the approach taken by Vickery J was correct.

More particularly, from the detailed analysis of this issue by the State Administrative Tribunal in *GRC Group Pty Ltd and Kestell* [2015] WASAT 11, and by the Tribunal following Vickery J's judgment in *470 St Kilda*, it may be *authoritatively* stated that in Victoria there is no requirement for a payment claim to be *bona fide*.

The issue as to what a claimant is entitled to will be determined by the adjudicator at the stage of the adjudicator's determination.

Vickery J referred to his Honour's judgment in *470 St Kilda* at [55] of *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500 and reaffirmed what his Honour had said in *470 St Kilda*.

See also the discussion at [SOP13.140] below.

For a discussion on the question as to whether or not a premature payment claim in Victoria is void, and for a note of the differences between s 13(1) of the New South Wales Act and s 14(1) of the Victorian Act, see [SOP13.110] above.

[SOP13.140] Western Australia — *"... payment claims ..."*

The time limit for the making of a payment claim in Western Australia under s 26 of the Western Australian Act is 28 days after the dispute arose. E M Heenan J at [50] of *Re David Scott Ellis; Ex Parte Triple M Mechanical Services Pty Ltd (No 2)* [2013] WASC 161, after having referred to the judgment of McKechnie J in *DPD Pty Ltd v McHenry* [2012] WASC 140 and that of Southwood J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1; [2011] NTCA 1, held that the condition of applying for an adjudication within the statutory time limit under the relevant legislation constituted an essential precondition to the adjudicator's jurisdiction to determine the application on the merits.

Under s 6(a) of the Western Australian Act, it is provided that a payment dispute arises when a payment claim is wholly or partly disputed: *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 at [130] – [155]; *NRW Pty Ltd as Trustee for NRW Trust v Samsung C & T Corporation* [2015] WASC 369 at [39], per Mitchell J.

It is to be noted that in Western Australia the draftsperson of a construction contract should make careful provision for progress payments, unless the parties wish to adopt the provisions of Sch 1, Div 3. Clause 4(1) of Sch 1, Div 3 provides that a claim by a contractor for a progress payment can be made at any time after the contractor has performed any of its obligations. This provision in Sch 1 is to be read with that which is provided in Div 2 that the contractor is entitled to be paid a reasonable amount for performing its obligations whether or not all of its obligations are performed.

Section 16 of the Western Australian Act picks up the provisions of Sch 1, Div 4, which are implied in a construction contract where there is no provision as to how a party is to make a progress claim. The provisions of Sch 1, Div 4 are contained in cl 5(1)–(4) of that Schedule and are in substantially greater detail than any provision found in any other Act. Specific reference can be made to cl 5(2)(f) which states:

> A payment claim must –
>
> (f) in the case of a claim by the contractor – itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim.

It is therefore doubted whether the New South Wales decisions on the sufficiency of the detail in a payment claim would be valid in the Western Australian courts. Specific emphasis is placed on the far more vaguely drawn provisions of s 13(2) of the New South Wales Act claims.

In the explanatory memorandum to the Western Australian Act, the following *inter alia* is stated:

> In particular, it is based on enforcing the contract between the parties and does not introduce a separate, and possibly conflicting, statutory right to payment. The Act applies to contracts for the carrying out of construction work and related services. The Act also covers contracts for the provision of related professional services and the supply of goods and materials to the construction site.
>
> This legislation supports the privity of the contract between the parties. Where there is no written contract covering the basic payment provisions of the right to be paid, how

> to deal with variations, how to claim payment and how to dispute it, or the rate of interest on late payments, the Act provides for fair and effective terms to be implied into the contract.
>
> The Act also provides implied terms to deal with the contentious issues of ownership of unfixed goods or materials when a contractor becomes insolvent, and the status of retention moneys. This means the parties should have clear contractual payment rights and obligations so that misunderstanding and disputes are minimised.
>
> The Act provides a rapid adjudication process that operates in parallel to any other legal or contractual remedy. The rapid adjudication process allows an experienced and independent adjudicator to review the claim, and where satisfied that some payment is due, make a binding determination for money to be paid.

This statement in the explanatory memorandum coincides with the statement made by the responsible Minister in the second reading speech in respect of the Northern Territory Act, and for which see [801.05].

It follows that under the Western Australian Act, unlike the payment claim provision in the East Coast models, there is no right to make a payment claim otherwise in accordance with the contract.

Under s 15 of the Act, the terms contained in Sch 1 under the heading "Implied provisions" are implied in all construction contracts which do not have any provision in writing on that matter. In Sch 1, Div 3, cl 4(1)–(2), under the heading "When claims for progress payments can be made", the following is provided:

> (1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.
>
> (2) The making of a claim for a progress payment does not prevent the contractor from making any other claim for moneys payable to the contractor under or in connection with this contract.

See the discussion in regard to the Northern Territory mirror provision in [SOP13.170].

In regard to the question as to whether or not a payment claim must be *bona fide*, the State Administrative Tribunal of Western Australia in *GRC Group Pty Ltd and Kestell* [2015] WASAT 11, after an exhaustive consideration of the relevant authorities of Western Australia and the other States and Territories: viz *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235; *Beba Enterprises Pty Ltd v Elle Pty Ltd* [2014] WASC 141; *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304; *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd* [2014] NTSC 20; *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409; *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123; [2008] NTSC 42, said:

> [69] The Tribunal, although not bound to follow Southwood J, should give his decision significant weight. Vickery J in dealing with the observations of Ipp JA in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 and Santow JA in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409: at [33] of *470 St Kilda Road* stated:
>
> > However, the observations of Ipp and Santow JJA are a long way from authoritatively ruling, following reasoned analysis, that "good faith" was an essential requirement for a valid payment claim under the statute.
>
> [70] This Tribunal is of a similar view in respect of the comments of Southwood J in *Trans Australian Constructions*. While recognising that the Northern Territory legislation is more closely aligned to the Western Australian jurisdiction than that of the Eastern States, when one looks at the rationale behind the Act in providing for rapid resolution of payment disputes arising under construction contracts and the wording of the Act itself, there is an inherent logic in the reasoning of Vickery J in *470 St Kilda Road*.

> [71] The Tribunal prefers and adopts the reasoning and analysis of Vickery J and finds that the issue of whether a payment claim is bona fide is not a requirement of a valid payment claim under either the contract or the Act. Such an additional test of criteria should not be imposed as a threshold jurisdictional issue to be decided at the time of considering whether to dismiss an application pursuant to s 31(2)(a) without making a determination on its merits.

At [81] of *GRC Group*, the Tribunal's conclusion was:

> In the present case the adjudicator will have to satisfy himself whether in all the circumstances any further information or evidence is necessary to fairly decide the matter keeping in mind his powers under s 32(2) of the Act, as against the fact that applicants generally must anticipate arguments the respondent may raise and possible findings by the adjudicator.

See also the discussion at [SOP13.120].

[SOP13.150] Queensland — *"... payment claims ..."*

Section 17(1) of the Act prescribes who is entitled to make a payment claim, and under s 17(2), what a payment claim must contain.

Under s 17(3)(a), a payment claim may include a claim under s 33(3) for losses or expenses incurred as a result of the removal by the respondent from the contract of any part of the work or supply, or under s 17(3)(b), the release of retention moneys.

Section 17(4) of the Act deals with when a payment claim may be served, and states:

> (a) the period worked out under the construction contract; or
>
> (b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

Section 17(5) – (6) reads as follows:

> (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.
>
> (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

Under s 5 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld) (assented to 26/09/2014, with ss 1 and 2 of the Act commencing on the same day, and the remainder of the Act commencing by proclamation on 15/12/2014 (SLI 2014)), ss 17(4) to 17(6) of the Queensland Act were omitted and a new subsection (4) was inserted in its place. The new subsection (4) reads as follows:

> (4) A claimant cannot serve more than 1 payment claim for each reference date under the construction contract, but may include in any payment claim an amount that has been the subject of a previous payment claim.

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, s 115 has been inserted in the Queensland Act. In the main, it provides under that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

In Queensland legislation, "reference date" is defined in Sch 2 of the *Building and Construction Industry Payments Act 2004* (Qld) as follows:

> reference date, under a construction contract, means—
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
>
> (b) if the contract does not provide for the matter—

(i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and

(ii) the last day of each later named month.

One of the authorities in Queensland on this point is, and to which reference should be made, is the judgment of Margaret Wilson J in *Queensland v T & M Buckley Pty Ltd* [2012] QSC 265. For a discussion on this case, see [SOP8.100].

In *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] QCA 150, the Queensland Court of Appeal cited the judgment and the reasons of Bryson JA at [58] of his judgment in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142.

At [22] and [23] of *John Holland*, the Queensland Court of Appeal held:

> [22] Douglas J's observation in *Simcorp Developments & Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162 at [26] that the Act does not override contractual provisions must be understood as being subject to any application of s 99. That decision is otherwise not on point. His Honour's conclusions that the contractor's claim in that case should have been treated simply as a progress claim under the contract and not as a payment claim under the Act, and that the "issuing or deemed issuing of a progress certificate by the superintendent is a necessary pre-condition to the delivery of a payment claim under s 17 of the Act", turned upon the construction of quite different contractual provisions and the application of s 17.
>
> [23] The approach I have adopted is, I think, consistent with McDougall J's general observations in *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798 at 722 [NSWLR] [82] which are quoted in [14] of these reasons. That case also concerned a different point, namely, whether a contractual provision requiring notification of a claim within a specified time of the occurrence of the events giving rise to the claim was inconsistent with the right given by s 13(4) of the New South Wales Act to bring a payment claim within twelve months after cessation of the contractual work. McDougall J found that the contractual provision was not rendered void by s 34 of the New South Wales Act because the contractual provision did not say anything about the time when a payment claim might be made but instead limited the entitlement to work that might be comprised in a payment claim whenever it was made. The point in issue in this appeal was not considered in that decision.

White J, in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 (20 November 2009), referred to *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1; *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391 and *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, and concluded at [32]:

> Since Neumann has not succeeded in proving that payment claim 12 identified the construction work to which it related within the meaning of s 17 of the Payments Act, Neumann's application for judgment is dismissed.

Protectavale was cited with approval by Blow J in the *Supreme Court of Tasmania in Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd* [2013] TASSC 3.

White J, in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376, referred to substantial amounts of New South Wales authority in considering the sufficiency of a payment claim within the context of an application for judgment against the respondent pursuant to s 19(2)(a)(i) of the BCIPA.

After an analysis of the New South Wales cases, her Honour concluded at [32] that as Neumann had not succeeded in proving that the relevant payment claim identified the construction work to which it related within the meaning of s 17(1) of the Queensland Act, the summary judgment application had to be refused.

In *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 it was argued that the payment claim required good faith on the part of the claimant, and in that context, it was submitted that the claimant was required to act "honestly and fairly". Reliance was placed upon the observations of Ipp JA in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409. At [70] of *Neumann Contractors v Traspunt*, the Court of Appeal stated:

> Counsel for Traspunt argued that a claim which did not comply with s 17(2) could not take effect as a payment claim. "Good faith" in this context was said to require that the claimant act "honestly and fairly": cf *Rimar Pty Ltd v Pappas* [1986] HCA 9; (1988) 160 CLR 133]. In support of the argument that good faith was required, reliance was placed on the observation of Ipp JA in *Nepean Engineering Pty Ltd v Total Process Services (in liq.)* (2005) 64 NSWLR 462; [2005] NSWCA 409 at [76] that, "(p)rovided that a payment claim is made in good faith and purports to comply with [s 17(2)] of the Act, the merits of that claim, including the question whether the claim complies with [s 17(2)], is a matter for adjudication …".

The Court of Appeal, in *Neuman Contractors v Traspunt*, said at [71]–[74] and [78]:

> [71] In Bitannia, Basten JA, with whose reasons on the question of whether there existed an obligation to make a payment claim in good faith Hodgson JA agreed, pointed out that Ipp JA's observation was obiter. He referred also to the observation of Santow J in the same case; [Nepean] that:
>
> > … I should note at the outset that there was no suggestion that the payment claim was not made in good faith and in purported compliance with s 13(2) of the Act, both minimal requirements of the Act.
>
> Basten JA found that it was not a requirement of a valid payment claim that the claimant had an actual bona fide belief in the truth of the facts asserted.
>
> [72] There being no material differences in the wording of the relevant statutory provisions, this Court should follow the decision in Bitannia unless persuaded that it was plainly wrong. In my respectful opinion, Basten JA's relevant conclusions are not wrong, let alone plainly so. The importing into the Act of an implied obligation to make payment claims in good faith would detract materially from the simple robust mechanism provided by the Act to achieve a speedy interim resolution of payment claims to promote early recovery of progress claims. In keeping with the Act's purpose, s 17 sets out the requirements for a valid payment claim.
>
> [73] That the claim must be made bona fide is not included in those requirements and I have difficulty in seeing how it could be implied. The Act enables the respondent to a payment claim to serve a payment schedule and for the payment claim and payment schedule to go to adjudication. The adjudicator addresses and determines the merits of the parties' dispute as articulated in the payment claim and payment schedule. No enquiry into the claimant's bona fides is mentioned and it is difficult to see why a claimant's bona fides should be any more fundamental to a valid payment claim than a plaintiff's bona fides would be in relation to a valid writ, claim, or statement of claim.
>
> [74] In Bitannia, Basten JA, noted that, "… the beliefs or motivations of the plaintiff in proceedings have generally been treated as irrelevant, unless they reach the stage of an improper purpose" which would constitute an abuse of process. An abuse of process arises where proceedings are brought, not for the purpose of prosecuting them to a conclusion, but to use them as a means of obtaining some advantage for which they are not designed, or some collateral advantage beyond that offered by the law: *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at 526, 527. The "improper purpose" must be the predominant purpose: *Williams v Spautz* (supra) at 529.

…

[78] It is difficult to see how the application of the last mentioned approach to construction would require the implication of a duty of good faith on the part of a claimant under s 17. Apart from the considerations already discussed, the Act provides an opportunity for a respondent to deliver what are, in effect, grounds of defence addressing the merits of the claim and the dispute then goes to an adjudicator to make a determination on the merits. If the claim is soundly based the claimant should be entitled to an adjudication in its favour irrespective of the claimant's motives or purposes in bringing the claim. If the claimant is seen to be engaging in an abuse of process, which one would think would be exceedingly rare, the respondent has the normal remedies in that regard. The adjudicator's determination does not affect the right of the respondent to a payment claim to have the issues finally determined on the merits by a court and any moneys ordered by an adjudicator to be paid may be ordered by a court to be repaid: *Building and Construction Industry Payments Act 2004*, s 100.

The purported meaning and effect of Basten JA's judgment in *Bittania* is discussed in subparagraph (h) at [SOP13.100].

For a discussion in regard to the impact of the statutory provision that a payment claim must be served within 12 months after the construction work to which the claim related was carried out, see [SOP13.100] *(e)*.

Peter Lyons J, at [56]–[59] of *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] QSC 292, after citing much New South Wales authority, and also after reference to *T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd* [2010] QCA 381, which his Honour said was a leading judgment given by Philippides J, with whom Fraser and White JJA agreed, noted at [58] of *QCLNG* that Philippides J endorsed the approach taken in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409; and *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229.

At [59] of *QCLNG* his Honour cited, with approval, Philippides J's judgment at [38] of *Buckley*, where Philippides J said:

[38] ... The issue for determination was not whether the payment claim explained in every respect the means by which a particular claim item had been calculated, but whether the relevant construction work or related goods and services was sufficiently identified as explained above. That is, whether the payment claim reasonably identified the construction work to which it related such that the basis of the claim was reasonably comprehensible to the applicant.

For a discussion on the approach of the Queensland Courts to the construction of documents purporting to be payment claims, see [SOP13.100].

In *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279, Fryberg J held that, on a proper construction of s 17(2)(b) of the *Queensland Building Services Authority Act 1991* (Qld), there was no requirement that the payment claim correctly state the amount payable. In his Honour's view, it was sufficient to state the amount which the claimant claimed to be payable.

[SOP13.155] Time requirements for payment claims in Queensland – payment claims – time limits for submitting

Section 6 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld), (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), inserts a new s 17A into the Queensland Act. Section 17A provides for the time requirements for payment claims, and reads as follows:

17A Time requirements for payment claims

(1) This section applies if a claimant serves a payment claim on a respondent.

(2) Unless the payment claim relates to a final payment, the claim must be served within the later of —

(a) the period, if any, worked out under the relevant construction contract; or

(b) the period of 6 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(3) If the payment claim relates to a final payment, the claim must be served within the later of the following —

(a) the period, if any, worked out under the relevant construction contract;

(b) 28 days after the end of the last defects liability period, if any, worked out under the relevant construction contract;

(c) 6 months after the later of —

(i) completion of all construction work to be carried out under the relevant construction contract; or

(ii) complete supply of related goods and services to be supplied under the relevant construction contract.

(4) In this section —

defects liability period, for a construction contract, means the period, if any, worked out under the contract as being the period —

(a) starting on the day the construction work is completed or the related goods and services are supplied; and

(b) ending on the last day any omission or defect in the construction work or related goods or services may be rectified.

final payment means a progress payment that is the final payment for construction work carried out, or for related goods and services supplied, under a construction contract.

This section is a very troublesome one. There is no definition of the word "completion".

Was the word "completion" intended to refer to that state of the building when each and every substantial aspect thereof has been built in accordance with the plans and specifications? See *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 (12 June 2012) at [17], where the judgment of Barrett J (as he then was) was referred to with apparent approval in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2006] NSWSC 481, and to the decision of the Victorian Court of Appeal in *Morgan v S & S Constructions Pty Ltd* [1967] VR 149 at 154 [40], referred to with approval by the NSW Court of Appeal in *Owners Corporation Strata Plan 64757 v MJA Group Pty Ltd* [2011] NSWCA 236, viz that for the project building to be complete it is required that it be completed in accordance with the plans and specifications in all material respects.

It is to be noted that Under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

[SOP13.160] A premature payment claim in Queensland

In *FK Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2007] 1 Qd R 10 at [23], Lyons J reasons as follows:

> Progress claim 16, which was dated 20 June and submitted on 22 June, clearly sets out that it is for work done in June 2006. It is not a claim for work done before 28 May 2006, which could have been claimed on that date. Under the contract no claim could have been made for this work until 28 June 2006 and it has not been submitted that

> there was any agreement between the parties to change this date. It is clear then that claim for the progress payment is not made pursuant to the contract but is reliant on the statutory scheme.

It is respectfully submitted that Lyons J's judgment on this aspect is to be preferred to that of Vickery J in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183.

It will be noted that the is in the same form as the on this point: see the discussion in [SOP13.110].

[SOP13.165] *Subcontractors' Charges Act 1974* (Qld)

Under s 10(1)(a), where the relevant notice under the *Subcontractors' Charges Act 1974* (Qld) and the payment claim under the *Building and Construction Industry Payments Act 2004* (Qld) are in existence at the same time a payment claim is issued, an adjudication application is not permitted: see [24] of the judgment of Boddice J in *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 223.

[SOP13.168] *"… construction work is completed …"*

The phrase "construction work is completed", or similar phrases, has been the subject of many New South Wales decisions: *Owners Strata Plan 62930 v Kell and Rigby Holdings Pty Ltd* [2010] NSWSC 612; *Owners Corporation Strata Plan 64747 v MJA Group Pty Ltd* [2011] NSWCA 236 among them.

An instructive decision is that of the Full Court of Victoria in *Morgan v S & S Constructions Pty Ltd* [1967] VR 149. An extract of that judgment is set out below for the sake of ease of reference:

> Prima facie, one would have thought that the work to be done under a contract was "completed" when everything required to be done had been done in accordance with the contract, both in respect of manner and materials. But when the subject-matter is the erection of a house, it is reasonable to think that if the building owner had gone into occupation, it would not be open to him thereafter to rely on the fact that there had been latent or unobserved departures from the contract to justify a contention that he had gone into occupation of a house which was not "completed", at all events when relief against such departures was open to him through a "maintenance clause". On the other hand, it would seem equally reasonable to think that, if, before the owner went into occupation, he was able to point out obvious departures from the contract, which were not merely trivial, he could not be required by the contractor to accept occupation of the house as "completed", on the ground that it was thereafter open to him to give notice to have them remedied under a "maintenance clause". The proper view would appear to be that, until the work to be done under the contract had been carried out in accordance with the contract, both in respect of manner and materials (except for departures from the contract which were either latent or undiscovered or merely trivial), it would not be "completed".

This judgment appears to have been referred to with approval in *Owners Corporation Strata Plan 64747 v MJA Group Pty Ltd* [2011] NSWCA 236 above. It is submitted that the phrase "construction work is completed" falls to be interpreted as it was in *Morgan v S & S Constructions Pty Ltd* [1967] VR 149.

[SOP13.170] Northern Territory — *"... payment claims ..."*

The formalities for making a payment claim in the Northern Territory are set by s 19 of its Act which, in turn, picks up Div 4 of the Schedule as an implied term in a construction contract, but does not have a written provision about how a party must make a payment claim. Division 4, cl 5(1)(f) and (g) are of significance, and read as follows:

> A payment claim under this contract must —
>
> …

(f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;

(g) for a claim by the principal – describe the basis for the claim in sufficient details for the contractor to assess the claim.

Had there been similar provisions in the New South Wales Act, a lot of litigation in the New South Wales courts would have been obviated.

In *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123; [2008] NTSC 42, Southwood J had occasion to refer to the essential requirements of a valid payment claim. Southwood J said:

> [67] In my opinion the essential requirements of a valid payment claim are as follows:
>
> (1) The payment claim must be made pursuant to a construction contract and not some other contract;
>
> (2) The payment claim must be in writing;
>
> (3) The payment claim must be a bona fide claim and not a fraudulent claim;
>
> (4) The payment claim must state the amount claimed;
>
> (5) The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.
>
> The above requirements of a valid payment claim are consistent with the definition of payment claim in the Act. They are also consistent with the basic requirements of procedural fairness. Section 28(2) of the Act and r 6 of the *Construction Contracts (Security of Payments) Regulations* contain little particularity about the necessary details of an application for adjudication. However, s 28(2)(b)(ii) does require the relevant payment claim to be attached to the application for adjudication.

Trans Australian Constructions above was referred to by Mildren J in *GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd* [2010] NTSC 34.

In *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1; [2011] NTCA 1, Southwood J said at [55] that the combined effect of s 33(1)(a)(ii) and s 28(1)(a) and (b) of the Northern Territory Act was to confer a right to adjudication which would endure for 90 days after a payment dispute arose.

Southwood J held at [56]:

> The right to apply for adjudication of a payment dispute is subject to a condition namely that the right be exercised with 90 days of the payment dispute arising. The condition is part of the statutory right to adjudication that is conferred by the Act. The right to apply for adjudication, being a conditional right, is lost when the condition is not satisfied. The right, having been lost, cannot be revived or retriggered by the making of another payment claim for the same amount for the same construction work. The filing of a repeat payment claim comprised of claims for the identical amounts for the identical work cannot operate to revive a right which the Act Parliament has terminated or destroyed. The condition created by s 28(1)(a) and (b) of the Act was part of the right conferred by s 27 of the Act, and the right to apply to for adjudication, being a conditional right, was lost when the condition was not satisfied.

However, Kelly J differed in the result by considering the actual contract under consideration. Ollson AJ also differed and said at [260]:

> Whilst I respectfully accept that the manner in which s 8 sets out to define what constitutes a payment dispute does not make any provision for the re-triggering, by a repeat payment claim, of a payment dispute in respect of a payment claim that had been made earlier, as to which the 90 day limit has expired, nevertheless, it does not prohibit such a practical situation arising if such a situation is expressly stipulated for by the relevant construction contract.

This case was referred to by McKechnie J in *DPD Pty Ltd v McHenry* [2012] WASC 140 and his Honour concluded as follows:

> [53] The words of the CCA s 6(a) are unambiguous. A payment dispute arises if by the time the amount claimed is due to be paid the amount has not been paid in full. The amount must be paid within 28 days after a payment claim. Any right to adjudication arise solely from statute, and in consequence must be so governed. Time limits are imposed in many sections of the CCA and in the schedules. The clear aim is to have matters determined quickly. This is not solely for the benefit of the parties but for the wider community in keeping the flow of money going especially when subcontractors and others are involved.
>
> [54] Consequently, the right to adjudication given by statute lapses if not exercised within the time limits. Taking the most beneficial view of the facts, the right to adjudication by DPD in respect of payment claims that had been submitted previously was lost by mid July 2011. Once lost, any attempt to revive it in November 2011 was doomed.

For a consideration of the question as to whether or not a payment claim in the Northern Territory must be *bona fide*, see the detailed discussions on the same issue in Victoria at [SOP13.120] and in Western Australia at [SOP13.140] and above.

There is no requirement for a threshold decision as to whether or not a payment claim must be *bona fide*; that question may arise at the stage of the ultimate determination of the payment claim by the adjudicator.

[SOP13.180] South Australia — *"... payment claims ..."*

Section 13(2) of the Act states what a payment claim must contain.

Under s 13(3), the Act provides for what the claim amount may include. Under s 13(3)(b), the claimed amount may include a retention sum due for release.

Section 13(4)–(6) states:

> (4) A payment claim may be served only within —
>
> (a) the period determined by or in accordance with the terms of the construction contract; or
>
> (b) the period of 6 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),
>
> whichever is the later.
>
> (5) A claimant cannot serve more than 1 payment claim in respect of each reference date under the construction contract.
>
> (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

[SOP13.190] Tasmania — *"... payment claims ..."*

Section 17(1)–(6) of the Act deals with payment claims. These provisions are in similar terms to the New South Wales model.

[SOP13.200] Australian Capital Territory — *"... payment claims ..."*

Section 15(1)–(6) of the Act deals with payment claims. Section 15 is also in similar terms to the New South Wales model.

[SOP13.210] Retrospective application of definitions inserted by the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW)

Under Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), the amendments contained in the amending Act do not apply to a construction contract entered into before the commencement of the amending Act on 21 April 2014.

However, under Sch 2 Savings and transitional provisions, cl 1(1) of the principal Act is omitted and instead thereof, the following is inserted:

> (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

The question then arises is whether or not under Sch 2, cl 1(1) above, any one of the definitions inserted by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) can be retrospective?

The answer is not at all clear as to what the legislature intended by the somewhat strange and obscure provision, and that can only add uncertainty and spawn litigation.

[SOP13.220] Need for simple reform in regard to payment claims

At [26] of *Facade Treatment Engineering v Brookfield Multiplex Constructions Pty Ltd* [2015] VSC 41, Vickery J said:

> [T]he Victorian Building Authority established under the *Building Act 1993*, although it is charged with the responsibility under s 47A(a) of the BCISP Act to "keep under regular review the administration and effectiveness of this Act and the regulations", has not taken the step of prescribing any forms either for use in making payment claims under s 14(2[)(a) and (b) or for use in providing payment schedules under s 15(2)(d) and (e). Had there been such a prescribed form in existence, no doubt the present issue in the proceeding would not have arisen and the parties would have been saved the costs of litigating the matter. This situation has not escaped the earlier attention of this Court. In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 [139] (Gantley), the Court, after noting the absence of any prescribed form for the making of payment claims under s 14 of the BCISP Act, and noting the initiatives of the Victorian Civil Contractors Federation and the New Zealand Subcontractors Federation Inc in developing payment claim forms for use under the security of payment legislation (Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106*Gantley* [133]–[139]), said:
>
> > If one or other or a combination of these forms, or an appropriate adaptation thereof, had been used by the claimant in this case, it may well have averted the cost, expense and delay associated with the prosecution of Ground 1 and the claimant's exposure to the allegation of invalidity of its payment claims and the subsequent adjudications upon them, at least on this ground.

At [151] of *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500, Vickery J, after having reaffirmed what he said in *Façade*, went on to say:

> The Victorian Building Authority is established under the Building Act 1993 (Vic). Amongst other things, it is charged with the responsibility under s 47A(a) of the Act to "keep under regular review the administration and effectiveness of this Act and the regulations." Cases such as the present amply justify a review of the present position, where, although power is provided by the Act for prescribing standard forms for payment claims and payment schedules, none have thus far been provided. The result is that the existence or otherwise of a valid payment claim or payment schedule is an issue which commonly arises to be resolved by litigation. This situation presents as an opportunity to improve the effectiveness of the Act by eliminating or at least reducing

such legal issues, thereby reducing the legal costs to which claimants and respondents in the building industry are exposed. It would appear that these opportunities have not been fully explored.

14 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

SECTION 14 COMMENTARY

[SOP14.50] *"… the amount of the payment (if any) …"*

In *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay* [2004] NSWSC 1232 (9 December 2004), McDougall J resolved the question as to whether or not "nothing" or "nil" or "zero" is "an amount" for the purpose of s 14(2)(b). His Honour said:

> [15] There is a question as to whether "nothing" or "nil" or "zero" is "an amount" for the purposes of s 14(2)(b). In the context of the Act, and regardless of mathematical and philosophical considerations, I think that it is. That is because a respondent who

> proposes to pay nothing is clearly proposing to pay less than the claimed amount. In those circumstances, as s 14(3) makes clear, the claimant should know why. For example, the claimant would need to decide whether to take the next step, of seeking adjudication. It seems to me that a practical, rather than a mathematical or philosophical, approach is required. A practical approach would include within "the amount" the concept of a nil payment. Some support for this is, I think, obtained from the words "(if any)" that followed the word "amount" in s 14(2)(b).
>
> [16] Further, the alternative view would mean that where a respondent proposed to pay nothing, a valid payment schedule need only identify the payment claim to which it relates (s 14(2)(a)). It need not, on the alternative view, say anything more: an obvious absurdity. I do not think that the legislature intended that a respondent who proposed to pay nothing need comply only with s 14(2)(a).

In *Veolia Waters Solutions v Kruger Engineering* [2007] NSWSC 46 (19 January 2007), at [8], McDougall J made a timely observation as to the structure of the material provided to an adjudicator. His Honour said:

> Before I turn to the issues, I wish to put on record the problems with which the parties presented the Adjudicator. She was given material that, before me, occupied six lever arch folders – in excess of 1,800 pages in all. The material, in particular that emanating from Veolia, was tendentious, repetitive and unfocused. It does not appear that any effort was made to isolate and define the real issues, and to direct the Adjudicator to the relevant parts of the documentation bearing on each issue. Instead, she was left to deal with this unstructured mass of material, with a maximum (subject to extension by consent) of ten business days to produce her determination. The Adjudicator commented adversely on this in [14] of her determination. She then said in [15]:
>
> > To ensure that all the respondent's reasons for withholding payment are addressed, much of the repetition found in the payment schedule is, unfortunately, reproduced below. The paragraphs referred to are the paragraphs of the payment schedule.

At [53] of his judgment, his Honour said that he did not think Veolia should be able to gain any advantage by the confusion created "by its tendentious, repetitive and unfocused approach to the task of setting out its position in the payment schedule".

[SOP14.60] *"… payment schedule …"*

In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003), Palmer J held, at [76], that it was not necessary that a payment schedule should mirror precise and particularised pleadings in the Supreme Court. His Honour pointed out that, in most cases, payment schedules are exchanged between parties experienced in the building industry and who have a history of familiarity with a particular contract, and the disputes or differences which have arisen. His Honour noted the necessity to draft payment schedules, in a short space of time, and that, in many instances, they were "in an abbreviated form which will be meaningless to the uninformed reader [but which] will be understood by the parties themselves". His Honour cautioned, however, that there was a need for "precision and particularity … to a degree reasonably sufficient to apprise the parties of the real issues in the dispute".

In *Multiplex* at [77]–[78], Palmer J said that "[a] respondent to a claim cannot always content itself with cryptic or vague statements … as to his reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised".

Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

Multiplex v Luikens was also referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v Luikens* was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

See also Einstein J's observations in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 in regard to the sufficiency of a payment claim and payment schedule.

In *Baulderstone Hornibrook Pty Ltd v Queensland Investment Corp* [2006] NSWSC 522, the payment schedule was signed by the principal's solicitor. That fact led to the major attack by Baulderstone Hornibrook on its validity.

In [36], Einstein J, in rejecting this contention, held that:

> The following matters are trite:
>
> (i) There are no requirements in s 14 of the Act that in order for a document to be a "payment schedule" it must be signed in a particular manner or by a particular person.
>
> (ii) Indeed, there are no requirements that the payment schedule be signed at all.
>
> (iii) The only relevant requirement is that the payment schedule be provided by the respondent [being the person on whom the payment claim has been served] to the claimant (s 14(1)).
>
> (iv) The question as to whether the payment schedule has been provided to the claimant by the respondent is a question of fact.
>
> (v) That question of fact is answered in the affirmative on the evidence before the court.

Baulderstone Hornibrook Pty Ltd v Queensland Investment Corp [2006] NSWSC 522 has been upheld by the Court of Appeal in *Baulderstone Hornibrook Pty Ltd v Queensland Investment Corp* [2007] NSWCA 9.

In *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2007) 23 BCL 292; [2006] NSWCA 259, it was held per Hodgson JA, with whom Handley JA and Hunt JA agreed, that the onus of proof to establish that the payment schedule with which a claimant in an adjudication is served, was not authorised by the respondent, rested on the claimant. This judgment was referred to with approval by Hammerschlag J in *Randhawa v Serrato* [2009] NSWSC 170 (20 February 2009). This holding was referred to by the Court of Appeal at [84] in the *Baulderstone Hornibrook Pty Ltd v Queensland Investment Corp* [2007] NSWCA 9.

In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems* [2008] NSWSC 858 at [34], Einstein J, after referring to the judgment of Palmer J in *Multiplex* above at [70], accepted that s 14(3) required reasons to be indicated in the payment schedule with some particularity and that it was insufficient for a payment schedule to incorporate reasons from some other document.

In *Perform* at [36], his Honour added:

> This is not a case where the Payment Schedule is made subject to the degree of close analysis reserved for pleadings [cf *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [76] per Palmer J] or Acts of Parliament [cf *Inten Constructions Pty Ltd v Refine Electrical Services Pty Ltd* [2006] NSWSC 1282 at [56] per McDougall J]. Instead this is a case where no reasons were given in the Payment Schedule but in a separate document.

At [43], his Honour explained:

> The scheme of the Act (sometimes described as "fast track") must be kept in mind: cf *Procorp Civil Pty Ltd v Napoli Excavations and Contracting Pty Ltd* [2006] NSWSC 358 [at 14]. It is particularly important to recall that an approach which would permit a party, by the so-called "incorporation route", to purport to include into the payment schedule, all manner of previous documents claimed to have passed between the parties, could lead to mayhem where time is of the essence in relation to the critical significance of the steps to be taken by the respective parties under the Act.

Einstein J went on to reiterate, at [44], that even if the adjudicator had erred in holding, as he did, that the payment schedule in its attempt at incorporation by reference failed to comply with the provisions of s 14(3), such an error did not render the determination a nullity. The determination of the validity of a payment schedule, so his Honour held, was a matter for the adjudicator.

Einstein J's judgment at first instance in *Perform* was confirmed on appeal in *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157, but Giles JA, with whom McColl JA and Young JA concurred, did not agree with Einstein J's observations, which the Court of Appeal considered were obiter.

At [47], Giles JA referred to the remarks of Davies AJA (Handley and Stein JJA agreeing) in *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20], that s 13 should not be approached in an unduly technical manner and:

> … The terms used by subs (2) of s 13 are well understood words of the English language. They should be given their normal and natural meaning. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner.

At [48] of *Perform*, Giles JA said:

> So in *Multiplex Constructions Pty Ltd v Luikens*brief reference to prior correspondence could suffice, and in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229* at [42] Basten JA said of "identify" in s 13(2) that, on a purposive construction, a payment claim must be accompanied by such supporting documentation as makes it reasonably comprehensible to the other party "unless it has already been provided".

At [49], his Honour said "[t]he same approach should be taken to s 14(3)" and that "indicate" was an ordinary word, to be applied in a common sense practical manner, and often where the parties to the payment claim and payment schedule would have debated a claim to payment in prior correspondence. Giles J said that it should not be overlooked that a payment claim should be intelligible, not only to the recipient, but to the adjudicator as well.

Giles JA referred to what Mason P said at [30] of *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391, the joinder of issue achieved through the payment claim and the payment schedule "sets the parameters for the matters that may be contested if an adjudication under the Act ensues (cf s 20(2A) and (2B))". Giles JA stressed however that it set the parameters between the parties and that "primary regard should be had to the parties' communications."

Giles JA's observations at [50], [52] and [53] of *Perform* are important, where his Honour said:

> [50] In my opinion, indication within s 14(3) does not exclude what the adjudicator described as incorporation by reference of material extrinsic to the payment schedule. The adjudicator appears to have thought that provision involving physical receipt meant that regard could not be had to anything not physically received with the payment schedule. That can not be so. As a simple illustration, a payment schedule will commonly refer to provisions of the construction contract; it would make no sense that the construction contract, or the relevant provisions, had to be set out in full or attached although known to the parties and the basis for their relationship. It would equally be neither common sense nor a practical application of s 14(3) to deny indication by reference to correspondence in which reasons have been fully set out simply because a copy of the correspondence is not physically attached to or provided with the payment schedule.
>
> [51] The adjudicator appears to have thought that provision involving physical receipt meant that regard could not be had to anything not physically received with the

payment schedule. That can not be so. As a simple illustration, a payment schedule will commonly refer to provisions of the construction contract; it would make no sense that the construction contract, or the relevant provisions, had to be set out in full or attached although known to the parties and the basis for their relationship. It would equally be neither common sense nor a practical application of s 14(3) to deny indication by reference to correspondence in which reasons have been fully set out simply because a copy of the correspondence is not physically attached to or provided with the payment schedule.

[52] It will be a question of fact whether, in the particular circumstances, reference to material extrinsic to the payment schedule is an indication of reasons. Reference to a memorandum internal to the provider of the payment schedule could not indicate reasons for the purposes of s 14(3); reference to a conversation, without giving its substance, is unlikely to do so; reference to a long-past letter not readily to hand might not do so; but there is no reason why reference to a recent and specific letter received by the recipient of the payment schedule should not do so. The recipient is thereby informed, and can decide whether or not to pursue the claim and understand the case it will have to meet in an adjudication, and being informed in that way is well within the meaning of "indicate".

[53] In *Pacific General Securities Ltd v Soliman and Sons Pty Ltd* [2006] NSWSC 13; (2006) 196 FLR 388 at [71] Brereton J was "inclined to accept, without deciding, that a payment schedule may 'sufficiently indicate' reasons for withholding payment by reference to reasons previously advanced in an earlier payment schedule, if appropriately worded". His Honour's inclination was correct, as was his observation that it was not sufficient to incorporate reasons advanced in previous payment schedules, adjudication responses or otherwise so that the claimant could not know whether all or any and if so which of the grounds previously advanced were now relied on. In the present case, in my opinion the March payment schedule indicated as reasons for the $nil being less than the claimed amount and for withholding payment the reasons in the February payment schedule, in substance, the claimed backcharges, at the least as in relation to the $209,968.68 if not as to the entirety of the claimed amount.

In *J & Q Investments Pty Ltd v ZS Constructions (NSW) Pty Ltd* (2008) 24 BCL 401; [2008] NSWSC 838 at 421 (BCL); McDougall J followed *Multiplex Constructions Pty Ltd* at [76] in holding that a payment schedule need only contain adequate details for the parties' own purposes in framing the claim and that it need not be adequate for a stranger to the contract.

Multiplex v Luikens was referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v Luikens* was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

[SOP14.70] *"… by providing …"*

In *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903 at [38], Einstein J said that service in accordance with the Act "is critical as it governs the commencement of the time limitations following such service".

His Honour continued at [59]:

In my view the character of the subject legislation is such that general principles of actual or ostensible authority in solicitors to receive service of copies of relevant notices must yield to the strictures of the strict requirement to prove service. The service provisions of the Act require to be complied with in terms. Prudence dictates that those responsible for complying with the service provisions take steps to be in a position to strictly prove service in the usual way. One only example of the difficulties which may arise is where a solicitor who may have been instructed to act in relation to

> an adjudication application has his/her instructions withdrawn. There are no provisions similar to those to be found in the Supreme Court Rules 1970 for notices of ceasing to act and the like. The Act here under consideration simply proceeds by requiring particular steps to be taken by the parties and by the adjudicator and proof of strict compliance with the Act is necessary for the achievement of the quick and efficient recovery of progress payments and resolution of disputes in that regard.

In *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2007) 23 BCL 292; [2006] NSWCA 259, it was held that s 109X of the *Corporations Act 2001* (Cth) dealing with the service of documents on corporations, applied to the word "provide" in s 14 of the Act. This judgment was referred to with approval by Hammerschlag J in *Randhawa v Serrato* [2009] NSWSC 170 (20 February 2009). Where a payment schedule was posted, s 29 of the *Acts Interpretation Act 1901* (Cth) gives a rebuttable presumption which would have effect as to the time when a payment schedule was "provided" under s 14. This presumption would be displaced if it is proved when the payment schedule actually arrived at the head office to which it was addressed.

In *Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd* [2006] VSC 425 (10 November 2006), Habersberger J considered the question as to whether or not service of a payment claim on the agent of the Principal satisfied the requirements of s 15 of the Victorian Act, the equivalent of s 14. His Honour dealt with the submissions on this point at [43]–[45] as follows:

> [43] Mr Delaney also referred me to the decision of Einstein J in *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903. In that case, the question was whether there had been proper service under the NSW Act of an adjudication application. That document had been served on a firm of solicitors acting for Emag Constructions Pty Ltd ("Emag"). His Honour found as a fact that the solicitor had stated that his firm had no instructions to accept service. Further, his Honour held that "there was neither actual authority in the plaintiff's solicitors to receive a copy of the adjudication application nor ostensible authority in that regard". Those findings were sufficient to resolve the dispute.
>
> [44] However, his Honour then went on to say by way of obiter dictum that:
>
> > In my view the character of the subject legislation is such that the general principles of actual or ostensible authority in solicitors to receive service of copies of relevant notices must yield to the strictures of the strict requirement to prove service. The service provisions of the Act require to be complied with in terms.
>
> [45] The rationale of his Honour's approach is to be found in an earlier passage in his judgment, where he said:
>
> > Service being effected in accordance with the Act is critical as it governs the commencement of the time limitations following such service. The consequence of non-compliance with the time limitation periods is harsh. As was submitted to the court by counsel for the plaintiff, the Act exhibits "zero tolerance" for delay. To borrow a phrase from the world of contract, and in particular conveyancing, in a real sense *time is of the essence*.
>
> Reading these two passages together would suggest to me that his Honour was of the view that service on the solicitors would not have been in compliance with the Act even where they had actual authority to receive service of notices. Strict compliance with the Act was required. Thus, his Honour stated in *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 at [49]:
>
> > In my view it is simply critical for a rigid approach to be taken to compliance with the terms of the Act, particularly for the reason that the legislation provides for a fast dual-track interim determination, reserving the parties' final legal entitlements for subsequent determination.

In *Randhawa v Serrato* [2009] NSWSC 170, it was submitted that the adjudicator's determination was invalid because receipt of the notice of the adjudicator's acceptance had

not been received. It was established that the notice was posted and it was accepted that the notice did not come to the attention of the plaintiff, the respondent in the adjudication application.

Hammerschlag J drew a distinction between non-delivery, and not coming to the attention of the recipient. His Honour held that the claimant in an adjudication had the benefit of a presumption of delivery, which the respondent in the adjudication application did not rebut by showing non-receipt, as opposed to mere non-delivery.

In the premises, his Honour held that the adjudication determination was valid. He held:

> [17] The authorities make it clear that delivery of post to a particular place and receipt of the item by the intended recipient are two different things, and that if delivery is not disproved the fact of non-receipt does not displace the result that the delivery is deemed to be effected at the time at which it would have taken place in the ordinary course of the post; see *Fancourt v Mercantile Credits* [1983] HCA 25; (1983) 154 CLR 87 at 97; *Tsoukatos v Mustafa* [2007] NSWSC 614.
>
> [18] The fact that the evidence from the Post Office does not establish actual delivery to the relevant address does not detract from the efficacy of the presumption that it occurred.

See further the discussion on the "sufficiency" of service of notices in [SOP31.50].

[SOP14.80] *"… within the time required by a relevant construction contract …"*

(a) Generally

Section 14(2)(b)(ii) was considered by Giles JA, with whom Tobias JA and Handley AJA concurred, in *Thiess Pty Ltd v Lane Cove Tunnel Nominee Co Pty Ltd* [2009] NSWCA 53 (20 March 2009).

At [33], Giles JA said that the phrase "whichever time expires earlier" in s 14(4)(b) might be considered as meaning that s 14(4) assumed that there would always be two times, one a time required by the construction contract s 14(4)(b)(i), and the other referred to in s 14(4)(b)(ii), and that the only question was which of the times expired earlier. His Honour explained that this was not necessarily so, and s 14(4)(b) must operate in the event that the construction contract makes no reference to a time for the provision of a statutory payment schedule. In such a case, the 10 business day period may be a default period, but that is as a consequence of the construction of the contract. His Honour added that neither a notion of primacy of 10 business days nor the notion of a default period was of assistance in the construction of the contract.

At [34], Giles JA went on to say that the task is first to determine what time, if any, was required by the construction contract for the provision of a statutory payment schedule, and then to see whether that time had expired earlier than 10 business days (as defined in the Act) after the payment claim was served.

(b) "… if the scheduled amount is less than the claimed amount …"

Section 14(3) has two concepts, namely, where the "scheduled amount is less than the claimed amount" and "where the respondent is withholding payment for any reason". In respect of the first concept the schedule is to indicate why the scheduled amount is less and in respect of the second concept it is to indicate the respondent's reasons for withholding payment. Section 20(2B) refers only to one of these concepts, viz "reasons for withholding payment". It is arguable therefore that where the scheduled amount is less than the amount claimed, the limiting provisions of s 20(2B) do not apply.

(c) "… indicate … the respondent's reasons for withholding payment …"

In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003), Palmer J, at [78], considered the employment of the word "indicate" in the above sub-section. His Honour said that this word "conveys an impression that some want of

precision and particularity is permissible as long as the essence of 'the reason' for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication". In *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay* [2004] NSWSC 716 (13 August 2004) McDougall J referred to *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 with approval. McDougall J, in *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay* [2004] NSWSC 1232 (9 December 2004) again referred to [78] of *Multiplex*, where he added further gloss to his earlier judgment.

In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, Palmer J, at [68] gave the phrase "reasons for withholding payment" a wide meaning and said that this included matters going to the construction of the relevant contract as well as those relating to the quantum of the alleged payment. His Honour said "[i]f the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s 14(3) requires that that reason be indicated in the payment schedule and s 20(2B) prevents the respondent from relying in its adjudication response on any reason not indicated in the payment schedule in accordance with s 14(3)".

At [69]–[70] his Honour held however that a response "rejected" did not constitute a response under this section. His Honour said:

> [69] A subsidiary argument which Mr Rudge appeared to advance in his oral submissions was that Multiplex had given a sufficient reason in its Payment Schedule for withholding payment of the claim in respect of Item 8 simply by stating that the claim was "rejected"; Multiplex had thereby complied with the requirements of s 14(3) and was permitted to amplify that reason in its Adjudication Response by giving particulars of valuations and calculations on the basis of which the claim had been rejected.
>
> [70] I am unable to accept this submission. For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is "withheld": the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.

Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

Multiplex v Luikens was also referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v Luikens* was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

In *Lucas Stuart Pty Ltd v Sydney City Council* [2005] NSWSC 840 (23 August 2005), Einstein J, at [21] said:

> [T]he court may comfortably be satisfied that … the council has become "liable to pay the claimed amount to the claimant under s 14(4) *as a consequence* of having failed to provide a payment schedule to the claimant within the time allowed by that section", within the meaning of these words as found in s 15(1)(a). The critical words are "has become liable to pay the claimed amount to the claimant under s 14(4)". These words create what may be described as a strictly mechanical scheme. Whilst ever the environment concerns the engagement of the fast track interim provisions of the Act [as opposed to the parties retained curial rights to have a final determination of their dispute on a later occasion] there is simply no room for moving outside of this scheme

> … the council can be seen by its stance in the instant proceedings to seek to move outside this strictly mechanical scheme. The Act permits no such thing.

McDougall J, at p 11 of his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004), comments thus:

> Of course, this last point works both ways. If the respondent does not state its case with the requisite degree of precision and particularity, it may not be able to rely on the issue in its adjudication response (s 20(2B)). If the issue has not been adequately raised in its payment schedule, then it cannot complain if the adjudicator does not consider it: s 20(2B), s 22(2d). Nor could it rely upon it in any proceedings to set aside a judgment entered under s 25(1) upon the filing of an adjudication certificate in a court of competent jurisdiction: s 25(4)(a)(ii), (iii).

Whether a payment schedule does properly "indicate why the scheduled amount is less and … the respondent's reasons for withholding payment" is a question of fact: *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [79]–[80].

Multiplex v Luikens was referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v Luikens* was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

In *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388; [2006] NSWSC 13 (31 January 2006). Brereton J, at [71], rejected the submission that a statement in the payment schedule to the effect that the respondent "again" refuted all the claims, was not a good reason or ground for withholding payment, but simply a statement of position. His Honour said such a statement "… simply restates a consistent position of refusal to pay, without indicating reasons for that refusal".

In *J & Q Investments Pty Ltd v ZS Constructions (NSW) Pty Ltd* (2008) 24 BCL 401; [2008] NSWSC 838 at 421 (BCL), McDougall J followed *Multiplex Constructions Pty Ltd* at [76] in holding that a payment schedule need only contain adequate details for the parties' own purposes in framing the claim and that it need not be adequate for a stranger to the contract.

In *Stuart v Hemmes Hermitage* [2009] NSWSC 477 at [42], McDougall said that the Act required the respondent to provide a written reply to the progress claim, so that the claimant could decide whether to accept the scheduled amount or proceed to adjudication.

An express challenge in a payment schedule and the reasons therefore to allegations in a payment claim may correctly be taken as an implied admission, by the adjudicator. Such a reasoning process was accepted by the Queensland Court of Appeal in *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495; [2008] QCA 213, referred to by Margaret Wilson J in *John Holland Pty Ltd v Walz Marine Services Pty Ltd* [2011] QSC 39 at [53].

Her Honour said at [54] of *John Holland*:

> Adjudication of a claim requires, as a minimum, determination of whether the construction work the subject of the claim has been performed and its value: *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 at [52] per Hodgson JA; *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300 at [22]–[23], [25] per Vickery J; *David Hurst Constructions Pty Ltd v Durham* [2008] NSWSC 318 at [69] – [74] per McDougall J. There may be room for argument about the extent of an adjudicator's function where there is no payment schedule: *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 at [50] – [53] per Hodgson JA, cf [64] – [68] per Basten JA. But where there is a payment schedule as well as a payment claim, the factual and legal issues for his adjudication are defined by those documents: ss 17, 18 and 24. If the validity of the claim depends on certain acts, the respondent's failure expressly to put those facts in

issue in the payment schedule may amount to an admission of them. In *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495; [2008] QCA 213, where the respondent contended in its payment schedule that a value of "nil" should be ascribed to the claim because certain deductions ought be made from the amount claimed, the adjudicator properly treated the payment schedule as impliedly admitting the claimant's valuation of the work.

(d) "… provide …"

Section 14(4)(b) employs the word "provide". Austin J, at [51] of *Firedam Civil Engineering Pty Ltd v KJP Construction Pty Ltd* [2007] NSWSC 1162, said:

> [51] Section 31 applies to any "notice" that by or under the Act is authorised or required to be "served" on a person. A payment schedule, like a payment claim, is a "notice" for the purposes of s 31 (*Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2007) 23 BCL 292; [2006] NSWCA 259 (BC200607427) at [59] per Hodgson JA, obiter). Although the Act uses the word "provide", rather than "serve" or "give" or "send", when speaking of a payment schedule, "provide" in the context of s 1 does not mean anything different from "serve", and consequently the section applies to "provision" of a payment schedule as well as to "service" (Falgat at [60]–[61] per Hodgson JA, obiter).

This judgment was referred to with approval by Hammerschlag J in *Randhawa v Serrato* [2009] NSWSC 170 (20 February 2009). At [52] of *Firedam* Austin J went on to hold that s 31 was generally applicable. His Honour noted that it was only s 31(3) that might arguably be relevant. Section 31(3), in turn, brought in s 109X of the *Corporations Act 2001* (Cth).

At [53] of *Firedam* his Honour said that as that the defendant was a company, s 109X of the *Corporations Act 2001* (Cth) and s 29 of the *Acts Interpretation Act 1901* (Cth) were relevant and their relevance was confirmed by s 31(3) of the Act.

His Honour went on to say at [53]:

> [53] According to s 109X(1)(a), a document may be served on a company by posting it to the company's registered office. The evidence establishes that the registered office of the first defendant, on 2 July 2007, was 222 Bronte Rd Waverley. The evidence also shows that the payment schedule was served on the first defendant at that address by postage on 2 July. Therefore service was effected under s 109X(1)(a).

[SOP14.90] *"… within the time — or 10 business days …"*

Davenport, in *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at pp 151–152, says:

> The significance of the issue is as follows. If a payment schedule that is served after the 10 days is not a payment schedule under Div 1, s 17(1), then before the claimant could make an adjudication application, the claimant would have to give the respondent the notice under s 17(2) giving the respondent five business days in which to serve a payment schedule. However, if the respondent has served a payment schedule, albeit out of time, then it seems anomalous to require the claimant to give the respondent another opportunity to provide a payment schedule. One view is that a payment schedule served out of time is nevertheless a payment schedule under Div 1. The consequence would be that where the respondent has served a payment schedule later than the time prescribed in s 14(4) and has not paid the full amount claimed by the due date for payment, the claimant can make an adjudication application under s 17(1), and the adjudicator can determine it immediately on accepting the adjudication application because the respondent is barred by s 20(2A) from making any adjudication response. In that circumstance it seems that under s 22(2)(d) the adjudicator can have regard to the payment schedule, even though it was served late, but cannot have regard to any submissions made to the adjudicator by the respondent as an adjudication response (s 20(2A)).

In the light of the analysis below, it is doubted if this statement can be correct. In *Amflo Constructions Pty Ltd v Jefferies* (2004) 20 BCL 452; [2003] NSWSC 856 Campbell J (as his Honour then was) held that a payment schedule served out of time was of no effect. But this judgment preceded that of the Court of Appeal in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004).

In the light of the decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, there can no longer be any residual doubt that the service of a payment schedule beyond the statutory time limits would be a nullity.

At [16] of *Thiess Pty Ltd v Lane Cove Tunnel Nominee Co Pty Ltd* (2008) 24 BCL 401; [2008] NSWSC 729, Hammerschlag J accepted as correct the agreement between counsel that there must be clear contextual support for an implication in the contract that the parties intended its provisions were to supplant the provisions of s 14(4)(b)(ii). This judgment was upheld on appeal, but for different reasons: see *Thiess Pty Ltd v Lane Cove Tunnel Nominee Co Pty Ltd* [2009] NSWCA 53 (20 March 2009).

[SOP14.100] Victoria — *"… payment schedule …"*

(Under the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 17 of the amendment Act provides for, *inter alia*, an amended s 15(2) of the principal Act as follows:

> (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
>
> (d) must be in the relevant prescribed form (if any); and
>
> (e) must contain the prescribed information (if any).

It remains to be seen whether the word "must" in each one of paras 15(2)(c)–(e) will be held to be pre-emptory by the Victorian courts and/or whether they will hold that substantial compliance is sufficient.

[SOP14.110] Western Australia — *"… responding to claim for payment …"*

Section 17 of the Western Australian Act picks up Sch 1, Div 5 of that Act where there is a detailed provision as to how a party is to respond to a claim for payment made by another party. Division 5 of Schedule 1 should be carefully considered when drafting and/or responding to a payment claim. Unlike all the other Acts in the other States, this provision is done by way of a statutorily implied term in the construction contract. Of significance, is the provision in cl 7(1) that a party who receives a payment claim must, within 14 days after its receipt, give the claimant a notice of dispute which must, under cl 7(2) of the Schedule, contain the matter and comply with the provisions of cl 7(2)(a)–(h). This provision goes much further than that which is required to be contained in a payment schedule under the New South Wales Act and, consequently, all of the New South Wales cases dealing with the sufficiency of the contents of a payment schedule, will probably be of no or little validity in the Western Australian courts.

The Western Australian Act does not use the phrase "payment schedule". Section 17 is entitled "Responding to claims for payment". That section, in turn, makes reference to Sch 1 Div 5 about when and how a party is to respond to a claim for payment. The provisions of Div 5 of Sch 1 are implied in a construction contract that does not have written provisions about the matter.

After referring to and analysing the judgments of Le Miere J in *Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2012) WASC 129; *Re Graham Anstee-Brook; Ex parte Karara Mining Ltd (No 2)* [2013] WASC 59, Gething C's judgment in *Witham v Raminea Pty Ltd* [2012] WADC 1 and E M Heenan J's own judgment in *Triple M Mechanical Services Pty Ltd v Ellis* [2013] WASC 67, his Honour at [46] of *Re David Scott Ellis; Ex Parte Triple M Mechanical Services Pty Ltd (No 2)* [2013] WASC 161

accepted the view that the adjudicator did not have a discretion to extend the time for a respondent to file its response, under s 27(1).

In *Blackadder Scaffolding Services (Australia) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133, the Tribunal examined the way in which Pt 2, Div 2 required the different provisions of Sch 1 to be implied, with a particular focus on s 17 and s 18 which were relevant to the facts of that case. Paragraphs [40] to [42] of *Blackadder* state:

> Part 2 Div 2 of the CC Act describes many circumstances in which different provisions in Sch 1 are to be implied into construction contracts, in each case limited to those contracts which do not have a written provision about a particular matter. So, for example, s 13 of the CC Act provides for the implication of terms dealing with variations of the contractor's obligations; s 15 of the CC Act deals with implication of terms concerning the contractor's ability to make a claim for a progress payment; and s 16 of the CC Act provides for implied terms about how a payment claim is made. Each of the stated examples requires that the entirety of the provisions in the relevant division of Sch 1 are to be implied in contracts which contain no written provision about the particular subject matter referred to expressly in the section.
>
> Both s 17 and s 18 of the CC Act employ a slightly different formula. They commence with '(t)he provisions in Sch 1 Div 5 about', followed by a particular subject matter encompassed in the provisions referred to, before finishing with a reference to the contract not having a written provision "about that matter". Some evaluation is therefore required of the contract under consideration so as to determine if it has written provisions about the "matter" to which the section refers, and if not, it is necessary to determine those provisions in Sch 1 Div 5 relating to the same"matter" which are to be implied.
>
> It is clear that it was Parliament's intention that the contract should itself stipulate *both* when a response to a payment claim is to be made, and how to respond, failing which the provisions in the schedule about "that matter" will be implied. An initial question arises as to the meaning of "respond". Dictionary definitions provide the two broad alternatives of "answer, give reply" on the one hand and "non-communicative return" on the other. In our view, the former alternative is applicable in the context of s 17 of the CC Act because of the nature of the implied provisions in cl 7 of Sch 1 of the CC Act, including the requirement for the giving of a detailed notice of dispute which includes the reasons for rejecting or disputing the claim.

At [14] of *Croker Construction (WA) Pty Ltd and Stonewest Pty Ltd* [2014] WASAT 19, the Senior Member said:

> In my view, s 16 requires a similar analysis and comparison to determine whether the contract contains a provision about how to make a claim to another party for payment. As discussed in Blackadder, s 16 differs in its wording from s 17 and s 18, with no reference to the formula "about that matter". The logical reason is that if the conditions of s 16 are not met, the whole of the implied provisions set out in Div 4 are implied, whereas in the case of s 17 and s 18, if the respective conditions or any one of them are not met, it is only the corresponding part of the implied provisions as set out in Div 5 which will be implied.

A draftsperson of a construction contract which falls under the Western Australian Act must obviously have knowledge of the provisions of Sch 1, Div 5 and be appreciative of the fact that unless the construction contract contains express provisions which differ from those, the provisions of the schedule will be implied.

The draftsperson must also be aware of the provisions of s 18 read with Sch 1, Div 5 about the time by when a payment must be made. The provisions of that division of Sch 1 are implied where there is no written provision about the matter. See the further discussion at [SOP14.130] in regard to the Northern Territory Act which substantially follows the same model as the Western Australian Act.

[SOP14.120] Queensland — *"… payment schedule …"*

Under the unamended legislation

Section 18(1)–(5) of the Act, concerned with payment schedules, substantially follows the thrust of the New South Wales model.

However, there are significant differences to be found in s 18(2)(b) and s 18(3).

Under s 14(2)(b) of the New South Wales Act, it is provided that the payment schedule "must indicate the amount of the payment (if any) that the respondent proposes to make".

The word indicate is also to be found in s 14(3) of the New South Wales Act, which provides that "if the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less…"

The requirement of a mere indication in the New South Wales Act is not to be found in the Queensland Act, which requires that the respondent "must state".

An injunction to state is, with submission, something more than a mere indication, and this deviation from the New South Wales model might well give rise to a submission in the Queensland Courts that a payment schedule which merely contains an indication of the amount which the respondent proposes to pay, and/or merely an indication of why the schedule amount is less than the claimed amount, may be invalid.

In regard to the manner in which the New South Wales Supreme Court has dealt with the phrase "to indicate", see [SOP14.80].

Lucas Stuart Pty Ltd v Sydney City Council [2005] NSWSC 840 was cited with approval by Mullins J in *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd* [2008] 1 Qd R 139; [2007] QSC 20 (13 February 2007).

The principles to be extracted from the observations of Chesterman J (as his Honour then was) in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333 of the decision of Fryberg J in *Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd* [2010] QSC 7 and the judgment of Douglas J at [8]–[9] of *Gisley Investments P/L v Williams* [2010] QSC 178, are as follows:

(a) If the payment schedule does not state the amount of the payment that the respondent proposes to make, that payment schedule is contrary to s 18(2)(b) of the Queensland Act and the adjudication process which follows is void.

(b) Where there is however a clear enough statement of the amount of any payment proposed to be made subject to certain conditions which are required to be fulfilled, despite the relative informality of the document purporting to be a payment schedule, it may nevertheless comply with s 18(2)(b) of the Queensland Act, and the adjudication process cannot then be said to be invalid.

In *Cant Contracting Pty Ltd v Casella* [2006] QSC 242, de Jersey CJ following, in this regard, *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 said at [12] of his Honour's judgment:

> The New South Wales Court of Appeal in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, dealt with the relevance, to the statutory right to recover the amount claimed as a debt, of the absence of the requisite builder's licence. The legislation was again comparable. In this case the respondent delivered a payment schedule in response to a payment claim, but omitted to raise as a ground for non-payment the fact that the builder was not licensed. The point was first raised on appeal. Hodgson JA said at [82]:
>
> > [T]he civil consequences for an unlicensed contractor for its breach of s 4 are those set out in s 10, and not any wider deprivation of remedies … this is confirmed by the different provisions of s 94… the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s 10 of the HBA (*Home Building Act 1989*).

Cant, however, was reversed generally on appeal, and for which see *Cant Contracting Pty Ltd v Casella* [2007] 2 Qd R 13; [2006] QCA 538 (15 December 2006). It is significant that, although New South Wales authority was referred to and, in particular, *Brodyn*, the Queensland Court of Appeal had an opportunity to say that they agreed with the *Brodyn* dicta, but did not do so, but went on to distinguish it. The fact that *Brodyn* was not enthusiastically embraced by the Queensland Court of Appeal provides a certain amount of hope that the Courts of Appeal of the other States and Territories will not follow it and endorse the draconian results which flow from it. Whether or not the Queensland Courts will still regard *Brodyn* as authority, *Brodyn* having, for all intents and purposes, not been followed in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, remains to be seen.

Where a Queensland contract is in conflict with s 55 of the *Domestic Building Contracts Act 2000* (Qld) and consequently unenforceable, similar considerations apply, see *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd* [2008] 1 Qd R 139; [2007] QSC 20 (13 February 2007). See also *On Hing Pty Ltd v Phoenix Project Development Pty Ltd* [2006] QDC 159 (8 June 2006).

See further, the decision of District Court Judge Alan Wilson SC in *Phoenix Project Development Pty Ltd v On Hing Pty Ltd* (2007) 27 Qld Lawyer Reps 213; [2006] QDC 75, where, at [10], his Honour referred to *Brodyn* to suggest that the legislature intended certain matters to be determined finally by the adjudicator and to preclude parties from raising separate or new triable issues subsequently. What of course Judge Alan Wilson SC did not consider, and obviously the point was not taken before him, was that this issue was just not entrusted by the Queensland or any of the other security of payment acts to the adjudicator to determine, see by way of comparison, *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [36], where the New South Wales Court of Appeal said:

> The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

At [45] of *South East Civil & Drainage Contractors Pty Ltd v AMGW Pty Ltd* [2013] 2 Qd R 189; [2013] QSC 45, Jackson J held:

> The conclusion to which I would come, uninstructed by authority, is that a respondent's failure to take the point of non-compliance with s 17(4) in a payment schedule does not authorise an adjudicator to ignore the point, where it is apparent on the face of the material which the adjudicator is obliged to consider under s 26(2).

(cf *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1; *GW Enterprises Pty Ltd v Xentex Industries Pty Ltd* [2006] QSC 399; *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119).

[SOP14.125] Queensland — *"… payment schedule …"* in the light of the amendments to the *Building and Construction Industry Payments Act 2004* (Qld) under ss 7 and 8 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld)

The Amendment Act, viz the *Building and Construction Industry Payments Amendment Act 2014* (Qld) was assented to on 26/09/2014.

Ss 1 and 2 of the Act commenced on the same day, and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014).

Under s 7 of the Amendment Act, ss 18(4) and (5) of the Queensland Act have been omitted.

Under s 8 of the Amendment Act, a new s 18A is inserted; that section states:

18A Time requirements for payment schedules

(1) This section applies if, in reply to a payment claim, the respondent serves a payment schedule on the claimant.

(2) The payment schedule, if it relates to a standard payment claim, must be served on the claimant within the earlier of —

(a) the time required, if any, by the relevant construction contract; or

(b) 10 business days after the payment claim is served.

(3) The payment schedule, if it relates to a complex payment claim, must be served on the claimant within the earlier of —

(a) the time required, if any, by the relevant construction contract; or

(b) whichever of the following applies —

(i) if the claim was served on the respondent 90 days or less after the reference date to which the claim relates - 15 business days after the claim is served;

(ii) if the claim was served on the respondent more than 90 days after the reference date to which the claim relates - 30 business days after the claim is served.

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, s 115 has been inserted in the Queensland Act. In the main, it provides under that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act. It is to be noted that those parties to a construction agreement who wish to get the benefit of extended time limits to respond to "complex payment claims" and the shutdown period over Christmas, must amend their contracts so that a clause to that effect is incorporated therein.

In regard to "reference date", see [SOP13.150].

[SOP14.127] *"… complex payment claim …"* – in the 2014 Queensland Amendment Act

The definition of the phrase "complex payment claim" is set out in s 45 of the Amendment Act. That section amends the definitions in Sch 2 (Dictionary). The Dictionary definition of "complex payment claim" means:

complex payment claim means a payment claim for any of the following —

(a) any payment for an amount more than $750,000 or, if a greater amount is prescribed by regulation, the amount prescribed;

(b) a latent condition under the relevant construction contract;

(c) a time-related cost under the relevant construction contract.

[SOP14.130] Northern Territory — *"… responding to payment claims …"*

Under Div 5 of the Schedule appended to the Northern Territory Act, detailed provisions similar to those in the Western Australia Act are set out, detailing the method of making and the contents of a response by way of a notice of dispute to a payment claim.

It is significant that, unlike the East Coast model, there is no provision for a payment schedule.

Under Div 5, 6(1)(b) of the Schedule, it is provided that a notice of dispute may be given by the party who believes that the claim should be rejected because it was not made in accordance with a contract, or if that party disputes the whole or part of the claim.

Under Div 5, 6(2) of the Schedule, such party must give the notice of dispute within 14 days after receiving the payment claim.

Div 5, 6(3), details what the notice of dispute must contain, and careful attention should be paid to that detail, but neither the Act nor the Schedule of implied provisions spells out the consequences to a respondent whose notice of dispute fails to address the criteria listed in Div 5, 6(3) of the Schedule.

A further question that arises is whether or not a failure to comply with the specific requirements for a response to a payment claim, precludes the adjudicator from considering the material and, whether or not, if the adjudicator excludes from his/her consideration material which does not comply with the provisions of the relevant schedules, and makes an adverse adjudication, this will ground a challenge to the adjudication determination.

A failure to comply with the relevant criteria required in a notice of dispute may probably assist opposing a determination being made an order of court under s 45(1) of the Northern Territory Act on the ground that the adjudication determination is void. An answer to this question will have to be developed through decisions of the Queensland Courts. See further the discussion at [SOP14.110] on the Western Australian Act, the model substantially followed by the Northern Territory Act.

[SOP14.140] South Australia — *"… payment schedule …"*

Section 14 of the Act mirrors the provisions of s 14 of the New South Wales Act in respect of payment schedules

[SOP14.150] Tasmania — *"… payment schedule …"*

Section 18 of the Act details the contents of a payment schedule that may be provided to a claimant.

Significantly, the phrase "must indicate" in s 14(3) of the New South Wales Act has given way to the phrase "must specify" in s 18(3)–(4) of the Tasmanian Act. Accordingly, all of the New South Wales learning on the validity of a payment schedule, where the scheduled amount is less than the claimed amount and there is mere indication why that is so, is of doubtful relevance in Tasmania.

The Tasmanian Act does not spell out the consequences of a failure "to specify". Is the payment schedule visited with a total invalidity, and must be ignored by the adjudicator, or is the defective payment schedule still of utility? These are questions that will have to be answered by the Tasmanian Courts.

[SOP14.160] Australian Capital Territory — *"… payment schedule …"*

Section 16 of the Act deals with payment schedules. Significantly, under s 16(2)(b), the word "indicate", found in s 14(2)(b) of the New South Wales Act, is replaced by the word "state". However, in s 16(3) of the Australian Capital Territory Act, the word "indicate" is used, bringing the wording of that section in line with s 14(3) of the New South Wales Act.

The change of wording as between s 16(2)(b) of the Australian Capital Territory Act on the one hand, and s 16(3) on the other, probably shows an altered legislative intention. The question that then arises is whether a payment schedule which does not "state" the amount of the payment, if any, that the respondent proposes to make, but merely "indicates" an amount, is a valid payment schedule and, if not, what the consequences may be. Questions may include whether or not the adjudicator can have regard to any of the material in the non complying payment schedule and what the consequences of the non compliance may be.

These are matters that will have to be worked out by the ACT Courts.

15 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent:

(a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17(1)(b) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[25]]

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

[Subs (4) subst Act 133 of 2002, s 3 and Sch 1[26]]

[S 15 am Act 133 of 2002]

SECTION 15 COMMENTARY

[SOP15.60] *"… as a debt …"*

The question arises as to whether or not the phrase "as a debt" in s 15(2)(a)(i) defines the parameters of the allegations which are necessary and the proof thereof, in a claim for the recovery of the unpaid portion of the claimed amount under that section.

In other words, does it mean that the plaintiff in such an action is not obliged to allege any other material facts in its cause of action other than the fact of a payment claim and the fact of there being no payment schedule, coupled with an allegation that any other statutory provision has been complied with, such as the giving of a notice under s 17(2)(a)?

The phrase "as a debt" has been referred to in a different context in *Builders' Licensing Board v Inglis* (1985) 1 NSWLR 592; *McCallum Developments Pty Ltd v The Owners Corporation SP53908* [2002] NSWSC 1103 (21 November 2002) per Studdert J and *P & V Sammut Homes Pty Ltd v Building Services Corp* (unreported, NSW Sup Ct, Newman J, 24 April 1997).

In *McCallum*, Studdert J said:

> [21] This very same provision influenced the decision in *Sammut Homes*. Newman J reasoned that in order to succeed in an action for debt under s 98 the Corporation would have to prove "all the elements of its claim" (at 13 of the judgment). Later (at 14) his Honour said:
>
> > It follows that any payment due by the defendant to the [owners] does not involve an interference with the private right of the plaintiff in defending a claim made on the scheme. This is particularly so because it is also the law that the plaintiff's rights in respect of any liability under s 98 of the Act are the same as any other person suing for debt. That is, as I have said, that [if] the present defendant were to bring such a claim [it] must prove all elements of its claim and if it has paid too much to the [owners] as a consequence of an administrative error any excess payment would not be recoverable.
>
> [22] In *Sammut Homes* and in the present case reference was made to the decision in *Builders' Licensing Board v Inglis* (1985) 1 NSWLR 592. That case involved consideration of the *Builders Licensing Act 1971*, later replaced by the *Building Services Corporation Act*. Under s 36 of the 1971 Act, there was a recovery provision similar to s 98 of the 1989 Act. Section 34(3) of the *Builders Licensing Act* provided:
>
> > Any amount paid by the Board under a house purchasers' agreement in respect of any building work may be recovered by the Board in a court of competent jurisdiction as a debt from the person by whom the building work was carried out or undertaken to be carried out or out of the estate of that person from his personal representation.
>
> [23] In *Inglis* the Court of Appeal considered the nature of the recovery proceedings under s 34(3) and Kirby P said (at 596–597):
>
> > It cannot be said that any amount paid by the Board is recoverable. For example, an amount paid as a result of an administrative error or for a reason wholly extraneous to the purposes of the Act, would clearly not be recoverable. The terms of s 34(3) of the Act limit the amount recoverable to amounts paid "under a house purchaser's agreement" and "in respect of any building work". So that connection, at least with the builders conduct, must be shown. Indeed this much was conceded by counsel for the Board.

> But the result of the Board's contention would still be surprising if it meant that an amount paid under such an agreement and in respect of building work could be recovered as a debt without the builder having any entitlement to scrutinise, and have the court scrutinise, the basis of the debt. Such a result would deprive the builder of the opportunity to challenge the claim, to subject it to scrutiny and to rebut it if such scrutiny disclosed defects in it.
>
> It is possible that the legislature intended to take away this normal entitlement of our system. However, it would be unusual for it to do so. And clear statutory language or other indicia of the Parliament's intent would be needed to drive the court to such a result. For the consequences would be that a person might complain to the Board, the Board might pay a very large amount and the builder might be fixed with an obligation to reimburse the Board, although the builder never had knowledge, even after the payment, of the precise way in which this substantial debt was said to be incurred. Such a legislative scheme could be devised, relying on the integrity and good sense of the officers of the Board, to protect builders. It would certainly save the costs of litigation, typically high in building cases, and often in such cases disproportionate to the matter in dispute. But it would be an unusual provision. It would, in my view, require the clearest possible legislative language to produce such a result.

[24] And, later (at 598) the President said:

> But where, as here, there is a contest, the entitlement to recover as a debt should not, in my view, bypass the normal requirement that, when a claim is disputed, he who alleges must particularise and prove.

[SOP15.70] *"… in any court of competent jurisdiction …"*

At [45] of *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* [2011] NSWSC 195, Ball J held that a s 15(2)(a)(i) claim was not arbitrable. His Honour held:

> Despite these considerations, I do not think that a claim under s 15(2)(a)(i) is arbitrable. I accept that the fact that the CA Act 2010 does not contain an equivalent of s 3(8) of the CA Act 1984 is one matter that can be taken into account in interpreting the CA Act 2010: see *Geaghan v D'Aubert [2002] NSWCA 260; (2002) 36 MVR 542* at [22]- [23], quoting DC Pearce and RS Geddes, (*Statutory Interpretation in Australia*, 5th ed (2001) Butterworths). However, it seems to me that the failure to include in the CA Act 2010 a similar provision to s 3(8) of the 1984 Act can be explained on the basis that the provision was though to be unnecessary having regard to the terms of ss 8(1) and 34(2) of the 2010 Act and the particular nature of the SOP Act. Provisions such as s 43 of the *Insurance Contracts Act* and s 7C of the *Home Building Act 1989* are necessary precisely because, on the face of it, disputes under contracts of those types are arbitrable. The same could not be said of disputes under the SOP Act. Moreover, s 15(2)(a)(i) is part of the mechanism established to give effect to the adjudication process and the policy underlying it. It seems odd if one aspect of that process could be made the subject of an arbitration when all other aspects of it could not. Finally, s 15(2)(a)(i) specifically says that the claimant may bring proceedings in any court of competent jurisdiction. In doing so, it gives the claimant a right. Section 34 of the SOP Act makes it clear that the claimant cannot contract out of that right. Elsewhere, the Act recognises that disputes under construction contracts may be the subject of arbitration. In particular, as I have said, s 32(3) confers powers on arbitrators (as well as courts). However, s 15(2)(a)(i) confers a right to bring a claim in a court. It makes no reference to arbitration. If the legislature had intended the section to include an arbitration, it would have specifically said something about arbitration in the section, as it did in s 32(3). In my opinion, a provision of an arbitration agreement that prevents a party from exercising a right under s 15(2)(a)(i) to bring proceedings in a court of competent jurisdiction is, to that extent, void under Section 34 of the SOP Act.

[SOP15.80] Summary judgment in respect of a cause of action based on s 15(2) – no payment schedule

(a) Generally

In *Roads & Traffic Authority (NSW) v John Holland Pty Ltd* [2006] NSWSC 567 (3 July 2006), Associate Justice Macready, at [67], raised the important question as to whether, in the light of s 20(2B), the respondent can give any reason for withholding payment at all in a case of an adjudication going forward under the subsection, in the absence of a payment schedule. His Honour also drew attention to this problem, dealt with in another context, in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [40]–[42].

There is surprisingly no provision for payment of interest in s 15(2). McDougall J in his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999*, (September 2004), at p 12, has raised the following interesting question:

> If a claimant sues under s 15(2)(a)(i) to recover the unpaid portion of a claimed amount as a debt, it cannot recover judgment unless the court is satisfied of the existence of the circumstances referred to in s 15(1) (see s 15(4)(a)). Does that mean, among other things, that the claimant must show that it served a "valid" payment claim?

In *Isis Projects Pty Ltd v Clarence Street Ltd* [2004] NSWSC 222 (29 March 2004), Einstein J held at [33], that "a claimant", who relies upon the provisions of this section, must prove "that a **valid** payment claim has been served and also clearly prove what is the due date for a progress payment".

In his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999*, (September 2004), McDougall J, at p 12, observes that *Consolidated Constructions* was not cited to Einstein J in *Isis Projects*; see further *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 (20 April 2004).

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

The grant of summary judgment on a cause of action based on s 15(2)(a)(i) is final and not interlocutory, see [4] of *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409.

As held by Einstein J in *Schokman v Xception Construction Pty Ltd* [2005] NSWSC 297 (4 April 2005) at [19], s 15 applies only where no payment schedule has been served by the respondent and where, because of the provisions of s 14(4), the respondent has become liable to pay the claimed amount as a consequence of the respondent's failure to provide a payment schedule within the time allowed.

It is submitted that it would be sheer folly for a contractor to be armed with a "statutory debt", and then re-open the whole matter by going to adjudication.

Einstein J continued thus:

> [22] The whole of the relevant scheme is clearly to provide a fast track approach leading to a result but importantly never operating to the exclusion of "any other entitlement that a claimant may have under a construction contract" [s 4(a)]. Hence it cannot have been the intention of the legislature to permit a claimant [in a circumstance where no payment schedule has been provided] to make an adjudication application in relation to the payment claim and later in the event that the adjudication miscarried, to pursue curial proceedings to recover the unpaid portion of the claimed amount from the respondent as a debt. This would expose a respondent not to one set of interim procedures aimed at a swift (albeit interim) result, but to two such interim sets of procedures.
>
> …

> [27] Ultimately the matter is simply one of raw statutory construction. The word "or" separating s 15(2)(a)(i) and (ii) is used disjunctively.

In *Schokman v Xception Construction Pty Ltd* [2005] NSWSC 297, Einstein J held that an election to proceed under s 15(2)(a)(ii), even if that election in the circumstances it was made was invalid, was nevertheless binding and a party having made such an election could then not revert to that party's rights under s 15(2)(a)(i).

In *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd* [2007] NSWSC 554 (1 June 2007), Bergin J (as her Honour then was) said:

> [18] In *Rojo Building Pty Ltd v Jillcris Pty Ltd* [2006] NSWSC 309 a notice under s 17(2) had been served within time, however there was an issue as to whether the payment schedule that had been provided the day after the s 17(2) notice had been given was in response to that notice or in response to the payment claim that had been served. Einstein J referred to his decision in *Schokman* and said:
>
> > [36] Once Rojo had served its s 17(2) notice of intent to make an adjudication application [it being quite plain that certainly by 22 December 2005 that service had been effected], Jillcris became entitled to exercise its statutory right to provide a payment schedule within five business days of service of the notice of intent to apply for adjudication. In those circumstances Rojo, having elected:
> >
> > (i) not to proceed by the route provided for in s 15(2)(a) [vide by proceeding to recover the unpaid portion of the claimed amount as a debt by curial process],
> >
> > (ii) instead to make an adjudication application under s 17(1)(b) became disentitled from restoring the position ante.
> >
> > [37] Rojo's election had now triggered a statutory right in Jillcris. That step having been taken, Jillcris was entitled to exercise that statutory right.
> >
> > [38] The effect of Rojo's solicitors communication of 23 December 2005 [advising that Rojo did not propose to proceed to make an application for adjudication and that accordingly, Jillcris was not required to provide a payment schedule in accordance with s 17(2)(b)]:
> >
> > (i) was not to restore the position to that which it had been prior to Rojo having made the election provided for in s 15(2)(a) as between the two inconsistent routes;
> >
> > (ii) was that Rojo had waived its anterior rights to proceed by curial process to recover the unpaid portion of a claimed amount as a debt.

Her Honour continued thus:

> [19] In *Rojo Building Pty Ltd v Jillcris Pty Ltd* [2006] NSWSC 649 McDougall J referred to Einstein J's judgment in *Rojo Building Pty Ltd* and at [31] observed that the point on which Einstein J had found that Rojo failed was "that it had made an election to proceed down the adjudication path". McDougall J referred to the plaintiff's submission that Einstein J had erred in dealing with the concept of election (at [50]) but did not need to deal with this matter and, indeed, suggested that it was more appropriate to be dealt with by the Court of Appeal (at [51]–[52]).

A similar question arose in *Kell & Rigby*. Bergin J (as her Honour then was) attempted to distinguish *Schokman* by saying:

> [21] In that case a notice under s 17(2) was provided, albeit out of time. In the present case no notice was given. However it is true that in both cases the adjudication application was invalid by reason of the failure to comply with s 17(2). There are further differences between the two cases. In *Schokman* the parties appear to have argued that the adjudication process "miscarried" rather than approaching the matter on the basis that it was a nullity. In this case the plaintiff has submitted that the adjudication application was a nullity and therefore the plaintiff could not be taken to have made an election. Additionally there was apparently no argument before

Einstein J that the notice under s 17(2), as opposed to the adjudication application, was itself a nullity. The fact that the notice under s 17(2) was provided, albeit out of time, was a matter that Einstein J regarded as important in determining whether the plaintiff in that case had elected for the adjudication process. That is not a matter for consideration in this case because no notice was provided. Whether an election has been made will depend upon the facts of the particular case.

Her Honour continued:

> [23] In *GJ Coles & Co Ltd & Ors v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 McHugh JA said at 525:
>
> > One of the basic doctrines of common law jurisprudence is the failure to perform a *mandatory* condition imposed by statute invalidates the doing of any act dependent on the fulfilment of that condition. Insofar as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this basic doctrine.
> >
> > [24] I am satisfied that the absence of the word "valid" before the words "adjudication application" in s 15(2)(a)(ii) of the Act does not mean that the legislature intended that a party could make an invalid application. This is particularly so having regard to the rights that are triggered when an adjudication application is made, including the right of the respondent to receive notice of the intention to make the application and the right of the respondent to have the fresh opportunity to file a payment schedule.
> >
> > [25] I am of the view that the adjudication application was a nullity by reason of the plaintiff's failure to comply with the mandatory condition imposed by s 17(2) of the Act. Accordingly the act of filing and serving that document was incapable of creating legal consequences, including the legal consequence of the making of an election under s 15(2) of the Act. I do not need to deal with the common law of election as this case depends upon the construction of the statute. This was the only issue that has been argued at the hearing.

Her Honour concluded:

> [26] I am of the view that the plaintiff is not precluded from commencing these proceedings. Although in its List Response the defendant denied that it is liable to pay the plaintiff the amounts claimed or at all (at 17), this denial has not been supported by any argument or evidence during the hearing. It is necessary to be satisfied of the existence of the circumstances referred to in s 15(1) of the Act before judgment for the plaintiff may be entered: s 15(4)(a) of the Act. Those circumstances are that the defendant became liable to pay the claimed amount under s 14(4) of the Act as a consequence of having failed to provide a payment schedule within the stipulated time (s 15(1)(a)); and that the defendant has failed to pay the whole or any part of the amount claimed (s 15(1)(b)). I am satisfied of both of those matters.
>
> It is respectfully submitted that the preferred view would be that of Einstein J and that is that once a party, having made an election to proceed under either of the two sections above, even if that election was invalid, the election is binding and that party cannot revert to an alleged right under the alternative procedure allowed.

At [43] of *Cromer Excavations Pty Ltd v Cruz Concreting Services Pty Ltd* [2011] NSWSC 51, Davies J preferred the decision of McDougall J in *Rojo* to that of the earlier decisions of Einstein J.

It is respectfully submitted that his Honour's preference is correct.

In *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2013] WASC 407 there was an application to set aside a statutory demand based upon a judgment obtained after

adjudication under the Western Australian Act. Master Sanderson held after an examination of all the relevant authorities that, in those circumstances, a genuine dispute could not arise.

(b) Where provisions of s 15(2) not used, but in turn statutory demand is served

In *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005] NSWSC 284 no payment schedule in response to a payment claim was filed. The claimant did not invoke the provisions of s 15(2) by suing for the debt, but in turn served a statutory demand for which the other party was liable pursuant to s 14(4). It was submitted before Palmer J that as the provisions of ss 15(2) and (4)(b) created a statutory debt, no challenge could be mounted against that. As noted by Brereton J at [74] of *Re Douglas Aerospace Pty Ltd* (2015) 294 FLR 186; [2015] NSWSC 167, Palmer J, in *Aldoga*, rejected that submission.

At [8] of *Aldoga*, Palmer J dealt with proceedings to wind up a company for a failure to comply with a statutory demand arising from a debt under s 15(2)(a)(i) of the NSW Act. His Honour said:

> … In my view, the provisions of s.15(2) and (4) of the BACISOP Act do not preclude a company served with a statutory demand from raising a genuine dispute for the purpose of setting aside that statutory demand under s.459G, even where that dispute has not been the subject of a payment schedule served in accordance with the provisions of the BACISOP Act.

Palmer J added at [11]:

> As I have observed, in my opinion the rationale underlying those observations is not affected by the circumstance that the ground for setting aside a statutory demand is said to be an offsetting claim rather than a dispute as to whether the debt has been contracted in the first place. It seems to me, with respect, that both Campbell and Barrett JJ are correct in their conclusion that it is not possible for the provisions of the *Corporations Act*, a Commonwealth statute, to be limited by reference to the provisions of the BACISOP Act, a State Act, and that the question for the Court in an application under s.459G is simply whether, as a matter of fact, a genuine dispute exists.

At [12], Palmer J concluded that a party liable for an amount under ss 15(2) and (4) of the NSW Act as a debt is not precluded from raising a genuine dispute in order to set aside a statutory demand under the provisions of s 459G of the *Corporations Act*, where such a debt is based on the sections referred to above.

See also *Re Douglas Aerospace Pty Ltd* (2015) 294 FLR 186; [2015] NSWSC 167 per Brereton J. See further *Khouzame v All Seasons Air Pty Ltd* (2015) 294 FLR 186; [2015] FCAFC 28 at [23] where the following cases are referred to: *Amos v Brisbane TV Ltd* 2000) 100 FCR 82; [2000] FCA 825; (*Re Ferguson; Ex parte E N Thorne & Co Pty Ltd (in liq)* (1969) 14 FLR 311; *Re King; Ex parte Gallagher Ryan & Maloney v King* (1994) 54 FCR 493; [1994] FCA 1448.

For a further discussion and further authorities, see [SOP25.455] below.

(c) Criteria for an application for summary judgment under s 15(2) of the New South Wales Act

Under s 15(4) of the New South Wales Act, certain criteria are set for an application for summary judgment under s 15(2).

On p 13, of his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004), McDougall J, observed:

> Section 15(4)(a) provides that judgment is not to be given in favour of the claimant "unless the court is satisfied of the existence of the circumstances referred to in subs (1)". The particular circumstance referred to in s 15(1)(a) is that the respondent has become liable to pay the claimed amount through the operation of s 14(4). Nothing in s 14(4) requires the respondent to serve a payment schedule only if the payment claim is "valid". A respondent wishing to contend that a payment claim is not "valid"

can only assert that in its payment schedule. If it does not do so, it cannot later raise the argument (ss 15(4)(b)(ii); 16(4)(b)(ii); 20(2B); 25(4)(a)(ii), (iii)) until there is a final hearing etc on the merits (s 32). It seems, with respect, to be anomalous that such a respondent could nonetheless, in defending proceedings brought pursuant to s 15, challenge the validity of the payment claim. At first blush, that appears to be inconsistent with the clear Parliamentary intention of "speak up or pay up".

(d) Comparative sections in the other States and Territories providing for summary judgment where there has been a failure to submit a payment schedule

There are comparative sections in certain of the other States and Territories providing for summary judgment where there has been a failure to submit a payment schedule:

Australian Capital Territory – s 17

Queensland – s 19

South Australia – s 15

Tasmania – s 19

(e) Questions of construction – not appropriate to be considered in the context of an application for summary judgment

In *Bellevarde Constructions Pty Ltd v Cosmas Pty Ltd* [2016] NSWSC 406, Stevenson J reaffirmed the principle that under New South Wales Supreme Court Practice Note SC Eq 3 applications for summary judgment, presumably including applications for summary judgment under s 15(2), are not appropriate and will not generally be entertained in the Commercial and Technology and Construction Lists of the Supreme Court.

(f) Matters of discretion - not appropriate to be considered in the context of an application for summary judgment

See Stevenson J's judgment in *Bellevarde* above.

(g) Where there is an arguable defence challenging the validity of a payment claim

Mossop AsJ, in *Denham Constructions Pty Ltd v Islamic Republic of Pakistan* [2016] ACTSC 67, concluded at [2] that in such an application for summary judgment pursuant to r 1146 of the *Court Procedure Rules 2006* (ACT), it must be demonstrated that the defence is "so obviously untenable that it cannot possibly succeed".

At [3] of *Denham*, his Honour relied on a judgment of Jagot J at [5] of *Galovac Pty Ltd v Australian Capital Territory* [2010] ACTSC 132, where her Honour said:

> There was no dispute about the principles that apply:
>
> (1) The party seeking summary judgment faces a "very high threshold" (*Financial Integrity Group Pty Limited v Farmer* [2009] ACTSC 143 at 12).
>
> (2) The lack of a cause of action must be "clearly demonstrated" (*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 [; 1964] HCA 69 at 129).
>
> (3) The procedure calls for "exceptional caution" (*General Steel* at 129).
>
> (4) The necessity for argument, even extensive argument, is no bar. However, as soon as it appears that there is a "real question" to be determined on which relief depends, the summary judgment procedure is not available (*General Steel* at 130 citing *Dey v Victorian Railways Commissioners* [1949] HCA 1; (1949) 78 CLR 62 at 91).
>
> (5) Mere implausibility of the claim or improbability of success is insufficient; there must clearly be no real question to be tried in the sense that the claim is bound to fail (*Seven Network Ltd v News Ltd (No 4)* (2005) 214 ALR 686; [2005] FCA 244 at [14] citing *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch D) at 5; [1991] 4 All ER 961 at 965).

(6) The application is to be assessed on the assumption that every fact pleaded by the plaintiff is true (*West v State of New South Wales* [2007] ACTSC 43 at [9]).

(7) The application must be determined on the substance, not the mere form or expression, of the claim (*Financial Integrity Group* at [15]).

(h) "… any cross-claim …" – where no payment schedule in opposition to an application for a summary judgment

In regard to the bringing of any cross-claim, see the discussion at [SOP25.462].

(i) "… any defence …"

It will be observed that the respondent in the proceedings for payment, where no payment schedule is provided by it, is precluded from raising any defence "in relation to matters arising under the construction contract". The phrase, "in relation to matters arising under the construction contract", limits the operation of this sub-section and, properly construed, does not preclude a respondent from raising, as a defence, that the jurisdictional facts, which must be in existence in order to invoke the provisions of this section, have not been proved.

This submission is supported by the judgment in *Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714 (13 August 2004), in which Einstein J distinguished between defences that relate to matters arising under the construction contract and defences that do not. At [65] of his Honour's judgment he said:

> The statutory scheme is, undoubtedly, supplementary to the contractual scheme; see for example s 3(4) of the Act. However, one object of the statutory scheme is to provide a swift remedy to a claimant in circumstances where the scheme is engaged. That is why (for example) a respondent that does not raise a contractual defence in its payment schedule cannot raise that defence thereafter: ss 15(4)(b)(ii); 20(2B); 22(2)(d) and 25(4)(a)(ii). In my judgment, that statutory scheme does not permit a respondent to refrain, upon some contractual basis, from providing a payment schedule but to retain the right, in subsequent proceedings, to rely upon whatever the contractual issue was. The matter may be tested simply. Under s 15(2)(a), a claimant to whom no payment schedule has been provided has two options. One is to recover the unpaid amount as a debt. The other is to make an adjudication application under s 17(1)(b). If the claimant took the latter course, the respondent could not, in its adjudication response, rely upon the contractual issue: s 20(2B). If an adjudication determination were made in the claimant's favour and the claimant sought to register as a judgment a certificate issued consequent upon that determination, the respondent could not rely upon the contractual issue: s 25(4)(a)(ii). It would be anomalous in the extreme if the claimant, by choosing the alternative path of suing for the debt as provided by s 15(2)(a)(i), were placed in a worse situation because, as a result of that choice, the respondent was able to raise an argument that it could not raise had the claimant followed the other path.

Isis Projects was referred to with approval by Hammerschlag J in *Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd* [2013] NSWSC 707, where his Honour at [20]–[25] held:

> The plaintiff - whether rightly or wrongly from a contractual point of view - claims such an entitlement. Whilst the payment claim does not reveal the relationship between the amount claimed and any particular provision of the contract, it describes the two components of the claim as Progressive Billing and identifies as the event giving rise to the payment obligation, provision of items of Equipment described in Schedule 2 of the contract.
>
> Having regard to the defendant's failure to respond, the Court is able to be, and is, satisfied that the circumstances described in s 15(1) have arisen.

> One of the principal underlying philosophies of the statutory scheme is to provide a swift remedy to a claimant who invokes it.
>
> The defendant had the option of serving a payment schedule, and if ultimately appropriate, an adjudication response raising the contractual issue which it now seeks to raise. But it did not do so.
>
> Section 15(4)(b)(ii)) now precludes it from doing so. The statutory scheme does not permit the respondent to refrain, upon some contractual basis, from providing a payment schedule, but to retain the right in subsequent proceedings to rely upon whatever the contractual issue was: see *Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714 at [65].
>
> It would be inimical to this philosophy and out of step with the express wording of s 13 for the Court to be required at this stage to become enmeshed in a determination of the contractual efficacy of the plaintiff's claim (or the defendant's response to it): see *Consolidated Constructions Pty Ltd v Ettamogah Pub* [2004] NSWSC 110 at [58] and following.

In *Lucas Stuart Pty Ltd v Sydney City Council* [2005] NSWSC 840 (23 August 2005), per Einstein J, Lucas Stuart brought proceedings in which it sought summary judgment under s 15(2)(a)(i).

The council, who had not served a payment schedule, sought to defend the proceedings by alleging estoppel and defences under the then *Trade Practices Act 1974* (Cth) (see now the *Competition and Consumer Act 2010* (Cth)) / *Fair Trading Act 1987* (NSW).

Einstein J said:

> [37] It is unnecessary to repeat the analysis of estoppel to be found in the judgment of Mason CJ in *Commonwealth v Verwayen* (1990) 170 CLR 394; 64 ALJR 540; 95 ALR 321; [1990] Aust Torts Reports 67,952 (81-036); [1990] ANZ ConvR 600 at 409–413. Suffice it to say that the overarching doctrine of estoppel
>
> > provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid, it would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption [per Mason CJ at 413].
>
> [38] Even taking the council's evidence at its highest the evidence does not raise an arguable case that Lucas Stuart can by its submission of the payment claim in the circumstances be seen to have unjustly departed from an assumption as to a present or future state of affairs which that conduct caused the council to adopt or accept. The whole of the environment involved as an important backdrop, the parties respective contractual rights, as well as the parties rights and obligations accruing by the very fact that the Act contained provisions regulating the interim fast track adjudication procedure. Further and independently of what has been said above, the council has not, taking its evidence at its highest, raised an arguable case that the estoppel contended for would achieve the necessary proportionality between the remedy and the detriment which is its purpose to avoid. The council's case here amounts to what would be a disproportionate making good of the relevant assumption. The case is entirely inchoate as to the period during which Lucas Stuart would have been disentitled from submitting a payment claim under the Act. In short taking its evidence at its highest, the council's estoppel case is not an arguable case in the environment of the Act.

> [39] Likewise the *Trade Practices Act 1974* (Cth)/*Fair Trading Act 1987* (NSW) which rests upon the same central foundation is not an arguable case in the environment of the Act.

This case was cited by Mullins J in *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd* [2008] 1 Qd R 139; [2007] QSC 20 (13 February 2007).

The *Lucas Stuart Pty Ltd v Sydney City Council* [2005] NSWSC 840 was analysed by Adrian Bellemore in his article "Topic of Interest" (2005) 21 BCL 425. The learned author's conclusion at p 427 reads as follows:

> What is impermissible by the terms of s 15(4)(b)(ii) is for the respondent "to raise any defence *in relation to matters arising under the construction contract*" (emphasis added). If, therefore the respondent wanted to raise a defence that was not one that related to matters "arising under the construction contract", then it would seem that the legislation permits such a defence.
>
> It is suggested that the words "arising under the construction contract" mean that what is prohibited by the Act is limited to any defence that arises solely out of the contract, its terms or its execution. Any defence that arises in a manner similar to the facts of *Lucas Stuart* would, it is suggested, be permissible.
>
> The suggestion that what is prohibited by way of defence is limited in this manner is supported in the Second Reading of the amendment to the Act, whereby the terms of the Act limiting defences were added. In that reading, the Minister for Public Works and Services (Mr Iemma) noted that delay has been caused to claimants by respondents "raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work".
>
> Insofar as what is impermissible by the terms of s 15(4)(b)(ii) being a defence relating to matters *arising under* the construction contract, it would appear that Einstein J's words, ie that a defence of estoppel "flies in the face of s 15(4)(b)(ii)", may well be arguable, as is (probably) any defence that does not relate to matters arising under the construction contract.

There is much force in this submission which again underlines the difficulties one has in construing the Act.

A number of points of significance here relevantly appear from the decision of the New South Wales Court of Appeal in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238.

First, an absence of "bona fides" and/or "good faith" on the part of a claimant in submitting a payment claim are not separate criteria for a valid payment claim: per Basten JA at [58], with Hodgson and Tobias JJA concurring.

In the same paragraph, Basten JA said further "rather, as with any other issue going to the merit of the claim, the scheme of the legislation was to require that an assessment be made by an adjudicator".

At [59], his Honour held that the merits of the payment claim fall within the remit of the adjudicator notwithstanding the severe hardship this can cause to the respondent in an adjudication where the adjudicator is persuaded to accept a payment claim which is false to the knowledge of an impecunious applicant with a result that the respondent is obliged to pay and has no ultimate prospect of recovery.

If this judgment truly reflects the intention of the legislature, it is respectfully submitted that amending legislation to ameliorate this harsh result is urgently called for.

At [60] of *Bittania* his Honour concluded thus on this point: "Accordingly, it is within the scheme of the Act to allow a judgment debt to arise in circumstances in which later court proceedings may determine that no such liability existed".

At [61], his Honour dealt with the case where no payment schedule was provided by the respondent without any fault on its part and noted that the New South Wales Act envisaged

that liability may arise even in that event. His Honour referred to *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [85]–[88] in support of this proposition.

The question remains as to whether or not Basten JA's construction of s 13 in *Bittania* is correct. At [69]–[71] of *Bittania* Basten JA referred to the judgment of Santow JA in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409, where at [49] Santow JA stated:

> [49] [I] should note at the outset that there was no suggestion that the payment claim was not made in good faith and in purported compliance with s 13(2) of the Act, both minimal requirements of the Act.

Ipp JA, in the same case, said to similar effect: In *Bittania*, Basten JA, in dealing with Santow JA and Ipp JA's dicta said:

> [71] This last statement invites closer attention to what is meant by a lack of good faith on the part of the claimant. At the very least it would appear to involve two elements, namely that the claim was without merit and that the claimant knew it. But the merit (or lack of merit) of a claim is, as Ipp JA expressly accepted, a matter for determination by the adjudicator. Similarly, his Honour accepted that the express elements of a valid claim set out in s 13(2) are matters for the adjudicator. As suggested in Coordinated Construction Pty Ltd v Climatech, at [43]–[46] (a passage cited without disagreement by Hodgson JA in *Nepean Engineering* at [32]–[34]) determination of the existence of essential preconditions to a valid claim are matters for the adjudicator, not for objective determination by a court. If the express requirements of the Act are to be so treated, it is difficult to see why some unexpressed precondition should have a different status. Even more is that the case when, as has been noted, a key element in the supposed condition of "good faith" is that the claim is without merit, a matter indisputably within the powers of the adjudicator to determine
>
> [72] The appellants then observe, no doubt correctly, that the question whether the claimant knew or believed that the claim was without merit would be a matter beyond either the special expertise, or the procedural powers of the adjudicator to determine with any degree of reliability. However, unlike the well-known example of civil proceedings in a court, the *Building Payment Act* contains no requirement that a claimant must verify by affidavit that the claim has reasonable prospects of success. Nor is there any requirement, as appears in some standard forms of building contract, for an affidavit verifying that sub-contractors have been paid amounts claimed in relation to their work: see, eg, *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340.
>
> [73] In these circumstances, I would not imply an additional requirement for a valid payment claim, namely that the claimant had an actual bona fide belief in the truth of the facts asserted, or at least did not believe that the claims were entirely meritless.

The dicta of Basten JA above were obiter. The appeal was decided in *Bittania's* favour (the appellant on appeal on other grounds). Two submissions are made here: (1) the observations of Santow JA and Ipp JA above, being more consistent with the dictates of justice and the avoidance of imputing a harsh and arbitrary intention to the legislature, should be accepted as correct, and (2) alternatively, that the matter is still open.

Secondly, s 15(4)(b)(ii) does not preclude a defence to a summary judgment, where the defence relies on misleading and/or deceptive conduct or conduct likely to mislead or deceive under s 52 of the *Trade Practices Act 1974* (Cth), as it then was (see now s 18 of the Australian Consumer Law, contained in Sch 2 to the CCA) insofar as that conduct accompanies the service of the payment claim.

At [79] of *Bittania* Basten JA pointed out that such a defence was not a matter "arising under the construction contract". His Honour went on to note that this was so provided that that defence could be pleaded by way of a defence and not a cross-claim, which is precluded by the provisions of s 15(4)(b)(i).

At [124]–[127] of his Honour's judgment, he concluded that it was permissible to take a trade practices point by way of a defence and a cross-claim was not necessary.

At [105]–[119] of *Bittania*, Basten JA concluded that, but for that view, ie that a trade practices "defence" could be taken by way of points of defence and did not require a cross-claim, there was no s 109 inconsistency.

See the discussion in regard to the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)) at [SOP25.70].

For a discussion on the Trade Practices defence, see [SOP25.70].

If the point sought to be raised in a defence was not taken in a payment schedule, it cannot subsequently be relied on: Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [48], [51] and McDougall J in *Zebicon Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 1408 at [33].

For a discussion in regard to the impact of the statutory provision that a payment claim must be served within 12 months after the construction work to which the claim related was carried out, see [SOP13.100] *(e)*.

In *Grave v Blazevic Holdings Pty Ltd* (2010) 79 NSWLR 132; [2010] NSWCA 324 at 138 (NSWLR), McDougall J explained:

> [29] Section 15 provides for alternative ways of enforcing a statutory liability which may arise under s 14(4). If the alternative of litigation is chosen, the rights of the respondent are limited by s 15(4)(b). It is to be noted that again, in subpara (ii), the words "under the construction contract" are used. It follows from s 15(4)(b)(ii) that the statutory liability created by s 14(4) may be defeated by a defence that does not arise under the construction contract.
>
> [30] It is accordingly necessary to consider the extent of the words "arising under the construction contract". In some contexts, those words have been considered to be equivalent to the words "arising out of". See, for example, the authorities reviewed by Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192 at [169] and following. However, as Lord Brandon of Oakbrook pointed out in *Samick Lines Co Ltd v Antonis P Lemos (Owners)* [1985] AC 711 at 727 (one of the decisions reviewed by Allsop J), the width to be given to prepositional phrases such as "arising out of" and "arising under" must depend on their context.
>
> [31] In some cases, as French J observed in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 439 at 448, reference to a dispute "arising under" an agreement may be of more limited application than reference to a dispute "arising out of" an agreement.
>
> [32] Again in some cases, prepositional phrases should be construed widely. Thus, an arbitration clause that sends to arbitration disputes arising out of or under a contract would generally be given a wide construction, consistent with the presumed intention of the parties that arbitration is their preferred method of dispute resolution.
>
> [33] In this case, however, the words "arising under the construction contract" must be construed having regard to their statutory context and the object of the legislation in which they appear. That statutory object does not extend to imposing obligations on those who are not parties to construction contracts. The context of s 13 makes it clear that the liability that is enforced through the mechanism of judgment, is one of which the starting point is, again, "arising under a construction contract".
>
> [34] The alternative construction - that it is sufficient that the person be named as a respondent and not supply a payment schedule, so as to be susceptible to judgment - has consequences which render it unlikely. First, it creates

> disconformity with the alternative enforcement path of adjudication. It is clearly established, by the decision in *Brodyn*, that an adjudication determination is void if there is no underlying construction contract. The authority of *Brodyn* in this respect was not disturbed by the decision of this Court in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190. It would be quite extraordinary if a claimant who chose to go down the path of adjudication could be disappointed because the adjudicator lacked jurisdiction (for want of a construction contract between the claimant and the respondent), but a claimant who went down the path of litigation could enforce the claimed right even in the absence of such a construction contract.

See further *Mansouri v Aquamist Pty Ltd* [2010] QCA 209.

In *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd* [2011] VSCA 99, Tate JA and Hargrave AJA held that an order for summary judgment under s 16 of the Victorian Act was interlocutory and required an order for leave to appeal.

In *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, the comparative provisions in the Victorian Act, where they were in conflict with s 553C of the *Corporations Act 2001* (Cth), were held by Warren CJ, Tate and McLeish JJA, in applying obiter observations, to be invalid. See the detailed discussion in [SOP3.130] *(b)* above.

[SOP15.120] Victoria — *"… consequences of not paying claimant where no payment schedule …"*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

This provision is not found in Victoria prior to the amendment of the Act where s 16 of the Victorian Act lists the rights of the claimant where the respondent fails to provide a payment schedule.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 18 of the amendment Act substitutes s 16(2) and (4) of the principal Act by listing consequences of a failure to pay the claimant where the respondent does not submit a payment schedule. These subsections facilitate the process of recovering through the courts the unpaid portion of the claimed amount from the respondent as a debt due to the claimant.

A claimant may, instead of proceeding, in court, make an application for adjudication under s 18(1)(b) of the principal Act: see s 20 of the amendment Act.

The court is enjoined not to give judgment in favour of the claimant unless the court is satisfied as to a number of jurisdictional facts, including the fact that the amount claimed does not include any excluded amount. It is to be assumed, although the amending sections do not say this, that the court may give judgment for the total amount claimed, less any excluded amount.

The respondent is not entitled to bring "(i) any cross-claim against the claimant; or (ii) to raise any defence in relation to matters arising under the construction contract" (s 16(b)(i)–(ii)).

One wonders what the purpose of this subsection is and why a claimant would go to the trouble of making an application for adjudication where it has the right to recover the amount claimed as a debt due. It does seem to be rather a waste of time, effort and costs to go through the adjudication procedure where a far simpler step is merely to claim the amount claimed in payment claim as a debt.

For a discussion with regard to constitutionality: ss 16(2)(a)(i), 16(4)(b)(i) and 16(4)(b)(ii) of the Victorian Act, see [SOP3.130] *(b)* above.

[SOP15.130] Western Australia — *"… consequences of not paying claimant where no payment schedule …"*

The Western Australian Act has no provision in it comparable to s 15 of the Act. However, under s 25, it is provided that any party to a construction contract may apply for adjudication if a payment dispute arises, unless an application for adjudication has already been made by a party, or the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or a court or other body dealing with a matter arising under a construction contract.

The question arises as to whether or not a claimant can apply for adjudication where the disputed claim has been determined by a superintendent or other such person. It appears as if the answer to this question is in the negative. See at [SOP15.140] in regard to the Northern Territory provision.

[SOP15.140] Northern Territory — *"… consequences of not paying claimant where no payment schedule …"*

The Northern Territory Act has no provision in it comparable to s 15 of the Act. However, under s 27 of the Northern Territory Act, once there is a payment dispute, as defined in s 8, any party to the contract may apply to have that dispute adjudicated, not only the claimant.

This is a radical departure from the New South Wales, Queensland and Victorian thinking. There are, however, two provisos under s 27(a) and (b), which in summary are, unless an application for adjudication has been made already by a party to the contract (subject to the provisions of s 39(2) which provides for the dismissal of an adjudication application under certain circumstances) and/or if the dispute is the subject of an order judgment or finding by an arbitrator or other person, or a court or other body, dealing with a matter arising under the contract. It is noted that, apparently, an adjudication can continue if arbitration proceedings are on the go but not determined or if the matter has been referred to an expert for determination, and the determination has not been made.

[SOP15.150] South Australia — *"… consequences of not paying claimant where no payment schedule …"*

Section 15 of the Act, which is modelled on s 15 of the New South Wales Act, provides for the consequences of not paying a claimant where there is no payment schedule.

For a discussion with regard to constitutionality, South Australian Act: ss 15(2)(a)(i), 15(4)(b)(i) and 15(4)(b)(ii), see [SOP3.130] (b) above.

[SOP15.160] Tasmania — *"… consequences of not paying claimant where no payment schedule …"*

Section 19 of the Act provides for the consequences of failing to provide a payment schedule within the relevant period. Section 19 does not follow either the East Coast or the West Coast models. Under s 19(1), there is an extensive definition of the phrases "building practitioner" and "owner".

Under s 19(2)–(3), it is provided as follows:

> (2) If –
>
> (a) a claimant serves a payment claim on a respondent; and
>
> (b) the respondent does not provide to the claimant a payment schedule –
>
> (i) before the end of the period in which the payment is required to be made under the building or construction contract under which the payment is to be made; or

(ii) before the expiry of the applicable day in relation to the payment claim made to the respondent –

whichever period expires earlier, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

(3) In s (2)(b)(ii), the applicable day in relation to a payment claim made to the respondent –

(a) is the day 20 business days after the payment claim is served on the respondent, if –

(i) the claim relates to a residential structure to be built on land; and

(ii) the respondent is the owner of the land; and

(iii) the respondent is not a building practitioner; or

(b) is, in any other case, the day 10 business days after the payment claim is served on the respondent.

It will be seen that s 19(2)(b)(ii) refers to the applicable day in relation to a payment claim is 20 business day after the payment claim is served on the respondent, but that is subject to the proviso set out in s 19(3)(a)(i)–(iii). In any other case the time frame is 10 business days after the payment claim is served on the respondent.

Section 19(5) continues to make elaborate provisions for where the subsection applies to a claimant. It is difficult to see how s 19(5) could be invoked by a respondent. Section 19(5)(b) corresponds with s 16(2)(b) of the New South Wales Act, and s 19(7)–(8) of the Tasmanian Act correspond to s 15(4) of the New South Wales Act.

For a discussion with regard to constitutionality, Tasmanian Act: ss 19(5)(a)(i), 19(8)(a) and 19(8)(b), see [SOP3.130] *(b)* above.

[SOP15.170] Australian Capital Territory — *"… consequences of not paying claimant where no payment schedule …"*

Section 17 of the Act, which provides for the consequences of not paying a claimant where there is no payment schedule, follows s 16 of the New South Wales Act.

For a discussion with regard to constitutionality, ACT Act: ss 17(2)(a)(i), 17(3)(b)(i) and 17(3)(b)(ii), see [SOP3.130] (b) above.

[SOP15.180] Queensland — *"… consequences of not paying claimant where no payment schedule …"* – prior to the commencement of *Building and Construction Industry Payments Amendment Act 2014* (Qld)

The Amendment Act, viz the *Building and Construction Industry Payments Amendment Act 2014* (Qld) was assented to on 26/09/2014.

Ss 1 and 2 of the Act commenced on the same day, and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014).

In *Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd* [2009] 1 Qd R 505; [2009] QSC 1 at [4], Daubney J states as follows:

> Section 19 of the *Building and Construction Industry Payments Act 2004* (Qld) provides for the consequences of not paying the claimant where there has been no payment schedule served. Relevantly it provides as follows:
>
> 1. This section applies if the respondent–
>
> (a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

2. The claimant–
   (a) may–
      (i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or
      (ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and
   (b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.
3. A notice under subsection (2)(b) must state that it is made under this Act.
4. If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt–
   (a) judgment in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
   (b) the respondent is not, in those proceedings, entitled–
      (i) to bring any counterclaim against the claimant; or
      (ii) to raise any defence in relation to matters arising under the construction contract.

For a discussion with regard to constitutionality, *Queensland Act*: 19(3)(a)(i), 19(6)(b)(i) and 19(6)(b)(ii), see [SOP3.130] (a) and (b) above.

No payment schedule was provided. This was then followed by an application for summary judgment. In the application for summary judgment, the defendant sought to argue that there was a breach of s 52 of the *Trade Practices Act 1974* (Cth), and further, that part of the claim was outside the scope of the contract. Daubney J found that there was misleading and deceptive conduct and then went on to say:

> [64] The impact of this conclusion on a payment claim was discussed by the Court of Appeal in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238. One of the issues in that case was whether a claim under the *Trade Practices Act* could be raised to defeat an applicant's claim to summary judgment under the NSW equivalent of s 19 of the BCIPA. At [8], Hodgson JA remarked:
>
> > The basic complaint of the appellants is that one element of the cause of action brought against them, namely the non-service of a payment schedule, came about as a result of Parkline's breach of s 52; and that if a remedy is not provided by the *Trade Practices Act*, they suffer the substantial damage of having a judgment against them which is obtained by Parkline in reliance on its own misleading conduct. The *Trade Practices Act* discloses a legislative intention that persons should have a remedy to protect them from damage from the misleading conduct of a corporation, or to recover from the corporation compensation for such damage; and it would not be in accordance with that intention that a corporation should be permitted to obtain a judgment against a defendant on a cause of action one essential element of which has been created by that corporation's misleading conduct against that defendant. Subject to discretionary questions, it would in my opinion be appropriate for a court to give effect to that legislative intention by granting an injunction under s

> 80, or by making an order pursuant to s 87 dismissing proceedings (noting that the orders made available by s 87 include orders mentioned in s 87(2), but are not restricted to those orders).
>
> And at [17], Tobias JA said:
>
> I have had the benefit of reading in draft the judgments of Hodgson JA and Basten JA. I agree with their Honours for the reasons each has given, that s 15(4)(b) of the *Building Payment Act* does not prevent the appellants from raising by way of defence to the respondent's proceedings in the District Court to recover the amount of its payment claim pursuant to s 15(2)(a)(i) of that Act, the contention that their failure to provide a payment schedule with respect to that claim was induced by the respondent's misleading or deceptive conduct in breach of s 52 of the *Trade Practices Act*.
>
> [65] It seems to me to be now established that s 19(4)(b)(ii) of the BCIPA does not preclude reliance on s 52 of the *Trade Practices Act* to prevent the entry of summary judgment where a payment schedule is not delivered. I am satisfied that it would be improper to permit the applicant to take advantage of the respondent's failure to deliver a payment schedule in circumstances where that failure was brought about by the applicant's misleading conduct.

It will be noted that Daubney J sanctioned the trade practices defence in regard to the adjudication process. His Honour did not go so far as to say that misleading and/or deceptive conduct anterior to the making of the construction contract could give rise to a trade practices defence.

In the light of his Honour's finding, it was not necessary to deal with the further defence, and the application for summary judgment was dismissed.

[SOP15.190] Queensland — *"… consequences of not paying claimant where no payment schedule …"* – under the Queensland Act, as amended by *Building and Construction Industry Payments Amendment Act 2014* (Qld)

The Amendment Act, viz the *Building and Construction Industry Payments Amendment Act 2014* (Qld) was assented to on 26/09/2014.

Ss 1 and 2 of the Act commenced on the same day, and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014).

Section 9 of the amending legislation omits s 19 of the Queensland Act and inserts the following in its place:

19 Consequences of not paying claimant if no payment schedule

(1) This section applies if a respondent served with a payment claim does not serve a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant.

(2) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

(3) If the respondent fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates, the claimant —

(a) may —

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.

(4) A notice under subsection (3)(b) must state that it is made under this Act.

(5) The claimant cannot start proceedings under subsection (3)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt unless—

(a) the claimant gives the respondent a notice under section 20A(2); and

(b) the 5 business days for the respondent to serve the payment schedule, as stated in the notice, has ended.

(6) If the claimant starts proceedings under subsection (3)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt —

(a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied the respondent —

(i) did not serve a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant; and

(ii) failed to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates; and

(b) the respondent is not, in those proceedings, entitled —

(i) to bring any counterclaim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

In a paragraph under the heading "Notes on provisions" in the Explanatory Notes for Amendments moved during consideration in detail, the Minister said:

> Amendment 4 inserts new subsections 19(5) and (6) (Consequences of not paying claimant if no payment schedule). Under proposed new section 19(5), the claimant can only start proceedings under subsection (3)(a)(i) to recover the unpaid portion in any court of a competent jurisdiction if they have first given the respondent a notice under section 20A(2) and the time for the respondent to serve the payment schedule, as stated in the notice, has ended.

It is to be noted that Under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

16 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent provides a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17(1)(a)(ii) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[27]]

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

[Subs (4) subst Act 133 of 2002, s 3 and Sch 1[28]]

[S 16 am Act 133 of 2002]

SECTION 16 COMMENTARY

[SOP16.50] ***"… any cross-claim …"***

See the discussion at [SOP25.462].

For a discussion with regard to constitutionality: ss 15(2)(a)(i), 15(4)(b)(i) and 15(4)(b)(ii) of the New South Wales Act, see [SOP3.130] (b) above.

[SOP16.60] ***"… any defence …"***

See the discussion at [SOP25.460].

[SOP16.70] Victoria – lien in respect of unpaid progress payments

There is a unique provision in the Victorian Act inserted by s 14 of the *Building and Construction Industry Security of Payment (Amendment) Act 2006*. This section inserted a new s 12A into the principal Act. The section provides for a lien in favour of contractor and/or subcontractor in respect of unpaid progress payments over any unfixed plant or material or supplied by the claimant for use in connection with the carrying out of construction work for the respondent. Section 12A(2)–(5) contain further procedural and other details.

[SOP16.80] Victoria — *"… consequences of not paying claimant in accordance with payment schedule …"* - under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007

There are similar but more limited provisions in s 18(1) in respect of construction contracts concluded prior to 30 March 2007. In Victoria an adjudication application can only be made if the respondent provides a valid payment schedule, and that schedule is designed to establish that the amount due is less than that claimed. In New South Wales, there may be an adjudication application under s 17 of the New South Wales Act even if no payment schedule is submitted by the respondent.

For a discussion on this aspect see [SOP17.50].

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 20 of the Act substitutes s 18(1)–(4) of the principal Act by the provisions set out therein. Under the new s 18(1), there are certain jurisdictional facts that are to be established before there can be an application for an adjudication determination. The new s 18(1)(a)–(b) reads as follows:

> A claimant may apply for adjudication of a payment claim (an "adjudication application") if –
>
> (a) the respondent provides a payment schedule under Division 1 but –
>
> (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or
>
> (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or
>
> (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

Under the new s 18(2), there are limitations upon an application for adjudication which falls under s 18(1)(b).

Section 18(3) lists all the criteria that must be present for a valid adjudication application, thus:

(a) must be in writing; and

(b) subject to sub-section (4), must be made to an authorised nominating authority chosen by the claimant; and

(c) in the case of an application under sub-section (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule; and

(d) in the case of an application under sub-section (1)(a)(ii), must be made within 10 business days after the due date for payment; and

(e) in the case of an application under sub-section (1)(b), must be made within 5 business days after the end of the 2 day period referred to in sub-section (2)(b); and

(f) must identify the payment claim and the payment schedule (if any) to which it relates; and

(g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and

(h) may contain any submissions relevant to the application that the claimant chooses to include.

Under s 18(4), it is provided that:

> If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.

The extent and purpose of subsection (4) is, with respect, obscure.

[SOP16.90] Western Australia — *"... consequences of not paying claimant in accordance with payment schedule ..."*

Under s 25 of the Act, "any party to the contract" can apply for adjudication, unlike the provisions in all of the other Acts, excepting for the Northern Territory where only "a claimant" can make any such application.

There are however two provisos in s 25(a)–(b), which reads as follows:

> If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless —
>
> (a) an application for adjudication has already been made by a party, whether or not a determination has been made, but subject to section 37(2); or
>
> (b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.

The question that arises is if a superintendent or any such person has provided a final certificate, whether that precludes adjudication. It would appear as if the answer to this is in the affirmative. For a discussion on the question of whether or not an adjudicator is bound to follow the superintendent's certificate, see [SOP22.690].

A further question arises as to whether or not an adjudication application made in the face of the final superintendent's certificate gives rise to a jurisdictional challenge which may be made before there is any adjudication determination. It is submitted that the answer to this question is also in the affirmative.

[SOP16.100] Queensland — *"... consequences of not paying claimant in accordance with payment schedule ..."* – prior to the commencement of *Building and Construction Industry Payments Amendment Act 2014* (Qld)

The Amendment Act, viz the *Building and Construction Industry Payments Amendment Act 2014* (Qld) was assented to on 26/09/2014.

Ss 1 and 2 of the Act commenced on the same day, and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014).

Section 20 of the Queensland Act follows s 16 of the New South Wales Act.

[SOP16.105] Queensland — *"… consequences of not paying claimant in accordance with payment schedule …"* – under the Queensland Act, as amended by *Building and Construction Industry Payments Amendment Act 2014* (Qld)

The Amendment Act, viz the *Building and Construction Industry Payments Amendment Act 2014* (Qld) was assented to on 26/09/2014.

Ss 1 and 2 of the Act commenced on the same day, and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014).

Under s 10 of the Amendment Act, s 20(1)(b) of the *Building and Construction Industry Payments Act 2004* (Qld) (Queensland Act) is omitted, and in its place the following subsection is inserted:

> (b) the respondent serves a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant; and

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

Clause 11 of the Act inserts a new section, s 20A, to Pt 3, Div 1 of the Queensland Act, as follows:

> **20A Notice required before starting particular proceedings**
>
> (1) This section applies if a claimant serves a payment claim on a respondent and —
>
> (a) the respondent —
>
> (i) fails to serve a payment schedule on the claimant under this part; and
>
> (ii) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates; and
>
> (b) the claimant intends to —
>
> (i) start proceedings to recover an unpaid portion of the claimed amount as a debt owing to the claimant; or
>
> (ii) apply for adjudication of the payment claim.
>
> (2) Before taking the intended action mentioned in subsection (1)(b), the claimant must first give the respondent notice of the claimant's intention to take the action.
>
> (3) The notice must —
>
> (a) be given to the respondent within 20 business days immediately following the due date for payment; and
>
> (b) state that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the notice; and
>
> (c) state it is made under this Act.
>
> (4) However, this section does not apply if the claimant previously gave the respondent a notice under this section for the unpaid portion of the claimed amount.
>
> (5) The giving of a notice under subsection (2) does not —
>
> (a) require the claimant to complete the action stated in the notice; or

(b) prevent the claimant from taking different action to that stated in the notice.

In a paragraph under the heading "Notes on provisions" in the Explanatory Notes for Amendments moved during consideration in detail, the Minister said:

> Amendment 7 inserts a new section 20A. The intention of this amendment is to clarify the circumstances in which prior notice is required before starting legal proceedings.

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

[SOP16.110] Northern Territory — *"… consequences of not paying claimant in accordance with payment schedule …"*

Section 27 of the Act provides for an application for adjudication as follows:

> If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless –
>
> (a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2); or
>
> (b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract.

s 14-16

Section 28 of Act delineates the steps that must be taken in applying for adjudication. Under s 28(2)(a), it is provided that the adjudication application must be prepared in accordance with and contain the information prescribed by, the Regulations. Section 28(2)(b)–(c) provides carefully drafted criteria as to the contents and/or attachments to an adjudication application. The consequences of failing to comply with s 28(2)(a)–(c) are not stated. Whether or not any such failure will give rise to a valid jurisdictional challenge is a matter that will have to be worked out through the Courts of the Northern Territory.

[SOP16.120] South Australia — *"… consequences of not paying claimant in accordance with payment schedule …"*

Section 16 of the Act follows the New South Wales model, with a significant difference however being in s 16(1)(b)(i)–(ii), which state as follows:

> This section applies if —
>
> (b) the respondent provides a payment schedule to the claimant —
>
> (i) within the time required by the relevant construction contract; or
>
> (ii) within 15 business days after the payment claim is served, whichever time expires earlier.
>
> whichever time expires earlier.

Section 16(1)(b)(ii) of the New South Wales Act applies within 10 business days after the payment claim is served.

[SOP16.130] Tasmania — *"… consequences of not paying claimant in accordance with payment schedule …"*

Section 20 of the Act contains detailed provisions in regard to the consequences of not paying a claimant in accordance with a payment schedule. Under s 20(2), it is provided as follows:

> If this subsection applies to a claimant, the claimant –
>
> (a) may –

(i) apply to a court of competent jurisdiction to recover from the respondent the unpaid part of the scheduled amount, as a debt due to the claimant; or

(ii) make an adjudication application under section 21 in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out building work or construction work, or supplying goods and services, under the building or construction contract.

It is difficult to understand how this subsection could, in any event, apply to a respondent. The balance of the provisions of s 20 are substantially in accordance with the New South Wales Act.

[SOP16.140] Australian Capital Territory — *"… consequences of not paying claimant in accordance with payment schedule …"*

Section 18 of the Act deals with the consequences of not paying the claimant in accordance with the payment schedule. The ACT Act substantially follows the New South Wales model. Section 18(1)(a)–(b) provides as follows:

This section applies if —

(a) a claimant gives a payment claim to a respondent; and

(b) the respondent provides a payment schedule to the claimant within the earlier of —

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is given to the respondent.

DIVISION 2 – ADJUDICATION OF DISPUTES

17 Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) An adjudication application:

(a) must be in writing, and

(b) must be made to an authorised nominating authority chosen by the claimant, and

(c) in the case of an application under subsection (1)(a)(i)—must be made within 10 business days after the claimant receives the payment schedule, and

(d) in the case of an application under subsection (1)(a)(ii)—must be made within 20 business days after the due date for payment, and

(e) in the case of an application under subsection (1)(b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2)(b), and

(f) must identify the payment claim and the payment schedule (if any) to which it relates, and

(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and

(h) may contain such submissions relevant to the application as the claimant chooses to include.

(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

[S 17 subst Act 133 of 2002, s 3 and Sch 1[29]]

SECTION 17 COMMENTARY

[SOP17.50] *"... may apply ..."*

What is the status of the requirements under s 17(1)(a) and (b)? Do they constitute jurisdictional facts?

At [24]–[26] of *Kembla Coal & Coke Pty Ltd v Select Civil Pty Ltd* [2004] NSWSC 628 (23 July 2004), McDougall J, after referring to *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55; 102 LGERA 52; [1999] NSWCA 8, Spigelman CJ (with whom Mason P and Meagher JA agreed), at [37]–[44], discussed that principle. See also *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; 136 LGERA 288; [2004] NSWCA 422.

At [25] of *Kembla* McDougall J, with reference to Spigelman CJ's judgment in *Timbarra* said:

> It is apparent from his Honour's analysis that a jurisdictional fact is one that must be seen to exist before the statutory power can be exercised. Thus, as his Honour pointed out at [41], even where as a matter of construction, the legislature empowers the primary decision-maker authoritatively to determine the existence or non-existence of the jurisdictional fact, a court with judicial review jurisdiction may enquire into the determination of the jurisdictional fact – ie, into the reasonableness of the determination (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; [1947] 2 All ER 680) – but cannot itself determine the actual existence or non existence of the relevant facts. As Jordan CJ pointed out in *Ex parte Mullen; Re Hood* (1935) 35 SR (NSW) 289, 298 (in a passage cited with approval by Spigelman CJ in *Timbarra* at 64–65 [43]), the question, whether a particular matter is one the actual existence of which is a condition of the existence of jurisdiction to determine matters or

> is a matter that arises for decision in the exercise of that jurisdiction, is often difficult, and is normally to be determined by implication from the language of the relevant legislation.

McDougall J's judgment in *Kembla Coal* was affirmed by the New South Wales Court of Appeal in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288. The High Court has given leave to appeal in this matter. As at the date of the publication of this book, judgment is still reserved.

In her article, "The application of administrative law standards to the Security of Payment Act" (2006) 22 BCL 162, Julia Murray, at 166, says:

> The grounds upon which *certiorari* will issue are: jurisdictional error; breach of natural justice; fraud; and error of law on the fact of the record.

While the first three grounds represent fundamental flaws sufficient to invalidate a decision, the fourth operates as an exception and is commonly referred to as a form of "illegality falling short of invalidity", see Aronson et al, n 22, pp 166–168, or non-jurisdictional error, see Shaw JW and Gwynne FJ, "*Certiorari* and Error on the Face of the Record" (1997) 71 ALJ 356 at 357. It has therefore been carefully defined to ensure that review of what is essentially authorised public conduct is restricted to serious errors warranting judicial intervention, see, eg *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338; [1952] 1 All ER 122; [1951] EWCA Civ 1 at 352 (KB); *R v Tennant; Ex parte Woods* [1962] Qd R 241 at 258. Hence, the requirement for the court to restrict itself to those materials constituting "the record" when reviewing decisions under this ground: *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 at 176. See also Creyke and McMillan *Control of Government Action: Text, Cases and Commentary* (Butterworths, 2005), n 21, p 811.

The distinction between jurisdictional and non-jurisdictional error has assumed primary importance in the case law relating to the Act. However, the distinction has proved somewhat elusive, with the scope of jurisdictional error alternating between broad and narrow archetypes. The "narrow notion" of jurisdictional error espouses that only a failure to satisfy a "condition precedent" to the exercise of a decision-maker's jurisdiction will amount to a jurisdictional error, Hotop SD, *Principles of Australian Administrative Law* (6th ed, Lawbook Co., 1985), n 21, p 248. Under the "broad notion", errors made after the conditions precedent have been satisfied may be jurisdictional, Hotop, n 21, p 255. In general, recent decisions have favoured the broad notion, with the High Court in *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 at 179 stating that jurisdictional error will occur where:

> [A]n administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion.

The jurisdictional facts which must be in existence for an adjudication application, are set out in s 17(1) as read with ss 13 and 16, and may be summarised as follows:

(a) the failure by a respondent to provide a payment schedule coupled with a failure to pay the whole of the amount claimed by the due date (s 17(1)(b));

(b) the failure by a respondent, who provides a payment schedule, to pay the whole of the scheduled amount by the due date (s 17(1)(a)(ii)); or

(c) the provision of a payment schedule by the respondent, but where the scheduled amount is less than the claimed amount (s 17(1)(a)(i));

(d) the compliance with the statutory time frames and formalities listed in the above sub-sections.

[SOP17.60] Necessity of giving notice – under s 17(2)(a) of the New South Wales Act

The necessity of giving notice of the claimant's intention to seek adjudication, must not be overlooked. It is an essential pre-condition for requiring adjudication.

The sections of the other States and Territories concerning the necessity of giving notice in advance of a claimant's intention to apply for adjudication are listed below:

Australian Capital Territory – s 19(2)(a)

Northern Territory – no express provision

Queensland – s 21(2)(a)

South Australia – s 17(2)(a)

Tasmania – s 21(4)(a)(i)

Victoria – s 18(2)(a)

Western Australia – no express provision

In *Vinson v Neerim Properties Developments Pty Ltd* [2016] VSC 321, Vickery J stressed, under the Victorian Act, the importance of giving notice in advance of the intention to apply for adjudication, by stating:

> [51] Neerim made its purported Adjudication Application under s 18(1)(b) of the Act. However, s 18(2) of the Act provides a bar to the making of an adjudication application to which sub-section 1(b) applies unless both of the mandatory requirements of paragraphs 18(2)(a) have been satisfied.
>
> [52] As to the requirements under s 18(2)(a) of the Act, Neerim's email of 9 February 2016, whether or not it was provided to Ms Vinson within the time prescribed, manifestly failed to notify her of Neerim's intention to apply for adjudication of the Payment Claim, as is required. The notice, such that it was, merely reserved the exercise of the company's rights under the Act. This is insufficient, for the purposes of the Act, to amount to a notice that Neerim intended to apply for adjudication of its Payment Claim.
>
> [53] The object and purpose of a s 18(2)(a) notice is to enable the respondent to the payment claim to be given an opportunity under s 18(2)(b) to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice provided under s 18(2)(a). This opportunity was denied to Ms Vinson by Neerim simply stating that it 'reserved' its rights.
>
> [54] For these reasons, Neerim failed to comply with an essential and obligatory requirement of s 18(2) of the Act (see *Hallmarc Construction v Saville* [2014] VSC 491, [24]) and the purported notice was invalid for this purpose.

[SOP17.70] Effect of notification on the time frame

In *Rojo Building Pty Ltd v Jillcris Pty Ltd* [2006] NSWSC 309 (19 April 2006), it was plain to Einstein J, at [18], that once the employer received notification under s 17(2)(a)–(b), its earlier failure to provide a payment schedule as required by the time limit set in s 14, no longer triggered the initial right to recover the unpaid portion of the claimed amount as a debt through the courts. Instead, an alternative opportunity was provided for a payment schedule within an entirely different time frame, viz, five days after receiving the notification of intent to apply for adjudication.

[SOP17.80] *"... after ..."*

In *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 (5 May 2005), Einstein J held, at [33], that a payment schedule provided to a s 17(2)(a) payment claim, and which was not proceeded with, did not qualify as a payment schedule where the adjudication proceeded subsequently under s 17(2)(b).

At [36] of his Honour's judgment, he said:

> Further, the 27 January letter did not purport to be given under s 17(2)(b). That is, it did not purport to be the provision of a payment schedule. To the contrary, it spurned Brick's invitation to submit a payment schedule. The premise on which the letter is written is that Taylor had already served a payment schedule *within the time specified by s 14*– a proposition made, expressly or impliedly, in each paragraph in that letter. In that circumstance, so Taylor's solicitor asserted, there was no necessity to serve another and Taylor declined the invitation to do so. The position taken by Taylor's solicitors is consistent with that taken by Taylor 7 days earlier, namely that the payment schedule served on 20 January was within time.

One wonders whether his Honour's approach was one which was overly technical, where his Honour, at [40], held as follows:

> The holding is that s 17(2)(b) merely provides a respondent with an (additional) opportunity to provide a payment schedule when it has failed to do so in accordance with s 14 and to do so after the claimant has given notice of its intention to apply for adjudication. The respondent may ignore the opportunity [in which case it loses the opportunity to lodge an adjudication response – s 20(2A)] or it can provide a payment schedule. If it chooses to provide a payment schedule then it might choose to provide one identical to that which it has previously provided or it might choose to provide a different payment schedule. However the Act is not to be construed to require the claimant or the adjudicator to guess whether a respondent relies on a payment schedule for the purpose of s 17(2)(b) when it has not been provided in accordance with that section.

[SOP17.90] *"... chosen by the claimant ..."* s 17(3)(b) of the New South Wales Act

A further disturbing and draconian provision of this somewhat one-sided legislation, viz the Security of Payment legislation, is that it is only the claimant in New South Wales, who can choose the nominating authority. The respondent, although no adjudication can be made against the claimant, has no say whatsoever. A list of the authorised NSW nominating authorities can be found at http://www.cpsc.nsw.gov.au/SOP.

Certain of the other States and Territories have also specifically addressed the issue of who can choose the nominating authority:

Australian Capital Territory – s 19(1)
South Australia – s 17(3)(b)
Tasmania – s 21(1)
Victoria – s 18(3)(b)

[SOP17.100] *"... receives ..."*

The words "receive – receives" within the context of the New South Wales Act, has been given substantial judicial attention. Reference should be made to the discussion at [SOP19.50].

Shortly, as Austin J held in *Firedam Civil Engineering Pty Ltd v KJP Construction Pty Ltd* [2007] NSWSC 1162, the word "received" where used in s 17(3)(c) means received at a place, ie the registered office or place of address during normal office hours and does not require receipt in the hands of or possession of somebody on behalf of the company. See further the commentary at [SOP25.570].

[SOP17.110] *"... adjudication application ..."* — the time within which application must be made

An adjudication application under s 17(1)(b) must be made within 10 business days after the end of the 5 day period referred to in subs (2)(b): *Amflo Constructions Pty Ltd v Jefferies* (2004) 20 BCL 452; [2003] NSWSC 856 at [41]–[42], *Schokman v Xception Construction Pty Ltd* [2005] NSWSC 297 (4 April 2005) at [14].

The decision by McDougall J in *Multipower Corp Pty Ltd v S & H Electrics Pty Ltd* [2006] NSWSC 757 (10 July 2006) rests on a curious set of facts. It was contended by the unsuccessful party in the adjudication in injunction proceedings to restrain the successful party from pursuing its rights under the determination, that the application for adjudication was out of time. McDougall J held, in [41], that it necessarily followed from what Hodgson JA said in *Brodyn*, discussed more fully in [SOP25.70], that as the adjudicator's implicit conclusion was that the adjudication application was timeously brought, the determination was not void. His Honour held that, at the most, and assuming that the adjudicator's decision was in error, that error would have been within the scope of jurisdiction entrusted to adjudicators, and a mistake that the adjudicator was entitled to make.

What would the result have been if there was no implicit conclusion in the adjudicator's determination that the adjudication application was out of time and if it, in fact, was? The judgment does not touch on this point. It is submitted that, under those circumstances, the determination would have been void.

At [17] of *Gisley Investments P/L v Williams* [2010] QSC 178, Douglas J referred to a judgment of McMurdo J in *Nebmas Pty Ltd v Sub Divide Pty Ltd* [2009] 2 Qd R 241; [2009] QSC 92 at [20]–[25] on this issue with approval. An extract from *Nebmas* containing the relevant paragraphs is at [SOP17.180].

The debate in the immediately preceding paragraph is academic in the light of decision of the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

[SOP17.120] Making of an election

This has been discussed in [SOP10.70], and to which reference should be made.

[SOP17.130] *"... may contain ..."*

As this is probably the only opportunity that a claimant will have of putting documentary submissions before the adjudicator, the claimant should carefully address all the relevant issues raised by the respondent in the payment schedule. The adjudicator has no obligation to afford the claimant a further opportunity of placing information before him/her, *Transgrid v Walter Construction Group* [2004] NSWSC 21 (6 February 2004).

At [65] McDougall J said:

> It was open to TransGrid to take whatever approach it wished to the adjudication application propounded by Walter. It chose to take the course of criticising the material relied upon by Walter and, in some cases, the approach taken by Walter. It chose to put forward no evidence of its own as to valuation of the claims. It is not suggested that Mr Sullivan denied it the opportunity to do so. The submission is simply that Mr Sullivan, having rejected the criticisms that TransGrid made of Walter's claims, was then obliged to give it "a second bite of the cherry". I do not agree. Mr Sullivan was entitled to think that TransGrid had taken a considered approach to the adjudication application, and that it had put forward whatever material it wished to rely upon in answer to that application. There is no suggestion that, for example, TransGrid put its position on the express basis that, if Mr Sullivan rejected its primary criticisms, it would then seek to put forward further material in reply; or that Mr Sullivan induced it to take the approach that it did. Indeed, having regard to the time limits imposed by the Act for filing an adjudication response, and thereafter for determining the application, it is difficult to see how (without the consent of Walter) Mr Sullivan could have extended a further opportunity to TransGrid to put submissions. There is no doubt that, under s 21(4) of the Act, Mr Sullivan could have called for further material from TransGrid. (This would have given him the obligation to afford Walter an opportunity to comment on that material.) However, unless there were an agreed extension of time, that request (and the provision of material in response to it, and any further comment on that

material) must all take place within the 10 business days' time frame within which, subject to any agreement of the parties, the application is to be determined.

At [129] of *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 (8 November 2005), Brereton J addressed the limits of matters that can be dealt with in an adjudication application. His Honour said:

> While I accept that, as a respondent to a payment claim is not able in its adjudication response to go beyond the matters raised in its payment schedule, so an adjudication application may not include materials which go outside, in the sense of falling outside the ambit or scope of the materials provided in the payment claim [*John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258], neither this principle, nor the provisions of the Act – which plainly envisage that an "adjudication application" may contain such submissions relevant to the application as the claimant chooses to include [s 17(3)(h)] – have the consequence that no material which was not included in the payment claim can be included in the adjudication application. The test is whether the additional material is or is not within the scope or ambit of the payment claim. If it is, then evidentiary and argumentative material to support it can be included in the adjudication application.

In an appeal against Brereton J's decision in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, *sub nom Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 (28 February 2007), Giles JA, with whom Santow JA and Tobias JA agreed, said:

> [26] With respect to the trial judge, I consider that the fundamental vice in the adjudicator's determination can be shortly explained without embarking on an exegesis of the reference in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* to a bona fide attempt to exercise the statutory power. Section 22 of the Act required that the adjudicator determine an adjudicated amount (s 22(1)) by considering particular matters (s 22(2)). The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters. But that is what the adjudicator did. He stated expressly in his reasons that he did not have evidence on which he could independently arrive at the value of the completed work, and that he adopted the appellant's valuation in preference to that of the respondent because of the respondent's unmeritorious challenges to the validity of the payment claim.
>
> [27] On the face of the determination, the adjudicator simply did not perform the task required by the Act, and his purported determination was not given greater respectability by the reference to his inclination "to believe the claimant rather than the respondent": the unmeritorious challenges were not a basis for belief or disbelief, and in any event it was not correct to speak of believing a corporate body. The adjudicator did not comply with an essential precondition to the existence of a valid determination.
>
> [28] That is sufficient for the disposal of the appeal, and it is not necessary to consider failure to have regard to relevant contractual provisions or failure to have regard to the payment schedule. I should not be taken to approve by silence all that the trial judge said.

It will be seen that, for different reasons than that which were given by Brereton J, the appeal was dismissed.

Holmwood and *Halkat* were cited with approval by Sackar J at [58] and [59] of *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123.

In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), it was held that material may properly be incorporated by reference in a payment schedule. Giles JA, with whom McColl JA and Young JA concurred, noted in [55]–[57] that in *Halkat* above, there was a wholesale departure from an adjudication according to the Act, and that that was quite different from error.

[SOP17.140] Are the provisions of s 17 in regard to the procedure for adjudication applications jurisdiction facts?

A discussion on jurisdictional facts is contained in the paragraph under the heading "may apply" at [SOP17.50].

Section 17(1)–(3) contains criteria that should be in existence for a valid application for adjudication. In *Energy Australia v Downer Construction (Australia) Pty Ltd* [2006] NSWSC 52, it was held, at [64], that nothing in the language of s 17 required precision of correspondence between that which appeared in an adjudication application with that contained in the supporting documentation and the payment claim.

The question that arose was whether or not the failure of one or more or all of these criteria constitute "the basic and essential requirements" for the valid initiation of the adjudication process, as that phrase has been dealt with in the decisions of the Court of Appeal in New South Wales in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004) and *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004) and for which see the discussion at [SOP25.450]. *Brodyn*, as discussed at [SOP25.450], no longer represents the law in New South Wales, see *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

The Court of Appeal overturned the judgment on the issue referred to above and with reference to other issues as well in *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 (19 March 2007), where Giles JA, with whom Santow and Tobias JJA agreed, said:

> [64] Accordingly, if an adjudication application does what s 17(3)(f) requires, ie identifies the payment claim and the payment schedule (if any) to which it relates, it is a sufficient application and the adjudicator can carry out the statutory task. The application is not changed by the submissions accompanying it, and it remains an application for adjudication of the identified payment claim. To repeat, there may not be any submissions in support of the payment claim. The adjudicator must still make the determination, perhaps invoking the powers under s 21(4). If the submissions in whole or part address a progress payment in relation to construction work (or related goods and services) other than that identified in the payment claim, the adjudicator can invoke those powers in order to clarify matters; but even if the adjudicator does not do so, the adjudicator must make the determination addressing the work identified in the payment claim.
>
> [65] In the present case the adjudication application sufficiently identified the payment claim, and also the payment schedule; it was not submitted to the contrary. The "submissions relevant to the application" (s 17(3)(h)) which accompanied the payment claim, which must fall within "submissions … that have been duly made by the claimant in support of the claim" in s 22(2)(c), may have had the substantial difference which for the present I assume, but that did not invalidate the application. On no view was this a case of an adjudication application which, from the submissions contained within it, sought adjudication of a payment claim unrelated to the payment claim served on 12 July 2005.

In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [35], Spigelman CJ said:

> However, the element presently under consideration – "cannot be made unless" – does not, in my opinion, invoke a jurisdictional fact. Like the formulation "must not be granted" considered in *Gedeon* supra at [46], it "conveys the notion of a contraction in the content of what would be the power otherwise conferred", relevantly in this case, the right to make an application under s 17(1). Similarly, an "integer or element of the

right" under s 17(1) "is its exercise by application made within the time specified": *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43; (1995) 184 CLR 265 at 277).

Spigelman CJ continued at [36]:

> The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

Basten JA, at [96] of the judgment in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 concluded:

> For the reasons given by the Chief Justice at [31]–[53] and by McDougall J, I agree that compliance with the time limit specified in s 17(2)(a) is an essential condition for a valid adjudication application. The language of the provision ("cannot be made unless") is intractable; neither the structure nor the purpose of the Act suggests a different conclusion.

Upon an analysis of all of the provisions of s 17(1)–(3), in those States and Territories where *Brodyn* will still be followed, it appears as if the contents thereof are all essential preconditions for a valid adjudication application. In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, in which the New South Wales Court of Appeal has in effect declined the principal principles of *Brodyn*, Spigelman CJ, with whom Basten JA and McDougall J concurred, was concerned with s 17(2)(a) of the New South Wales Act. His Honour held, with very great respect correctly so, that s 17(2)(a)of the New South Wales Act did not confer any power on an adjudicator to determine whether s 17(2)(a) had been complied with. McDougall J in *Chase Oyster Bar* said at [218]:

> To my mind, the weight of those factors favours the conclusion that the requirement of s 17(2)(a) are jurisdictional, in the sense that the giving of notice within the requisite period is a condition that must be satisfied for a valid application to be made pursuant to s 17(1). Considerations of inconvenience and departure from the statutory scheme do not tell against that conclusion. There are a number of reasons why this is so:
>
> (1) Satisfaction of the condition is a matter peculiarly within the control of the claimant. A requirement to give notice of intention to proceed to adjudication within 20 business days is hardly onerous, particularly in the context of other requirements as to time in the *Security of Payment Act*.
>
> (2) It is unlikely that investigation, assessment and decision on the s 17(2)(a) jurisdictional fact will be complex. Nor is it something that is likely to involve the particular expertise of adjudicators (beyond an ability to count) or difficult questions of construction.
>
> (3) The inconvenience resulting from any challenge (a matter to which attention was directed in the submissions for the Attorney General) is but one side of the coin; on the other side, there is the inconvenience to the respondent of being subjected to adjudication applications even in circumstances where their making is forbidden by the legislation.
>
> (4) The departure from the statutory scheme of speedy but interim resolution is scarcely substantial; on the contrary, as I have shown, the right to the claimed amount remains alive and may be enforced, either through a subsequent payment claim or by an action for debt in which the ability to defend is

severely limited.

This passage from McDougall J's judgment was referred to by Macready AsJ in *Steel v Beks* [2010] NSWSC 1404 at [29].

In *Chase Oyster Bar* at [238]–[244], McDougall J added:

> [238] For the reasons that Basten JA gives at [97] to [101] above, the power to determine compliance with s 17(2)(a) is not given to the adjudicator. The Court is not bound by his finding that the requirements of s 17(2)(a) had been met.
>
> [239] In this case, the ultimate jurisdictional fact, as found by the adjudicator, was that set out in para 24 of what it remains convenient to call his determination. (For the reasons that I have given at [192] above, the actual "determination" is in fact the decision on the three matters referred to in s 22(1), not the reasons, as required by s 22(3)(b), for that decision.) That finding was, in relation to the notice under s 17(2)(a), that it had been served within time.
>
> [240] The adjudicator's finding was not correct. It is clear, from what I have said at [115] and [116] above, that no notice was given in accordance with s 17(2)(a).
>
> [241] Alternatively, even if satisfaction of the existence of the fact were a matter entrusted to the adjudicator for determination, the Court does not inquire into the existence of the fact itself but, rather, looks at the adjudicator's reasoning.
>
> [242] The adjudicator found that:
>
> (1) the payment claim was served on 22 December 2009 (para 13);
>
> (2) the due date for payment was 6 January 2010 (para 31);
>
> (3) notice under s 17(2)(a) was served on 11 February 2010 (para 19)
>
> [243] On the basis of those findings, it was not possible rationally to conclude that the notice under s 17(2)(a) had been served in time. That ultimate finding had no basis in the evidence (in so far as that is reflected in the adjudicator's findings of primary fact to which I have just referred). On the contrary, the ultimate finding is in contradiction to those findings of primary fact.
>
> [244] On either approach, therefore, the Court is not bound by the adjudicator's finding. It follows that the erroneous finding as to satisfaction of the jurisdictional fact cannot bind the Court.

These passages from McDougall J's judgment were referred to by Macready AsJ in *Steel v Beks* [2010] NSWSC 1404 at [31].

[SOP17.150] *"... must be served ..."*

In *TQM Design & Construct Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1216 (3 December 2004), McDougall J, at [4] contrasted the phrase "must be served" with the word "receiving" in s 20(1)(a). At [5], his Honour said:

> It will be seen that the Act talks variously of service and receipt. They are not equivalent concepts. It was submitted that I should construe the word "receiving" in s 20(1)(a) as having its ordinary English meaning, namely, taking into one's possession and not as equivalent to "being served" or "having been served". On the view to which I have come it is not necessary to answer that question, but, in particular having regard to the consequences that follow if an adjudication response is not lodged within time, I incline to the view that the distinction between the concept of service and concept of receipt is deliberate and that in s 20(1) the word "receiving" should be given its ordinary English meaning.

The question as to whether or not compliance with s 17(5) of the New South Wales Act was jurisdictional was left open by McDougall J in *Douglas Aerospace v Indistri Engineering Albury* [2014] NSWSC 1445.

[SOP17.160] Victoria — *"… adjudication applications …"*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

It is to be noted that s 18 of the principal Act lists criteria, some of which differ from those as set out in s 17(1)–(3). The Victorian Act also contains different time limits, eg under s 18(3)(b), the adjudication application must be made within 5 business days after the claimant receives the payment schedule and not within 10 business days as provided for in s 17(3)(c) of the New South Wales Act .

Under s 18(4), it is provided that if the construction contract to which the payment claim relates lists three or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 20 of the amendment Act substitutes the material in s 20(1)–(4) for the contents of s 18(1)–(4) of the principal Act.

Of significance is that under s 18(2)(a) of the amended Act, the claimant is to notify the respondent of the claimant's intention to apply for adjudication of the payment claim within the period of 10 business days immediately following the due date for payment and under s 18(2)(b), the respondent must be given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

Section 18(3) lists all of the criteria for a valid adjudication application.

Section 18(4) provides that if the construction contract to which the payment claim relates lists three or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.

In neither the old or amended version of the Victorian Act is there any method prescribed in regard to the making of an adjudication application. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [130]–[132], Vickery J said, with reference to s 18(3)(c) of the old Act:

> [130] An adjudication application is required to be made under s 18(3)(c) of the Act within the time prescribed. The Act, however, is silent on the question as to what constitutes the making of an application. The paragraph is not expressed in terms of service of the application on the authorised nominating authority: Cf. *Austar Finance v Campbell* [2007] NSWSC 1493, nor is it expressed in terms of notifying the authority: Cf. *Xiao v Perpetual Trustee Company Ltd and Anor* [2008] VSC 412 at [58]–[65], or giving the application to the authority:*Xiao v Perpetual Trustee Company Ltd and Anor* [2008] VSC 412 at [62], or that the documents which comprise the application have been physically received by the authority within the time specified.
>
> …
>
> [132] Accordingly, there appears to be no reason in principle why an adjudication application cannot be commenced by the filing of the appropriate documents electronically with the authorised nominating authority. In such a case the date and time of filing of the application may be determined by the date and time when the email transmission arrives at the authority's server where it may be accessed by its administrators.

Vickery J held at [136] of *Hickory* that although the mandatory word "must" appears in s 18(3)(c) of the Act, "this does not in itself render an act done in breach of the provision should be invalid (sic). I do not find that this was a purpose of the legislation".

[SOP17.170] Western Australia — *"… adjudication applications …"*

(a) Generally

Under s 25 of the Act, there can be an application for adjudication if there is a payment dispute under a construction contract. The Western Australian Act, unlike the East Coast model, makes no reference to a payment schedule in response to the payment claim. Under Sch 1, Div 5, cl 7, appended to the Western Australian Act, it is provided that:

(1) If a party that receives a payment claim —

(a) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(b) disputes the whole or part of the claim, the party must, within 14 days after receiving the claim, give the claimant a notice of dispute.

(2) A notice of dispute must —

(a) be in writing;

(b) be addressed to the claimant;

(c) state the name of the party giving the notice;

(d) state the date of the notice;

(e) identify the claim to which the notice relates;

(f) if the claim is being rejected under subclause (1)(a) — state the reasons for the belief that the claim has not been made in accordance with this contract;

(g) if the claim is being disputed under subclause (1)(b) — identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(3) Within 28 days after a party receives a payment claim, the party must do one of the following, unless the claim has been rejected or wholly disputed in accordance with subclause (1) —

(a) pay the part of the amount of the claim that is not disputed;

(b) pay the whole of the amount of the claim.

(4) If under this contract the principal is entitled to retain a portion of any amount payable by the principal to the contractor —

(a) subclause (3) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of any amount retained under the entitlement.

Significantly, under cl 7(2), there is a requirement of a notice of dispute, and not a payment schedule, a requirement in all of the Acts following the East Coast model. Under cl 7(2)(f), the notice of dispute must state the reasons for the belief that the claim has not been made in accordance with the contract. Under cl 7(2)(g), it is provided that if the claim is being disputed under subcl (1)(b), the notice of dispute must identify each item of the claim that is disputed, and state, in relation to each of those items, the reasons for disputing it. The question is whether the notice of dispute is valid if it merely "indicates" the reason for the rejection of a claim, as provided for in the East Coast model.

A further question is, if the notice of dispute fails to comply with one or more of the requirements of cl 7(2)(a)–(h), whether the Western Australian adjudicator can still have regard thereto?

Section 26 of the Western Australian Act details the prerequisites for an adjudication application. The period of 28 days referred to in s 26(1) is probably a jurisdictional fact that must be complied with. The requirement under s 26(2)(a) that the application is to be prepared in accordance with a contain the information prescribed by regulation is probably

not a prerequisite to the validity of the application. The relevant regulations are the *Construction Contracts Regulations 2004* (WA).

It will be seen that under s 26(2)(c), the application must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

Section 26(2)(a) of the Western Australian Act provides that the application must conform to that which is prescribed by the regulations, viz *Construction Contracts Regulations 2004* (WA).

Regulation 5 says:

> For the purposes of section 26(2)(a) of the Act, an application to have a payment dispute adjudicated must, in addition to the other information required by section 26(2) of the Act, contain –
>
> (a) the name of the appointed adjudicator or prescribed appointor and the adjudicator's or appointor's contact details;
>
> (b) the applicant's name and contact details; and
>
> (c) the respondent's name and contact details.

The phrase "contact details" in turn is defined in Regulation 4 which states:

> If a person is required by these regulations to give the contact details of a person, the person required to give the details must give the address, telephone and facsimile numbers and ABN of the person or the person's business (or ACN of the person if there is no ABN) to the extent to which the person required to give the details knows those details.

In *Marine & Civil Pty Ltd and WQUBE Port of Dampier Pty Ltd* [2014] WASAT 167, the application failed to provide the ABN.

At [79], the State Administrative Tribunal of Western Australia held:

> Given the conclusion just stated, and the mandatory and strict regime of compliance with the requirements of the CC Regulations for adjudication applications, I consider that the correct and preferable decision is to affirm the adjudicator's decision to dismiss the Adjudication Application based upon s 31(2)(a)(ii) of the CC Act.

In the light of the principles set out in *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, it is to be doubted whether this judgment is correct.

That section does not spell out the consequences of a failure to provide the relevant document, nor does it state that that document cannot be subsequently submitted to the adjudicator.

As at the date of publication, there have been no Western Australian decisions on this point.

As noted elsewhere, the Western Australian and Northern Territory security of payments legislation follow substantially the same model, which differs from what may be called the East Coast model adopted in New South Wales, Queensland, Victoria, the Australian Capital Territory, Tasmania and South Australia.

The decision of Barr J in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd* [2012] NTSC 22 explains the difference between the Western Australian and Northern Territory Acts insofar as they relate to the conditions precedent for an adjudication application.

See further [SOP17.190] below.

(b) Time limits for "… adjudication application …"

In *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88, Tottle J discussed the time limits for bringing an application for adjudication and the other

procedural steps that are required in that process. His Honour stressed the fact that the Western Australian legislation deliberately imposed strict time limits for all steps in respect of the adjudication application.

The question is an important one and, for that reason, Tottle J's discussion of this aspect is set out in full below:

> [35] In *Alliance Contracting Pty Ltd v James* [2014] WASC 212 Beech J stated (at [69]):
>
> > In my view, the scheme of the Act deliberately imposes strict time limits for all steps in respect of adjudication applications. To my mind, the Act does not reveal an intention that the strictness of these time limits is qualified by the potential revival of a right to obtain an adjudication determination after expiration of the time limit.
>
> [36] Beech J further stated (at [85]):
>
> > That is because of the operation of s 31(3) of the Act. That section provides that if an adjudicator does not make a determination within the prescribed time, "the application is taken to have been dismissed when the time has elapsed".
>
> The critical questions in relation to ground 1
>
> [37] The following questions were raised by the facts and the submissions:
>
> (a) Did the parties consent to extending the prescribed time and, if so, to when was the time extended?
>
> (b) Did the Adjudicator consider that the parties had consented to an extension of the prescribed time?
>
> (c) If the parties did not in fact consent to extending the prescribed time, was it sufficient that the Adjudicator acting reasonably concluded that the parties had consented to extending the prescribed time?
>
> The parties' submissions
>
> [38] Citygate's position is that the parties did not consent to an extension of time beyond 26 February 2015.
>
> [39] In its written submissions, BGC's position was that the first determination was made within time because, as a matter of objective fact, the parties had consented to an extension of time.
>
> [40] In oral submissions, Mr Hodgkin, counsel for BGC, developed an alternative submission that the Adjudicator retained authority to determine the first application if he concluded, acting reasonably, that the parties had consented to an extension of the prescribed time (ts 66, 5 November 2015). The focus of this submission was not on whether the consent of the parties could be established as an objective fact, but on whether the Adjudicator "reasonably understood" that the parties had consented to an extension of time.
>
> [41] Framed as a question of statutory construction, BGC's submission was that s 32(3)(a) of the Act should not be construed as requiring the existence of consent by the parties as a matter of fact, but as requiring a state of mind on the part of the Adjudicator, namely a satisfaction on his part that the parties had consented. Engaging in the "nomenclature characterisation exercise" referred to by K Martin J in *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 at [94], Mr Hotchkin for BGC submitted that the existence or otherwise of consent to an extension of the prescribed time was a "broad" jurisdictional fact.

It is submitted that this reasoning is applicable to the time limits set in all of the Security of Payment Acts in all of the States and Territories.

[SOP17.180] Queensland — *"… adjudication application …"* – prior to the commencement of *Building and Construction Industry Payments Amendment Act 2014* (Qld)

In *Nebmas Pty Ltd v Sub Divide Pty Ltd* [2009] 2 Qd R 241; [2009] QSC 92 at [17], McMurdo J concluded that the adjudication application was out of time. The applicant

argued that the adjudication application was one which could not be made according to the language of s 21(2), and accordingly neither the adjudication, nor the adjudication itself, was of any legal effect. The applicant relied on the judgment of Bergin J in *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd* [2007] NSWSC 554, where, for the first respondent, it was contended that following *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 and *JAR Developments Pty Ltd v Castleplex Pty Ltd* [2007] NSWSC 737, that compliance with the time fixed in the Act for the making of an adjudication application was not essential to the validity of the application.

McMurdo J said the following in *Nebmas*:

> [20] In *Brodyn*, Hodgson JA listed five "basic and essential requirements" for a valid determination, which he compared with certain "more detailed requirements" of the legislation which were not essential: [2004] NSWCA 394; (2004) 61 NSWLR 421, 441. However, this particular requirement, that which is within s 21(2) of the Queensland statute, was not referred to in either category. Hodgson JA noted that his list of the basic and essential requirements might not have been exhaustive. Hodgson JA said:
>
> > The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.
> >
> > In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination.
>
> [21] Neither *Multipower* nor *JAR Developments Pty Ltd* concerned the effect of a failure to give the notice required by the New South Wales equivalent of s 21(2). In each case the question was whether the making of the adjudication application out of time had the result that the adjudication was void. In the latter case, Rein AJ distinguished Kell & Rigby on the basis that the failure to meet a time limit imposed by the Act was established "at the adjudication". In the present case, as discussed, the adjudicator decided that the notice was within time.
>
> [22] In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*(2005) 21 BCL 364; [2005] NSWCA 229, Basten JA discussed the effect of non-compliance with the equivalent of s 17 of the Act, which refers to payment claims. He held that it was not possible to construe the equivalent of s 17(2) as doing otherwise than imposing mandatory requirements with respect to the making of payment claims but that it did not follow that the court should set aside a determination in circumstances where, in its view, the claim does not satisfy those requirements. Basten JA said:
>
> > [44] Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior

courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard: see *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1938) 59 CLR 369 at 391 (Dixon J). A factor favouring that approach is "the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact": *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at 72 (Spigelman CJ).

[45] In the present case, three factors militate in favour of treating elements identified in s 13(2) as properly dependent upon the satisfaction or opinion of the adjudicator. First, what is or may be a sufficient identification of matters for the purposes of a claim falls within the special experience which a qualified adjudicator is intended to bring to the task and is one which may well require evaluative judgment. Secondly, the requirement relates to a procedural step in the claim process, rather than some external criterion. Thirdly, the overall purpose of the Act, as reflected in its objects and procedures, is to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law.

[46] In my view the omission of reference to s 13(2) in the list of mandatory requirements identified in *Brodyn*, should be understood as giving effect to these principles.

[47] It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 at [133], was to the following effect:

> If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.

Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that is must be undertaken in good faith, but that is not a sufficient condition of validity.

[23] Much of that reasoning applies to the present question. This requirement of s 21(2) "relates to a procedural step in the claim process, rather than some external criterion". And the overall purpose of this legislation would appear to be better served by permitting an adjudicator to decide what will usually be the factual question of whether the required step has been taken. In some cases (although not in the present one) that factual issue might involve the use of the adjudicator's specialist knowledge.

In the premises, McMurdo J rejected the motion. It is unlikely that McMurdo J would have come to the same conclusion in the light of the subsequent decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

Reference should also be made to *Gisley Investments P/L v Williams* [2010] QSC 178, where Douglas J referred to the judgment of McMurdo J in *Nebmas Pty Ltd v Sub Divide Pty Ltd* [2009] 2 Qd R 241; [2009] QSC 92 at [20]–[25] with approval.

[SOP17.185] Queensland — *"… adjudication application …"* – under the Queensland Act, as amended by *Building and Construction Industry Payments Amendment Act 2014* (Qld)

The 2014 Amendment Act was assented to on 26/09/2014. Ss 1 and 2 of the Queensland Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)

Under s 12(2) of the Amendment Act, ss 21(2)(a) and (b) of the Act are omitted from the Queensland Act and replaced as follows:

(a) the claimant gives the respondent a notice under s 20A(2) of the Amendment Act; and

(b) the 5 business days for the respondent to serve the payment schedule, as stated in the notice, has ended.

Section 12(3) of the Act omits and replaces ss 21(3)(a) and (b) of the Queensland Act as follows:

(a) must be in the approved form; and

(b) must be made to the registrar; and

Section 12(4) of the Act omits the phrase "5 day period" from s 21(3)(c)(iii) and (b) of the Queensland Act and replaces it with "5 business days".

Section 12(5) of the Act omits s 21(3)(e) of the Queensland Act and inserts in its place:

(e) must be accompanied by the fee prescribed by regulation for the application; and

Section 12(6) of the Act omits the phrase "authorised nominating authority to which an adjudication application is made" from s 21(6) of the Queensland Act and replaces it with "registrar".

In a paragraph under the heading "Notes on provisions" in the Explanatory Notes for Amendments moved during consideration in detail, the Minister said:

> Amendment 8 makes amendments to sections 21(2)(a) and (b). The amendment clarifies that an adjudication application under section 21(1)(b) cannot be made unless the claimant first gives the respondent a notice under section s 20A(2) of the Amendment Act and the time for the respondent to serve the payment schedule, as stated in the notice, has ended.

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, s 115 has been inserted in the Queensland Act. In the main, it provides under that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

[SOP17.187] Queensland – the Registrar's powers and functions and other related matters in regard to the nominating authority

The powers and functions of the Registrar/Registry are dealt with under ss 38, 39, 40, 41, Pt 4, Div 2, s 68, Pt 4, Div 4, s 69, Pt 4, Div 5, s 73, Pt 4, Div 6, ss 76, 84, 85, Pt 4, Div 7, s 86, ss 102, 111 of the Queensland Act.

These sections/parts are amended under ss 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 34A, 35, 36, 39, 41 of the *Building and Construction Industry Payments Amendment Act 2014*, assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)

Section 44 of the *Building and Construction Industry Payments Amendment Act 2014* of the Amending Legislation inserts a new Division 2, ss 113 and 114, which deals with transitional provisions for the registration of authorised nominating authorities, and applications to the authorised nominating authority for the appointment of an adjudicator.

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, s 115 has been inserted in the Queensland Act. In the main, it provides under that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

[SOP17.190] Northern Territory — *"… adjudication applications …"*

Under s 27 of the Act, (who can apply for adjudication) and following the Western Australian Act, it is provided that if a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated unless:

(a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2);

(b) or the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract.

Section 27 is to be read with s 8 which reads as follows:

A payment dispute arises if –

(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed;

(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or

(c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

Presumably, an expert determination of a matter arising under the contract will preclude an adjudication application. The question is whether the determination by a superintendent or such other person also falls within the provisions of s 27(b)? Prima facie, the words of s 27(b) are wide enough to include any finding by a superintendent or any such person in respect of matter arising under the contract. For a discussion on whether or not an adjudicator is bound by a superintendent's determination in New South Wales, see [SOP22.690].

Section 28 provides for the procedure for applying for adjudication and states as follows:

(1) To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b) –

(a) prepare a written application for adjudication;

(b) serve it on each other party to the contract;

(c) serve it on –

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator;

(ii) if the parties to the contract have appointed a prescribed appointer – the appointer; or

(iii) otherwise – a prescribed appointer chosen by the party; and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).

(2) The application must –

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations;

(b) state the details of or have attached to it –

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

(3) Subsection (1) applies to a dispute even if it arises within the 90 day period immediately preceding the commencement of this subsection.

The question that arises immediately is whether or not an application which is not in accordance with the prescribed regulation, or does not have the details or attachments referred to in s 28(2)(b)–(c), constitutes a valid application? Nothing is stated in the Northern Territory Act with regard to the consequences of failing to comply strictly with the provisions of s 28(2)(a)–(c).

In Department of *Construction and Infrastructure v Urban and Rural Contracting Pty Ltd & Anor* [2012] NTSC 22, Barr J analysed the difference between the Western Australian and the Northern Territory legislation insofar as conditions precedent are concerned to making an adjudication application.

At [20], his Honour said:

> In my opinion, the correct construction of s8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non-payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the "payment dispute" does not arise until the due date for payment.

Barr J's conclusions are at [30] – [32], where his Honour held:

> [30] When s 8(a) is construed as explained in par [20] and applied to the facts stated in par [6] above, the conclusion must be that the first defendant applied for adjudication before a "payment dispute" had arisen under the Act.
>
> [31] To the extent that the adjudicator decided that s8(a) allowed two possible dates when a payment dispute might arise, the first being the due date for payment under the contract, if payment has not been made by that date, and the second being the presumably earlier date when the claim has been rejected or disputed, he erred in law. That error led the adjudicator to find that a payment dispute had arisen within s8(a) in the present case, when it had not. Again he erred in law. In my opinion, that was an error of law going to the jurisdiction of the adjudicator. The existence of a payment dispute is the foundation of the adjudicator's jurisdiction. In my view it is a jurisdictional fact such that, in the absence a payment dispute, the adjudicator did not have jurisdiction. The adjudicator determined the merits of the application for adjudication when he did not have jurisdiction.
>
> [32] In *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14; [2009] NTSC 4 at [13], Mildren J referred to the privative clause in s48(3) of the Act and held that that provision did not prevent the court from declaring a determination void for jurisdictional error of a kind where the adjudicator wrongly construes the Act and assumes jurisdiction as a result of an error of law going to jurisdiction. His Honour said: "... I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction. In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46, I held that the decision of an adjudicator who wrongly determined whether the 90-day time-limit had been complied with, was not void. The judge below felt constrained to follow what I then said. But that was a case of non-jurisdictional error. In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits."

In *Brierty Ltd v Gwelo Developments Pty Ltd* [2014] NTCA 7, Riley CJ (with whom Southwood and Barr JJ concurred) held at [10]-[12] of their Honours' judgment that the submission by the appellant, as set out in [8] of the judgment, that:

> The appellant further submitted that such a construction of s 27 of the Act enables applicants to meaningfully avail themselves of the right of withdrawal granted by

> s 28A of the Act. It is also consistent with the object of the Act which is to promote the security of payments under construction contracts by facilitating timely payment and the rapid resolution of payment disputes.

was not sustainable.

Their Honours said:

> [10] … Such a construction is neither consistent with the text of s 27 of the Act nor the objectives of the legislative scheme. Section 27 of the Act permits a party to a construction contract to apply to have the payment dispute adjudicated unless, relevantly, an application for adjudication has already been made by a party, whether or not a determination has been made. The words "whether or not a determination has been made" are relevant to indicate that a party is disentitled from applying for adjudication of a dispute not only where an application for adjudication of that dispute has been made and determined, but also where an application has been made but, for any reason, not determined.
>
> [11] Contrary to the appellant's arguments, the use of the present perfect tense of the verb "to make" (as in "has already been made") does not resolve the statutory interpretation issue of in favour of the appellant. Rather, it makes it clear that the relevant question to be asked immediately prior to any application to have a payment dispute adjudicated is: "Has any party to the contract already made an application for adjudication of the payment dispute?"
>
> [12] The question is not, as the appellant contends: any application to have a payment dispute adjudicated is: "to make" (as in "has already been made") does not resolve ths 27(a) the Act. To derive that question from s 27(a) is creative invention, not statutory interpretation.

[SOP17.200] South Australia — *"… adjudication application …"*

Section 17 of the Act, which details the procedure to be adopted in making an adjudication application, substantially follows s 17 of the Act.

[SOP17.210] Tasmania — *"… adjudication application …"*

The content of Section 21 of the Act is substantially in accordance with the provisions of s 17 of the New South Wales Act, but for two additional provisions which are contained in s 21(8)–(9). These two subsections provide for the withdrawal of an adjudication application at any time prior to the determination thereof, and that a claimant who withdraws an application is liable to pay any fees and expenses to which the adjudicator is entitled to under s 37(1) of the Tasmanian Act.

[SOP17.220] Australian Capital Territory — *"… adjudication application …"*

Section 19 of the Act follows s 17 of the Act.

18 Eligibility criteria for adjudicators

(1) A person is eligible to be an adjudicator in relation to a construction contract:

(a) if the person is a natural person, and

(b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract:

(a) if the person is a party to the contract, or

(b) in such circumstances as may be prescribed by the regulations for the purposes of this section.

SECTION 18 COMMENTARY

Note

A discussion of the various differences in the legislation of Victoria and Queensland concerning the authorisation of the nominating bodies, and appointment of adjudicators is at [SOP25.290].

[SOP18.50] *"… eligibility criteria for adjudicators …"*

Under the New South Wales legislation, unlike that in Queensland, Western Australia and the Northern Territory, adjudicators need not be registered nor are they obliged to have any eligible qualifications and/or experience.

The New South Wales Act gives awesome powers to lay adjudicators without ensuring any "quality control".

In her article, "The application of administrative law standards to the Security of Payment Act" (2006) 22 BCL 162 at 181, Julia Murray concludes correctly, with respect, as follows:

> Although the post-*Brodyn case* law demonstrates a readiness on behalf of the judiciary to restrict the scope of review in accordance with the scheme of the Act, this development highlights the need to ensure that the quality of adjudications is not brought into disrepute. Thus, the challenge is for government and industry to uphold the integrity of the adjudication regime by implementing the necessary systems and procedures to ensure that adjudication determinations are of the highest possible standard.

This has not always been apparent from decisions of adjudicators in New South Wales.

19 Appointment of adjudicator

(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent.

[Subs (1) subst Act 133 of 2002, s 3 and Sch 1[30]]

(2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

[S 19 am Act 133 of 2002]

s 17-21

SECTION 19 COMMENTARY

[SOP19.50] *"... notice of the acceptance ..."* – by nominated adjudicator – and other criteria for a valid appointment

The appointment of an adjudicator is not complete until the notice of acceptance has been served.

In *IDE Contracting Ltd v RG Carter Cambridge Ltd* [2004] BLR 172; [2004] EWHC 36 (TCC) (16 January 2004), per HHJ Havery QC, the relevant contract provided that any dispute be referred to adjudication in accordance with s 108 of *Housing Grants, Construction and Regeneration Act 1996* (UK). The named adjudicator was either unable or unwilling to act. The claimant then served its adjudication notice, and applied to the Chartered Institute of Arbitrators for the appointment of an adjudicator. The Institute duly obliged and appointed S in that capacity. The defendant, being unhappy with the appointment, complained that it was not valid in that, *inter alia*, the approach by the claimant for the appointment of an adjudicator in place of P preceded the service of the adjudication notice. The defendant reserved its position and when S rejected its objections, withdrew from the adjudication.

In an application to enforce the sum determined by S in the adjudication process, it was held that the English Scheme contemplated that the adjudication notice would be served first before the named adjudicator was approached. Furthermore, the request for adjudication had to be in writing and not telephonic. As the adjudicator was therefore not properly appointed, the adjudication failed. It was not necessary for the defendant to show prejudice. This decision under the comparative English legislation stresses the necessity to comply with all of the jurisdictional facts and criteria in seeking the appointment of an adjudicator.

The requirement for an adjudicator to serve a notice of acceptance is basis and essential, see *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2005] NSWSC 378 (14 April 2005), at [40], per McDougall J.

At [25], his Honour pointed out that, under s 19, the operative concept is that of service, which his Honour compared to the provisions of s 20, where the operative concept is that of receipt. His Honour went on to state that, where s 31(1)(c) was availed of, the operative concept, by virtue of subs (2), was of receipt.

At [27], McDougall J said:

> [27] The verb "receive" in its ordinary meaning denotes the taking of something into one's hand or possession, of something given or delivered, or having something delivered or brought to one. I see no reason why the word "receive", and its cognate forms in the Act, should not be given that ordinary English meaning. This does not mean, in the case of a corporation (at least absent any contractual stipulation to the contrary) a document must come to a particular person within a corporation before it can be received. It means that the document must come into the hand or possession of, or be delivered or brought to, someone on behalf of the corporation; or, perhaps, that otherwise somehow it comes into the hand or possession of, or is delivered or brought to, the corporation.

Austin J, at [64]–[66] of *Firedam Civil Engineering Pty Ltd v KJP Construction Pty Ltd* [2007] NSWSC 1162, declined to follow McDougall J's judgment. He reasoned thus:

> [64] In my opinion, that passage is inconsistent with Hodgson JA's remarks in *Falgat* (at [62]–[63]). Where, as in s 17(3)(c), the word "receive" is used in connection with receipt by a person rather than (as in s 31(2) receipt at a place, Hodgson JA's view was that the requirement is satisfied once the document has arrived at the registered office or place of address and is there during normal office hours. Consequently, his Honour did not accept the proposition that there can be no receiving unless and until the document is in the hand or possession of someone on behalf of the company.
>
> [65] McDougall J's view was cited, evidently with approval, by Einstein J in *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 at [17]–[18] (see also *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903 at [56]). All of those cases were cited to the Court of Appeal in Falgat. Hodgson JA's observations at [62]–[63] must therefore be taken as the unanimous disagreement of the Court of Appeal with McDougall J's construction of the word "receive", and hence his decision, in Pacific General Securities. Although *Pacific*

General Securities was not overruled (presumably because Hodgson JA's comments on the construction of "receive" were obiter), my view is that in light of the Court of Appeal's judgment, *Pacific General Securities* should not be followed.

[66] Hodgson JA's view in *Falgat* (at [63]) means that in the present case, the first defendant received the payment schedule, for the purposes of s 17(3)(c), when it arrived at the first defendant's registered office during office hours on 3 July 2007, regardless of whether it came into the hand or possession of Mr O'Connor or any other agent of the first defendant on that or any other day. Consequently s 17(3)(c) required that the adjudication application be made, if at all, within 10 business days after 3 July 2007. The first defendant lodged its adjudication application on 8 August 2007, outside that time limit.

[SOP19.65] Queensland - Application for appointment of Adjudicator to authorised nominating authority - transitional provisions

Under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s 114 was inserted in pt 7, div 2 of the Queensland Act, as follows:

114 Applications to authorised nominating authorities for referral to adjudicators

(1) This section applies to an adjudication application made, but not yet referred to an adjudicator, under section 21 before the commencement.

(2) The adjudication application must be dealt with under the unamended Act, section 21 as if this Act had not been amended by the Building and Construction Industry Payments Amendment

(3) In this section—unamended Act means this Act as in force immediately before the commencement of this section.

[SOP19.70] Victoria — *"… eligibility criteria for adjudicator …"*

Section 19 of the Act lists the eligibility criteria for adjudicators.

[SOP19.80] Western Australia — *"… eligibility criteria for adjudicator …"*

Section 48 of the Act provides for the registration of adjudicators by the Construction Contract Registrar. Section 49 provides for a review of the registration decision. Section 50 provides for the publication of adjudicators' decisions. Under s 51, there is a provision for the publication of the Registrar's appointments of adjudicators and their rates.

Unlike any other provision in any of the legislation of the States, under s 29 of the Act, there is a specific injunction against the adjudicator having a conflict of interest and the consequences thereof to the adjudication process.

[SOP19.90] Queensland — *"… eligibility criteria for adjudicator …"*

Under s 38(2)(a) of the Act, the Adjudication Registrar, appointed under s 36 and s 37, is required to keep a register of adjudicators.

Section 22(1) provides that a person may be an adjudicator in relation to a construction contract if that person is registered as an adjudicator under the Act.

Section 22(2) provides that a person is not eligible to be an adjudicator in relation to a particular construction contract:

(a) if the person is a party to the contract [one would have thought that that was something one could take for granted]; or

(b) in circumstances prescribed under a regulation for this section [s 22].

Under s 22(3), a regulation may be made under s 22(2)(b) of the Act only to prescribe circumstances in which the appointment of an adjudicator might create a conflict of interest. The relevant regulation is to be found under "QLD".

For a decision of the Commercial and Consumer Tribunal of Queensland reviewing the decision of the Adjudication Registrar to refuse the applicant's application for registration as an adjudicator, see *Rahmanian Mr Mohsen v Building & Construction Industry Payments Agency* [2006] QCCTB 083.

Appointment of an adjudicator

Under s 13 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld), the phrase "an authorised nominating authority" is replaced with the words "the registrar".

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

In a paragraph under the heading "Notes on provisions" in the Explanatory Notes for Amendments moved during consideration in detail, the Minister said:

> Amendment 24 inserts a transitional provision which provides for how a construction contract entered into before the commencement of the Amendment Act is to be dealt with. The existing recovery of progress payment provisions continue to apply for the recovery of progress payments relating to the construction contract as if the provisions had not been amended by the amending Act. However, the changes made under the amending Act and relating to the functions of the authorised nominating authorities being transferred to the registrar do apply to the construction contract.
>
> Amendment 24 also introduces a new section 116 which provides that the Registrar may impose a condition on the registration of an adjudicator that requires the adjudicator to complete mandatory transition training prescribed by regulation and to pay the cost of the training prescribed by regulation. New section 116 expires six months after its commencement.

Part 3 of the Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No. 1) 2016, provides for amendments that commence on 29 January 2016 to the *Building and Construction Industry Payments Regulation 2004*.

[SOP19.100] Northern Territory — *"… eligibility criteria for adjudicator …"*

Section 49 and s 50 of the Act provide for the appointment of a Constructions Contracts Registrar. Section 52(2) provides for the Registrar to register a person as a registered adjudicator. Section 52(4) provides that the Registrar must not register a person as a registered adjudicator, unless satisfied the person is eligible to be registered.

Section 53 provides for a review of the registration decision by the Local Court.

Section 55 provides for the adjudicators' and prescribed appointers' rates to be published.

Under s 30(1), the prescribed appointer must, within 5 working days, appoint a registered adjudicator. Under s 30(2), if the prescribed appointer does not make the appointment under subs (1), the Registrar may appoint a registered adjudicator.

Section 31(1) provides for the disqualification of an adjudicator on the ground of a conflict of interest. Subsections (2)–(8) provide for what takes place where an adjudicator is so disqualified.

Section 32 provides for a review of any disqualification decision by the Local Court.

As in the case of Western Australia, there are specific provisions against an adjudicator having a conflict of interest.

[SOP19.110] South Australia — *"… eligibility criteria for adjudicator …"*

Section 18 of the Act sets out the eligibility criteria for adjudicators. Section 18(2) provides for the non eligibility of adjudicators:

(a) if the person is a party to the contract; or
(b) if either or both of the parties have nominated the person to be an adjudicator in relation to the contract; or
(c) in such circumstances as may be prescribed by regulation for the purposes of this section.

[SOP19.120] Tasmania — *"... eligibility criteria for adjudicator ..."*

Under Section 22(2) of the Act, it is provided that "[a] person is a qualified adjudicator if the person is a natural persons with the qualifications, expertise and experience, if any, determined by the Security of Payments Official to be required". Section 22(3) provides for the disqualification of an adjudicator if that person is a party to the building or construction contract, or in circumstances prescribed for the purpose of this subsection.

Under s 35(1), an adjudicator is disqualified if he or she has a material personal interest in a building or construction contract, dispute, or party to the contract, to which the application relates. Subsections (2)–(8) describe what the adjudicator must do when he or she becomes aware that he or she is disqualified, and the procedure which then follows.

Section 36(1) provides for a party to an adjudication to require the adjudicator to take the steps set out in s 35(2). Under s 36(2), a party to an adjudication application who makes a request to an adjudicator under subs(1) must provide particulars to the adjudicator setting out the grounds upon which that party is of the opinion that the adjudicator is disqualified from adjudicating the application.

Under s 36(6), there can be a review of a decision by an adjudicator conducted by the Magistrate's Court (Administrative Appeals Division). Any such review is confined to the grounds provided to the adjudicator under subs (2).

[SOP19.130] Australian Capital Territory — *"... eligibility criteria for adjudicator ..."*

Section 20 of the Act lists the eligibility criteria for adjudicators. Under s 20(2), it is provided that:

(2) A person is not eligible to be an adjudicator for a construction contract —
(a) if the person is a party to the contract; or
(b) if the person is employed by, or represents a building and construction industry organisation; or
(c) in circumstances prescribed by regulation.

Examples—building and construction industry organisation

(1) Housing Industry Association Limited (ACN 004 631 752)
(2) Master Builders Australia Incorporated (ABN 701 134 221 001)

Note

An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

20 Adjudication responses

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within:

(a) 5 business days after receiving a copy of the application, or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[31]]

(2) The adjudication response:

(a) must be in writing, and

(b) must identify the adjudication application to which it relates, and

(c) may contain such submissions relevant to the response as the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14(4) or 17(2)(b).

[Subs (2A) insrt Act 133 of 2002, s 3 and Sch 1[32]]

(2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

[Subs (2B) insrt Act 133 of 2002, s 3 and Sch 1[32]]

(3) A copy of the adjudication response must be served on the claimant.

[S 20 am Act 133 of 2002]

SECTION 20 COMMENTARY

[SOP20.50] *"… a response …"* – contents thereof

At [30] of *TQM Design & Construct Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1216 (3 December 2004), McDougall J emphasised the fact that an adjudication response "may do more than parrot the terms of the payment schedule".

His Honour appears to have modified the view expressed above in *Veolia Waters Solutions v Kruger Engineering* [2007] NSWSC 46 (19 January 2007).

At [72], he referred to [129] of the judgment of Brereton J, in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, in which Brereton J explained that the test in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 and the observations of Hodgson JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [24] were to the effect that the parameters of a payment claim defined the material which a claimant could place before an adjudicator in an adjudication application.

He held by parallel reasoning that the adjudication response could not contain material that travelled beyond the parameters of the payment schedule. See now also *Bergemann v Power* [2011] NSWSC 1039 (9 September 2011) at [13]:

> I note also that, where the adjudicator did identify s 20(2B) as applying, Mr Corsaro asserted that he was wrong, and thus that Bergemann had been denied natural justice. That submission cannot be accepted. In *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* (2007) 23 BCL 205, the Court of Appeal said, although in obiter dicta, that a decision as to whether or not a submission was "duly made" (which is the inquiry that precedes the application of s 20(2B)) fell within the province of the adjudicator to decide: see Hodgson JA (with whom Beazley JA agreed) at [63], and Basten JA at [71]. In *Broad Construction Services (NSW) Pty Ltd v Michael Vadasz* (2007) 73 NSWLR 149, I held at [38] that I should follow that aspect of the Court of Appeal's reasoning in *John Holland*. I remain of that view.

[SOP20.60] *"… at any time …"*

An adjudication determination made before the time limits above have expired is void; *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 988 (26 September 2003). But what if the adjudication response is served and filed before the expiration of the time limits, and the adjudicator then follows before the expiration of the time limits. Surely in those circumstances the adjudication determination will stand.

It has been held that an adjudication made after the time limits would not offend the principles set out in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004), and would be valid. McDougall J made a finding to this effect before *Brodyn* in *MPM Constructions Pty Ltd v Trepcha Constructions Pty Ltd* [2004] NSWSC 103 (18 February 2004). However, in the light of the decision of the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, it now seems to be clear that an adjudication determination made after the time limits is in breach of a jurisdictional fact rendering the determination void. Accordingly, the cases referred to in the second subparagraph of this paragraph have probably been wrongly decided.

[SOP20.70] *"… at any time within …"*

In *TQM Design & Construct Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1216 (3 December 2004), McDougall J referred to the different concepts expressed in s 17(5) on the one hand, ie "receiving".

His Honour said:

> [4] Under the *Building and Construction Industry Security of Payment Act 1999* ("the Act"), an adjudication application may be made in the circumstances set out in s 17(1). When made, it is by s 17(5) to be "served on the respondent concerned". Once a respondent is served, it has an opportunity to furnish an adjudication response. By s 20(1)(a) (which is the relevant paragraph in this case) that is to be done within "five business days after receiving a copy of the application". The significance of that time

> limit (and for that matter, the alternative time limit in s 20(1)(b)) is that under s 21(2) an adjudicator must not consider an adjudication response unless it is made in time.
>
> [5] It will be seen that the Act talks variously of service and receipt. They are not equivalent concepts. It was submitted that I should construe the word "receiving" in s 20(1)(a) as having its ordinary English meaning, namely, taking into one's possession and not as equivalent to "being served" or "having been served". On the view to which I have come it is not necessary to answer that question, but, in particular having regard to the consequences that follow if an adjudication response is not lodged within time, I incline to the view that the distinction between the concept of service and concept of receipt is deliberate and that in s 20(1) the word "receiving" should be given its ordinary English meaning.

The question arises as to what the adjudicator's obligations are if the adjudication response is out of time, say even by a fraction of an hour. Does the adjudicator ignore that response? Is the adjudication process flawed if the adjudicator reads the response and is persuaded by part of it? If that happens, can a disgruntled claimant move to set aside the adjudication? Are the principles in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004) and *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004) of application in these circumstances? However, in the light of the decision of the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, it now seems to be clear that an adjudication determination made after the time limits is in breach of a jurisdictional fact rendering the determination void. Accordingly, the cases referred to in the second subparagraph of this paragraph have probably been wrongly decided.

The legislation is silent on this matter.

[SOP20.80] *"… may lodge an adjudication response only if …"*

Under the New South Wales Act, an adjudication response can only be lodged provided a payment schedule has been provided within the time specified in s 14(4) or 17(2)(b) of the New South Wales Act. The question still arises as to what happens if there is substantial compliance either in regard to the prerequisites of a payment schedule and/or the time within which it is to be served. Section 21(2) precludes the consideration of an adjudication response which is out of time. But what happens if the adjudicator reads the response which is out of time, and/or reads it and gives the matter therein contained consideration in contravention of s 21(2)?

What happens if there is a failure by the respondent to comply with the provisions of s 20(2)(b), or if the respondent makes submissions that are irrelevant?

Do the principles in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004) and *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004), and discussed at [SOP25.70] apply here? One would hope that they do, but this point remains undecided, but there is no direct decision on this point in New South Wales. See commentary on *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 above.

There is no provision similar to s 20(2A) of the New South Wales Act in the Queensland Act.

In *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at pp 151–152, Davenport discusses the adjudicator's powers if the payment schedule is late.

[SOP20.90] *"… reasons for withholding payment …"*

In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003), Palmer J, at [68] gave the phrase "reasons for withholding payment" a wide meaning and

said that this included matters going to the construction of the relevant contract as well as those relating to the quantum of the alleged payment. His Honour said "[i]f the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s 14(3) requires that that reason be indicated in the payment schedule and s 20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule".

Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

Multiplex v Luikens was also referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v Luikens* was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

In *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 (20 April 2004), Einstein J at [22] and [23] said that a technical compliance with s 13 by providing a minimal amount of information in the payment claim, insufficient to enable the respondent to discern its nature and be in a position meaningfully to verify or reject it, may have the inexorable consequence that the respondent is barred under this section from dealing with that matter in its adjudication response. That might result in the adjudication process being aborted.

At [24], his Honour emphasised that the adjudicator does not have the power to consider materials supplied by a claimant and which go outside the scope of the materials provided in the payment claim.

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004] NSWSC 823 (13 September 2004), McDougall J summed this principle up in the following paragraphs of his judgment:

> [49] In *John Holland*, it was submitted to Einstein J that considerations of procedural fairness demanded that a restriction similar to that contained in s 20(2B) be read into s 17(3), to the effect that a claimant in an adjudication application is restricted to raising only matters canvassed in its payment claim. While his Honour thought that considerations of "logic", and "consistency" with the situation of respondents, suggested that this submission be accepted (at [4]), his conclusion was that the "accepted principles of statutory construction" would not permit the suggested implication to be made (at [21]). This conclusion was bolstered by the fact that, in contrast to the situation of respondents when preparing payment schedules pursuant to s 14(3), it is not an "essential condition" of s 13 that the claimant include *any* reasons whatsoever in a payment claim (at [18]).
>
> [50] Einstein J dealt with the problem in a different way. He said that when an adjudication application put a claim on a basis that had not been advanced in the payment claim, the adjudicator, as a matter of jurisdiction, could not deal with it; and there would also be denial of natural justice (at [41]). That was because (as his Honour explained at [40]), s 20(2B) would prevent the respondent from including in its adjudication response any reasons relating to the new claim; but it could not deal with a new claim except by doing that which was prevented by s 20(2B). To determine such a new claim upon a basis that the respondent could not answer was, his Honour said, a denial of natural justice.
>
> [51] In some cases, the point will be clear. For example, the particular challenge in *John Holland* was clearly grounded because the claimant, for the first time in its adjudication application, raised an alternative contractual basis for a particular entitlement. But in other cases, as Einstein J pointed out, there will be questions of fact and degree involved: for example, when no new basis is advanced for a claim but further documentation or other material is relied upon in support of it. The test would

appear to be whether s 20(2B) would prevent the respondent from dealing with that new material; and, if it did, whether that would amount to a denial of natural justice (see, for example, at [30], [31] and [47]).

…

[56] Section 20(2B) of the Act prevents a respondent from including in its adjudication response any reasons for withholding payment that were not included in the payment schedule provided to the claimant. There is no equivalent limitation, in the case of adjudication applications, in s 17 of the Act; and, as Einstein J held in *John Holland* at [21], no such limitation could be implied by any process of statutory construction.

[57] What Einstein J said in *John Holland* was that a claimant that did not provide sufficient details in its payment claim to enable the respondent to verify or reject (ie assess) the claim could not include the missing details in its adjudication application. That was because, since the respondent was barred by s 20(2B) from replying to those details (ie, of responding in its adjudication response in a way that did deal with the merits of the claim) the result "may indeed be to abort any determination": at [23]. His Honour said, alternatively, that an adjudicator did not have power to consider materials supplied by a claimant in its adjudication application which went outside the materials provided in the payment: at [24]. Materials would go outside what had already been provided if they fell outside the ambit or scope of that earlier material.

[58] The Minister does not suggest, in this case, that Contrax failed to supply sufficient details to enable its payment claim to be assessed. He does not suggest that Contrax supplied further details in its adjudication application. The submission was simply that, in relying on s 34 to answer an argument raised by the Minister himself in his payment schedule, Contrax was raising a "new issue".

[59] I do not agree. The claim made by Contrax in its adjudication application is the same claim that was made in its payment schedule. What Contrax has done, in its submissions in support of the payment application, is rely, in its submissions made under s 17(3)(h), on an answer to the Minister's contractual defence.

[60] It would be quite extraordinary if the statutory regime, on its proper construction, prevented an applicant for adjudication from dealing with issues raised by the respondent to adjudication in its payment schedule. Such a construction would mean, in effect, that the applicant would be required to anticipate in its payment claim, and deal with at length, every possible argument that the respondent might rely upon. That would have the effect of increasing enormously the complexity and expense of the statutory procedure: something quite at odds with the statutory objects set out in s 3 and reinforced in the Second Reading Speech. It would also mean that, notwithstanding the best attempts of the applicant to foresee and answer all possible arguments, it might be defeated if the ingenuity of the respondent or its lawyers turned up yet further arguments.

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 (6 May 2005), Hodgson JA, with whom Bryson JA and Brownie AJA concurred, see [34]–[37], extracted the following principles from this case. The Court of Appeal discussed what the adjudicator was entitled to take into account under s 22(2)(a) and (b). It held that an adjudicator could take into account any considerations other than those arising from the facts and circumstances of the particular case, which considerations the adjudicator thinks relevant to the construction of the Act, the construction of the contract and the validity of the terms of the contract having regard to the provisions of the Act.

See further the discussion at [SOP22.780], more particularly, the observations of Macready AsJ in *Roads & Traffic Authority (NSW) v John Holland Pty Ltd* [2006] NSWSC 567, and the passages extracted from his Honour's judgment.

In *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165, Ball J said at [11], of a similar argument put to him for consideration, that s 20(2B) prevented the

respondent:

> ….from raising in its adjudication response a reason for not making a payment that was not raised in its payment schedule. It did not prevent it from raising grounds on which it was asserted that the adjudicator did not have jurisdiction to make a determination.

McDougall J at [38] of *Rail Corp (NSW) v Nebax Constructions* [2012] NSWSC 6 agreed with that statement by Ball J of the law on this issue.

In *South East Civil & Drainage Contractors Pty Ltd v AMGW Pty Ltd* [2013] 2 Qd R 189; [2013] QSC 45, the payment claim was served after the 12 month cut-off period referred to in s 17(4) of the *Building and Construction Industry Security of Payment Act 1999*. At [24], Jackson J said that:

> ... the question remains whether the adjudicator was entitled to ignore AMGW's contravention of s 17(4) in the discharge of his obligation to consider the matters specified pursuant to s 26(2) of BCIPA. Under that sub-section, the adjudicator is obliged to consider both "the provisions of" BCIPA, and "the payment claim to which the application relates, together with all submissions ... that have been properly made by the claimant in support of the claim".

At [25], his Honour noted:

> What occurred in this case was that because the point that the payment claim being served out of time was not taken by South East in a payment schedule, the adjudicator found himself "not satisfied that the adjudication application was invalid".

His Honour considered the judgment in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1, in which Palmer held:

> [46] An assertion that service of a payment claim is prohibited under s 13(4) or (5) is like a defence in bar. ... A respondent to a payment claim may have a reason for electing not to raise such a defence: the payment claim may raise for determination an issue which will inevitably have to be determined in subsequent payment claims and the respondent may wish the issue to be resolved sooner rather than later.
>
> [47] However, if the respondent does elect to raise a defence in bar founded on s 13(4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. ...
>
> [48] In my opinion, the scheme of the Act in general and of s 13 and s 14 in particular requires that a defence in bar to a payment claim founded on s 13(4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity ...

Jackson J at [29] of *South East Civil* noted that a similar point arose in relation to BCIPA in *GW Enterprises Pty Ltd v Xentex Industries Pty Ltd* [2006] QSC 399, in which Peter Lyons J, said at [24]:

> The applicant accepts that the issue of the timing of the payment claim was not raised in its payment schedule as required by s 18 but submits that this omission should not be fatal as the adjudicator was required to consider the timing of the claim to determine if it was a valid payment claim. The applicant states that the adjudication is a nullity because the payment claim was not a valid payment claim as it was out of time and accordingly there was nothing which the adjudicator could validly adjudicate.

Peter Lyons J at [31] of *G W Enterprises* said further:

> In the circumstances of the current case I am not satisfied that the payment claim was a nullity on the ground that it should have been apparent from the face of it that it was out of time.

At [31] of *South East Civil*, Jackson J was of the opinion that the case before his Honour seemed to fall between the circumstances considered in *Brookhollow*, on the one hand and *G W Enterprises* on the other. His Honour noted that it could not be said in the present case that the date when the goods were last supplied was not before the adjudicator and that on the material property before the adjudicator as to that date was in AMGW's own submission. It clearly disclosed that the last supply was more than 12 months before the service of the payment claim.

At [35] – [39], Jackson J reasoned as follows:

> [35] If, in those circumstances, a respondent is entitled to raise non-compliance with s 17(4), it might be seen as inconsistent that a respondent could not do so if the claimant chooses the alternative pathway of making an adjudication application. Against that, it can be said that a respondent has the ability to raise the point in its second opportunity to serve a payment schedule under s 21(2)(b) of BCIPA. However, there does not seem to be any obvious contextual reason to conclude that it was intended that non-compliance leading to invalidity can be relied on in the curial pathway under s 19(2)(a)(i) but not on the adjudication application pathway made under s 19(2)(a)(ii) and s 21, where the point of invalidity is not taken in a payment schedule in either case.
>
> [36] Further, the analogy drawn by Palmer J in *Brookhollow* between a respondent's right to elect not to raise a contravention of s 17(4) and a plea in bar in curial proceedings is imperfect, in my view.
>
> [37] First, it fails to take account of the statutory obligation that s 26(2)(a) and (b) of BCIPA imposes on an adjudicator "to consider" the provisions of BCIPA and all submissions properly made (compare, for example, *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322; 25 ALR 497 at 329 (CLR) and *Rathborne v Abel* (1964) 38 ALJR 293). It seems inconsistent with those obligations to conclude that an invalidity apparent in carrying them out may be ignored because a respondent failed to take the point in a payment schedule.
>
> [38] Secondly, in drawing any analogy between a plea in bar, meaning in this context a curial defence that a claim is filed out of time under a limitation statute, and the operation of s 17(4), it should be remembered that the operation of a limitation statute as a defence in curial proceedings is a matter of legal history, not the modern approach to statutory interpretation.
>
> [39] The introduction of a statute based time limit within which to bring an action was a seventeenth century development: s 3 of the *Statute of Limitations 1623* (Eng). Legislatures around the common law world followed that model. In some places, such as the ACT, the original English statute was the relevant provision until relatively recently. Also common in Australia was the adoption of the revised 1939 English model of the limitation section (Queensland, Tasmania and Victoria), or its New South Wales counterpart of 1969 (ACT and NT), which respectively provided in effect (SA and WA are not significantly or materially different) as follows:
>
> > no action shall be brought after the expiration of [x] years after the date on which the cause of action accrued (the word "accrued" appeared first in s 7 of the Act of 1623); or
> >
> > an action is not maintainable if brought after the expiration of a limitation period of [x] years running from the date on which the cause of action first accrues.

At [42] – [48], his Honour added:

> [42] Nevertheless, the idea of the accrual of a cause of action informs the operation of a limitation statute. There is no close analogy to accrual in s

17(4). Section 17(4) is part of a series of procedural requirements for the making of a payment claim. The making of a valid payment claim is a necessary element of obtaining the right to recover an entitlement to a progress payment under BCIPA.

[43] Thirdly, it should not be forgotten that the right granted by BCIPA is a statutory right to payment on account, usually on a monthly basis following the relevant work or supply. It does not establish any final entitlement to payment.

[44] Fourthly, a number of cases, including *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, recognise that the validity of a complying payment claim is a jurisdictional element of obtaining entitlement to payment of a progress payment as a debt.

[45] The conclusion to which I would come, uninstructed by authority, is that a respondent's failure to take the point of non-compliance with s 17(4) in a payment schedule does not authorise an adjudicator to ignore the point, where it is apparent on the face of the material which the adjudicator is obliged to consider under s 26(2).

[46] I am not persuaded to come to a contrary view by the reasoning in *Brookhollow*. In my view, nothing supports the application to BCIPA of the interpretation which has been given to limitation statutes in respect of stale causes of action the subject of curial proceedings.

Consequences of non-compliance

[47] It then becomes necessary to consider the consequences of non-compliance with s 17(4) and the adjudicator's error in failing to have regard to it.

[48] BCIPA does not expressly provide for any consequence of non-compliance with s 17(4). The question is whether it makes a payment claim served out of time invalid. That question is to be resolved as a matter of construction of BCIPA (Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; 72 ALJR 841 at 388-389 (CLR) [91]). There are some analogous cases of assistance. First among them is Brodyn. In that case, the following important passage appears:

> What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:
>
> 1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).
> 2. The service by the claimant on the respondent of a payment claim (s 13).
> 3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).
> 4. The reference of the application to an eligible adjudicator, who accepts the application (s 18 and s 19).
> 5. The determination by the adjudicator of this application (ss 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).
>
> The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these

> requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.
>
> In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 72 ALJR 841 at 390–391 (CLR). What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf *R v Hickman; Ex parte Fox* (1945) 70 CLR 598; [1945] HCA 53), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [53] – [55].

At [50] of *South East Civil*, his Honour further noted:

> I prefer the approach Spigelman CJ adopted in relation to the time limit for bringing an adjudication application in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [35] – [47]:
>
> > Similarly, an "integer or element of the right" ... is ... its exercise by application made within the time specified. (*David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277.) ...
> >
> > This detailed series of time provisions is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry. The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. It is commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value.

At [51], Jackson J concluded thus:

> The conclusion to which I have come in this case is that the payment claim as made was invalid because of non-compliance with s 17(4) and, since that matter was apparent on the face of the claimant's submissions validly made to the adjudicator, and

he was aware of the point, he was obliged to consider the operation of s 17(4) in making his adjudication decision. It is unnecessary to consider any wider question, and I do not do so.

[SOP20.100] *"… served on the claimant …"*

Note the provisions of s 31 in regard to service of notices.

[SOP20.110] Victoria — *"… adjudication responses …"*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Note that under s 21(2)(c), an adjudication response "must include the name and address of any relevant principal of the respondent". The phrase "relevant principal" is defined in s 20(4). The purpose of this requirement is not readily apparent.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Under s 21 of the amendment Act, substantial parts of s 21 of the principal Act are substituted and additional subsections are inserted.

The substituted s 21(2)(c) reads as follows:

> (c) must include the name and address of any relevant principal of the respondent and any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application; and

Again, the question arises as to the purpose of this provision.

Under the substituted s 21(2)(ca), it is provided that the adjudication response must identify any amount which the respondent alleges is an excluded amount.

The new s 21(2A) brings the Victorian principal Act in line with a similar provision in the New South Wales Act, viz, that a respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in s 15(4) or s 18(2)(b) of the Victorian Act.

A far-reaching provision is now contained in s 21(2B):

> (2B) If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant –
>
> (a) setting out those reasons; and
>
> (b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.

This sensible provision, not found in the relevant statutes in the other States, will cut right across the debate as to whether or not the adjudication response is confined only to that which the respondent has set out in its payment schedule. The question that still remains open is the status of the adjudication response where the respondent has not complied with the provisions of s 21(2)(c) and (ca).

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

There is no similar limitation in the principal Victorian Act. Presumably a respondent may make a submission in its adjudication response even if the payment schedule is silent on that matter.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 21(2) of the amendment Act inserts a new s 21(2A) in the principal Act and brings the Victorian position in line with the above.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

For the Victorian adjudication procedures, see s 22(2) of the principal Act as substituted by s 22(1)–(4) of the amendment Act.

Section 22(2)(b) provides for a written notice to be given by the adjudicator:

> (b) on any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application.

What the Victorian legislature did not say was what the consequences were of a failure by the adjudicator to provide that notice. There is no definition of what constitutes a financial or a contractual interest in the subject matter of the adjudication. It is to be regretted that this loose drafting finds its way into legislation which is otherwise complicated enough.

One will have to see how the Victorian courts deal with these matters, which appear to extend an open invitation for litigation.

It is to be noted that s 22(4)(b) of the principal Act provides for a further extension of time not exceeding 15 business days and under s 22(4A), it is provided that a claimant must not unreasonably withhold their agreement to any such extension.

[SOP20.120] Western Australia — *"… adjudication responses …"*

Under s 27(2)(a) of the Western Australian Act, the response must be prepared in accordance with, and contain all the information prescribed by the regulations, viz reg 6.

More significantly, s 27(2)(b) and (c) state:

> (b) must set out the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and
>
> (c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

Again, it is to be doubted whether the New South Wales case law on the sufficiency of the adjudication response would apply to a construction of this section.

In *Re Graham Anstee-Brook; Ex parte Karara Mining Ltd (No 2)* [2013] WASC 59, Miere J in his final determination in this case, decided that s 27(1) of the Western Australian Act does not require an adjudicator to consider a response filed out of time. Miere J accepted the view expressed in *Witham v Raminea Pty Ltd* [2012] WADC 1 that the Western Australian Act does not confer a discretion on the adjudicator to extend the time for the respondent to file his response. These decisions were referred to with approval by E M Heenan J in *Re David Scott Ellis; Ex Parte Triple M Mechanical Services Pty Ltd (No 2)* [2013] WASC 161.

At [50] of *Re Ellis [No 2]* [2013] WASC 161, E M Heenan J referred to *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1; [2011] NTCA 1 per Southwood J and *DPD Pty Ltd v McHenry* [2012] WASC 140 per McKechnie J with approval.

[SOP20.130] Queensland — *"… adjudication responses …"*

See the limitation as to the contents of an adjudication response may contain in New South Wales in s 20(2B). Note the similar limitation in the Queensland Act. Under s 14 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld). (The Act was assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s 24 of the *Building and Construction Industry Payments Act 2004* (Qld) is omitted and is replaced by

new ss 24, 24A and 24B. Those new sections read as follows:

24 Adjudication responses

(1) This section applies if —

(a) an adjudicator accepts a claimant's adjudication application under section 23; and

(b) the respondent served a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant.

(2) The respondent may give the adjudicator a response to the adjudication application (the adjudication response).

(3) The adjudication response —

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may contain the submissions relevant to the response the respondent chooses to include.

(4) If the adjudication application is about a standard payment claim, the adjudication response cannot include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant.

(5) If the adjudication application is about a complex payment claim, the adjudication response may include any reasons for withholding payment whether or not those reasons were included in the payment schedule when served on the claimant.

24A Time requirements for adjudication response

(1) Subsection (2) applies for an adjudication response to an adjudication application about a standard payment claim.

(2) The respondent must give the adjudicator the adjudication response with in the later of the following to end —

(a) 10 business days after receiving a copy of the adjudication application;

(b) 7 business days after receiving notice of the adjudicator's acceptance of the adjudication application.

(3) Subsections (4) to (7) apply for an adjudication response to an adjudication application about a complex payment claim.

(4) The respondent must give the adjudicator the adjudication response within the later of the following to end —

(a) 15 business days after receiving a copy of the adjudication application;

(b) 12 business days after receiving notice of the adjudicator's acceptance of the adjudication application.

(5) However, the respondent may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the adjudication response.

(6) The application must —

(a) be made within the later of the following to end —

(i) 5 business days after receiving a copy of the adjudication application;

(ii) 2 business days after receiving notice of the adjudicator's acceptance of the adjudication application; and

(b) be in writing; and

(c) include the reasons for requiring the extension of time.

(7) If the application is granted, the respondent may give the adjudicator the adjudication response no later than the end of the extension of time granted by the adjudicator.

(8) A copy of an adjudication response must be served on the claimant no more than 2 business days after it is given to the adjudicator.

24B Reply to new reasons for withholding payment

(1) This section applies if, under section 24(5), the respondent includes in an adjudication response reasons for withholding payment that were not included in the payment schedule when served on the claimant (the *new reasons*).

(2) The claimant may give the adjudicator a reply to the new reasons (the *claimant's reply*) within 15 business days after receiving a copy of the adjudication response.

(3) However, the claimant may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the claimant's reply if, because of the complexity or volume of the new reasons, an extension of time is required to adequately prepare the claimant's reply.

(4) The application must —

(a) be made within 5 business days after receiving a copy of the adjudication response; and

(b) be in writing; and

(c) include the reasons for requiring the extension of time.

(5) If the application is granted, the claimant may give the adjudicator the claimant's reply no later than the end of the extension of time granted by the adjudicator.

(6) A copy of the claimant's reply must be served on the respondent no more than 2 business days after it is given to the adjudicator.

(7) If the claimant proposes to give the adjudicator a claimant's reply, the claimant must give the adjudicator notice of the proposal within 5 business days after receiving a copy of the adjudication response unless the claimant gives the reply within the 5 business days.

In a paragraph under the heading "Notes on provisions" in the Explanatory Notes for Amendments moved during consideration in detail, the Minister said:

> Amendment 9 inserts a new subsection 24B(7) which provides that if a claimant proposes to give the adjudicator a claimant's reply, the claimant must first give the adjudicator notice of the proposal within five business days after receiving a copy of the adjudication response unless the claimant gives the reply within five business days.

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, s 115 has been inserted in the Queensland Act. In the main, it provides under that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act. It is to be noted that those parties to a construction agreement who wish to get the benefit of extended time limits to respond to "complex payment claims" and the shutdown period over Christmas, must amend their contracts so that a clause to that effect is incorporated therein.

Note

Significantly, under the new s 24(5), it is provided that where the adjudication application is about a complex payment claim the adjudication response may include any reason for withholding payment whether or not these reasons were included in the payment schedule.

Queensland – "… complex payment claim …"

The definition of the phrase "complex payment claim" is set out in s 45 of the Amendment Act. That section amends the definitions in Sch 2 (Dictionary). The Dictionary definition of "complex payment claim" means:***complex payment claim*** means a payment claim for any of the following-

(a) any payment for an amount more than $750,000 or, if a greater amount is prescribed by regulation, the amount prescribed;
(b) a latent condition under the relevant construction contract;
(c) a time-related cost under the relevant construction contract.

[SOP20.140] Northern Territory — *"... adjudication responses ..."*

Under s 29(2) of the Northern Territory Act, there are provisions substantially similar to those set out in s 27(2)(b) and (c) of the Western Australian Act above. In addition thereto, under s 29(2)(a), it is provided that the response must accord with and contain the information prescribed by the Regulations.

It is doubted whether, under the circumstances, the New South Wales case law on the sufficiency of an adjudication response, has any application to the construction of s 29 of the Northern Territory Act.

[SOP20.150] South Australia — *"... adjudication responses ..."*

Under s 20(1)(a)–(b) of the Act, an adjudication response is to be lodged with the adjudicator within 5 business days after receiving a copy of the application, or within 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later. Section 20(2) states what the contents of an adjudication response must be. Section 20(3)–(5) refers to certain limitations on the contents of any such response.

[SOP20.160] Tasmania — *"... adjudication responses ..."*

The Act substantially follows the East Coast model: see the definition of the East Coast model in the article by Teena Zhang entitled, "Why national legislation is required for the effective operation of the security of payments scheme" (2009) 25 BCL 376 at 381.

Under s 23(2) an adjudication response may be lodged within 10 business days after receiving a copy of the adjudication application, or within 5 business days after having received notice of an adjudicator's acceptance of the application, whichever period expires later. The contents of an adjudication response is set out in s 23(3) of the Act. There are further limitations in s 23(4)–(6).

[SOP20.170] Australian Capital Territory — *"... adjudication responses ..."*

Section 22(1) of the Act requires an adjudication response before the latter of:

(a) 7 business days after the respondent receives a copy of the application; or
(b) 5 business days after receiving notice of the adjudicator's acceptance of the application.

There is a note to s 22(1) stating that if a form is approved under s 47 of the Act for a response, the form must be used.

Nothing is stated in the Act as to the consequences of not using the requisite form. The question arises as to whether the content on an adjudication response, otherwise in the form required, invalidates it so that the adjudicator is obliged to ignore its contents. Section 22(2) sets out the further requirements of a valid adjudication response, with s 22(3)–(5) setting out certain limitations in accordance with the New South Wales model.

21 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.

(3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:

(a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or

(b) within such further time as the claimant and the respondent may agree.

(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and

(b) may set deadlines for further submissions and comments by the parties, and

(c) may call a conference of the parties, and

(d) may carry out an inspection of any matter to which the claim relates.

(4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.

[Subs (4A) insrt Act 133 of 2002, s 3 and Sch 1[33]]

(5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

[S 21 am Act 133 of 2002]

SECTION 21 COMMENTARY

[SOP21.50] *"… not to determine …"*

In *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 988 (26 September 2003), it was held that an adjudicator's breach of this subsection resulted in the adjudication being void, and liable to be quashed.

In *Laing O'Rourke Australia Construction v H & M Engineering & Construction* [2010] NSWSC 818 at [38] and [39], McDougall J said:

> [38] As a matter of plain English, the obligation to "consider" something requires that it be given attention, or looked at on its merits (see, for example, the **Australian Oxford Dictionary**, Second Edition, 2004). Thus, in *Tickner v Chapman* (1995) 57 FCR 451, Black CJ, speaking of a statutory obligation on a minister of the Crown to consider representations made to him, said at 464 that "the consideration of a representation involves an active intellectual process directed at that representation". In the same case, Burchett J said at 476 that the obligation required "the Minister … to apply his own mind to the issues raised by [the representations]" which involved obtaining "an understanding of the facts and circumstances set out in them, and of the contentions they urged based on those facts and circumstances". Kiefel J said at 495 that the obligation "requires that the Minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them".

> [39] In my view, the obligation to consider various matters imposed by s 22(2) of the Act should be read in the same way: namely, as requiring an active process of intellectual engagement. It may be thought that this imposes a substantial burden on adjudicators. That may be so; but there are at least two reasons why, even if that is correct, it does not justify reading down the statutory obligation to "consider". The first is that adjudicators are not forced to accept nomination. They may decline nomination; or they may accept only on condition that they are given some longer period of time than ten working days to produce their determination. The second reason is that the outcome of the adjudicator's consideration may have very significant consequences. In this case, the three delay claims total, in round figures, $7.5 million – a little under 75% of the total of the payment claim. Having regard both to the limited ability for adjudicators' determinations to be reviewed and to the nature of the estoppels that they create, the parties to an adjudication are entitled to have the adjudicator's consideration, in the sense that I have explained, of the case that each of them brings.

This decision was cited with approval by Stevenson J in *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 491 at [51]–[52].

A discussion of what the Adjudicator may consider is dealt with in the commentary to s 22(2) below.

[SOP21.60] *"… not to consider …"*

Time limits must be complied with and are essential to the operation of the Act, see *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 (5 May 2005) at [49].

[SOP21.70] *"… within 10 business days …"*

In *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2003] NSWSC 869 (2 July 2003), Bergin J granted an interim injunction restraining an adjudicator from proceeding with an adjudication. Davenport, in *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at p 129, argues that her Honour should not have done so, as she overlooked the time limits for bringing down an adjudication decision.

If the learned author is correct, it would mean that a court could under no circumstances grant an interlocutory injunction or a permanent one at that, precluding an adjudication from continuing, as any such order may impact on the time limits.

Take the example where the respondent to adjudication proceedings denies that he/she is a party to any construction contract. Surely that will be a matter for the court to decide ante omnia, and an injunction in aid of stopping the adjudication until the issue is decided would be within the court's power.

It is pointed out that in *Abb Zantingh Ltd v Zedal Building Services Ltd* 2000 WL 1841636; [2001] BLR 66; [2000] EWHC Technology 40 (12 December 2000), the claimant in the proceedings applied for an order that certain contracts did not fall under the relevant provisions of the English Act. The application was refused, but not on the ground that such proceedings were inappropriate.

[SOP21.80] *"… written submissions …"*

Written submissions requested by the adjudicator must be confined to a clarification of earlier submissions and not used as a pretext to place additional information not allowed by the Act, before the adjudicator, see the observations of Einstein J in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 (20 April 2004) at [26].

[SOP21.90] *"… legal representation …"*

It is to be noted that no legal representation is allowed at any such conference, but what about being assisted by an architect/engineer etc? Legal submissions could prove to be useful. What evil was contemplated in precluding legal representation? Lawyers at such a conference could be of great help to the lay adjudicator in clearing up a difficult legal issue that has to be decided.

There is no provision in any of the States and Territories precluding legal representation in the adjudication process, but there is a provision precluding legal representation at informal conferences in the following States and Territory. The relevant sections are:

(a) New South Wales: s 21(4A)

(b) Victoria: s 22(5A), unless permitted by the adjudicator.

(c) Queensland: s 25(5).

(d) South Australia: s 21(5).

(e) Tasmania: s 24(5).

(f) Australian Capital Territory: s 23(5)(b).

[SOP21.100] Victoria — "… *adjudication procedures* …"

Section 22 of the Act provides for the adjudication procedure to be followed. Section 22 of that Act is substantially in accordance with s 21 of the Act excepting for the following differences.

Under s 22(2) of the Victorian Act, the adjudicator is required to serve written notice on any relevant principal and any other person who is included in the adjudication response under s 21(2)(c), and on any other person whom the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application. It is noted that there is no definition of the phrase "a financial … interest". Would a chargee or mortgagee qualify?

The next point of difference is that under s 22(4)(b), any agreed extension of time by the claimant for the adjudication determination is not to exceed 15 business days "after that date". The phrase "after that date" appears to refer to the date of the acceptance by the adjudicator of the application in accordance with s 20(2).

The final point of difference is to be found in s 22(4A), which provides that a claimant must not unreasonably withhold their (sic) agreement to an extension of time under s (4)(b).

[SOP21.110] Western Australia — "… *adjudication procedures* …"

The Act details the adjudication procedure in s 32(1)–(6).

In order to have a comprehensive view of its provisions, reference should also be made to s 30, which states the object of the adjudication process, and to s 31 which details the adjudicator's functions.

Under s 31(2)(a)–(b), an appointed adjudicator must, within the prescribed time or any extension thereof given under s 32(3)(a):

(a) dismiss the application without making a determination of its merits if —

(i) the contract concerned is not a construction contract;

(ii) the application has not been prepared and served in accordance with s 26;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;

(b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so, determine —.

(i) the amount to be paid or returned and any interest payable on it under s 33; and

(ii) the date on or before which the amount is to be paid, or the security is to be returned, as the case requires.

The provisions of s 31(2)(b), that the adjudicator must determine the matters referred to therein "on the balance of probabilities" is not found in the security of payment statutes in any of the other States or Territories.

Section 31(3) of the Act states:

> If an application is not dismissed or determined under subsection (2) within the prescribed time, or any extension of it made under section 32(3)(a), the application is to be taken to have been dismissed when the time has elapsed.

Some of the substantial differences between s 32 of the Western Australian Act and s 21 of the New South Wales Act, both dealing with adjudication procedures, are set out below:

(a) s 32(1)(a)–(b) of the Western Australian Act, states:

(1) For the purposes of making a determination, an appointed adjudicator —

(a) must act informally and if possible make the determination on the basis of —

(i) the application and its attachments; and

(ii) if a response has been prepared and served in accordance with section 27, the response and its attachments;

and

(b) is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.

There is no provision in the Acts of any of the other States and Territories, but for s 34(1)(a) of the Northern Territory Act, to the effect that the adjudicator is constrained only "if possible" to make the determination on the basis of any prescribed data.

The phrase "if possible" leaves so many considerations wide open, and has a potential to lead to further litigation.

The question that arises is if the adjudicator has strayed, and referred to extraneous material, when the determination could possibly have been made on the basis of the data referred to in s 32(1)(a)(i)–(ii) of the Western Australian Act is the adjudication valid?

The statement that an adjudicator "is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit" is also not found elsewhere, but for s 34(1)(b) of the Northern Territory Act.

This provision in s 32(1)(b) of the Western Australian Act as read with the "if possible" statement in s 32(1)(a) seems to indicate that in Western Australia an adjudicator can roam far and wide in his or her absolute and sole discretion, a rather startling provision with possible draconian consequences.

(b) Under s 32(2)(a) of the Western Australian Act, an adjudicator can require that a party provide not only information, but documents. This provision goes beyond

the provisions of s 21(4)(a) of the New South Wales Act, which provides for the adjudicator requiring further written submissions, but no reference to information or documents.

(c) Under s 32(2)(c)(i) of the Western Australian Act, unless all parties object, the adjudicator may inspect any work or thing to which the payment dispute relates, provided the occupier of any place concerned consents to the entry and inspection. Under s 21(4)(d) of the New South Wales Act, it is provided that an adjudicator may carry out an inspection of any matter to which the claim relates, and is not constrained by the unanimous objection of the parties, nor the refusal of the occupier of the place concerned.

(d) Section 32(2)(c)(ii) of the Western Australian Act provides for testing of any thing to which the payment dispute relates, provided the owner of the thing consents to the testing. There is no such provision in the New South Wales Act.

(e) There is provision in s 32(2)(c)(iii) of the Western Australian Act for an adjudicator to engage an expert to investigate and report on any matter relevant to the payment dispute. But for s 34(2)(c)(iii) of the Northern Territory Act, and which is in identical terms to s 32(2)(c)(iii) of the Western Australian Act, none of the Acts in the other States and Territories have a similar provision.

(f) Under s 32(3)(a), an adjudicator may, with the consent of the parties, extend the time prescribed by s 31(2) for the making of a determination.

(g) Under s 32(3)(b), an adjudicator may, with the consent of the parties, adjudicate simultaneously two or more payment disputes between the parties.

(h) Under s 32(3)(c), an adjudicator may, with the consent of all of the parties concerned, adjudicate the payment simultaneously with another payment dispute.

(i) Under s 32(4), it is provided that if an adjudicator adjudicates simultaneously two or more payment disputes, the adjudicator may, in adjudicating one, take into account information the adjudicator receives in relation to the other, and vice versa. It is to be noted that the word "documents" does not appear in this subsection, as it does in s 34(4) of the Northern Territory Act. It is submitted that the word "information" obviously includes information contained in documents.

(j) Under s 32(6) of the Western Australian Act, the adjudicator is empowered to determine his or her own procedure to the extent that the practice and procedure in relation to adjudications is not regulated by the provisions of Part 3 of the Western Australian Act. A similar provision is to be found in s 34(1)(b) of the Northern Territory Act. That section provides that an adjudicator is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate.

[SOP21.120] Queensland — "… *adjudication procedures* …"

Section 25 of the Act dealt with the adjudication procedures, which followed s 21 of the New South Wales Act.

Under s 15 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld). (The Act was assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s 25 of the Queensland Act has been amended by the insertion of new ss 25, 25A and 25B. Those new sections read as follows:

25 Adjudication procedures

(1) Subject to the time requirements under section 25A, an adjudicator must decide the following as quickly as possible —

(a) an adjudication application;

(b) applications for extensions of time under this part.

(2) An adjudicator must not consider an adjudication response or a claimant's reply unless it was given to the adjudicator within the time that the respondent or claimant may give it to the adjudicator.

(3) For a proceeding conducted to decide an adjudication application, an adjudicator —

(a) must decide whether he or she has jurisdiction to adjudicate the application; and

(b) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and

(c) may set deadlines for further submissions and comments by the parties; and

(d) may call a conference of the parties; and

(e) may carry out an inspection of any matter to which the claim relates.

(4) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation.

(5) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

Time requirements for adjudication proceedings

(1) An adjudicator must decide an adjudication application on or before the deadline for deciding the application but not before the end of the minimum consideration period for deciding the application.

(2) However, the claimant and respondent may, before or after the deadline, agree in writing that the adjudicator has additional time to decide the application.

(3) The minimum consideration period for deciding an adjudication application is —

(a) the period within which the respondent may give an adjudication response to the adjudicator under section 24A; but

(b) if the claimant may give a claimant's reply under section 24B — the period mentioned in paragraph (a) plus the period within which the claimant may give the reply.

(3) Note — Only a complex payment claim may involve a claimant's reply. See section 24B.

(4) The deadline, for deciding an adjudication application relating to a standard payment claim, is the day that is 10 business days after —

(a) if the adjudicator was given an adjudication response in compliance with section 24A—the day on which the adjudicator receives the response; or

(b) otherwise — the last day on which the respondent could have given the adjudicator the response.

(5) The deadline, for deciding an adjudication application relating to a complex payment claim, is the day that is 15 business days after —

(a) if the adjudicator was given an adjudication response in compliance with section 24A—the day on which the adjudicator receives the response; or

(b) otherwise — the last day on which the respondent could have given the adjudicator the response.

(6) However, if the claimant may give the adjudicator a claimant's reply under section 24B, the deadline for deciding the adjudication application is the day that is 15 business days after —

(a) if the adjudicator was given a claimant's reply in compliance with section 24B — the day on which the adjudicator receives the reply; or

(b) otherwise — the last day on which the claimant could have given the adjudicator the reply.

In a paragraph under the heading "Notes on provisions" in the Explanatory Notes for Amendments moved during consideration in detail, the Minister said:

> Amendment 11 inserts a new section 25A which deals with time requirements for adjudication proceedings. The amendments cater for the non-receipt of a claimant's reply and also for the situation where a reply is not given by a claimant so that the adjudicator is aware of whether or not a reply will be given and will not be negatively impacted the time they have to make a decision.

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, s 115 has been inserted in the Queensland Act. In the main, it provides under that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

25B Extension of time requirements by adjudicator

(1) This section applies if —

(a) an adjudication application relates to a complex payment claim; and

(b) in the opinion of the adjudicator, the claimant and respondent fail to reach agreement under section 25A(2).

(2) The adjudicator may, despite section 25A(5) or (6), decide the application within 5 business days after the time the adjudicator would otherwise have to decide the application under section 25A(5) or (6).

Note

Significantly, under the new s 25(5), the adjudicator's power to decide an adjudication application is not impacted on by the failure of either of both parties to make submissions or comment within time or to comply with the adjudicator's call for a conference of the parties. Further, under s 25(6), it is provided that where an adjudicator decides that an adjudication application has been incorrectly identified as a complex payment claim, and for which see s 45 of the Act where this phrase is defined, the adjudicator is required to continue to decide the application as if it related to a complex payment claim.

Conversely, under s 25(7) it is provided that if the adjudicator comes to the conclusion that a payment claim is not a standard payment claim as submitted by the claimant, the adjudication application is taken to be withdrawn.

Under s 25B provision is made for an extension of time for a determination if required by the adjudicator, despite the parties' lack of consent thereto.

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, s 115 has been inserted in the Queensland Act. In the main, it provides under that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act. It is also to be noted that those parties to a construction agreement who wish to get the benefit of extended time limits to respond to "complex payment claims" and the shutdown period over Christmas, must amend their contracts so that a clause to that effect is incorporated therein.

[SOP21.130] Northern Territory — "… *adjudication procedures* …"

Section 33 of the Northern Territory Act delineates the adjudicator's functions. The provisions of this section substantially follow the provisions of s 31 of the Western Australian Act.

The Northern Territory Act sets out the adjudication procedure in s 34 and substantially follows the Western Australian model.

The significant points of difference between the provisions of s 34 of the Northern Territory Act and s 21 of the Act are as follows:

(a) Under s 34(1)(b) of the Northern Territory Act, it is provided that the adjudicator in the Northern Territory is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate.

(b) Under s 34(2)(iii), the adjudicator may engage an expert to investigate and report on any matter relevant to the payment dispute.

(c) Under s 34(3), an adjudicator may, with the Registrar's consent, extend the time for making a determination under s 33(1). Note that there is no requirement that the claimant or the respondent to the adjudication provide any consent to an extension of time.

(d) Under s 34(3)(b), the adjudicator may, with the consent of the parties, adjudicate simultaneously two or more payment disputes between the parties.

(e) Under s 34(3)(c), the adjudicator may, with the consent of all the parties concerned, adjudicate the payment dispute simultaneously with any other payment dispute.

(f) Under s 34(4), if the appointed adjudicator adjudicates simultaneously two or more payment disputes, the adjudicator may, in adjudicating one, take into account information or documents the adjudicator receives in relation to the other and vice versa.

(g) Under s 34(6), to the extent that the practice and procedure in relation to adjudications is not regulated by Part 3 of the Northern Territory Act, an appointed adjudicator may determine the adjudicator's own procedure.

[SOP21.140] South Australia — "… *adjudication procedures* …"

The South Australian Act provides for the adjudication procedure in s 21 thereof, which follows the New South Wales model.

[SOP21.150] Tasmania — "… *adjudication procedures* …"

The Tasmanian Act provides for adjudication procedures in s 24. This section, for all intents and purposes, follows the New South Wales model.

[SOP21.160] Australian Capital Territory — "… *adjudication procedures* …"

Section 23 of the Act provides for adjudication procedures. This section, for all intents and purposes, follows the New South Wales model.

22 Adjudicator's determination

(1) An adjudicator is to determine:

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***), and

(b) the date on which any such amount became or becomes payable, and

(c) the rate of interest payable on any such amount.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[34]]

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

(a) the provisions of this Act,

(b) the provisions of the construction contract from which the application arose,

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[35]]

(3) The adjudicator's determination must:

(a) be in writing, and

(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

[Subs (3) subst Act 133 of 2002, s 3 and Sch 1[36]]

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:

(a) the value of any construction work carried out under a construction contract; or

(b) the value of any related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[36]]

(5) If the adjudicator's determination contains:

(a) a clerical mistake, or

(b) an error arising from an accidental slip or omission, or

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[36]]

[S 22 am Act 133 of 2002]

SECTION 22 COMMENTARY

[SOP22.50] *"... is to consider ..."*

In *Laing O'Rourke Australia Construction v H & M Engineering & Construction* [2010] NSWSC 818, McDougall J had occasion to determine whether or not the adjudicator had "considered" the matters that he was required to. In the process, his Honour dealt with the issue of reasons given by adjudicators. Relevantly, at [73], his Honour said:

> Finally, I note that although adjudicators are required to produce reasons for their determinations unless excused by the parties (s 22(3)(b)), it is unrealistic to expect that those reasons will treat minutely and in detail with each and every aspect of the parties' submissions and each and every aspect of the evidence. Having said that, adjudicators' reasons should be sufficiently detailed to enable parties to understand that their contentions, as advanced in the payment claim and payment schedule, and relevant material in support, have been considered, and to understand the process of reasoning that led to the particular conclusion.

This decision was cited with approval by Stevenson J in *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 491 at [51]–[52].

See the further discussion, more particularly in regard to the words "only", in [SOP22.780].

In *David Hurst Constructions Pty Ltd v Durham* [2008] NSWSC 318¸ McDougall J succinctly summarised the functions of an adjudicator when the adjudicator "considers" the material before him. His Honour said:

> [What] is called for is some process of balancing or evaluating the competing materials supplied by the parties. It is not a matter of calling evidence. Nor is it a matter of conducting some mini trial. But at the same time, if the Adjudicator is to determine the amount of a progress payment, it is implicit in the requirement to do so that he or she be satisfied that the amount so determined is in fact fairly or properly payable, having regard to the provisions of the Act and of the relevant construction contract (and any other relevant material duly put forward).

McDougall J's observations in this regard were cited with approval by Burns J in *Ostwald Bros Pty Ltd v Jaylon Pacific Pty Ltd* [2016] QSC 240 at [26].

[SOP22.55] The purpose of an adjudication determination and the functions of an adjudicator

Beech J, in *Alliance Contracting Pty Ltd v James* [2014] WASC 212, focused his attention on the purposes of an adjudication determination and the essential function of an

adjudicator. His Honour said:

> [74] The prospect of an adjudication application by the recipient of a payment claim is not a fanciful one. There may well be circumstances in which the recipient of a payment claim has commercial reasons for seeking a determination that it is not liable to pay, notwithstanding that the determination would be a provisional one. For example, the recipient might be faced with a threat that a bank guarantee or other security might be called in. There may be internal corporate or joint venture reasons for seeking an adjudication. The bringing of an adjudication application might be part of a strategy of attempting to discourage substantive litigation. I note that in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 [82]; (2011) 43 WAR 319 Murphy JA (with whom Martin CJ agreed) contemplated the prospect of the recipient of a payment claim seeking an early determination that it in fact owes no money, and took that prospect into account in determining the proper construction of the Act.
>
> [75] For these reasons, in my view, on a proper construction, the power of the adjudicator is to determine that a party is liable to make a payment arises only in respect of the payment claim the disputing or rejecting of which gave rise to and constituted the payment dispute the subject of the application. The function of the adjudicator is to determine the merits of the payment claim the disputing of which constituted the payment dispute, and to determine whether any party to that payment dispute is liable to make a payment in respect of that payment claim. Thus, the adjudicator was correct in concluding that he had no power to determine that Tenix was liable to make a payment to Alliance.

[SOP22.60] The adjudicator must make a determination

It is submitted that the adjudicator, even if he or she is required by some of the sections of the Act to disregard all the material in the respondent's adjudication response, must still apply his or her mind to the admissible material before him or her, and cannot just accept without query, the material put forward by the claimant in its payment claim and adjudication application.

Support for the submission that an adjudicator, even if he or she must disregard, for one or other reason, the payment schedule and the adjudication response, can nevertheless not grant a default determination but must apply his or her mind in determining value, is to be found at [60]–[61] of *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 (5 May 2005).

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 eroded much of the learning in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, but nevertheless what was stated at [52]–[53] of that case, and referred to by Martin J in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22 is probably still good law.

In *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22, Martin J, after citing a number of decisions refers to *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [10] of his judgment.

The paragraphs quoted by Martin J, which are probably still relevant, are:

> [52] However, it is plain in my opinion that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of *certiorari*.

[53] What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).
2. The service by the claimant on the respondent of a payment claim (s 13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and19).
5. The determination by the adjudicator of this application (s 19(2) and s 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).

His Honour continued:

[11] In summary, what is required of an adjudicator is that he or she make a genuine attempt to understand and apply the relevant contract and to exercise the power in accordance with the Act. *Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq)* [2010] QCA 7.

His Honour further said:

[18] In particular, s 26(2)(d) requires the adjudicator to consider "all submissions" of the respondent. Northbuild submitted that the adjudicator did not make a determination to the best of his ability on all of the material available, and thus did not make a bona fide attempt to determine the dispute.

The passages above are consistent with the holding of Brereton J in *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61, where he said:

[39] The adjudicator was not entitled simply to allow Sydney Civil's claim by default. But his determination does not suggest that he did so, nor that he considered himself bound to allow the amount claimed by Sydney Civil in the absence of contention. He concluded, as he was entitled to conclude: "*Based on the information before me, I am satisfied that the Claimant is entitled to the amount claimed for loss and profit*". That conclusion was based not on allowing Sydney Civil's claim by default, but on satisfaction on the part of the adjudicator on the material before him that that was the amount properly payable.

Vickery J dealt with this issue in the Victorian Courts in *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300. His Honour held:

[21] A failure to conduct an adjudication of a payment claim, which requires as a minimum a determination as to whether the construction work the subject of the claim has been performed and its value (or whether the goods and services have been supplied and their value) is a failure to comply with a basic and essential requirement of the Act.

[22] The absence of relevant material from the respondent, or the presentation of material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim without addressing its merits, namely, as a minimum, determining whether the construction work identified in the payment claim has been carried out, and what is its value.

[23] Accordingly, there will nor be a valid adjudication of a payment claim, within the meaning of the Act, if all the adjudicator does is reject the respondent's contentions. As Brereton J said in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388; [2006] NSWSC 13 at [86].

> ... By allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the claim has been performed and without valuing it – would bespeak of a misconception of what is required of an adjudicator. In traditional terms, it would be jurisdictional error resulting in invalidity.

At [71] of *J Hutchinson Pty Ltd v Cada Framework Pty Ltd* [2014] QSC 63, the Queensland Supreme Court restated what Fraser JA (with whom McMurdo P and Keane JA agreed) observed at [34] of *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] QCA 213; [2008] 2 Qd R 495; [2008] QCA 213, viz:

> Whilst a particular adjudication might involve a valuation, the express obligation imposed by s 26 is "to decide", not "to acquire".

[SOP22.63] Parties bound by the way they conduct their case before the adjudicator

In *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd (t/as Domus Homes)* [2011] NSWSC 604, Einstein J citing *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; [2001] HCA 24 per McHugh J, held that parties were bound by the way they conducted their case before the adjudicator. The judgments above were referred to by Ball J in *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126 with approval.

[SOP22.65] *"... reasons ..."*

(a) The provisions in New South Wales Act with regard to the inclusion of reasons in an adjudicator's determination

Under s 22(3)(a) of the New South Wales Act the adjudicator's determination must include reasons for the determination (unless the claimant and respondent have both requested the adjudicator not to include those reasons in the determination).

(b) Adequacy of reasons

The adequacy of reasons called for by s 22(3)(b) is to be considered in the light of the following circumstances:

(i) The summary process designed in the Act, more particularly, the relevant time limits.

(ii) The fact that the adjudicator is probably neither a lawyer nor a barrister.

(iii) The limited curial review of an adjudicator's determination.

(iv) His/her decision is not necessarily that of a lawyer.

(v) The draconian consequences of a determination which may sound in a very substantial amount of money.

(vi) Errors of law or fact, generally speaking, do not constitute grounds for the curial review of an adjudicator's determination.

In *Avopiling NSW Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466, Sackar J said the following:

> [34] As I have already observed s 22(3) requires the adjudicator to give reasons for the determination. There is clearly no requirement for the reasons to be lengthy elaborate or detailed. The reasons should be sufficient to show that the adjudicator has engaged actively with the dispute and dealt with it in a way that is reasoned, not perverse, arbitrary or capricious: *Bergemann v Power* [2011] NSWSC 1039 at [67] per McDougall J.
>
> ….
>
> [37] No mechanical formula can be given in determining the precise form the reasons are to take. There is clearly no need to refer to all of the evidence, in the reasons. It has to be clear enough that the relevant evidence or point has been considered. Any issue which is critical should be adverted to, but again the extent to which it needs to be dealt

with will be a matter of degree and depends to what extent the issue is canvassed by the parties themselves. It is not necessary for explicit findings to be made on each disputed question of fact provided it is clear by inference what is found. It is often said that subjecting every statement of reasons with a "fine tooth comb" will inevitably lead to the exposure of inadequacies often of no relevance. A statement of reasons should be looked at as a whole. *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430, per Meagher JA at 441 – 444. What I have said must be of course viewed in the context of the specific requirements of s 22.

[38] The content of the adjudication is obviously the most relevant source as to whether the adjudicator has or has not performed the relevant statutory functions. It is to be recalled that the process may or may not be interactive and will be conducted generally, entirely in writing. Provided it is apparent that the adjudicator has considered pertinent issues in good faith, very considerable latitude in my view should be afforded to an adjudicator as to the manner and form of the determination. To become too pedantic about the way in which the adjudicator has drafted a determination is to introduce an element of artificiality such as might well defeat the object and purpose of the Act and the aim of the process entirely. On the other hand the mere fact an adjudicator blandly says he or she has read "all of the submissions and accompanying documents" or simply that he or she is "satisfied" without more in relation to a particular issue under consideration may not, subject to viewing the determination as a whole survive as adequate reasons. As I have said it will always be a matter of degree. *Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd* [2006] NSWSC 94 at [25] and [26] per Bergin J (as she then was), and McDougall J in Leighton at [94].

See further the comments of Jackson J at [42] of *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd* [2016] QSC 108 below, where his Honour has quoted the above passage.

It must be firmly borne in mind, as in the case of the requirement of reasons for arbitral awards, a decision of an arbitral tribunal is not to be construed as if it were a decision of the Court, see for example: *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414 at [26] per Pagone J and perhaps less can be expected from an adjudicator whose decision and the reasons therefor have to be made in a tight timeframe without argument and on the papers before him/her.

In a separate judgment of Campbell JA in *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2010] NSWCA 59 at [5]-[12], his Honour extracted the essential distinctions between reasons in the context of an arbitrator's award, and expert's reasons for expert determination and a referee's reasons for a report Pt 20 of the UCPR.

It will be of no comfort to a respondent who is required to pay a large sum of money, to move a court to order an adjudicator to provide some or adequate reasons.

The adjudication will stand come what may, and the entire exercise will be one of futility.

In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1, the relevant paragraphs of Palmer J's judgment on the adequacy of reasons, including an award because of an alleged inadequacy, are set out below:

[56] It is now established, I think, that an adjudication determination is void if the adjudicator fails to address in good faith the matters required by s 22(2): see *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [31] and [49] per Brereton J and the authorities there discussed. Section 22(2) makes no distinction in this regard between, on the one hand, an adjudication in which the respondent has served timeously a payment schedule and has made submissions in support of the schedule and, on the other hand, an adjudication in which the respondent has been precluded from making submissions by s 20(2A).

[57] Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the

reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 22(2)(c) and (d). Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties.

[58] In some cases, it may be possible to say that the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination. In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties. If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result. Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination. The court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons: the court should not be too ready to infer lack of good faith from the adjudicator's omission to deal with an issue when error alone is a possible explanation.

[59] The case is very different when a respondent is precluded from participating in the adjudication process by the operation of s 20(2A). There will be no submissions of the parties raising issues for determination: the adjudicator will have the claimant's payment claim, the adjudication application and the attached documents and, probably, at least the relevant parts of the contract said to support the claim. The adjudicator may not know whether the respondent regards the claim as entirely justified and does not wish to contest the adjudication even though it has failed to make payment or whether the respondent has a "killer point" in defence of the payment claim but has been deprived of the opportunity to raise it because, by oversight or misadventure, it failed to serve a payment schedule within the prescribed time.

[60] Where there is no contested adjudication process, what must an adjudicator do in order to comply with the requirements of s 22(2)? Must the adjudicator examine all of the provisions of the contract and all of the provisions of the Act with a critical eye to see whether the claim is supportable? Or, may the adjudicator take the view that as the claim is "undefended", he or she may "rubber stamp" the claim and make a determination against the respondent "in default of a defence".

[61] In my opinion, neither position is correct. Section 22(2) requires the adjudicator to give consideration to the matters stated, to the extent applicable, whether the payment claim is "defended" or "undefended" in the adjudication process. That means that where the respondent is not a participant in the adjudication whether by preclusion under s 20(2A) or otherwise, the adjudicator must still consider "the provisions of the Act", "the provisions of the construction contract from which the application arose", the payment claim and the result of an inspection, if any.

[62] Because an adjudication determination can have drastic financial consequences, s 22(2) requires the adjudicator to see that, even when the respondent does not participate, the process is not abused. That does not mean, however, that the adjudicator must play devil's advocate on behalf of the absent respondent. The adjudicator is not required to test the payment claim and the adjudication application for all possible defects and non-compliances with all or any of the provisions of the Act and all or any of the terms of the contract. In *Holmwood* at [50] Brereton J said that the requirements of s 22(2)(b) to consider the provisions of the contract did not mean that:

> [In] each adjudication the adjudicator must consider every provision of the contract – any more than the requirement in s 22(2)(a) to consider the provisions of the Act

> has the effect that in each adjudication the adjudicator must consider every provision of the Act; both the paragraphs are to be read as requiring consideration of the provisions only to the extent that they are relevant to the adjudication application in question. In other words, the adjudicator is not required to consider provisions of the Act or the contract which have no bearing on, or relationship to, the adjudication application under consideration. This follows from the stated function of the considerations required by s 22(2)– which is, as its opening words express, "in determining an adjudication application"– and from the great inconvenience without utility which any other construction would involve.

I respectfully agree.

[63] In a contested adjudication, the adjudicator need consider only those provisions of the Act and of the contract which are relevant to the issues formulated by the parties in their submissions. In an adjudication in which the respondent does not participate the position of the adjudicator is, in my opinion, analogous to that of the court when a plaintiff seeks the entry of judgment in default of an appearance by the defendant or where the defendant has failed to file a defence. In such a case, the court still has a duty to decide the case according to truth and fact and if the plaintiff's case appears on the face of the pleading or on the plaintiff's evidence (or lack of it) to be fatally flawed, then the court will refuse to enter judgment: *Charles v Shepherd* [1892] 2 QB 622 at 624, 625; *Gramophone Company Ltd v Magazine Holder Company* (1911) 28 RPC 221 at 225; *Termijtelen v Van Arkel* [1974] 1 NSWLR 525 at 529; *Bridge Wholesale Acceptance Corp (Australia) Ltd v Burnard* (unreported, NSWSC, Young J, 31 May 1991).

[64] In my opinion, where the respondent has not participated in the adjudication process so that the payment claim is undefended, s 22(2) requires the adjudicator to address in good faith such issues arising from the need to conform with the provisions of the Act and of the contract as manifestly appear on the face of the payment claim, the adjudication application and any supporting material. In most cases, the consideration will be confined to:

- whether there is in existence a construction contract between the parties and whether the payment claim is made pursuant to that contract;
- whether the payment claim reasonably purports on its face to comply with the requirements of s 13(2);
- whether there is evidence that the payment claim has been served on the respondent;
- what the contract provides, if anything, about the particular claim made in the payment claim and the time for payment;
- whether the claimant says that it has done the work for which the payment has been claimed but has not received payment.

[65] If a fatal flaw in compliance with the Act or the contract is manifestly apparent from a consideration of these matters, the adjudicator will refuse to make a determination in favour of the claimant. If no fatal flaw appears, the adjudicator is entitled to make a determination in favour of the claimant even if a more penetrating analysis of the claim and the provisions of the Act or the contract would have revealed a flaw upon which the respondent could successfully have relied. In this regard, it must always be borne in mind that the adjudicator's determination is not final and binding on the parties; whatever defence to the claim the adjudicator may have overlooked in making the determination in this summary and provisional way may always be taken up by the respondent in civil proceedings to determine liability on a final basis: s 32.

[66] The extent to which an adjudicator must give reasons for the determination in accordance with s 22(3)(b) reflects the extent of his or her duty to give consideration to the matters required by s 22(2). In a fully contested adjudication in which several

issues have been raised, the adjudicator's reasons should demonstrate that he or she has endeavoured in good faith to consider those issues, in compliance with the requirements of s 22(2)(c) and (d).

[67] On the other hand, when the payment claim is undefended in the adjudication process so that no issues have been raised and contested, the adjudicator's reasons may, permissibly, be quite brief. They should show in general terms that the adjudicator has considered the payment claim and the contract. However, I do not think that the adjudicator must ritualistically recite that the payment claim conforms to the requirements of s 13(2): if s 13(2) is not explicitly mentioned in the adjudicator's reasons, it may be legitimately assumed that that is because the adjudicator sees no problem in that regard.

[68] Similarly, if no express reference is made in the reasons to any particular provisions of the Act or of the contract, it may legitimately be assumed that, in examining the payment claim, the adjudication application and any supporting material for a fatal flaw manifestly apparent on their face, the adjudicator has found none. He or she may be right or wrong in that regard but absence of explicit reference in the reasons cannot be taken, in itself, as evidence of failure to give such consideration in good faith to the requirements of s 22(2) as an uncontested adjudication process requires.

In *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd* [2016] QSC 108, Jackson J considered the adequacy of reasons in security of payments as required in the Queensland Act. At [40]-[45], his Honour said:

[40] The applicant relied on *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359, where McDougall J said:

> Although adjudicators work under significantly greater time pressures than judges, and their reasons should not be scrutinised with the attention to detail to which the reasons of trial judges and intermediate appellate courts are subjected in ultimate courts of appeal, **nonetheless the reasons must indicate why it was that the adjudicator arrived at the determination given in accordance with s 22(1)**. Just as there is with judges, so too with adjudicators there is a presumption that the stated reasons are all of the reasons for coming to the conclusion expressed.
>
> Of concern in *Waterways Authority v Fitzgibbons* (2005) 79 ALJR 816 was the primary judge's acceptance of the evidence of one medical practitioner over that of others. It appears from what Hayne J said at [131] that the trial judge concluded that the evidence of a particular practitioner should be accepted and preferred "but disclosed no reasoning supporting that conclusion". As his Honour said at the end of the same paragraph "[t]he absence of explanation for, and reasoning and support of, the conclusion expressed ….. reveals that the process of fact finding miscarried." (emphasis added)

[41] There are other useful statements to similar effect. So, in *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1, Palmer J said:

> The extent to which an adjudicator must give reasons for the determination in accordance with s 22(3)(b) [of the NSW Act] reflects the extent of his or her duty to give consideration to the matters required by s 22(2). In a fully contested adjudication in which several issues have been raised, the adjudicator's reasons should demonstrate that he or she has endeavoured in good faith to consider those issues, in compliance with the requirements of s 22(2)(c) and (d).

[42] And in *Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466, Sackar J said:

> The content of the adjudication is obviously the most relevant source as to whether the adjudicator has or has not performed the relevant statutory functions. It is to be recalled that the process may or may not be interactive and will be conducted generally, entirely in writing. Provided it is apparent that the adjudicator has considered pertinent issues in good faith, very considerable latitude in my view

> should be afforded to an adjudicator as to the manner and form of the determination. To become too pedantic about the way in which the adjudicator has drafted a determination is to introduce an element of artificiality such as might well defeat the object and purpose of the [Payments Act] and the aim of the process entirely. On the other hand the mere fact an adjudicator blandly says he or she has read "all of the submissions and accompanying documents" or simply that he or she is "satisfied" without more in relation to a particular issue under consideration may not, subject to viewing the determination as a whole survive as adequate reasons. As I have said it will always be a matter of degree. *Shell Refining (Aust) Pty Ltd v AJ Mayr Engineering Pty Ltd* at [25] and [26] per Bergin J (as she then was), and McDougall J in *Leighton* at [94].
>
> [43] And in *Transfield Services (Australia) Pty Ltd v Nortask Pty Ltd* [2012] QSC 306, Douglas J said at [13]:
>
> > The absence of reasons, even in truncated proceedings as occur with adjudicators exercising this statutory jurisdiction, can clearly affect the decisionmaking process.
>
> [44] In my view, the reasons of the second respondent in the adjudication decision for the original contract works claim are opaque. Although the second respondent referred to having "carefully" considered the applicant's material, the only particular reference made was to paragraph 119 of the adjudication response. Paragraph 119 was concerned with the dispute as to how the amount originally included in the schedule for the deleted swimming pools should be allocated. No reference was made to the extent of the work completed in any of the nine relevant contract categories, either as claimed by the first respondent or as disputed by the applicant.
>
> [45] In my view, the statement of reasons did not adequately discharge the obligation to "include the reasons for the decision" under s 26(3)(b) of the Payments Act.

Jackson J then directed his Honour's attention to the question as to whether the failure to provide reasons constituted a jurisdictional error with a result that the adjudication determination was void. His Honour, in discussing this aspect, referred to *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212; [2003] HCA 56; *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; [2006] NSWCA 284; *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43;; *MF-Insurance Aust v Milton* (2015) 73 MVR 13; [2015] NSWSC 1392;.

At [67] of *Sierra Property*, Jackson J concluded thus:

> In my view, consistently with the approach of McHugh J in Palme, and the constructional question to be answered in accordance with Project Blue Sky Inc, the true question is one of statutory interpretation as to the proper construction of s 26 of the Payments Act. The text supports the conclusion that the reasons required under s 26(3)(d) are an essential element of a decision made under s 26. The failure to include reasons for the decision amounts to a jurisdictional error.

(c) The functions to be served by the provision of reasons by an adjudicator

The functions to be served by the provision of reasons by an adjudicator include, at least:

(i) to see whether there has been that degree of natural justice that the Act requires; which in turn means, at least, whether the respondent was given a "fair go";

(ii) to see whether the adjudicator has made a *bona fide* attempt to exercise the power in the Act (one of the essential requirements of a valid adjudication, identified at [55] of).

Palmer J, in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1, addressed his attention to the adequacy of the adjudicator's reasons. It will be seen from the passages from Palmer J's judgment above, his Honour's focus was on the following matters:

(a) whether the adjudicator, in providing his/her reasons, addressed in good faith the matters required by s 22(2);

(b) whether the party seeking to impugn the adjudicator's determination was precluded from participating in the adjudication process by the operation of s 20(2A) and, as a consequence, there were no submissions of the parties on the issues in respect of which it is contended that the reasons were inadequate;

(c) that even in the absence of there being a contest, whether or not the adjudicator still had to apply his/her mind to the relevant issues and the inappropriateness of the adjudicator merely rubber stamping the claim.

Brookhollow above has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

(d) Whether the requirement of reasons is a basic and essential element for the validity of an adjudicator's determination

In *Tollfab Engineering Pty Ltd v Tie Fabrications Pty Ltd* [2005] NSWSC 236 at [43], Macready AsJ appeared to hold that the requirement for an adjudicator to give reasons was not a basic and essential requirement for the validity of an adjudicator's determination.

There is authority for the principle that a failure to give reasons or adequate reasons does give rise to an argument that there has been a failure of natural justice. Cole J, as he then was held so in *Xuereb v Viola* (1989) 18 NSWLR 453.

Xuereb has been followed in various cases, eg in *Hughes Bros Pty Ltd v Minister for Public Works* (unreported, NSWSC, Rolfe J, 17 August 1994), Rolfe J said (adopting the BC pagination) at 13–14:

> In my opinion the court must be able to see and follow a reasoning process …

McDougall J also referred to the above extract from Xuereb, with apparent approval in *A & P Parkes Constructions Pty Ltd v Como Hotel Holdings Pty Ltd* (2004) 22 BCL 45; [2004] NSWSC 588, at [13].

However, there is a line of cases that have doubted that the rules of natural justice require the giving of reasons. Simpson J appears to have led the charge in this regard, in *Archcom Pty Ltd v Consumer Claims Tribunal* (unreported, NSWSC, Simpson J, 29 September 1995), where her Honour said:

> There is some authority for the proposition that the obligation to give reasons is an incident of the obligation to accord natural justice: *Xuereb v Viola* (1989) 18 NSWLR 453 at 469, per Cole J.
>
> But the rules of natural justice are more traditionally seen as two in number – the "audi alteram partem" (requiring that an opportunity to be heard be given), and the "bias rule" requiring the decision maker to be disinterested or unbiased in the matter to be decided. More recently, a "no evidence rule" has made its appearance: see Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) at p 236.

Davies AJ followed *Archcom* in *Hamilton v Consumer Claims Tribunal* [1999] NSWSC 847 (21 July 1999).

However in *Ciciwill Pty Ltd v Consumer Claims Tribunal* (1997) 41 NSWLR 737; [1997] NSW ConvR 56,420, Hulme J was of the opinion that a failure to give adequate reasons gave rise to an inference that the tribunal did not apply its mind to certain issues that had been raised in the proceedings before it.

In *SZDCJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 82 ALD 35; 212 ALR 581; [2004] FCA 1500, the court, at [10]–[12] had the following to say about a possible miscarriage of justice arising from a failure to provide adequate reasons. The court said:

> [10] The duty of a judge or magistrate to state reasons was recently described by the NSW Court of Appeal in *Wiki v Atlantis Relocations (NSW) Pty Ltd* (2004) 60 NSWLR 127; 1 DDCR 554; [2004] NSWCA 174 (*Wiki*). There (at [56]–[59]) Ipp JA, with whom Bryson AJA and Stein AJA agreed, held that a miscarriage of justice can arise where what is and is not disclosed in a judge's reasons is a breach of the principle that

justice must not only be done but must be seen to be done, citing *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 431 per Mason P.

[11] Ipp JA found at [59] that it is well settled that a judge does not need to refer to all the evidence in the proceedings or to indicate that the evidence is accepted or rejected. As observed by Mahoney JA in *Tatmar* at 386, "the reasons given need not be elaborate, for an elaborate argument may not require an elaborate answer". The extent of the duty to give reasons depends upon the circumstances of the individual case: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728; 13 MVR 243 at 245–6 per Samuels JA, with whom Clarke JA and Hope AJA agreed.

[12] Ipp JA quoted, with approval, the observations made in *Archibald v Byron Shire Council* (2003) 129 LGERA 311; [2003] NSWCA 292 at [54] per Sheller JA (with whom Beazley JA agreed):

> Where a dispute, such as this one, involves something in the nature of an intellectual exchange with reasons and analysis advanced on either side, the parties are entitled to have the judge enter into the issues canvassed before the court and to an explanation by the judge as to why the judge prefers one case over the other.

Consequently, it is distinctly arguable that a failure by an adjudicator to address serious issues that have been raised in the documents before him/her in his/her reasons, may lead to the adjudication being quashed on the ground that there has been a failure of natural justice. But at the end of the day it is a matter of fact and degree.

But this was not the way the Court of Appeal, in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004), has decided the matter. At [54]–[55] it was held as follows:

[54] The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

[55] In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390–91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf *R v Hickman; Ex parte Fox* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the

> determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.

The Court of Appeal's decision above turned on the question that the giving of reasons was not one of the essentialia in an adjudication process. The first question that arose is whether this could ever have been a correct analysis?

In the light of the decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, discussed elsewhere in this work, it is now clear, certainly in New South Wales, that a failure to provide reasons under the provisions of the Act, strikes at the very heart of the adjudication process, and will probably result in any adjudication determination in which such reasons do not appear being declared void.

In *Integral Energy Australia v Kinsley & Associates Pty Ltd* [2009] NSWSC 64 at [47]–[48], Hammerschlag J correctly, with respect, expressed doubts as to the correctness of that statement.

In *Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd* [2006] NSWSC 94, Bergin J (as her Honour then was), at [27], cautioned adjudicators against employing a catch-all statement, that it should not be assumed that matters not mentioned in the adjudication have been taken into account, to fend off an allegation that they failed to consider a relevant matter. Her Honour said at [27]:

> It is perhaps understandable that some adjudicators whose determinations have been the subject of administrative law challenge may regard it as appropriate to utilise a catch-all statement, similar to the one used in the determination, to fend off an allegation that they have failed to consider a relevant matter. Notwithstanding the somewhat pressure cooker environment in which adjudicators provide their determinations, it seems to me that it would be unhelpful for adjudicators to develop such a practice. It is assumed that adjudicators will comply with their statutory duties under s 22(2) of the Act, which sets out the matters to which they are to give consideration. A consideration of whether they have so complied is made from the content of their determinations rather than from a statement or claim by the adjudicator in the determination that he/she has so complied. I am not persuaded that the defendant is able to obtain any assistance or support for its submissions from this statement by the adjudicator on the first page of the determination.

The decision in Shell *Shell* was cited with approval by Brereton J in *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61 at [34].

Curial remedies against an adverse adjudication are limited as they are. If the giving of adequate reasons is not an essential step in the adjudication process, the harsh consequences of an adjudication become even harsher. It is submitted that their Honours, in the Court of Appeal, were wrong in the holding above and that where similar considerations come up for determination in the Courts of Appeal of other Australian States and Territories, *Brodyn*, in this regard, should not be followed. But, it is pointed out that *Brodyn* was not a **numerous clausus** in regard to what constitutes a breach of the provisions of natural justice, and it is still open to argue that the failure to give reasons fits into that category.

At [27] of *Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd* [2006] NSWSC 94 (6 March 2006), Bergin J (as her Honour then was) observed:

> [27] It is perhaps understandable that some adjudicators whose determinations have been the subject of administrative law challenge may regard it as appropriate to utilise a catch-all statement, similar to the one used in the determination, to fend off an allegation that they have failed to consider a relevant matter. Notwithstanding the somewhat pressure cooker environment in which adjudicators provide their determinations, it seems to me that it would be unhelpful for adjudicators to develop such a practice. It is assumed that adjudicators will comply with their statutory duties under s 22(2) of the Act, which sets out the matters to which they are to give

> consideration. A consideration of whether they have so complied is made from the content of their determinations rather than from a statement or claim by the adjudicator in the determination that he/she has so complied. I am not persuaded that the defendant is able to obtain any assistance or support for its submissions from this statement by the adjudicator on the first page of the determination.

An adjudicator is not obliged to give reasons for an issue that was not raised before him/her: see *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279; *Integral Energy Australia v Kinsley & Associates Pty Ltd* [2009] NSWSC 64 (18 February 2009).

(e) Sufficiency of reasons in the light of their purpose

In *Xuereb v Viola* (1989) 18 NSWLR 453 at 468G, Cole J held that in addition to the requirements of Pt 72, r 11(c) (NSW), natural justice requires reasons to be given by a referee.

It is respectfully submitted that it is doubtful whether the failure to give reasons constitutes misconduct.

Where this section calls for "reasons" it is to be emphasised that it does not require the reasoning of the arbitration tribunal, nor an analysis of the law and the authorities. However, the tribunal must explain its "reasons" for having arrived at their particular resolution of the dispute. Decisions which support this proposition are:

JH Rayner (Mincing Lane) Ltd v Shaher Trading Co [1982] 1 Lloyd's Rep 632 at 637

Bingham J stated:

> but I do think it undesirable that at the end of the day the party should be left in any doubt as to the basis on which the award has been given against him.

Hayn Roman & Co SA v Cominter (UK) Ltd (No 2) [1982] 2 Lloyd's Rep 458; [1982] Com LR 168

It was held that it was incumbent upon arbitrators to explain in their reasons the basis upon which they rejected certain contentions submitted to them and, as the Committee of Appeal of the Coffee Trade Federation (which sat in an arbitration appeal from a decision of arbitrators) failed to give such explanation, the award would be remitted to the Committee in order to enable them to give the required reasons. Goff J (as he then was) stated (at 464), *inter alia*:

> Anyway, as a matter of commonsense, they [the parties] are entitled to know why their contentions have been rejected.

Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) [1981] 2 Lloyd's Rep 130 at 132–133

Donaldson LJ summarised the principles thus:

> No particular form of award is required … All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a "reasoned award" … Where a 1979 Act award differs from a judgment is in the fact that the arbitrators will not be expected to analyse the law and the authorities. It will be quite sufficient that they should explain how they reached their conclusion … The point which I am seeking to make is that a reasoned award, in accordance with the 1979 Act, is wholly different from an award in the form of a special case. It is not technical, it is not difficult to draw and above all it is something which can and should be produced promptly and quickly at the conclusion of the hearing.

Some of the English judges do not take up the same view. Bingham LJ, "Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award" (1988) 4 *Arbitration International* 141, dealt with virtually the entire spectrum of issues

relevant to the adequacy of reasons. His Lordship stated (at 152) that it is not even desirable that arbitrators should attempt, as a judge does, to summarise evidence given by the parties or their witnesses on each disputed factual issue, and (at 153) the further point is made that it is not incumbent on an arbitrator to give an assessment of the witnesses. This statement seems to accord with what was held by Leggatt J in *Reinante Transoceanic Navegacion SA v The President of India, The Apiliotis* [1985] 1 Lloyd's Rep 255 at 258–259:

> In my judgment the mere fact that the arbitrators have refrained from setting out the primary facts by reference to which they would or might have justified a conclusion of fact … is not a matter of which criticism can legitimately be made.

Bingham LJ states (at 154) that an arbitrator should avoid, if at all possible, annexing documents. His Lordship relies on his own judgment in *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep 16 at 23.

Bingham LJ (at 154) concludes by stating:

> An arbitrator is not called upon to make any detailed analysis of the legal principles canvassed before him or to review any detail of the legal authorities cited.

It is submitted that this statement cannot be generally applied on the grounds detailed below. Where the award turns on a point of law, a reasonable analysis of the legal principles involved is called for.

A passage from Donaldson LJ's judgment in *Bremer*at [28.40], "[a]ll that is necessary … is all that is meant by a 'reasoned award' [in s 1(6) of the1979 UK Act]," was cited with approval by the High Court in *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239; [2011] HCA 37 at [51]. The Court added:

> It may be noted that immediately following this passage Donaldson LJ had gone on to distinguish a reasoned award from reasons for judgment.

Transcatelana De Commercio SA v Incobrasa Industrial E Commercial Braziliera SA [1995] 3 Lloyd's Rep 215

At 217 Mance J (as his Lordship then was) stated:

> The function of a reasoned award is not simply to identify and determine a point which the arbitrators ultimately considered to be decisive. It is to enable the parties and the Court (a) to understand the facts and general reasoning which led the arbitrators to conclude that this was the decisive point and (b) to understand the facts, and so consider the position with respect to appeal, on any other issues which arose before the arbitrators. Where distinct issues have been argued, the award should thus indicate the nature of the findings and reasoning on each including those which the arbitrators may not themselves have thought to be determinative. Further, it serves no useful purpose, and can be positively unhelpful, to recite at great length messages exchanged or submissions made containing assertions of fact or law; the arbitrators' findings and brief reasoning upon them are what matters.

(f) Sufficiency without prolixity

Section 29(1)(c) of the model uniform legislation requires a statement of reasons.

It is to be noted that the word "statement" is not surplusage and focuses on a legislative intent of something less than full and comprehensive reasons which may be expected from a Supreme Court judge.

At [52] of *Oil Basins Ltd v BHP Petroleum Pty Ltd* (unreported, Vic Sup Ct, 27 May 1988), the Court of Appeal consisting of Buchanan, Nettle and Dodds-Streeton JJA, made the following observation:

> [52] Counsel for the appellant referred to an observation in Jacobs: "The John Keays Memorial Lecture: Reasons for Arbitral Awards" (1988) 7 *The Arbitrator* 95, 102, referred to in Jacobs, *Commercial Arbitration Law and Practice*, Vol 1B, (update 58),

> [A28.80] [now [510.90]] (emphasis added) to the effect that s 29(1)(c) of the Act requires a statement of reasons and that the use of the word "statement" is not surplusage but rather focuses on a legislative intent of something less than the full and comprehensive reasons which may be expected from a Supreme Court judge. But assuming without deciding that is so, it remains that an arbitrator's reasons must be intelligible in the sense already described and we observe that a good deal of the text in Jacobs which follows the cited passage is strongly supportive of that view. In a later stated proposition, Jacobs makes the point that judicial decisions and pronouncements in New South Wales show that judges in the Commercial Court require something more than a mere statement, and the point is then emphasised by Jacobs' citation of the following extra-curial pronouncement of Smart, J:
>
> > It is important that comprehensive findings of fact be made. Full reasons simply set down the processes which the arbitrator adopted (or should have adopted) in coming to his conclusion. The need to give reasons and think carefully helps you to arrive at the correct conclusion.

A fine balance must be achieved between sufficiency and verbosity.

As C Barclay stated in his guest editorial in (1987) 4 *Journal of International Arbitration* 5 at 6, with reference to a particularly lengthy award:

> An award of 80 pages is verbiage… The best judgments are short and precise. Counsel's torrential salivation is not indicative of talent. There is no need for the arbitrator to satisfy the disputants' curiosity. They know the targeting, the weaponry and the amplitude of straddling their objectives. Usually near misses.

American AAA awards are very good on this score. They are simple. They are direct. English awards used to be so before the 1979 Act. Now they have fallen victim to the enthusiasm of newcomers who believe that verbosity is synonymous with quality.

The less said of some Continental awards the better. Sometimes it is only the penultimate paragraph that merits reading. Perhaps the expositions follow the traditionalistic teachings of the universities, which have encouraged learned dissertations within postgraduate theses and a measure of spiritual onanism.

Similar sentiments were conveyed by Brownie J of the Supreme Court of New South Wales when he stated, in "The Basis on which Arbitrators' Awards are Upset" (1990) 8 *The Arbitrator* 202:

> One need not write out something of the nature of a long essay, much less a short novel; what is required is "a basic explanation of the fundamental reasons" which lead to the conclusion reached.

Of equal significance are the words of Sir Harry Gibbs, the former Chief Justice of the High Court of Australia who, in delivering *"The John Keays Memorial Lecture: Reasons for Arbitral Awards" to the Institute's International Arbitration Conference*, Sydney, 7 September 1988, published in (1988) 7 *The Arbitrator* 95 at 102 stated:

> the arbitrator is required to explain in the reasons which form part of the award why he or she reached the decision on which the award embodies. To do that it is necessary to state the relevant facts and to explain why each issue of fact was resolved in the way in which the arbitrator resolved it. It is further necessary to state what conclusion the arbitrator reached on each question of law or of mixed law and fact and how that conclusion was reached. All these things may be stated in the arbitrator's own words, and in the form and order that seems to the writer most convenient. No special knowledge or skill of a legal kind is necessary to prepare the reasons, although it no doubt will help if the architect has a sense of relevance, a logical mind and a gift of clear expression as well as expertise in the subject matter of the dispute. However, it should be kept in mind that there is nothing technical about the process and that once an arbitrator has reached a rational conclusion the expression of the reasons that led him or her to that result should present no great difficulty.

In an unpublished paper *What the Courts Expect of Referees' Reports* presented to the Institute of Arbitrators, Australia (IAA), New South Wales Chapter, 27 November 1989, Rogers J delineated the form and detail required in a referee's report under Pt 72, r 11 (NSW). This report is also relevant to, and can provide guidance for, the contents of "reasons".

In essence, what is required is the "telling [of] a story logically, coherently and accurately": *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 at 133 per Donaldson J.

Judicial decisions and pronouncements in New South Wales seem to indicate that the judges in the Commercial Court require something more than a mere statement. In "Resolution of Construction Disputes" (1987) 3 BCL 11 at 16, Smart J stated:

> I encourage arbitrators acting under the *Commercial Arbitration Act 1984* to give full reasons. I am unhappy with skimpy reasons which prejudice the appeal rights of parties or do not tell the parties what the arbitrator has done. It is important that comprehensive findings of fact be made. Full reasons simply set down the processes which the arbitrator adopted (or should have adopted) in coming to his conclusion. The need to give reasons and think carefully helps you to arrive at the correct conclusion. Some of the better arbitrators in Sydney gave reasons long before they were required to do so. They took the view that the parties should be able to correct their errors and that the losing party was entitled to know why he had lost. A well-run and fair hearing and good quality reasons induce parties to accept referees and arbitrators.

In *HD Constructions v Menna* (1987) 46 ACLR 32 at 34, Smart J held that the reasons given for the award were inadequate. His Honour stated:

> In this matter is seems to me that the reasons given in the award are inadequate in the following respects:
>
> (a) The arbitrator has not stated the facts and circumstances as found by him which led to his view that "on balance … the proprietor's purported termination amounted to the repudiation of the contract". The arbitrator does not deal with the issue whether as at either the date of the letter of 17 July 1985 or at the date of the alleged rescission, the builder had been guilty of repudiatory conduct. There is inadequate material from which the court can conclude that the arbitrator was entitled to make the finding in question.
>
> (b) The arbitrator has not stated which variations were accepted and which were rejected nor the value of each variation.
>
> (c) The arbitrator has not stated how the sum of $51,545.01 is made up for the basis of his valuation of the work done and materials provided.
>
> (d) The arbitrator has not indicated what work was done and what work was incomplete.
>
> (e) The arbitrator has not stated which of the cross claims are accepted and which are rejected and how the sum of $4,960 is made up.

In *Alex T Dobble Ltd v Creer* (unreported, NSW Sup Ct, Smart J, 9 July 1987), Smart J at 2 set out what he considered to be a sufficient statement of reasons:

> Reasons should tell the parties why the decision was made and allow them to exercise such rights as may be available to them in respect of it. The basis of the decision should be made apparent. … they should deal with those issues raised in the arbitration which are necessary to decide the matter. … The reasons should be appropriate to the case in hand and where the amount involved is small and the issues are limited, fairly simple reasons would suffice. Where there is no transcript, it is important that the arbitrators state their findings on the material facts and questions of law.

His Honour listed the following deficiencies:

> Unfortunately, it is not possible to tell from the award:

(a) which claims for late payment succeeded and the extent to which they did and which claims for interest succeeded and the extent to which they did;

(b) how the sums awarded, namely, $4,398.91 and $1,194.79, were made up and the basis on which they were calculated.

Stating that progress certificates, progress payments and the final certificate were not paid by the due date is expressing a final conclusion. It neither exposes the issues litigated nor the reasons for the decision, whether they be legal or factual or both.

Gobbo J in *Kontek v Daveyduke Industries* (1987) 6 ACLR 34 stated:

> Where, as I assume, the question is simply one of the interpretation of the contract of a contract in writing, it would generally be the case that the reasons would amount to no more than the statement that that is what is provided for in the actual document. One might perhaps, in this case, have expected some reference to the bare statement in the contract as to approximate cost such as, eg, a statement that the contract read as a whole provides for a cost plus basis and that this overrides what is found to be no more than estimate, but that is an example of some additional reasoning.

It is essential that arbitrators indicate in their reasons that they are aware and fully understand the issues before them, which are resolved logically, and they explain how, in the light of all the circumstances, they reach their conclusions and make the award. Unless points of law are specifically referred to arbitration, an arbitrator cannot be expected to do a detailed analysis of the law as would a judge of the Supreme Court. Having stated this proposition, it does not follow that the arbitrator is not required to do an adequate analysis of the legal issues and the principles involved.

As noted by George H Golvan Barrister, Victoria, in "Award and Costs" (1991) 17 *Australian Construction Law Newsletter*:

> A very experienced Victorian Supreme Court Judge his Honour Mr Justice Beach described at a recent Institute of Arbitrators' seminar, how each night at the conclusion of a trial he summarised the evidence given that day and made observations. By this process he was able to keep on top of a case and make the task of writing the final judgment much easier. This is a technique which has much to commend it. The better Supreme Court judges invariably remain on top of the case throughout a trial and actively work towards the preparation of the judgment.

In *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 at 486 the court said:

> Reasons that would not be considered adequate if given by a judge may nevertheless suffice for some other decision-makers not chosen for their task because of their resemblance to the judiciary.

This decision was specifically applied in an arbitration case in *Kennedy-Taylor (Qld) Pty Ltd v Civil & Civic Pty Ltd* (unreported, Qld Sup Ct CA, 3 February 1998) per Byrne J at 11. See further *BMD Constructions Pty Ltd v Golding Contractors Pty Ltd* [2000] QSC 057 at para [18].

Reasons for an award need not be contained in one document. Where material is identifiable, ascertainable and explicative of the arbitrator's reasoning, an arbitrator may refer to material not set out in the award: *RP Robson Constructions Pty Ltd v Williams* (1989) 6 BCL 219 at 222 per Giles J (as his Honour then was).

One of the more recent judgments in England on the question of the adequacy of reasons, is the decision of the House of Lords in *Westminster City Council v Great Portland Estates plc* [1985] AC 661, wherein it was held that notwithstanding the duty of a public body to give reasons that were proper, adequate and intelligible when so required by statute, such reasons could be brief. See also *Mohamad Kunjo s/o Ramalan v Public Prosecutor* [1979] AC 135 at 142; *Selvanayagam v University of the West Indies* [1983] 1 WLR 585 at 588; *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465; 77 ALR 577 and the authorities cited therein.

In *Floreani v Marshall Pty Ltd* (1986) 2 BCL 41, it was stressed that reasons do not have to be lengthy, provided they are intelligible, coherent and comprehensive.

Sufficient reasons must be given for awarding compound interest as damages pursuant to the principles contained in *Hungerfords v Walker* (1989) 171 CLR 125; 63 ALJR 210; 20 ATR 36. These reasons should include the findings of fact necessary to support such an award, including:

(i) questions of remoteness;

(ii) the loss of such interest; and

(iii) an explanation for the grant of an award of such interest as damages, together with an award for consequential loss.

In this regard, see *New South Wales v Coya (Constructions) Pty Ltd* (1994) 10 BCL 403b and *Storey v Johnson* (unreported, NSW Sup Ct, O'Keefe J, 26 July 1994).

A balance must therefore be maintained between sufficiency for the purposes of judicial review on the one hand, and the requirement of brevity on the other.

In *Sydney Water Corporation Ltd v Aqua Clear Technology Pty Ltd* (unreported, NSW Sup Ct, Rolfe J, 17 December 1996) Rolf J held that the insufficiency of the arbitrator's reasoning required his Honour to remit the award pursuant to s 43.

The dicta above are to be contrasted with the observations of Meagher J in *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 444 where His Honour said:

> It does not automatically follow that because the reasons for decision are inadequate then an appealable error has occurred. Examination of nearly any statement of reasons with a fine-tooth comb would throw up some inadequacies. Indeed, an appeal court will reserve any intervention to those situations in which it is left with no choice: where no reasons have been given in circumstances where there was an obligation to provide them and in circumstances where a statement of reasons is so inadequate as to constitute a miscarriage of justice. In other words, the statement of reasons must be looked at as a whole and the material inadequacies identified and considered.
>
> Another question, which need not presently be decided, is whether the failure to provide reasons or the provision of inadequate reasons constitutes either an error of law or some other appealable error. This was a question which Hope AJA noted but found unnecessary to decide in *Mifsud v Campbell* (1991) 21 NSWLR 725 at 729. It is sufficient to note that most cases have assumed the error is one of law.
>
> Lastly, it is noted that an appealable error arising from inadequate reasons does not necessarily mean that a new trial is required. An appeal court is entitled to consider the matter and, if appropriate reasons are given, may itself decide the matter. Thus, if the only conclusion open on the evidence available at trial was the conclusion reached by the trial judge, then, notwithstanding an inadequate statement of reasons, the matter need not go to a new trial: *New South Wales Insurance Ministerial Corporation (formerly GIO of NSW) v Mesiti* (unreported, Court of Appeal of NSW, 1 December 1994).

At [53] of *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239; [2011] HCA 37, the High Court, in discussing the references in *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346; [2007] VSCA 255 to the giving by arbitrators of reasons to a "judicial standard" at p 366 [54] and "cognate expressions" at p 364 [50], 367 [56], said that the Victorian Court of Appeal:

> … placed an unfortunate gloss upon the terms of s 29(1)(c). More to the point were observations in *Oil Basins* to the effect that what is required to satisfy that provision will depend upon the nature of the dispute and the particular circumstances of the case. Their Honours illustrated the point by saying:

> If a dispute turns on a single short issue of fact, and it is apparent that the arbitrator has been chosen for his or her expertise in the trade or calling with which the dispute is concerned, a court might well not expect anything more than rudimentary identification of the issues, evidence and reasoning from the evidence to the facts and from the facts to the conclusion.

The High Court at [53] went on to comment as follows:

> The primary judge in *Oil Basins* had, as the Court of Appeal put it, properly [353-354 [29]]:
>
> > … held that, in order to provide reasons of the standard required by s 29(1)(c), it was necessary for the arbitrators to decide and give reasons for deciding whether 'overriding royalty' was a technical term with a meaning usually understood by persons in the oil and gas industry and, if so, whether the context of the royalty agreement or the surrounding circumstances implied that the parties intended a different meaning from the technical meaning.

At [169] of *Westport* in the High Court, Kiefel J said that there was nothing in s 29(1)(c) of the *Commercial Arbitration Act 1984* (NSW), or in the nature of arbitrations subject to the Act, to suggest that the arbitrator's reasons be to a judicial standard. Her Honour also adopted the statement in *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)*.

This decision was referred to with approval by the Court of Appeal of the Supreme Court of Victoria in *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; [2002] VSCA 189 at [101] (29 November 2002).

Robert Goff J, in *Schiffahrtsagentur Hamburg Middle East Line GmbH Hamburg v Virtue Shipping Corp Monrovia (The Oinoussian Virtue) (No 1)* [1981] 2 All ER 887; [1981] 1 Lloyd's Rep 533; [1981] Com LR 32, at Lloyd's Rep 539-540, made the point that the expression "reasons" cannot be limited to "reasoning", but must include the relevant facts upon which the arbitrator's conclusion is based. His Lordship held that "facts found by the arbitrator appear to me to form an inseparable point of the total reasons for the award".

(g) Some decisions illustrating what the Australian courts have considered to be sufficient reasons

(i) Elaborate reasons not required

In *Alex T Dobble Ltd v Creer* (unreported, NSW Sup Ct, Smart J, 9 July 1987) at 3 Smart J, whilst holding that elaborate reasons were not required and an overly critical approach would not be adopted, found (at 4) that there were inadequate reasons when:

> It neither exposes the issues litigated nor the reasons for the decision, whether they be legal or factual or both.

(ii) An explanation for "reasons" for a decision is required

In *Menna v HD Building Pty Ltd* (unreported, NSW Sup Ct, 1 December 1986) the award of the arbitrator read as follows:

> (3) I do find on balance that the proprietors' purported termination amounted to a repudiation of the contract and evidenced an intention by the proprietors to be no longer bound by the contract between them.
>
> (4) I further find on the evidence that on or about 4 November 1985 there was a continuing refusal to perform the contract on the part of the proprietor and that the builder did accept that repudiation by letter to the proprietor on 4 November 1985, whereupon the contract was rescinded.

His Honour cited the dicta of Hutley JA in *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 381–382, where Hutley JA (Samuels JA concurring) formulated the test for a breach of the duty of a judge to give reasons as one where the finding of fact which it is submitted was not made, if made, would give rise to a question of law upon which an appellate court would have ordered a new trial of the proceedings.

In applying this test, Smart J, in the *Menna case*, held that the reasons were inadequate in

that:

> The arbitrator has not stated the facts and circumstances as found by him, which led to his view that "on balance … the proprietor's purported termination amounted to the repudiation of the contract". The arbitrator does not deal with the issue … either at the date of the letter of July 17 1985 or at the date of the alleged rescission, the builder had been guilty of repudiatory conduct. There is inadequate material from which the court can conclude that the arbitrator was entitled to make the finding in question.

In the *Menna case*, Smart J stated in terms that "Elaborate reasons finely expressed are not to be expected of an arbitrator"; *Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd* (1991) 22 NSWLR 653 at 657 per Rogers J (as his Honour then was).

(iii) Discretionary factors

In regard to discretionary factors, Mahoney JA, in *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386 said:

> Nor is it necessary for a judge who is exercising a discretionary judgment to detail each factor which he has found to be relevant or irrelevant.

(iv) Each disputed piece of evidence

A judge (and arbitrator) is not required to make an explicit finding on each disputed piece of evidence: *Housing Commission case* at 385 per Mahoney JA. See also *Re Poyser and Mills' arbitration* [1964] 2 QB 467; [1963] 1 All ER 612, and *Edwin H Bradley & Sons Ltd v Secretary of State for the Environment* (1982) 264 EG 926.

However in *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 443, Meagher J seemed to have come to an opposite conclusion where His Honour said:

> It follows, that reasons need not necessarily be lengthy or elaborate: *Ex parte Powter; Re Powter* (1945) 46 SR (NSW) 1 at 5; 63 WN (NSW) 34 at 36. The scope of the reasons to be given is, as Mahoney JA said in *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386, related "to the function to be served by the giving of reasons". Accordingly, the content of the obligation is not the same for every judicial decision. No mechanical formula can be given in determining what reasons are required. However, there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it: *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.

See further *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; [2002] VSCA 189 (29 November 2002) at [101].

In *Benaim (UK) Ltd v Davies Middleton & Davies Ltd* [2005] EWHC 1370 (TCC), Judge Coulson QC, in the High Court of Justice, Queen's Bench Division, Technology & Construction Court, said the following at [52] and [53]:

> 52. In *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 249, the Court of Appeal held, by reference to *Knight v Clifton* [1971] Ch 700 and *Egil Trust v Piggott-Brown* [1985] 3 All ER 119, that there was no duty on a judge in giving any kind of judgment to deal with every argument presented by counsel in support of his case. It was said:
>
> > It follows that if the appellate process is to work satisfactorily the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained, but the issues, the resolution of which were vital to the judge's conclusion, should be stated and the manner in which he

> resolved them explained … It does require the judge to identify and record those matters which were critical to his decision.

53. In *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 the Court of Appeal cited, with approval, this passage from *English*, and made it clear that it applied equally to arbitrators, and was therefore of direct relevance to an application under s 68(2). Ward LJ said:

> The first question that arises is what is meant by "all the issues that were put to it" in s 68(2)(d), the failure to deal with which would constitute the procedural irregularity. The words must be construed purposively. In my judgment, it does not mean each and every point in dispute. That has never been part of the judicial or arbitral function … In my judgment, "issues" certainly means the very disputes which the arbitration has to resolve. In this case the dispute was about the open market rent for this property. The arbitrator decided that in order fairly to resolve that dispute the arbitrator may have subsidiary questions, issues if one likes, to decide en route. Some will be critical to his decision. Once some are decided, others may fade away.

His Honour, at [55] of *Benaim*, continued thus:

> In *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] 2 All ER Comm Colman J cited, with approval, those passages from *Weldon*, as well as the decision of Thomas J (as he then was) in *Hussmann (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83. In that latter case the judge said:
>
> > I do not consider that s 68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning but it is no more than that.

(v) Supplementary or ancillary issues

A court is not required to give reasons in respect of issues of a supplementary or ancillary nature: *Kiama Constructions Pty Ltd v Davey* (1996) 40 NSWLR 639.

The same principles should apply to the reasons of an arbitrator.

(vi) Conclusions

Perhaps the problem is best answered by reference to the following passage in the judgment of Samuels JA in *Strbak v Newton* (unreported, NSW Sup Ct, 18 July 1989) at 6:

> [I]t is going too far to suggest that in every case a judge must submit the material before him or her to the most meticulous analysis and carry into judgment a detailed exposition of every aspect of the evidence and the arguments. What is necessary, it seems to me, is a basic explanation of the fundamental reasons which led the judge to his conclusion. There is no requirement, however, that the reasons must incorporate an extended intellectual dissertation upon the chain of reasoning which authorises the judgment which is given.
>
> In the present case, the reasons are certainly succinct; but that is often to be regarded as a judicial virtue. Trial judges must always endeavour to balance their duty to explain with their duty to be brief.

(h) Material which may be included in reasons for an award

Where there is identifiable and ascertainable material explicatively of the arbitrator's reasoning, the arbitrator may incorporate such material by reference in his or her award: *RP Robson Constructions Pty Ltd v Williams* (1989) 6 BCL 219 at 222, per Giles J.

(i) The failure to weigh and/or refer to particular evidence when giving reasons

In *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; [2002] VSCA 189 at [101]–[104] (29 November 2002), a number of judgments on this issue were referred to. The Court of Appeal said:

[101] In any case in which reasons are required, the necessary content will depend upon the circumstances of the particular matter. In *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 443–444, Meagher J suggested that while reasons need not necessarily be lengthy or elaborate, there were three fundamental elements of a statement of reasons, as follows:

> First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it … Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to. Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached … [W]here findings of fact are not referred to, an appellate court may infer that the trial judge considered that finding to be immaterial. Where one set of evidence is accepted over a conflicting set of significant evidence, the trial judge should set out his findings as to how he comes to accept the one over the other … Further, it may not be necessary to make findings on every argument or destroy every submission, particularly where the arguments advanced are numerous and of varying significance … Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well.

[102] In *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 18, Gray J identified two criteria for determining the adequacy of reasons saying that the reasons will be inadequate if:

> (a) the Appeal Court is unable to ascertain the reasoning upon which the decision is based; or
>
> (b) justice is not seen to have been done.

Later, Gray J turned to consider whether justice was seen to have been done, and stated his view that it was not, saying:

> The defendant, having led a weighty body of incriminating evidence was entitled to have the evidence weighed by the court and, if rejected, the grounds of its rejection expressed in reasoned terms. To have a strong body of evidence put aside without explanation is likely to give rise to a feeling of injustice in the mind of the most reasonable litigant.

[103] The failure of a judge to refer to particular evidence has drawn attention in a number of cases. In *Yendall v Smith Mitchell & Co Ltd* [1953] VLR 369 at 379 Sholl J said:

> The true principle, I think, must be, not that everything relevant which a magistrate does not refer to is to be taken to have been overlooked, or on the other hand, that it is to be taken to have been considered but that, if something which should have been considered is not referred to, and the nature of the decision suggests some error, which may have been due to the matter not having been considered as it should have been, or if the magistrate's observations indicate, on a comparison of what is said with what he did not say, that the matter in question has not been considered as it should have been, the appellate tribunal may properly draw that inference, and the magistrate will have no cause to complain if it does so.

In *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 17 Gray J said of the omission in that case that:

> The failure to make a single reference to evidence of such importance to the defendant leads to a strong suspicion that it was overlooked or ignored.

Then in *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 Samuels JA said:

> [I]t is an incident of judicial duty for the judge to consider all the evidence in the case. It is plainly unnecessary for a judge to refer to all the evidence led in the proceedings or to indicate which of it is accepted or rejected. The extent of the duty to record the evidence given and the findings made depend, as the duty to give reasons does, upon the circumstances of the individual case. Accordingly, a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her. However, for a judge to ignore evidence critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the judge … may promote a sense of grievance in the adversary and create a litigant who is not only "disappointed" but "disturbed" … it tends to deny both the fact and the appearance of justice having been done.

[104] Fletcher placed particular reliance, in this regard, on the decision of the New South Wales Court of Appeal in *NRMA Insurance Ltd v Tatt* (1989) 92 ALR 299, where the court held that the trial judge's failure to take into account a number of aspects of the evidence also vitiated his findings as to the credit of the witnesses. Samuels JA at 312 (Hope JA agreed) stated:

> Certainly it cannot be said that the learned judge gave no reasons; but in my judgment he failed to provide those findings and reasons which enable "a proper understanding of the basis upon which the verdict entered has been reached". That point is to my mind sufficiently taken by grounds of appeal which complain that the judge failed "to give any sufficient or any consideration to", amongst other things, the evidence of Mr Carmody and Mr Dowling and the cause of the fire and "failed to take into account" a number of aspects of the scientific evidence. By recording only one side of the judicial equation he has deprived this Court of the opportunity of assessing the weight to be given to the finding on credit, which might thus be accorded far greater cogency than in the whole of the context it properly deserves. It is, to my mind, impossible for a judge to make a finding on credit in a vacuum, as it were, without relating the witness' evidence, demeanour and particular circumstances to the other material evidence in the case.

(j) The requirement to deal with central contentions advanced by the parties in reasons

In *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; [2002] VSCA 189 at [165] and [166] (29 November 2002), the court observed as follows:

> [165] The contrast in the manner in which the judge dealt with the submissions of the parties is striking, to the point that it appears that most of Fletcher's arguments and the evidence supporting its arguments were simply ignored by the judge. If his Honour had any reasoned basis for rejecting the arguments, he did not state them. Fletcher was entitled to complain of that treatment.
>
> [166] In *Conder v Silkbard Pty Ltd* [1999] NSWCA 459 Beazley JA said that:
>
> > It was incumbent for [the trial judge] to deal with the central contentions advanced by the parties and indicate, even in general terms, whether and why he accepted or rejected those matters.
>
> Similarly, the New South Wales Court of Criminal Appeal in *R v Maxwell* (1988) 217 ALR 452 said:
>
> > The appellant had a right to expect that the arguments put on his behalf would be dealt with in such a way that he could be satisfied that they had been understood and, either accepted, or, if rejected, that the rejection was based on a clear and rational process of reasoning.
>
> Again in *Australian Securities Commission v Schreuder* (1994) 14 ACSR 614 at 625 Underwood J said:

> It was a clear obligation upon a judicial officer to deal with relevant submissions made by the parties for litigation. If this is not done the parties are denied their proper rights of appeal and justice does not appear to have been done.

In *International Malting Co Australia Pty Ltd v Pyle; Pyle v International Malting Co Australia Pty Ltd* (2004) 20 BCL 293; [2003] VSC 496 at [32], it was alleged that the arbitrator misconducted himself in that:

(a) notwithstanding comprehensive and detailed written submissions setting out detailed legal contentions and principles relied upon by the parties, there was no statement of any of those legal principles save a brief reference to an authority on lost opportunity damages. Counsel conceded that the arbitration agreement [cl 14.2] required the arbitrator's reasons to be brief but submitted that this did not excuse the arbitrator from giving proper consideration to the fundamental legal principles by which he was to determine the issues. The award should at least have contained a statement of the basic legal principles upon which he decided the issue [reliance was placed on *Peter Schwarz (Overseas) Pty Ltd v Morton* [2003] VSC 144 at [32]];

(b) IMCA relies also on a statement made by the arbitrator at the conclusion of the hearing in the following terms –

> I initially indicated I would try to produce an award within a week of today. I don't intend to make an enormously detailed legal analysis and hundreds of pages of detailed analysis. I don't think I'll be able to have done my award within a week but I will certainly do my very best to do it within two weeks. I'm required under terms of the agreement to provide brief reasons. I will almost certainly provide you with adequate reasons to understand my thinking. [Transcript 1197.]

(c) Counsel also relied upon a letter written by the arbitrator to IMCA's solicitors dated 6 November 2003 in which counsel submitted the arbitrator made it clear that he regarded himself as a commercial and not a judicial arbitrator. Counsel also relied upon the fact that the arbitrator referred to cl 8.2 of the arbitration agreement but not cl 8.6, the clause that required him to make his award in accordance with law. Counsel also submitted that it was significant that he had submitted his award to an engineer for "quality assurance".

In [36]–[39] of its judgment, the court said:

> [36] Counsel for IMCA relied upon statement of Byrne J in *Peter Schwarz (Overseas) Pty Ltd v Morton* [2003] VSC 144 at [32]:
>
> > The requirement for reasons in s 29 means that the Arbitrators must set out the facts which they have found and the legal principles which they have relied upon as the foundation for the award and that this should be in terms sufficient for the parties to understand why they have won and lost and for them to decide whether to make and for the Court to determine an application for leave to appeal or enforcement. [*Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 381, per Hutley JA, at 385, per Mahoney JA.]
>
> [37] Byrne J went on to say, however:
>
> > Judges, mindful of their own judgment-writing experience, have been careful not to impose upon Arbitrators a burden greater than their own. And so, there is no need to deal with contentions which are frivolous, irrelevant or even peripheral to the matters in issue.
> >
> > This has led the court to stipulate that Arbitrators must deal with every "submission worthy of serious consideration" [*Sydney Water Corporation Ltd v Aqua Clear Technology Pty Ltd* (unreported, NSW Sup Ct, Rolfe J, 17 December 1996) at p 51]. In *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; [2002] VSCA 189 at [166] the Court of Appeal in this State said that a reasoned judgment of a court must "deal with the central contentions

> advanced by the parties". However the test is expressed, the minimum requirement is not that the Arbitrators deal with every contention. Precisely where the line is to be drawn in a given case will depend upon the circumstances, including the relevance of the contention to the Arbitrators' conclusions. The decision to deal in the reasons with a particular rejected submission may also depend upon an assessment of its weight, particularly in a case where the arbitrating parties are not legally represented. Putting it bluntly, some points are so obviously bad that no good purpose is served by dealing with them in any detail. I need hardly add that the prudent Arbitrator will prefer to err on the side of comprehensiveness in order that the award should be of benefit to the parties.
>
> A further matter bearing upon the application of this principle is that the Arbitrators will commonly not have had the benefit of legal training. Accordingly, Smart J in a much quoted passage has said this:
>
> > Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the court should not construe his reasons in an overly critical way. [*Menna v HD Building Pty Ltd* (unreported, NSW Sup Ct, 1 December 1986) at p 5.]
>
> [38] In the present case I do not consider that it was necessary for the arbitrator in satisfying his obligations and performing his duties to set out, as a judge might, a summary of the relevant legal principles. The parties, reading his detailed and well organised award which dealt with all the issues raised by the parties for final determination, would understand, without them being spelt out, the legal principles he applied and the legal choices he made. In particular, it is quite clear that the arbitrator applied the *Meehan* and not the *Placer* analysis to the agreement.
>
> [39] I have also considered the three matters relied upon by IMCA in combination but am not persuaded that doing so leads to a different conclusion.

In *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409; [2002] 2 All ER 385, the Court of Appeal cited *Knight v Clifton* [1971] Ch 700; 2 All ER 378 and *Egil Trust v Piggott-Brown* [1985] 3 All ER 119, and held that there was no duty on a judge in giving any kind of a judgment to deal with every argument presented by counsel in support of his case. It was said:

> It follows that if the appellate process is to work satisfactorily the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained, but the issues, the resolution of which were vital to the judge's conclusion, should be stated and the manner in which he resolved them explained.… It does require the judge to identify and record those matters which were critical to his decision.

The Court of Appeal in *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84, held that the above passage from *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409; [2002] 2 All ER 385 applied equally to arbitrators and cited the following passage from *English* with approval. Ward LJ said:

> The first question that arises is what is meant by "all the issues that were put to it" in section 68(2)(d), the failure to deal with which would constitute the procedural irregularity. The words must be construed purposively. In my judgment, it does not mean each and every point in dispute. That has never been part of the judicial or arbitral function … In my judgment, "issues" certainly means the very disputes which the arbitration has to resolve. In this case the dispute was about the open market rent for this property. The arbitrator decided that. In order fairly to resolve that dispute the arbitrator may have subsidiary questions, issues if one likes, to decide en route. Some will be critical to his decision. Once some are decided, others may fade away.

In *World Trade Corporation Ltd v C Czarnikow Sugar Ltd* [2004] 2 All ER Comm, Colman J cited, with approval, the judgment on this issue of Judge Lloyd QC in *Weldon*

Plant v The Commission for New Towns [2000] BLR 496 as well as the decision of Thomas J, as he then was, in *Hussmann (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83; [2000] CLC 1243, where Thomas J said:

> I do not consider that section 68(2)(d) [Eng] requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning but it is no more than that.

As stated in subparagraph (a) above, under s 22(3)(b) of the New South Wales Act, the adjudicator must include reasons for the determination, unless the claimant and respondent have both requested that the adjudicator should not include those reasons in the determination.

At [18] of *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 39, Le Miere J said:

> I am not satisfied that the Adjudicator failed to take into account Brookfield's scope of work and its response. The Adjudicator's reasons must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the Adjudicator with a fine appellate toothcomb against the prospect that a verbal slip will be found warranting the inference of an error of law. The court must be careful to avoid turning an examination of the reasons of the Adjudicator into a reconsideration of the merits of the decision: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 291 (Kirby J).

[SOP22.66] Queensland – "… *reasons* …" for an adjudicator's determination

Under s 26(3)(b) of the Queensland Act, it is provided that the adjudicator's decision must include the reasons for the decision (unless the claimant and respondent have both requested the adjudicator not to include those reasons in the determination).

At [107] of *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22 per Margaret McMurdo P, Chesterman and White JJA, their Honour's confirmed the view of the primary Judge, in adopting the approach by Barrett J in *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152 and of Hodgson JA in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19, by noting that Barrett J at [20] said:

> … the whole of the content and tenor of an adjudication may be called in aid in deciding whether particular submissions were considered in the way the Act requires. Inference is permissible. The question is not to be approached solely by reference to the presence or absence of explicit statements referring expressly to the submissions.

and at [55] of *John Holland*, Hodgson JA said:

> The relevant requirement of s 22(2) is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination, or invalidate it as regards any part affected by the omission. One could express this by saying that such an accidental or erroneous omission does not amount to a failure to comply with s 22(2), so long as the specified classes of considerations are addressed…

Where the absence of reasons or adequate reasons does not impact upon the decision making process, the failure by the adjudicator in this regard may not necessarily lead to the setting aside of the adjudication determination.

At [13] of *Transfield Services (Australia) Pty Ltd v Nortask Pty Ltd* [2012] QSC 306, Douglas J held:

> The same conclusion applies to the potential ground of review related to the adjudicator's failure to give reasons why he preferred Mr Kamali's evidence to Mr Peters'. The absence of reasons, even in truncated proceedings as occur with adjudicators exercising this statutory jurisdiction, can clearly affect the decision-making process: see *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816; 221 ALR 402; [2005] HCA 57, 1835 [ALJR] at [130]–[131] applied in this context in *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [22]–[28]. That failure here, however, is also immaterial as the adjudicator's decision to, in effect, prefer Mr Kamali's evidence to Mr Peters' without saying why, can have had no effect on his earlier conclusion that the variation agreement should be construed to permit Nortask to claim what it did for the rock excavated using rock breakers on hydraulic excavators. I say this also bearing in mind the submissions for Nortask relating to the constrained circumstances in which decisions such as these are normally made: see *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 22 at [92] and [107] and *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941 at [33].

In *JAG Projects Qld Pty Ltd v Total Cool Pty Ltd* [2015] QSC 229, Bond J had no hesitation in saying:

> In appropriate circumstances, absence of sufficient reasons may be regard as jurisdictional error, and, similarly, in appropriate circumstances, demonstrated failure to consider relevant arguments can also amount to jurisdictional error.

There is Queensland authority for the proposition that the absence of reasons or adequate reasons may not necessarily lead to a declaration that the adjudication determination is void where there is no impact on the ultimate result: see the discussion in [SOP25.70], where reference is made to Douglas J's decision in *Transfield Services (Australia) Pty Ltd v Nortask Pty Ltd* [2012] QSC 306.

[SOP22.67] Victoria – "… *reasons* …" for an adjudicator's determination

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Under s 23A(b) of the Victorian Act the adjudicator must give a copy of the determination to the Building Commission within 5 working days of the making of the determination.

What the Building Commission's task is on the receipt of the determination, is not spelt out. What the consequences of a failure on the part of the adjudicator to comply with this requirement remains a matter of speculation.

Here are a number of possible situations. First the adjudicator complies with this requirement to the letter.

Secondly, there is substantial compliance even if late, and thirdly there is no compliance at all. What is the position in the last two of these cases? Is the adjudication liable to be quashed?

In the second case, probably the answer is in the negative. In the last case, the first question will be "what is the purpose of this requirement", before an answer can be given to the question as to whether or not the failure altogether to comply will result in the adjudication being quashed. It will be a matter for the court in Victoria to fashion an answer.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Under the amendment Act, s 23(3) and (4) of the principal Act are substituted by the

provisions of the new s 23(3) and (4) which provide:

> (3) The adjudicator's determination must be in writing and must include –
>
> (a) the reasons for the determination; and
>
> (b) the basis on which any amount or date has been decided.
>
> (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined –
>
> (a) the value of any construction work carried out under a construction contract; or
>
> (b) the value of any related goods and services supplied under a construction contract –
>
> the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

[SOP22.68] Northern Territory – "… *reasons* …" for an adjudicator's determination

Under s 38(1)(c) of the Northern Territory Act, the adjudicator must state the amount to be paid and the date on, or before, which it must be paid, or that security be returned, and the date on, or before, it must be returned.

Under s 38(1)(d), the adjudicator is to give reasons, but, under s 38(1)(e), must identify any information in the reasons that because of its confidential nature was not suitable for publication by the Registrar under s 54 of the Northern Territory Act.

[SOP22.69] Western Australia – "… *reasons* …" for an adjudicator's determination

The requirement for the inclusion of reasons in the adjudicator's determination in the Western Australian Act is to be found at s 36(d). There is also a clause in regard to confidentiality at 36(e).

The purpose of requiring reasons to be provided generally is to be found in the judgment of Martin CJ, Pullin and Newnes JJA in *Alvaro v Amaral (No 2)* [2013] WASCA 232 where their Honours at [36] referred to [24] of the judgment in *Nyoni v Patterson* [2011] WASCA 215, where the following was stated:

> The purpose of reasons is to disclose the basis for the decision, as otherwise the losing party cannot know whether there has been a mistake of law or of fact: *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2004] WASCA 149; (2004) 29 WAR 273 [27] - [28]. But reasons need not be lengthy and elaborate. What is necessary in any particular case will depend upon the nature of the case: *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 443. Moreover, as the Full Court pointed out in *Mount Lawley*, inadequacy of reasons does not necessarily amount to an appealable error. An appeal court will only intervene when no reasons have been given in circumstances in which they were required, or when the inadequacy is such as to give rise to a miscarriage of justice [29].

[SOP22.70] Australian Capital Territory – *"… reasons …"* for an adjudicator's determination

Section 24(3)(b) of the ACT Act requires the adjudicator's decision to include reasons, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.

[SOP22.71] South Australia – *"... reasons ..."* for an adjudicator's determination

Section 22(3)(b) of the South Australian Act requires the adjudicator's determination to include reasons, unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination.

[SOP22.72] Tasmania - *"... reasons ..."* for an adjudicator's determination

Section 25(4)(b) of the Tasmanian Act requires the adjudicator's determination to include reasons, unless the claimant and the respondent have both requested the adjudicator not to include the reasons in the determination.

[SOP22.75] Adjudicator having regard to a statutory declaration

It does not appear to have been the intention of the legislature that the adjudicator should hear evidence as is obviously the case in arbitration and/or litigation. In fact s 22(2) precludes the adjudicator from having regard to any such evidence.

But what is the position if a respondent submits a statutory declaration under cover of its adjudication response, and the adjudicator sees it and has regard to its content?

Prima facie this would amount to a serious breach of the provisions of the Act.

But in *Austruc Constructions Ltd v ACA Developments Pty Ltd* (2005) 21 BCL 191; [2004] NSWSC 131, McDougall J held at [65]–[69] that it was within the bounds of s 22(2) that the respondent's adjudication response could contain a statutory declaration. Paragraphs [65]–[69] are set out at [SOP22.780].

This statement, it is submitted, is of somewhat dubious authority. It now seems to be the norm that lengthy submissions accompany complicated adjudications and these in turn spawn detailed submissions in response. The question may be asked whether the adjudicator's functions are then not blurred with those of an arbitrator.

[SOP22.80] Adjudicator convening a meeting of the parties

However, nothing precludes the adjudicator from convening a meeting of the parties, and in fact there is specific authority to do so, see s 21(4)(c).

But what are the limitations at such a conference? Unlike the position in England where an adjudicator may be able to hear representations or receive oral evidence, it is doubtful if an adjudicator is so entitled under the Australian legislation. At the most perhaps the occasion may be used to clarify a difficult issue.

Because of the expedition required of the adjudicator, a meeting with the parties should be avoided if at all possible. Under s 21(5) above, an adjudicator's decision is not affected by the failure of either or both parties to comply with the adjudicator's call for a conference of the parties.

[SOP22.90] Adjudicator taking site inspection

An adjudicator may, "carry out an inspection of any matter to which the claim relates" under s 21(4)(d).

But what is the position if he observes something on which he later bases his/her decision?

Procedural fairness, discussed below, would require the adjudicator to advise the parties of what was observed, and to afford the parties an opportunity to make submissions thereon.

There is no requirement that an adjudicator hold a site inspection, and holding a site inspection may only give rise to a challenge that the adjudicator has taken matters into account which he or she has seen at the site inspection, and which could have impacted on the adjudicator's mind. Alternatively, these matters have been taken into account without giving the parties an opportunity to deal therewith, or alternatively, that matters which should have been noted and taken into account by the adjudicator, were ignored.

There may be exceptional circumstances where it is appropriate for the adjudicator to visit the site and, at the same time, hold an informal meeting between the parties and their representatives. It must be emphasised that, at all times, the adjudicator must employ procedural fairness.

As held by Refshauge J in *Steel Contracts Pty Ltd v Simons* [2014] ACTSC 146, despite the conditions of s 43 of the Australian Capital Territory Security of Payment Act, a court has power to grant prerogative relief in respect of an adjudication decision within the Act, for example, an order in the nature of *certiorari*. His Honour referred to the detailed reasons given for this by Master Mossop at [26]-[29] of *Pines Living Pty Ltd v O'Brien* [2013] ACTSC 156.

Refshauge J, relying on the decision of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; held that the existence of a construction contract between the claimant and respondent was an essential condition for an arbitrator's determination.

At [47] of *Steel Contracts*, his Honour added:

> In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, the court held that the adjudication determination of an adjudicator under the NSW equivalent Act to the Security of Payment Act is amenable to orders in the nature of *certiorari* for jurisdictional error and that the pre-conditions to such a determination are jurisdictional facts that, despite the statutory limitation on review of the determination, may be reconsidered by the Court on application for prerogative review. See also *Grocon Constructors Pty Ltd v 'Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426; at 194; [78].

[SOP22.100] Adjudicator – power to employ an expert

In England, an adjudicator can, and where appropriate should, engage an expert, legal or technical, to assist in the decision making process. The adjudicator is not obliged to obtain the parties' consent to taking such a course, but, should he decide to do so, procedural fairness requires the adjudicator to advise the parties of the fact that the adjudicator has sought expert advice and what expert advice the adjudicator has received so that the parties, should they be so advised, can make submissions in regard thereto.

In the light of s 22(2), which limits the matters to which an adjudicator can have regard, this is not permitted under the Act.

[SOP22.110] Adjudicator – right to speak to either one of parties

In England, the adjudicator may, because of the tight time constraints, speak to either one of the parties separately, but the requirement of procedural fairness dictates that he or she should inform the other party of the subject that was discussed. It would certainly be inappropriate to rely on the information which the adjudicator has obtained from the ex parte reference to merely one party; *Discain Project Services Ltd v Opecprime Development Ltd* [2000] BLR 402; *Discain Project Services Ltd v Opecprime Development Ltd (No 2)* [2001] BLR 285.

This is not a procedure to be encouraged, and should at all costs be avoided, in order to preclude a challenge on the basis of bias and/or a lack of procedural fairness.

[SOP22.120] Adjudicator taking evidence from third parties without giving parties opportunity to comment

Similarly, it is inappropriate for the adjudicator to take evidence from a third party. As the adjudication procedure is inquisitorial, it is debatable whether or not an adjudicator in Australia can gather information from a third party. If an adjudicator is constrained to do so, he/she should first notify the parties of his/her intention to do so, and should not rely on any information gathered in this manner, without giving one or more or all the parties

to the adjudication process an opportunity to refute such evidence by evidence and/or submissions; *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23.

[SOP22.130] Adjudicator – the same in a number of interrelated adjudications

Where an adjudicator is also the adjudicator in another or other adjudications arising out of the same project, problems may arise in regard to isolating, in his mind, the information obtained in one adjudication and then applying it, even subconsciously, in another. This may give rise to an allegation of a breach of procedural fairness.

Where this takes place, and where there is an objection by one or more of the parties to the adjudicator continuing to act in that capacity, he should withdraw; *Pring & St Hill Ltd v CJ Hafner (t/a Southern Erectors)* [2002] EWHC 1775; (2004) 20 Const LJ 402 (TCC).

In *Pring & St Hill*, the adjudicator had adjudicated between the head contractor and the subcontractor, and was asked to adjudicate on the same facts in the dispute between the same subcontractor and the sub-sub-contractor. The court said:

> In my view, in these circumstances, there is a very real risk that an adjudicator in the position of Mr Riches would be carrying forward from an earlier adjudication not merely what he had seen or been told but also the judgments which he had formed, the opinions which he had reached, which led him to conclude that sum was the correct measure of McAlpine's damages recoverable from PSH.

The court refused to enforce the award, which was for exactly the same amount as that award in the earlier adjudication. *Pring's case* was referred to, with approval, in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* (2004) 20 Const LJ 338; [2004] EWHC 393 (TCC), where the court at [117]–[121] said:

> [117] In this case Whitefriars say that there is a real possibility of bias in the possibility that Mr Biscoe would follow his previous decision which they say had been reached unfairly. Amec say simply that I should follow *Carter v Nuttall* and say that there was no real possibility of bias.
>
> [118] In my view it is not possible to conclude that the re-appointment of an adjudicator who has already reached a decision on the same or similar facts will inevitably lead the fair-minded and informed observer to conclude that there was a real possibility that the decision would be biased.
>
> [119] In practice there may be significant difficulties for an adjudicator in attempting to consider afresh matters which he has already decided. Such difficulties may well manifest themselves in the course of the subsequent adjudication. Adjudication can, as in this case, be an extremely expensive form of alternative dispute resolution, and it is very often better when the same or very similar issues need to be considered afresh, and objection is taken to the re-appointment of the first adjudicator, that they should be considered by a different adjudicator. It is often not possible at the outset to foresee problems which may only become apparent in the course of the second adjudication.
>
> [120] Whitefriars say that the re-appointment of Mr Biscoe must be considered against the background that his first decision was found to be a nullity, and that if Amec fail to pay the costs of the first adjudication there is a risk that Whitefriars would bring proceedings against Mr Biscoe for its wasted costs.
>
> [121] These circumstances, the first of which was known to the RIBA at the time of the second appointment, point to the good sense of appointing a different adjudicator. Both these points are matters to be taken into account in the overall assessment of the possibility that the decision was biased. I am not ready to conclude that, taken in isolation, they mean that there is a real possibility that Mr Biscoe was biased in reaching his decision in the second adjudication.

[SOP22.140] Adjudicator – consequence of relying on documents which the parties have not seen

Where an adjudicator relies on documents that one or more of the parties have not seen and had an opportunity to comment on, there has been a breach of procedural fairness; *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (16 June 2003).

[SOP22.150] Adjudicator ascertaining points of law and deciding them without reference to the parties

There is English authority for the principle that an adjudicator has acted properly where he has ascertained points of law and decided them without reference to the parties, even where the point was not raised by one or more of the parties.

The court in coming to its conclusion, at the same time, expressed its concerns about this practice being followed; *Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd* [2000] ScotCS 330.

It is submitted that this decision should not be followed in Australia if similar circumstances were to obtain.

[SOP22.160] Adjudicator - the determination of value of the work the subject of a payment claim

In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 21 BCL 312; [2005] NSWSC 77 (22 February 2005), there was a challenge to the adjudication *inter alia* on the basis that claims for EOT's (extensions of time) do not fit into s 5. At [57]–[58] McDougall J said:

> [57] Messrs Parnell and Sarlos acknowledged that these claims arose out of EOTs 1 and 2, which had been the subject of consideration by Mr Makin. However, in each case, they noted that the particular claims pressed before them were for damage said to have been sustained at a time after the expiry of the period of time covered by EOTs 1 and 2. Thus, they concluded that s 22(4) did not apply.
>
> [58] In my judgment, they were either correct so to conclude or, alternatively, it was open to them on the facts so to conclude. But in any event, even if they were wrong, there was no contravention of a basic and essential requirement for the existence of a valid determination. Hodgson JA referred to s 22 in *Brodyn* at [54] as one of the "more detailed requirements" of the Act. At [55], his Honour said that "the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a valid determination". I read what his Honour said at [55] as applying to, among other things, the more detailed requirements listed at [54]. This is sufficient to answer Coordinated's submission. But even if it were open to me to consider the matter afresh, I would conclude, basically for the reasons already given in respect of the first and second issues, that s 22 is not a precondition to the existence of a valid determination. It is a matter interior, rather than anterior, to the determination.

The appeal in *Hargreaves sub nom Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 (13 July 2005) was dismissed with costs.

To have held that the inclusion of a claim in an adjudication determination that exceeds the adjudicators jurisdiction, does not contravene a "basic and essential requirement" for the existence of a valid determination, is, with respect totally unsupportable.

In any event, the judgment in *Coordinated* was before the decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

[SOP22.170] Adjudicator given a free hand subject to compliance with the Act and acting fairly

Subject to the compliance with the jurisdictional facts above, and the specific provisions and limitations contained in the Act, the adjudicator, as his/her counterpart under the English legislation, see for example, *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] TCLR 6; [2004] EWHC 888 (TCC) (6 April 2004), is given a fairly free hand in procedure which is adopted and may use an inquisitorial process, see the judgment of Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] 37 EG 173; [1999] BLR 93 and *Allied London & Scottish Properties plc v Riverbrae Construction Ltd* [1999] ScotCS 170; [2000] SLT 981. However, what the adjudicator does, subject to the overriding requirement to act fairly and comply with the requirement of procedural fairness, is dealt with more fully below. However, as pointed out above, the adjudicator is severely limited as to the materials/matters that can be considered in making a determination.

[SOP22.180] Victoria — *"… adjudication determination …"* – adjudicator convening a meeting of the parties

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Under s 22 of the amendment Act, there is a new s 22(5A) which provides that any conference called under s 22(5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator. There are no guidelines as to the basis upon which the adjudicator is to decide whether legal representation should be allowed and/or whether or not his/her decision can be challenged.

[SOP22.190] Western Australia — *"… adjudication determination …"*

The adjudication process in Western Australia is set out in ss 30, 31 and 32.

Section 30 stresses that the object is to determine the dispute fairly and as quickly, informally and inexpensively as possible.

It is to be noted that under s 32(1)(b), an adjudicator in Western Australia is not bound by the rules of evidence, any may inform himself or herself in any way which he or she thinks fit. Presumably, natural justice must at all times be complied with.

Under s 32(6), it is provided that where the regulations and the Act are silent, the adjudicator can determine his or her own procedure.

[SOP22.200] Queensland — *"… adjudication determination …"*

The Queensland Act addresses the adjudicator's decision in s 26. The substantial points of difference between s 26 of the Queensland Act and s 21 of the Act are the following:

(a) There is no provision in s 26 of the Act similar to that contained in s 21 or (2) of the Act, however there are similar provisions in s 25(1) and (2) of the Act.

(b) There is no provision in s 26 of the Act similar to s 21(3) of the Acts, which requires the adjudicator to make his or her determination within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application. A provision similar to s 21(3) of the Act, viz adjudication procedures, is however to be found in s 25(3) of the Act.

It may be said that the provisions of ss 25 and 26 of the Act taken together are in accordance with the similar provisions in s 21 of the Act.

Two authorities to which reference should be made in determining the function of an adjudicator to decide, but not necessarily to inquire, are *J Hutchinson Pty Ltd v Cada Framework Pty Ltd* [2014] QSC 63; the Queensland Supreme Court restated what

Fraser JA (with whom McMurdo P and Keane JA agreed) observed at [34] of *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] QCA 213; [2008] 2 Qd R 495; [2008] QCA 213. See the extract from Bezzina at [SOP22.60].

[SOP22.210] Northern Territory — *"… adjudication determination …"*

Under s 33 of the Act, there are provisions substantially similar to those which are to be found in the Western Australian Act referred to above. Under s 39, an adjudicator must give written notice of the dismissal decision and reasons for it to the parties. There is a review of a dismissal decision under s 48 by an application to the local court.

Section 34 of the Northern Territory Act deals with the adjudication procedure.

Section 34(1)(b) records that the adjudicator is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate. It is to be assumed that the adjudicator must, at all times, comply with the requirement of natural justice.

Under s 34(1)(c)(ii), the adjudicator can have the subject matter of the adjudication tested, provided the owner thereof consents thereto.

Under s 34(2)(c)(iii), an adjudicator can, unless all parties to the adjudication object, engage an expert to investigate and report on any matter relevant to the payment dispute.

There are no limiting provisions such as those to be found in s 22(2) of the New South Wales Act.

[SOP22.220] Western Australia and Northern Territory — *"… adjudication determination …"* – adjudicator's power to engage an expert

Section 32(1)(b) of the Western Australian Act and s 34(1)(b) of the Northern Territory Act, record that an adjudicator is not bound by the rules of evidence, and may inform himself or herself, in any way the adjudicator considers appropriate.

Section 32(1)(b) of the Western Australian Act and s 34(1)(b) of the Northern Territory Act, record that an adjudicator is not bound by the rules of evidence, and may inform himself or herself, in any way the adjudicator considers appropriate.

Section 32(2)(c)(iii) of the Western Australian Act and s 34(2)(c)(iii) of the Northern Territory Act provide that, unless all the parties object, the adjudicator can engage an expert to investigate and report on any matters relevant to the payment dispute. The adjudicator informing himself or herself is, it is submitted, akin to the adjudicator taking evidence in Western Australia and the Northern Territory. This is a radical departure from the thinking behind the Acts covering this subject in the other States.

[SOP22.230] Western Australia and Northern Territory — the adjudicator's right to speak to either one of the parties

Under s 32(1)(b) of the Western Australia Act and s 34(1)(b) of the Northern Territory Act, an adjudicator may inform himself or herself in any way the adjudicator considers appropriate.

What is not spelt out is whether or not this entitles the adjudicator to speak to either one of the parties separately and, if that does take place, what the constraints are and what the consequences may be if the result is that of procedural unfairness. Is the adjudication void in the Northern Territory, and may an application under s 45 for the adjudication determination to be enforced as a judgment be resisted on that ground, notwithstanding the provisions of s 48(3) of that Act? These are matters that the relevant legislatures do not seem to have applied their minds to.

[SOP22.240] South Australia — *"… adjudication determination …"*

Section 21 of the Act, under the heading *Adjudication procedures*, is in accordance with s 21 of the New South Wales Act.

[SOP22.250] Tasmania — *"… adjudication determination …"*

Under s 24 of the Act, the timeframe for the adjudicator to make a determination is as follows:

> (1) An adjudicator is to determine an adjudication application as soon as practicable and, in any case –
>
> (a) within –
>
> (i) 10 business days after the date on which the adjudicator receives the adjudication response; or
>
> (ii) if the respondent lodged a payment schedule in relation to the payment claim to which the application relates, 10 business days after the date by which the respondent may, under section 23, lodge with the adjudicator an adjudication response; or
>
> (iii) if the respondent did not lodge a payment schedule in relation to the payment claim to which the application relates, 10 business days after the date on which the adjudicator accepted the application under section n 22(4); or
>
> (b) within a further period, if any, agreed to by the claimant and the respondent.

Section 25 of the Act details the adjudicator's tasks. The various subsections of s 25 of the Act substantially follow the provisions of s 22 of the Act.

[SOP22.260] Australian Capital Territory — *"… adjudication determination …"*

The provisions of the ACT Act in regard to the adjudicator's decision are set out in s 24, and are in accordance with the provisions of the New South Wales Act.

[SOP22.265] Jurisdictional error and where an adjudicator acts in excess of his/her jurisdiction

Proof of excess of jurisdiction confers the remedy of *certiorari* almost as a right. Nevertheless, as held at [32] of *New South Wales Netball Association Ltd v Probuild Construction (Aust) Pty Ltd* [2015] NSWSC 1401, Stevenson J added:

> … it is a discretionary remedy which, for good reason, can be withheld: for example see *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53 per McDougall J at [43] to [45].

The central principles in regard to the consequences of an adjudicator acting in excess of his/her jurisdiction are set out by the Queensland Court of Appeal per Holmes and Muir JJA and Ann Lyons J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394:

> (a) Those principles, and some of the reasoning of the Court of Appeal in *BM Alliance* for arriving at the conclusions which they reached, are:
>
> [31] The nature of a jurisdictional error is as defined by Brennan, Deane, Toohey, Gaudron and McHugh JJ in *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 at [11]; (1995) 184 CLR 163 at 177-178, and because of its importance and for ease of reference is as follows:
>
> [11] An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such

> jurisdictional error can infect either a positive act or a refusal or failure to act. Since *certiorari* goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction
>
> Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers ... [A]n inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case. Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern. (citations omitted)

[32] Later in their reasons, their Honours contrasted the position of an inferior court in relation to jurisdictional error with that of an administrative tribunal: at 179-180.

> The position is, of course, *a fortiori* in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.

(b) At [62] of *BM Alliance*, the Queensland Court of Appeal quoted from the judgment of *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 at 614-615 at [51], Gaudron and Gummow JJ, with whose reasons McHugh J relevantly agreed, as follows:

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged. *A fortiori* in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition.

(c) At [63] of *BM Alliance*, the Queensland Court of Appeal quotes Haynes J's judgment in *Minister for Immigration* above at 645-647 [151]-[153], as follows:

> In general, judicial orders of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction. By contrast, administrative acts and decisions are subject to challenge in proceedings where the validity of that act or decision is merely an incident in deciding other issues. If there is no challenge to the validity of an administrative act or decision, whether directly by proceedings for judicial review or collaterally in some other proceeding in which its validity is raised incidentally, the act or decision may be presumed to be valid. But again, that is a presumption which operates, chiefly, in circumstances where there is no challenge to the legal effect of what has been done. Where there is a challenge, the presumption may serve only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached. It is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside. For that reason, there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and

> orders of the Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction.
>
> This is not to adopt what has sometimes been called a "theory of absolute nullity" or to argue from an *a priori* classification of what has been done as being "void", "voidable" or a "nullity". It is to recognise that, if a court would have set the decision aside, what was done by the Tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision would be set aside for jurisdictional error, the statutory power given to the Tribunal has not been exercised. ...
>
> Nothing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the September decision. In particular, the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect. Once it is recognised that a court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences. (citations omitted)

(d) At [64], the Queensland Court of Appeal in *BM Alliance* said:

> In Plaintiff S157/2002, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, referring to passages from the reasons of Gaudron and Gummow JJ at 614–615 [51], McHugh J at 618 [63] and Hayne J at 646-647 [152] in *Bhardwaj*, said [*Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2 at 506 [76]:
>
> This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all". (citations omitted)

(e) At [65] of *BM Alliance*, the following was said:

> Finkelstein J observed in *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 413 in a passage implicitly approved of by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 at 604–605 [12]:
>
> There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside.

The Queensland Court of Appeal in *BM Alliance* concluded that the above authorities established that an administrative decision involving jurisdictional error is "regarded, in law, as no decision at all".

Barr J, in Note 23 of in *Re: Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20, referred to a decision of Kenneth Martin J in *Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35; [2011] WASC 172 at [18] – [22], where Kenneth Martin J held that jurisdictional error in the case of an adjudicator acting under the Western Australian legislation was to be assessed by reference to the standard applicable to tribunals rather than to an inferior court.

In *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, Mitchell J, dealing with the Western Australian security of payment legislation, said the following in regard to jurisdictional facts:

> [102] Other rules of statutory construction concern what are often referred to as grounds of judicial review. For example, common law rules of statutory construction

will assume that the rules of procedural fairness condition the valid exercise of certain statutory powers: *Plaintiff S10/2011 v Minister for Immigration* [2012] HCA 31; (2012) 246 CLR 636 [97]. Grounds of review such as taking irrelevant considerations into account, or failing to take relevant considerations into account, are based on a construction of legislation as either prohibiting or requiring that regard be had to those matters: *Minister for Aboriginal Affairs v PekoWallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39 40; *A v Corruption and Crime Commission* [2013] WASCA 288; (2013) 306 ALR 491 [88] - [90]. A ground of review which asserts improper purpose asserts that a power was exercised for a purpose not authorised by the relevant Act: *Thompson v Randwick Corporation* [1950] HCA 33; (1950) 81 CLR 87; *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170, 186, 233; *Hunter v Minister for Planning* [2012] WASC 247 [24]. A ground which asserts misapprehension of the nature or limits of the relevant statutory power: *Kirk v Industrial Court (NSW)* [2010] HCA 1 [72]; (2010) 239 CLR 531; *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 177 178 reflects a requirement of the law that a decisionmaker understand his or her statutory powers and obligations.

[103] Where the alleged jurisdictional error arises out of a failure to comply with legislative requirements, it is necessary to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. Answering that question is also a matter of construction of the relevant legislation, having regard to the language of the relevant provision and the scope and object of the whole statute: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 [91] - [93]; (1998) 194 CLR 355.

[104] An assertion of jurisdictional error in relation to the exercise of a statutory power is therefore a contention that the holder has purported exercised his or her power other than in accordance with the conditions for the valid exercise of the relevant power. The identification of the conditions which mark the limits of the holder's authority to decide is purely a matter of statutory construction. Those limits are to be identified by the application of common law and statutory rules of construction to the language which Parliament has chosen understood in the context in which it appears.

[105] Therefore, the issues raised in the present case are to be resolved by construing the Act to identify the limits on the adjudicator's power to determine a payment dispute, followed by a factual inquiry to see if he has transgressed those limits on his authority. Put simply, the question is whether the First and Second Determinations were authorised by the Act.

Jurisdictional fact

[106] Submissions in this case were directed to the issue of whether the existence of a payment dispute in relation to a payment claim under a construction contract was a "jurisdictional fact".

[107] A "jurisdictional fact" is simply a condition for the existence of jurisdiction, or authority, to exercise a statutory power: *Gedeon v Commissioner of the NSW Crime Commission* [2008] HCA 43; (2008) 236 CLR 120 [43]; *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, (177); ie, one kind of condition for the valid exercise of a statutory power. The legislature may decide to make the valid exercise of a statutory power conditional upon the existence of some set of circumstances. If those circumstances do not exist then the person to whom the statutory power is directed does not have the authority to exercise the power. In reviewing the lawfulness of the purported exercise of the power, the court may determine whether those circumstances in fact exist.

[108] The phrase "jurisdictional fact" has been described as awkward: *Minister for Immigration v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 [130]. The use of the phrase may have a greater tendency to confuse than enlighten the debate. For one thing the "jurisdictional fact" need not be a fact. It may be a complex of elements:

Corporation of the City of Enfield v Development Assessment Commission [2000] HCA 5; (2000) 199 CLR 135 [28]. The decisionmaker's assessment or evaluation may be an element of the "jurisdictional fact" or it may be the jurisdictional fact itself. For example, where a power is expressly conditioned upon the formation of a state of mind by the decisionmaker (such as an opinion, belief, state of satisfaction or suspicion) the existence of the state of mind itself will constitute a jurisdictional fact: *Plaintiff M70/2011 v Minister for Immigration* [2011] HCA 32; (2011) 244 CLR 144 [57].

[109] The language has been further refined by referring to "jurisdictional facts" in the "broad" and "narrow" sense. In *Perrinepod*, Murphy JA referred to "jurisdictional facts in the narrow sense" as facts which must actually exist for the decisionmaker's ultimate actions to be valid. A "jurisdictional fact in the broad sense" was one defined by reference to the belief or opinion of the decisionmaker: *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 [101] - [102]; (2011) 42 WAR 35; see also *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304 [73] - [74]. The use of these terms in the context of the Act was discussed by Kenneth Martin J in *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 [91] - [100] where he expressed "a degree of unease in proceeding too much further with any attempted application of a nomenclature characterisation as between broad and narrow jurisdictional facts" in light of recent developments to which he referred.

[110] A further complication under the Act is that s 31(2)(a) operates by imposing a duty rather than conferring a power. "Jurisdictional facts" usually condition the valid exercise of a statutory power or discretion. In the case of the Act, the valid exercise of the power to make a determination under s 31(2)(b) is conditioned by the absence of a duty to dismiss under s 31(2)(a) of the Act. That is, an adjudicator does not have the authority to determine an application which must be summarily dismissed under s 31(2)(a) of the Act: *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 [113] - [114].

[111] The term "jurisdictional fact" is well established by authority. However, in light of the above issues, I find it more useful to approach the task by an inquiry into the conditions for the valid exercise of the relevant power, identifying whether they are objective facts or the existence of a state of mind in the adjudicator. That different use of language does not reflect any substantive difference to the approach taken using the terminology "jurisdictional fact".

Mitchell J, at [112]-[113] of *Laing*, went on to deal with the question of a lack of reasonableness as going to jurisdictional error. That aspect is the subject of commentary in this service at [SOP25.70] (ss) under the heading "No requirement for a reasonable decision".

After noting at [29] of his Honour's judgment in *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88 that a determination made by an adjudicator under s 31(2)(b) of the Western Australian Act was amenable to judicial review for jurisdictional error as held by Murphy JA in *Perrinepod* above, Tottle J held:

[30] Defining what constitutes jurisdictional error is often difficult. In *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 Hayne J observed at [163]:

> In deciding whether writs of prohibition and *certiorari* (and analogous forms of relief) should be granted, a distinction is drawn between jurisdictional error and error within jurisdiction. This Court has not accepted that this distinction should be discarded. As was noted in *Craig v South Australia*, that distinction may be difficult to draw. The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something

> which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not. (footnotes omitted)

[31] The critical question underlying Citygate's grounds is whether the Adjudicator exceeded the authority to make a decision conferred upon him by the Act.

[32] As Mitchell J observed in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 at [98] and [99] the answer to that question:

> Will turn on the identification of the limits of authority conferred by the relevant statutory provision, and an analysis of the facts to ascertain whether those limits have been exceeded. The identification of those limits may also be described as identifying the conditions for the valid exercise of the statutory power.
>
> The identification of the conditions for the valid exercise of the relevant statutory power is entirely a question of statutory construction. The proper construction of the relevant statute is "reached by the application of rules of interpretation accepted by all arms of government in the system of a representative democracy". (footnotes omitted)

The Supreme Court of Victoria Court of Appeal in *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 per Warren CJ, Tate and Kaye JJA defined and analysed the meaning of the phrase "a jurisdictional fact". The following principles may be extracted from their Honour's judgment:

[55] A jurisdictional fact is an event, fact, or circumstance which, as Dixon J observed in *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1938) 59 CLR 369, is "made a condition upon the occurrence or exercise of which the jurisdiction of a court shall depend."

[56] In *City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 ("*Enfield*"), the High Court described a "jurisdictional fact" as the criterion that must be satisfied before a statutory power is enlivened:

> The term "jurisdictional fact" (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion.

[57] This understanding was further reflected in *Gedeon v Commissioner of the New South Wales Commission* [2008] HCA 43; (2008) 236 CLR 120 ("*Gedeon*"):

> The expression "jurisdictional fact" … is used to identify a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question. If the criterion be not satisfied then the decision purportedly made in exercise of the power or discretion will have been made without the necessary statutory authority required of the decision maker.

[58] In *Gedeon*, the Court illustrated the meaning of "jurisdictional fact" by reference to an observation by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1944) 69 CLR 407, 429–30 in which an industrial body could not begin to deal with the issue of rates of remuneration unless it first determined that the rates were anomalous:

> The concept appears from the following passage in the reasons of Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [2008] HCA 43; (2008) 236 CLR 120, 139 [44]:
>
> > The subject matter with which the Industrial Authority deals is, *inter alia*, rates of remuneration. There is power to deal with this subject matter in respect of rates of remuneration which existed on the specified date only if the authority is satisfied that the rates in question are anomalous. Unless this condition is fulfilled, the authority cannot act – it is a condition of jurisdiction.

At [59], their Honours noted that where a matter constituted a jurisdictional fact, it is reviewable by a superior court to determine whether or not the decision maker was correct in finding that the preconditions of its jurisdiction were met and therefore the relevant statutory power was enlivened. Their Honours held that the review is *de nova* and to be determined by reference to the evidence available in the reviewing court: see *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5.

Their Honours said at [60] that where jurisdictional facts are in issue, they are to be determined on the balance of probabilities as to whether or not they exist.

At [61], their Honours decided that where the relevant jurisdictional facts were held to be non-existent, a jurisdictional error resulted, and the decision below was a nullity. Their Honours cited *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11; [53] in support of the proposition that "a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all."

At [62], their Honours noted that errors within jurisdiction are unreviewable: *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5, 153–4 [44] (whether such an error is subject to a right of appeal depends upon the relevant legislation). Their Honours Honours said that an exception is however where the error amounts to an error of law on the face of the record: *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338; [1952] 1 All ER 122; [1951] EWCA Civ 1; *Hockey v Yelland* (1984) 157 CLR 124; [1984] HCA 72. Their Honours referred to a case in the High Court in *Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57, in which it was stated:

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

Commentary in regard to taking into account irrelevant considerations within the context of the West Coast security of payment model is at [SOP25.70] (rr) under the heading "The adjudicator asserting a power exercised for a purpose not authorised by the relevant act."

[SOP22.270] When does the question of the adjudicator's jurisdiction arise?

Notionally, the question of the jurisdiction of the Adjudicator may arise at various stages of the Adjudication procedure:

(a) when there is an application to Court for a stay of the Adjudication;
(b) when the Adjudicator's jurisdiction is challenged, once the Adjudication procedure is underway; and
(c) when there is an application to Court to set aside the Adjudication Determination.

The questions above give rise to an important, but further subset of questions, viz:

(a) Can there in New South Wales and in the other States and Territories be a curial review of an Adjudicator's Determination on the basis of a lack of or excess of Adjudicator's jurisdiction, at all?
(b) If the answer to (a) above is in the affirmative, which jurisdictional challenges are still open?
(c) At what stage can such challenges be made?

[SOP22.280] The source of the adjudicator's jurisdiction

The adjudicator derives his or her jurisdiction from his or her appointment. Once the appointment is made in accordance with the relevant provisions of the relevant Act, the adjudicator's jurisdiction is then determined by the provisions of the Act.

One of the fundamental issues in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 was whether the adjudicator had jurisdiction to determine whether an "Application" for a matter to go to adjudication failed to comply with s 17(2) of the Act (NSW), and was therefore void. In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [36], Spigelman CJ, with Basten JA and McDougall J concurring, said:

> The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

In *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168 (4 January 2000), it was held that in regard to the comparative English legislation, the *Housing Grants, Construction and Regeneration Act 1996* (UK), that the appointment must relate to a pre-existing dispute. The court held at [19]:

> Thus, the notice of adjudication; the selection of a person to act as an adjudicator by an adjudicator nominating body; the indication from the selected adjudicator of his willingness to act; and the referral notice must all relate to that same pre-existing dispute. Any selection, acceptance of appointment or subsequent adjudication and decision which are not confined to that pre-existing dispute would be undertaken without jurisdiction. Of course, in such a case, it would have to be determined whether the whole adjudication process and purported decision or only that part relating to matters not covered or embraced by the pre-existing dispute were invalid and not authorised by the HGCRA and Scheme procedures. That determination would depend on the facts and relevant wording of the suggested dispute, notice of adjudication, appointment, acceptance and referral notice and on the application of the relevant adjudication or Scheme rules to those facts and that wording.

See further *Edmund Nuttall Ltd v RG Carter Ltd* [2002] EWHC 400 (TCC) (21 March 2002).

In *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349 at [23], Rein J said:

> [23] It may be unfortunate that a party dissatisfied with an adjudication can precipitate a further examination of the issue of whether there was a construction contract and hence preclude the speedy outcome that the Act had been designed to achieve, but it follows from the Fifty Properties approach to Brodyn, which I adopt, that Dr Olbourne is entitled to challenge the conclusion of the Adjudicator that there was a construction contract within the meaning on the Act, between himself and Excell. It follows too, that the evidence to which objection was taken is admissible.

In the subparagraphs below, various aspects of the adjudicator's jurisdiction are discussed. Wherever the word "jurisdiction" is used, it may be that in certain circumstances, the more appropriate word would be "power". It is not necessary for the purpose of this discussion, at this point of time, to distinguish between the two concepts.

[SOP22.285] Consequences of an adjudication being in part in excess of jurisdiction

For a discussion on this aspect, see [SOP25.510].

[SOP22.287] Where courts have exercised their discretion not to grant prerogative relief or would have done so but for circumstances which enabled the case to be otherwise disposed of

In *New South Wales Netball Association Ltd v Probuild Construction (Aust) Pty Ltd* [2015] NSWSC 1401, Stevenson J explained:

> [33] I have been taken to a number of cases where judges of this, and other Courts, have either exercised their discretion not to grant prerogative relief or would have done so but for circumstances which enabled the cases to be otherwise disposed of: for example see *Oppedisano* per McDougall J at [43] to [45]; *NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd* [2013] NSWSC 842 per Hammerschlag J at [39]; *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2013] QSC 223 per Boddice J at [39] to [40].
>
> [34] Those cases, of course, give some guidance. However, this case must be decided by reference to its own facts.
>
> [35] Mr Miller also drew my attention to authorities to the effect that prerogative relief may be refused if the applicant for relief "has been guilty of unwarrantable delay" or has acted in "bad faith" (for example see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389; [1949] HCA 33 at 400), or where the applicant for relief has "acquiesced in the invalidity or has waived it" (per Lord Denning MR in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320). In NSW, the latter authority has been construed as referring to circumstances "where conduct could properly give rise to an inference that the person had abandoned her or his rights" (per Beazley JA in *Rodger v De Gelder* [2011] NSWCA 97 at [90]).
>
> [36] The criticism that Netball makes of Probuild is not as to its conduct before Ball J or before the Adjudicator, but rather as to its volte face on 20 April 2015 when, faced with the result of the Determination, it abandoned its previous contention that the Adjudicator had jurisdiction and embraced Netball's position that she did not.

At [40]-[44] dealt with the impact of a litigant approbating and reprobating on the exercise of the discretion by a Court to grant prerogative relief. Stevenson J said:

> [40] Probuild has sought to have it both ways; to approbate and reprobate.
>
> [41] In a passage cited with approval by the Full Court of the Federal Court of Australia in *Acohs Pty Ltd v Ucorp Pty Ltd* [2012] FCAFC 16 at [200] per Jacobson, Nicholas and Yates JJ, Browne-Wilkinson V-C put the matter this way in *Express Newspapers plc v News (UK) Ltd* (1990) 18 IPR 201 at 210:
>
> > "There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."
>
> [42] In*Acohs*, Jacobson, Nicholas and Yates JJ also referred with approval to the observations of McClure JA (as her Honour then was) in *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* [2008] WASCA 211. Her Honour stated at [109] and [110]:
>
> > There is authority in Australian law for an independent doctrine of approbation and reprobation: *Commonwealth v Verwayen* (1990) 170 CLR 394; 64 ALJR 540; 95 ALR 321; [1990] Aust Torts Reports 67,952 (81-036);

> [1990] ANZ ConvR 600 at 421-422 per Brennan J; *Fried v National Australia Bank Ltd* [2000] FCA 910. The doctrine is summarised in *Halsbury's Laws of Australia*, Vol 190 [190-35] as follows:
>
> A person may not "approbate and reprobate", meaning that a person, having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile once he or she has taken some benefit from the chosen course.
>
> In *Halsbury's Laws of England*, Vol 60 [962] the authors state:

> Thus a claimant, having two inconsistent claims, who elects to abandon one and pursue the other may not, in general, afterwards choose to return to the former claim and sue on it; but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them.

> [43] In this case, Probuild had a choice between two inconsistent courses of conduct; seeking to uphold the validity of Payment Claim 24, or not. It chose to adopt one of those courses (to uphold), and now seeks to follow the other. It has also taken a benefit from its previously chosen course; namely, resisting a stay of the adjudication process.

> [44] In that regard, Mr Miller drew my attention to the observations of Einstein J (albeit in a different context) in *Rojo Building Pty Ltd v Jillcris Pty Ltd* [2006] NSWSC 309 at [39]:
>
> The scheme of the Act is unforgiving in terms of the technicalities which require to be observed. There is no room for a claimant to approbate and reprobate. There is another party to be considered. There is no room for a claimant to leave a respondent in any form of doubt as to precisely what course is being followed by the claimant. Nor is there room for a respondent to leave a claimant in any form of doubt as to precisely what course is being followed by the respondent.

As held by the High Court in Plaintiff *S157/2002 v Commonwealth of Australia 211 CLR 476;* [2003] HCA 2 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [76]:

> This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all". [citations omitted]

[SOP22.290] Can adjudicator determine his/her jurisdiction?

(a) English authority – on whether an adjudicator can determine his or her jurisdiction

The question whether or not an adjudicator has jurisdiction to determine his/her jurisdiction was raised before an adjudicator whose decision on the point was referred to by Judge Bowsher QC at [31] in his judgment in *Grovedeck Ltd v Capital Demolition Ltd* [2000] BLR 181; [2000] EWHC Technology 139 (24 February 2000). The adjudicator said:

> [31] An adjudicator does not have jurisdiction to decide his own jurisdiction: *Smith v Martin* [1925] 1 KB 745; *Palmers Ltd v ABB Power Construction Ltd* (1999) 68 Con LR 52; [1999] BLR 426. A party who protests the jurisdiction of an adjudicator may invite him to inquire into his jurisdiction, but not to decide it: *Christopher Brown Ltd v Genossenschaft Oesterreichischer* [1954] 1 QB 8. The claimants expressly disavow any suggestion that the defendants have made an ad hoc submission to adjudication or waived any right to challenge the jurisdiction.

Christopher Brown was an arbitration case, in which the issue was the arbitrator's jurisdiction to determine his own jurisdiction. There are various references to this decision in this work, and for which see a reference to the relevant paragraph numbers in the table of cases. The law or arbitration has moved on since 1954, and it is by no means certain that the *Christopher Brown* principles apply today without qualification.

In *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] All ER (D) 311 (Nov); [2004] 1 All ER 818; [2004] 1 WLR 2082, the Court of Appeal (Eng) at [10] said:

> [10] One troublesome area has concerned adjudicators' jurisdiction. There is first instance authority that the question whether the adjudicator has the necessary jurisdiction is not itself a dispute arising under a construction contract and that the adjudicator has no jurisdiction to decide his own jurisdiction, except perhaps in obvious cases – see *Homer Burgess Ltd v Chirex (Annan) Ltd* [1999] ScotCS 264; [2000] BLR 124.

At [11] and [12], the Court of Appeal said:

> [11] Fears have been expressed that, if challenges to an adjudicator's jurisdiction are too readily entertained, the plain intention of Parliament will be frustrated. In *Project Consultancy Group v Trustees of the Gray Trust* [1999] BLR 377, the question was whether the construction contract had been entered into before or after 1 May 1998, the date when the 1996 Act took effect. Dyson J, sitting at first instance in the Technology and Construction Court, recorded counsel's suggestion that it would be easy enough for an imaginative defendant cynically to invent an argument that there was no contract, or that any contract was made before 1 May 1998. In his view these fears were exaggerated. It would only be in comparatively few cases that such argument would even be possible. Where they were advanced, the adjudicator and the court would be vigilant to examine the arguments critically. He concluded that it was open to a defendant in enforcement proceedings to challenge the decision of an adjudicator on the grounds that he was not empowered by the Act to make the decisions.
>
> [12] Simon Brown LJ said in *Thomas-Fredric's (Construction) Ltd v Keith Wilson* [2003] EWCA Civ 1494, 21 October 2003, that it did not follow that, because the policy of the Act was "pay now, argue later", even in the short term the adjudicator's decision binds the parties if a respectable case has been made out for disputing the adjudicator's jurisdiction ([20] of the judgment). One issue in that appeal was whether the appellant had submitted to the jurisdiction of the adjudicator. Simon Brown LJ said that to his mind it was impossible to conclude from the facts and documents that the appellant had done so. He summarised the position at [33] of his judgment in two propositions:
>
> (1) If a defendant to a Pt 24(2) application has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue.
>
> (2) Even if the defendant has not submitted to the adjudicator's jurisdiction in that sense, then he is still liable to a Pt 24(2) summary judgment upon the award if the arbitrator's ruling on the jurisdictional issue was plainly right.

Judge LJ and Jonathan Parker LJJ agreed with Simon Brown LJ, Judge LJ specifically endorsing the two essential principles at the end of the judgment.

Lady Justice Hale, in a separate judgment, at [35] said:

> [35] I am most grateful to my Lord for the history lesson and also for his analysis of the present legal position. I agree that the court should take care not to circumvent the policy of the Act. I would also emphasise the words of Mr Justice Dyson, as he then was, in *Project Consultancy Group* cited with approval by Lord Justice Simon Brown in *Thomas-Fredric's* at [32]:
>
> > It is only if a defendant had advanced a properly arguable jurisdictional objection with a realistic prospect of succeeding upon it that he could hope to resist the summary enforcement of an adjudicator's award against him.
>
> But this is clearly such a case.

The point may, for example, be taken that a party cited as a respondent is not a party to the construction contract, alternatively, a construction contract which reflects that party as a party to it, falls to be rectified so as to reflect a company of which that party was a shareholder and/or director as the true and correct party to the construction contract.

It is respectfully submitted that the principles set out in the English cases above, should be held to apply in all the Australian jurisdictions in which there is legislation with the same aims, objects and substantially similar provisions to that of the New South Wales Act.

(b) New South Wales authority — on whether an adjudicator can determine his or her jurisdiction

(i) ***Pre Chase Oyster Bar v Hamo Industries*** **[2010] NSWCA 190**

In *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 (14 April 2005) there were serious attacks on the adjudication process, in that there was a strong case that none of the claims in the payment claim fell under s 5 or 6 of the Act and there was evidence that one claim had been compromised and therefore the adjudicator who would be appointed would have had no jurisdiction.

McDougall J was urged to grant a declaration that the adjudicator had no jurisdiction and to grant an injunction restraining the adjudication process. His Honour's attention was drawn to *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; 21 BCL 437; [2005] NSWCA 49 at [24], in support of the principle that a court could grant an "anti-suit" injunction restraining an adjudication. At [10] of *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 McDougall J was unnecessarily dismissive of the English authorities referred to above. He relied on *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 in support of his finding that an adjudicator had power to decide his/her own jurisdiction and that the pay now, argue later principle was the overriding one. It is respectfully submitted that his Honour's judgment was wrong and should not be followed. *Brodyn* does not go to the extent that his Honour said it did.

In fact, McDougall J, sitting as one of the judges in the Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, was constrained to depart from the ratio in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394.

Brodyn held at [51] of the judgment in the Court of Appeal that an adjudicator's decision is not susceptible to relief in the nature of *certiorari* or prerogative relief in that the position of an adjudicator is not completely analogous to that of an administrative tribunal. If the adjudicator's decision cannot be challenged for jurisdictional error after it has been made, it surely must follow that in an appropriate case and extracting the principles from the English authority above, an "anti-suit" injunction should be made.

It is difficult to understand the logic behind holding that an adjudicator can determine his/her own jurisdiction, and the adjudication process cannot be brought to an end before the adjudicator, only to have the jurisdictional issue litigated at the last minute, in order to avoid the adverse consequences of a judgment following an adverse adjudication. By that stage the parties would have been put to a substantial amount of legal costs, very little of which, if any at all, can be recovered. The s 25(1) challenge is last minute and last ditch. Why should the employer be put to that financial and emotional strain?

As pointed out at [SOP5.90], it took over 100 years for the English courts to hold that an arbitrator had, in certain limited circumstances, preliminary power to determine his/her own jurisdiction and it took the New South Wales courts less than 100 minutes to make that quantum leap.

The New South Wales courts have sacrificed basic and logical principles on the so called altar of non curial intervention in the adjudication process, but what was the consequence and what did they achieve?

There is no provision in the Act for a court to be approached to determine a point of law. In the light of all those circumstances, there can be absolutely no warrant, even on a provisional basis, for holding that adjudicators have power to determine their own jurisdiction.

The same legal costs in mounting a s 25(1) attack on the adjudication would have been incurred at that stage, rather than the earlier stage. No provision was made for the recovery of the costs payable to an adjudicator where ultimately it is found that he has no jurisdiction. This merely adds a further element of unfairness.

Where this question remains undecided in the other States and Territories, whose legislation contains similar provisions, it is respectfully submitted that this line of authority in New South Wales should not be followed. Alternatively, the harshness of the consequences of this line of authority should be ameliorated by legislative amendment.

Further authority on the point discussed in this paragraph is set out below, in case *Brodyn* and its principles may still be followed in other States and/or Territories, after the *Chase Oyster Bar* decision referred to in subparagraph (b) below.

In *Boutique Developments Ltd v Construction & Contract Services Pty Ltd* [2007] NSWSC 1042, Construction & Contract Services provided engineering reports to Boutique Developments in aid of its litigation with CGU Insurance Pty Ltd. The services were the preparation and provision of expert reports. The question arose as to whether or not the provision of those reports fell within the definition of "construction work" or work undertaken to supply "related goods and services" in respect of both of which services a person became entitled to a progress payment under s 8(1) of the Act. In an application for an injunction restraining Construction & Contract Services from taking any steps to obtain or enforce any adjudication determination, Gzell J held at [7] and [8] that the work claimed for was not construction work under the Act, and that to qualify as such the services had to relate to the actual construction work itself. His Honour held that the adjudicator would act outside the scope of his jurisdiction if he proceeded with the matter.

However, although the facts of the matter before him were distinguishable, Gzell J followed *Australian Remediation Services* above and *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 411 in holding that the question of the adjudicator's jurisdiction was a matter for the adjudicator. In the premises, the application for an injunction was rejected.

It is respectfully submitted that this decision on this point, in keeping with the decisions in *Australian Remediation Services* and *Lifestyle Retirement Projects No 2* on the same issue, is wrong and should in due course attract the attention of the Court of Appeal.

Where clearly the work was neither construction work nor qualified as "related goods and services", the Court should have intervened at an interlocutory stage, and prevented the matter from proceeding further.

McDougall J's judgment in *Earth Tech* has been cited with approval by Palmer J in *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 411 (22 April 2005) where his Honour, at [4] of his judgment said:

> I think that the plaintiff's application should be declined. It has been made clear by McDougall J in *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 and in the authorities to which his Honour there refers that the existence of a fact necessary for the validity of an adjudication is a matter within the competence of the adjudicator to determine. If an adjudicator erroneously finds a fact essential to jurisdiction and an adjudication certificate issues accordingly, it is always open to a party adversely affected to seek to set aside any judgment sought to be entered under s 25(1) of the Act on the ground that the adjudication was, in truth, a nullity because an essential ingredient of jurisdiction was absent: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, at 42 per Hodgson JA, with whom the other members of the court agreed.

But, see the judgments in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 (23 November 2005) and*Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 (30 January 2006) discussed at [SOP13.100] and the impact that may ultimately have on this issue.

For a discussion in regard to the impact of the statutory provision that a payment claim must be served within 12 months after the construction work to which the claim related was carried out, see [SOP13.100] *(e)*.

In *Wooding v Eastoe* [2006] NSWSC 277 (12 April 2006) in New South Wales, it was definitively decided by Young J, prior to *Chase Oyster Bar*, as follows:

> [12] First, as acknowledged in *Brodyn*, the purpose of the Act is to minimise the number of situations in which a court can interfere with the obvious purpose of the Act and that is to make sure that pending the resolution of building disputes the sub-contractor or similar will actually receive money so that it can remain liquid, whereas before the Act it would be starved of funds until the dispute was determined or settled.
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> [13] Secondly, there are a whole series of decisions which distinguish between situations where an adjudicator or the like is given power to determine whether he or she has jurisdiction as well as jurisdiction to determine the dispute and those situations where an adjudicator or the like must objectively and in truth only determine a question if jurisdictional matters are absolutely established.
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> [14] The leading case in this area is *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369. At 389 Dixon J said:
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> > The clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, *certiorari*, or appeal. But, if there be want of jurisdiction, then the matter is *coram non judice*. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable.
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> [15] In *Ex parte Hulin; Re Gillespie* (1965) 65 SR (NSW) 31; [1965] NSWR 313; (1965) 82 WN (Pt 2), a decision of the Full Court of this court constituted by Sugerman, Maguire and Nagle JJ, Sugerman J said at 33 that there was a very real distinction between the absence of some essential preliminary, and an objection "that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try". Nagle J, in a separate judgment, came to the same view.
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> [16] In the instant case a matter for the adjudicator to decide was who were the parties to the contract under which the second defendant did its work. The adjudicator made a bona fide attempt to deal with those issues. He made a decision and I do not consider that there is anything in *Brodyn* which would make me say that if an adjudicator decides a question of fact which is one of the essential matters to his jurisdiction, after a bona fide inquiry into the fact, there is anything more than a mistake of fact and no error which would vitiate his judgment.

In *Smith v Coastivity Pty Ltd* [2008] NSWSC 313, the primary question was whether the agreement before the Court was for related goods and services.

The issues before the court were referred to at [2] of McDougall J's judgment in *Smith*, viz:

> (1) Whether under the deed Coastivity undertook to supply related goods and services for another party;
>
> (2) Whether under the deed the consideration for such related goods and services as Coastivity might have undertaken to supply was to be calculated other than by reference to the value of those goods and services; and

(3) Whether, if the first issue was to be answered "no" or the second issue were to be answered "yes", there were any available discretionary grounds for the refusal of relief to the Owners.

McDougall J went on to point out that it was common ground that the first and second issues raised questions as to the basic and essential requirements for the existence of a valid adjudication determination as held by Hodgson JA, with whom Mason P and Giles JA agreed, in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at 441 [53] (NSWLR).

After a detailed analysis of the various facts and circumstances relating to questions (1) and (2), McDougall J held that the owners had made good their claims to declaratory and injunctive relief which he accordingly granted. What seems to have been completely overlooked is the line of authority above to the effect that the jurisdiction of the adjudicator is a matter for the adjudicator and not for the court and that the two questions before the court were matters clearly going to questions of jurisdiction.

The judgment in *Smith* is to be contrasted with the judgment of Hammerschlag J in *Bucklands Convalescent Hospital v Taylor Projects Group* [2007] NSWSC 1514, where his Honour examined the question as to whether or not the allegation that a payment claim had not been served in accordance with the provisions of the Act was a matter for the court or the adjudicator.

Hammerschlag J said:

> [22] In *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* Palmer J considered that disputes whether a payment claim had been served within the time prescribed under the Act and whether a payment schedule had been served within the time prescribed by the Act were matters properly for the determination of an adjudicator. The present situation is to my mind analogous to that being considered there by his Honour.
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> [23] The existence of a payment claim under the Act is clearly a jurisdictional requirement for an adjudicator to validly exercise the jurisdiction conferred under the Act. Palmer J, following McDougall J in *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*, held that whether such a fact existed was a matter within the competence of the adjudicator to determine.

It seems to be quite clear now that all of the decisions above which followed the *Brodyn* principle, can no longer be regarded as the law in New South Wales following the *Chase Oyster Bar* decision.

Again, it is respectfully submitted that this is quite a draconian result, where a lay adjudicator (in the sense of not having any or adequate legal knowledge) can make a determination of this nature, with a result that vast sums of money have to change hands, with the potential of bankrupting the unfortunate company required to make payment.

It seems to be clear that an adjudicator, who has to decide whether or not facts which are essential preconditions of jurisdiction exist, cannot give himself or herself additional jurisdiction by making a wrong decision on collateral questions as to the existence of such facts: see *Fifty Property Investments Pty Ltd v O'Mara* (2007) 23 BCL 35; [2006] NSWSC 428; *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd (t/as Domus Homes)* [2011] NSWSC 604 at [21].

In *State Water Corp v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879, Sackar J undertook a thorough and detailed analysis of all of the authorities going to the question as to whether or not it is for the adjudicator to determine whether submissions made by a claimant were within the parameters of the claimant's payment claim. His Honour had regard to *inter alia* to the following case law: *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [24]–[26] and [42]; *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19 at [63] and [71]; *Downer Construction (Australia) Pty Ltd v Energy Australia*

(2007) 69 NSWLR 72; [2007] NSWCA 49 at [86] and [88]; *Broad Construction Services (NSW) Pty Ltd v Vadasz* (2008) 73 NSWLR 149; [2008] NSWSC 1057 at [37]; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [220]; *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 at [13]; *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61 at [24]; *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [67].

Sackar J reached the following conclusion:

> [56] However, the true position, which I think emerges from a more fulsome reading of the authorities, is slightly different. In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 itself, Basten JA appeared (at [43]) to agree with Hodgson JA that it was for the adjudicator to determine whether or not a claimant's submissions were within the parameters of the payment claim to which they relate (and by analogy whether a respondent's submissions were within the parameters of the payment schedule to which they relate), and also observed that it was for the adjudicator to determine whether or not the mandatory requirements in s 13(2) of the Act had been satisfied (at [44]–[46]), and that intervention by a court where it thinks that the mandatory requirements in s 13(2) have not been met "will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine" (at [44]). Nonetheless, his Honour was careful to add (at [47]) that:
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> > [47] It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; [1999] HCA 21 at [133], was to the following effect:
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> > > If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.
> >
> > Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that is must be undertaken in good faith, but that is not a sufficient condition of validity.
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> [57] The same, in my view, may be said about the adjudicator's opinion with respect to whether, for the purpose of s 20(2B), a respondent's submissions come within the parameters of the respondent's payment schedule.

Having reached that conclusion, his Honour noted at [62] of *State Water* that a slightly different, but nonetheless related, question was determined by McDougall J in *Leighton v Arogan* [2012] NSWSC 1323, in which McDougall J said:

> [82] In *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61, Brereton J said at [22] that it was established "that an applicant may not rely on, and an adjudicator may not consider, material that is included in an adjudication application which is outside the scope or ambit of the claim described in the payment claim". His Honour referred to the decision of Einstein J in *John Holland Pty Ltd v Cardno MBK* (NSW) Pty Ltd [2004] NSWSC 258 at [22]–[25]. Brereton J also referred to my decision in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004]

NSWSC 823 at [49], [50], [56] and [57]. I repeat what I said in the last two of those paragraphs, as explaining the reasoning of Einstein J in the earlier case:

> [56] Section 20(2B) of the Act prevents a respondent from including in its adjudication response any reasons for withholding payment that were not included in the payment schedule provided to the claimant. There is no equivalent limitation, in the case of adjudication applications, in s 17 of the Act; and, as Einstein J held in *John Holland* at [21], no such limitation could be implied by any process of statutory construction.
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> [57] What Einstein J said in *John Holland* was that a claimant that did not provide sufficient details in its payment claim to enable the respondent to verify or reject (ie, assess) the claim could not include the missing details in its adjudication application. That was because, since the respondent was barred by s 20(2B) from replying to those details (ie, of responding in its adjudication response in a way that did deal with the merits of the claim) the result "may indeed be to abort any determination": at [23]. His Honour said, alternatively, that an adjudicator did not have power to consider materials supplied by a claimant in its adjudication application which went outside the materials provided in the payment: at [24]. Materials would go outside what had already been provided if they fell outside the ambit or scope of that earlier material.

[83] There is no doubt that, *in general*, the question of whether a submission has been "duly made" is one for the adjudicator to determine. See Giles JA in *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 at [86]–[88]. (I note that Santow and Tobias JJA agreed with his Honour: and reference may be made as well to the cases cited by his Honour in the paragraphs in question.)

[84] Accepting that this is so, nonetheless, the consequence of an invalid application of s 20(2B), with the effect (as here) that the respondent is prevented from advancing reasons because the payment claim that is advanced in the adjudication application is different to the one that was advanced in the payment claim and answered in the payment schedule, is to deny the respondent natural justice.

[85] There is, in my view, another way of approaching the same question. Section 22 of the Act deals with the topic of the "adjudicator's determination". By subs (2), the adjudicator is commanded to "consider the following matters only": namely, the matters listed in paras (a)–(e). One of those matters (para(c)) is:

> ... the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim ...

[86] In this case, in my view, the submissions that were made by Arogen in the adjudication application, in support of the variations in question, could not be regarded as having been "duly made" in support of those aspects of its payment claim. That is because, on its fair and obvious reading, the payment claim referred to a basis of claim that was quite different to that advanced in the submissions. As I have said already, I have no doubt that the way in which this part of the adjudication application is framed reflects a clear appreciation by Arogen of the strength of Leighton's response to the claims, insofar as it relates to V03 from and after 10 February 2012, and V16, V19 and V21.

[87] Thus, in my view, the adjudicator failed to comply, to the extent indicated, with the mandatory requirements of s 22(2)(c). He failed to comply because he considered submissions that should not be regarded as "duly made ... in support of the claim". For that reason, he did not make his determination (in respect of the relevant variations) in accordance with a condition of, or within the limits of, the jurisdiction given by the Act.

[88] Further, and in any event, by approaching the matter in this way, the adjudicator denied natural justice to Leighton, because he permitted Arogen to advance its claim in a way that Leighton was not able to answer (on the adjudicator's application of s 20(2B)).

However, after having considered all the case law above, Sackar J summarised his view, as follows:

[65] To summarise, the general position is that it is for the adjudicator to determine whether submissions made by a respondent were "duly made" and in compliance with s 20(2B). However, that does not necessarily place the adjudicator's decision beyond review. If the adjudicator formed his or her opinion by taking into account irrelevant considerations, or by misconstruing the terms of the Act, or the adjudicator's opinion simply cannot be described as reasonable, or is without foundation, that may provide a basis for the intervention of the court.

[66] Applying the principles to this case, there is, in my view, no basis whatsoever for the view that State Water's submissions were "duly made", as they clearly and obviously advanced reasons for non-payment which were not included in State Water's payment schedule. It is possible that the adjudicator did not actually turn his mind to the requirement, but simply, as a matter of practice, said that he did so.

In the ultimate result, it would appear as if in Sackar J's considered view questions such as whether submissions have been "duly made" are **generally** matters falling within the adjudicator's jurisdiction, but however that is not an absolute position, in that there might well be exceptions to that principle. [emphasis added]

Where his Honour (at [65], cited above) referred to the fact that an adjudicator's decision "simply cannot be described as reasonable" and that may give rise to curial review, it is respectfully pointed out that there is substantial case law to the effect that the adjudicator's decision is not required to be reasonable, see the discussion at [SOP25.70].

At [69] of *State Water*, his Honour held that a submission included in an adjudication response, contrary to the requirements of s 20(2B), was not "duly made" within the meaning of s 22(2)(d), and therefore that submission cannot be considered by the adjudicator under s 22(2)(d). His Honour noted:

> ... [c]onsistent with the purpose for which the Act was introduced, the aim of s 20(2B) is to avoid new submissions being introduced late in a process running on a strict and brief timetable (*John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19 at [33]).

However, at [70], his Honour cautioned that:

> ... it must be remembered that the claimant's and respondent's submissions (duly made) are only two of a number of matters that the adjudicator is required to consider. Accordingly, an adjudicator should not ignore something of real relevance to issues arising under s 22(2)(a) or (b) (or both), simply because the matter was not raised in submissions duly made by the parties (*John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19 at [47]–[48]). That applies even where the adjudicator only gained an awareness of those particular matters (ie of particular provisions of the relevant construction contract or the Act, as opposed to the facts and circumstances of the particular case) from having come into contact with submissions not duly made (Minister for *Commerce v Contrax Plumbing (NSW) Pty*

Ltd [2005] NSWCA 142 at [35] per Hodgson JA). But where that situation arises, the adjudicator must bear in mind the need to afford natural justice to the parties. To address that problem, the adjudicator may wish to call for further submissions (s 21(4)(a)) or arrange a conference (s 21(4)(c)).

(ii) ***Post Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190**

It is clear from *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 that *Brodyn* can no longer be referred to as authority for the proposition that the remedy of *certiorari* is excluded.

At [102] of *Chase Oyster Bar*, Spigelman CJ, with Basten JA and McDougall J concurring, said:

> If the last conclusion be wrong, and the practical considerations should be considered determinative, the decision of the adjudicator in respect of the validity of an adjudication application would not be beyond review. The opinion of the Tribunal that its jurisdiction was engaged cannot be arbitrary, capricious or irrational and must be an opinion open to a reasonable person correctly understanding the meaning of the law under which authority is conferred: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; [1944] HCA 42 at 430 and 432 (Latham CJ); *Buck v Bavone* (1976) 135 CLR 110; [1976] HCA 24 at 118–119 (Gibbs J); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; [1999] HCA 21 at [133]–[135] (Gummow J); *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 78 ALJR 992; [2004] HCA 32 at [37]–[38] (Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 84 ALJR 369; [2010] HCA 16 at [23]–[24] (Gummow ACJ and Kiefel J, dissenting as to the result) and at [102]–[103] (Crennan and Bell JJ). Although, as noted by Gibbs J in *Buck v Bavone*, the Court may be slow to intervene where authority depends upon a matter of "opinion or policy or taste", that will not be so where authority depends upon a straightforward calculation of time, as in the present case.

The judgment in *Chase Oyster Bar* above was explained further by McDougall J in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2010] NSWSC 1367.

By a majority of Macfarlan JA and Tobias AJA, with Basten JA dissenting, the appeal against McDougall J's decision, at first instance in this matter, was dismissed with costs: see *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399.

For a discussion on Macfarlan JA's decision, in which Tobias AJA concurred, see [SOP25.570].

[SOP22.310] The adjudicator's jurisdiction to determine that he has no jurisdiction

In *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165, the adjudicator determined that he had no jurisdiction. Ball J held that that decision was not a determination, but was validly made. His Honour considered the submission by Hansen Yuncken that the determination of the adjudicator in substance was that the amount of the payment claim was nil because the payment claim was not validly made under the Security of Payment Act.

Hansen Yuncken, as his Honour noted at [13], contended that its submission was supported by *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159 and *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49.

At [14], his Honour held:

> I do not accept Hansen Yuncken's submissions. In my opinion, the adjudicator's decision was not a determination of the type contemplated by Security of Payment Act 2009Cths 22. Rather, it was a decision whether the SOP Act applied to the claim made by *Olympia* having regard to where the relevant construction work was carried out. The

adjudicator had to make a decision about that question because it was an essential precondition to the exercise of the powers granted to him by the Act. But is does not follow that, in making that decision, he was exercising a power to make a determination of the type required by s 22. As Spigelman CJ explained in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [36]:

> The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2) [which relevantly states in para (a) that an adjudication application cannot be made unless the claimant has notified the respondent within 20 business days immediately following the due date for payment of the claimant's intention to apply for adjudication of its claim]. The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

However, his Honour went on to hold at [17] that the determination of the parameters of a payment claim is a matter for the adjudicator and a reasonable but erroneous decision of the adjudicator does not invalidate the determination.

His Honour went on to explain his decision as follows:

> [18] I accept that it is difficult to reconcile the conclusions of the previous paragraph with statements made by Applegarth J in *John Holland*. However, the decision in that case did not turn on whether the original adjudicator's decision was a decision under s 26 of the Queensland Act. Rather, it turned on the extent to which a decision of an adjudicator was binding in a later adjudication. The resolution of that issue did not depend simply on characterising the decision in relation to the earlier adjudication application as falling within s 26 of the Queensland Act. It also turned on principles of issue estoppel and abuse of process. In any event, *John Holland* was decided before *Chase Oyster Bar*. In my opinion, the point made by Spigelman CJ in the latter case is correct and I should follow it.
>
> [19] In my opinion, the conclusion that the adjudicator did not make a determination under s 22 of the SOP Act is supported by what the adjudicator actually did. He was asked to make a decision on the question of jurisdiction before he accepted his nomination. Faced with that request, he accepted his nomination but, on the same day, caused ASC to write to the parties to say that he accepted that he did not have jurisdiction. He did not wait for an adjudication response as he was required to do before making a determination under s 22. Nor does it appear that he examined the payment claim or the payment schedule in arriving at his decision. Rather, what he relied on was the fact that the construction site was located outside New South Wales. It seems clear from those facts that the adjudicator - correctly, in my view - was not purporting to make a determination under s 22.

[SOP22.325] Queensland — whether an adjudicator can determine his or her jurisdiction

Under s 25(3)(a) of the *Building and Construction Industry Payments Act 2004* (Qld) inserted by s 15 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld), which commences on a day to be fixed by proclamation, an adjudicator is required to decide whether he/she has jurisdiction to adjudicate the application.

[SOP22.330] Victorian authority — on whether an adjudicator can determine his or her jurisdiction

In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [164], Vickery J held that conformably with the New South Wales case law, issues of compliance or otherwise with the technical requirements of the equivalent of s 14 of the Victorian Act [cf s 13 of the New South Wales Act] are matters for the adjudicator to determine. This judgment was applied by Vickery J at [6] of *Grocon Constructors v Planit Cocciardi Joint Venture* [2009] VSC 339. His Honour followed *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 at [76] (23 November 2005) and *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 (19 March 2007).

After a detailed analysis of all of the relevant case law including: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190; *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426; *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163]; *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 72 ALJR 841; *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] QB 815; [1986] EWCA Civ 8; *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171; *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369; [1938] ALR 119; *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156; *Laing O'Rourke Australia Construction v H & M Engineering & Construction* [2010] NSWSC 818; *RJ Neller Building Pty Ltd v Ainsworth* [2008] QCA 397, Vickery J in *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 was persuaded that *Grocon* above can no longer stand and called for some clarification and qualification.

At [111]–[115] of *Sugar Australia*, his Honour said:

> [111] In the light of *Kirk* and *Chase Oyster Bar*, the statements referred to in paragraphs [115]–[116] of *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426 call for some clarification and qualification.
>
> [112] In *Grocon* it was said:
>
> > With the exception of the case where the basic and essential requirements of the Act for a valid determination are not satisfied, or where the purported determination is not a bona fide attempt to exercise the power granted under the Act, if the Act does make the jurisdiction of an adjudicator contingent upon the actual existence of a state of facts, as distinguished from the adjudicator's determination that the facts do exist to confer jurisdiction, in my opinion the legislation would not work as it was intended to. Unnecessary challenges to the jurisdiction of an adjudicator appointed under the Act would expose the procedures to delay, cost and expense. The very purpose of the Act would be compromised.
> >
> > For these reasons, in my opinion, in order to serve the purposes of the Act, the intention of the legislation is to confer upon an adjudicator the capacity to determine facts which go to his or her jurisdiction, subject to exceptions of the type to which I have referred. It follows that, in making those determinations, the Act confers on adjudicators jurisdiction to make an incorrect decision in relation to such jurisdictional facts which will not be overturned by *certiorari*.

[113] For the purposes of s 18 of the Victorian Act, it appears to me that the elements of the section which serve to confer jurisdiction on an adjudicator to make a valid determination under s 23, on the proper construction of the Act, do not permit the adjudicator to finally determine the validity of the adjudication application. If there be any challenge to the jurisdiction assumed by the adjudicator it must finally be determined on the basis of facts found by the Court on judicial review, in the course of determining whether a jurisdictional error has been exposed which calls for the exercise of the Court's discretion to grant relief in the nature of *certiorari* and, if necessary, mandamus. The Court may grant relief on such relevant evidence as may be adduced before it, whether or not such evidence was before the adjudicator at first instance. Further, the Court may grant such relief without regard to any determination which may have been made on the issue of jurisdiction by the adjudicator. The Court is obliged to arrive at its own conclusion as to jurisdiction based on the law and on the facts as found by it.

[114] This is not to say that an adjudicator should not make any findings of fact or rulings on law if a question of jurisdiction is raised in the course of determining an adjudication application. Clearly if an adjudicator is presented with material or submissions which bring into question the jurisdiction of the adjudicator, he or she should determine the question and give reasons for the findings of fact or rulings on law. If however the adjudicator's decision on jurisdiction is challenged in Court on judicial review, the Court may deal with the matter afresh and receive additional evidence on the matter if the additional evidence is relevant to the determination of the question.

[115] To the extent that anything inconsistent with this conclusion appears in paragraphs [115]–[116] of Grocon, in the light of the later reasoning of the High Court in *Kirk* and of the New South Wales Court of Appeal which followed it in *Chase Oyster Bar*, I do not follow my earlier ruling.

It can no longer be said in Victoria that an adjudicator can be the final "judge" of his/her own jurisdiction. Where there is a jurisdictional challenge, it is clear now from his Honour's judgment that, in Victoria, that is a question that must be determined by the Court in the light of all of the relevant and admissible facts placed before the Court.

Sugar Australia was referred to and discussed at [73] of *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 per Warren CJ, Tate and Kaye JJA.

See further the judgment of Vickery J in *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd* [2013] VSC 552, where the decision in *Sugar Australia* above was referred to with approval.

In *Maxstra Constructions Pty Ltd v Active Crane Hire Pty Ltd* [2013] VSC 177, McMillan J held:

[35] In *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426, 203, Vickery J considered that the intention of the legislation was to confer upon the adjudicator the power to determine certain facts that go to his or her jurisdiction and that that determination would not be open to *certiorari*, save where the purported determination is not a bona fide exercise of the power or where a basic and essential requirement of the Act is not satisfied.

[36] Although the adjudicator was of the opinion that the Act did not allow an adjudicator to determine his own jurisdiction, he was allowed to determine facts that went to his jurisdiction, and he in fact did. Specifically, it was within the adjudicator's power to determine whether the payment schedule served by Maxstra was in time. It was found that the payment claim was served on 14 January 2013 and that the payment schedule was served on 24 January 2013. It was therefore found that the payment schedule was

served in time. In my opinion, the adjudicator's determination on the matter of service was a bona fide exercise of his power under the Act.

[SOP22.335] Whether or not an adjudicator can be the final arbiter of his/her own jurisdiction

In [SOP22.330], this question is referred to in Victoria with reference to Vickery J's judgment in *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535.

At least in Victoria, it is clear that an adjudicator, although being encouraged to find the necessary facts which go to his/her jurisdiction, cannot be the final arbiter on this issue where his/her jurisdiction is challenged in subsequent proceedings.

It is submitted that this position should obtain in all of the States and Territories which follow the East Coast model.

[SOP22.340] Western Australian authority — on whether an adjudicator can determine his or her jurisdiction

In *O'Donnell Griffin Pty Ltd v Davis* [2007] WASC 215, Templeman J, at [30]–[32], held as follows:

> [30] In my view, it is not appropriate for me to express any view in this application as to the soundness or otherwise of the plaintiff's contention. Whether or not the adjudicator has jurisdiction is, in the first instance, a matter for him. As the authors of *Building and Construction Contracts in Australia* say:
>
> > [A] nominee/arbitrator is entitled to consider a question going to his jurisdiction to the point of investigating and satisfying himself that there is a dispute and that it is worthwhile proceeding further.
>
> [31] I consider that approach to be particularly apposite in the present case, for two reasons. First, s 31(2)(a)(iv) of the *Construction Contracts Act* imposes on the adjudicator an obligation to dismiss an application without making a determination of its merits:
>
> > [I]f satisfied that it is not possible to fairly make a determination because of the complexity of the matter.
>
> In other words, an adjudicator who was faced with a complex question of jurisdiction which he or she felt unable to resolve on the papers would be obliged to dismiss the application.
>
> [32] I wish to emphasise that I should not be taken as suggesting to the adjudicator that he adopt that course in the present case. It is entirely a matter for him to decide.

It will be noted that this Honour was persuaded by an arbitration principle in arriving at the above decision.

It is respectfully submitted that in that regard his Honour misdirected himself. As pointed out elsewhere in this book it took many tens of years for the English courts to acknowledge that an arbitrator had jurisdiction where the arbitration clause was wide enough to allow the adjudicator to determine his/her jurisdiction.

Furthermore, his Honour's reference to s 31(2)(a)(iv) of the Western Australian Act is also, with respect, inappropriate. The fact that an arbitrator may dismiss an application for determination because of its complexity does not seem to be a bar to a court determining the prior issue, and that is whether or not the arbitrator has jurisdiction in the first instance.

The *O'Donnell Griffin* case was cited with approval at [2] and [3] of *Match Projects Pty Ltd and Arccon (WA) Pty Ltd* [2009] WASAT 134 (30 June 2009). The tribunal at [3] referred further to *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46.

[SOP22.350] Queensland authority — on whether an adjudicator can determine his or her jurisdiction

Lyons J, in *GW Enterprises Pty Ltd v Xentex Industries Pty Ltd* [2006] QSC 399, referred to the following statement by Wilson DCJ in *Phoenix Project Development Pty Ltd v On Hing Pty Ltd* (2007) 27 Qld Lawyer Reps 213; [2006] QDC 75 at [10], where it was stated:

> There is authority, involving similar legislation in New South Wales, to suggest that the legislature intended these matters to be finally determined by adjudication, and to limit the opportunity for parties to attempt, later and elsewhere, to raise separate, or new "triable" issues.

In *Bloomer Constructions (Qld) Pty Ltd v O'Sullivan* [2009] QSC 220, White J, at [23], held that if an adjudicator had fallen into jurisdictional error, the Court had power under s 128 of the *Supreme Court Act 1995*(Qld) to declare the adjudication void for want of jurisdiction. His Honour added:

> It is unnecessary, on this application, to go further and consider whether this court's inherent power to control error in subordinate or inferior courts and tribunals extends to the decision of an adjudicator under the BCIP Act: *Musico v Davenport* [2003] NSWSC 977 at [55], or whether that power extends to other examples of error such as failure to accord natural justice beyond what the BCIP Act requires. The legislature clearly does not want the process of speedy cash flow for contractors frustrated by access to the courts "obtained from the rear": *Musico* at [28]–[41].

What his Honour did not address is whether the adjudicator had such jurisdiction, ie to determine his or her own jurisdiction, and whether any such decision would be reviewable by a superior Queensland Court.

That position has now been determined by Fryberg J at [11] of *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279, where his Honour recorded having ruled against the submission that the court had no jurisdiction to determine the validity of a payment claim on the basis that the legislature had committed that issue to the determination of the adjudicator. His Honour said:

> I ruled against that submission on the basis that the jurisdiction of this Court to supervise statutory offices and tribunals has not been ousted by the Act. It is most unlikely that the legislature would have intended that adjudicators should be able conclusively to define the scope of their own jurisdiction. Indeed any attempt by the legislature to oust the supervisory jurisdiction of this Court might encounter constitutional difficulties: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1 and cf *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426; *Hansen Yuncken Pty Ltd v Ericson* [2010] QSC 156.

The position would therefore appear to be that an adjudicator may initially decide the validity of a payment claim and other matters going to the jurisdiction of the adjudicator, but ultimately the issue is one for the court.

[SOP22.360] Northern Territory authority — on whether an adjudicator can determine his or her jurisdiction

In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46 (14 November 2008), the question arose as to whether an adjudicator had jurisdiction to decide the question as to whether or not the provisions of s 28 of the Act had been complied with.

For the sake of ease of reference s 28(1) of the Act states:

> (1) To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b) …

Mildren J summarised his decision in *Independent Fire Sprinklers* on the question of the adjudicator's jurisdiction to determine whether or not the provisions of s 28 had been complied with, as follows:

> [36] The statute specifically provides that the adjudicator must dismiss the application if there is a failure to prepare and serve the application in accordance with s 28. So far as service is concerned, the Act makes no provision enabling the adjudicator to extend the time for service, even by consent of the parties. The Act does not prescribe **how** a document is to be served; that is covered by s 25 of the *Interpretation Act 1978*.
>
> …
>
> [40] However, I think that it is clear that the adjudicator did have jurisdiction to decide the question of whether or not the provisions of s 28 had been complied with, because s 33(1)(a)(ii) commands him to dismiss the application if those provisions have not been complied with. How else will the adjudicator be able to comply with s 33 if he had no jurisdiction at all? A similar conclusion was reached in Parisienne Basket Shoes Pty Ltd & Ors v Whyte [1937-1938] HCA 7; (1937-1938) 59 CLR 369.
>
> [41] If the adjudicator had jurisdiction to decide this question, he also had jurisdiction to decide it wrongly. Suppose the adjudicator had dismissed the application upon the ground that it was out time, s 39(1) requires the adjudicator to give written notice of the decision and the reasons for it to the parties and the Registrar. Further, the adjudication has power to make an order for costs under s 46(b) read with s 36(2). Also, the decision to dismiss the application is reviewable by the Local Court under s 48(1).
>
> [42] Section 48(3) provides:
>
> > Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.
>
> [43] If the adjudicator had jurisdiction to decide this question wrongly that can hardly mean that the decision is void.

[SOP22.370] South Australian authority — on whether an adjudicator can determine his or her jurisdiction

No decisions have been found on the issue discussed herein.

[SOP22.380] Tasmanian authority — on whether an adjudicator can determine his or her jurisdiction

No decisions have been found on the issue discussed herein.

[SOP22.390] Australian Capital Territory authority — on whether an adjudicator can determine his or her jurisdiction

No decisions have been found on the issue discussed herein.

[SOP22.400] Adjudicator's jurisdiction to determine issue of related goods and services

In s 6 of the NSW Act (and its similar sections in the Acts of the other States and Territories), the phrase "in relation to", when dealing with related goods and services, probably bears the broad meaning ascribed to it by Sundberg J in *Timic v Hammock* [2001] FCA 74 at [9], and by Barrett J in *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587; [2001] NSWSC 596. Davenport, in *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at p 31, queries what aspect the phrase "advisory services" qualifies in this subsection. It is submitted that it merely qualifies "landscape".

Note: *Savcor* was referred to with approval by Darke J in *Cavasinni Constructions Pty Ltd v New South Wales Land and Housing Corporation* [2014] NSWSC 1678.

In *Boutique Developments Ltd v Construction & Contract Services Pty Ltd* [2007] NSWSC 1042, Construction & Contract Services provided engineering reports to Boutique

Developments in aid of its litigation with CGU Insurance Pty Ltd. The services were the preparation and provision of expert reports. The question arose as to whether or not the provision of those reports fell within the definition of "construction work" or work undertaken to supply "related goods and services" in respect of both of which services a person became entitled to a progress payment under s 8(1) of the Act. In an application for an injunction restraining Construction & Contract Services from taking any steps to obtain or enforce any adjudication determination, Gzell J held at [7] and [8] that the work claimed for was not construction work under the Act, and that to qualify as such the services had to relate to the actual construction work itself. His Honour held that the adjudicator would act outside the scope of his jurisdiction if he proceeded with the matter.

However, although the facts of the matter before him were distinguishable, Gzell J followed *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 and *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 411 in holding that the question of the adjudicator's jurisdiction was a matter for the adjudicator. In the premises, the application for an injunction was rejected.

Where clearly the work was neither "construction work" nor qualified as "related goods and services", the Court should have intervened at an interlocutory stage, and prevented the matter from proceeding further: cf *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

In *Smith v Coastivity Pty Ltd* [2008] NSWSC 313, McDougall J at [34] held that the work done under the contract was of limited relevance in determining whether or not that work constituted related goods and services as defined, in that:

> [T]o the extent that it goes further than the contract, it is presumably to be regarded as having been undertaken under some sort of variation or ad hoc agreement. In this case, as I have said, the only candidate for the role of "construction contract" was the deed.

A valid payment claim is the foundation for a valid adjudication, and following *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, it seems to be quite clear that it is not the function of the adjudicator to determine its validity.

Spigelman CJ, with whom Basten JA and McDougall J concurred, at [36] of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 determined that an adjudicator had no jurisdiction to determine an "application" which had been made without compliance with the provisions of s 17(2) of the New South Wales Act, and added:

> That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act.

His Honour continued:

> It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

[SOP22.410] Adjudicator's jurisdiction to determine whether or not there was a construction contract

An issue going to the adjudicator's jurisdiction is whether or not there was a construction contract. In *Fifty Property Investments Pty Ltd v O'Mara* (2007) 23 BCL 35; [2006] NSWSC 428 at [17], Brereton J held that the basic and essential requirement which was a precondition to a valid adjudicator's determination was the existence of a construction contract between the claimant and the respondent to which ss 7 and 8 of the Act apply. His Honour said:

> *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 71 NSWLR 421; [2004] NSWCA 394 thus establishes that it is an essential precondition of an adjudication that there be a construction contract between the claimant and respondent;

> here, between Impero and FPI. In other words, the jurisdiction of an adjudicator to make a determination is dependent upon the existence of a relevant construction contract.

At [70] of *Blackadder Scaffolding Services (Australia) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 (30 June 2009), the State Administrative Tribunal of Western Australia considered that the determination of the terms of the contract was a matter for the adjudicator to determine.

In *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349 at [23], Rein J said:

> [23] It may be unfortunate that a party dissatisfied with an adjudication can precipitate a further examination of the issue of whether there was a construction contract and hence preclude the speedy outcome that the Act had been designed to achieve, but it follows from the *Fifty Properties* approach to *Brodyn*, which I adopt, that Dr Olbourne is entitled to challenge the conclusion of the Adjudicator that there was a construction contract within the meaning on the Act, between himself and Excell. It follows too, that the evidence to which objection was taken is admissible.

It is submitted that following *Chase Oyster Bar*, it is certainly not the function of the adjudicator to determine whether or not there was a construction contract: see Spigelman CJ's comments from [36] of the *Chase Oyster Bar* decision above.

[SOP22.420] Adjudicator's jurisdiction to determine meaning and import of contractual terms

In *Watson Building Services Ltd, Re Application for Judicial Review* [2001] ScotCS 60 (13 March 2001), the court, at [25] said:

> Firstly, the adjudicator, although not a lawyer, can and should consider the contract terms, form a view about their meaning and import, and make decisions and rulings accordingly. In certain cases, it may be advisable for the adjudicator to obtain legal advice (cf s 108(f) of the 1996 Act and para 13(f) of the statutory scheme), but such advice is not mandatory. I have difficulty accepting the petitioners' submission that a dispute about "what the contract was" could not properly be determined by the adjudicator. Many disputes arising in the course of construction works relate to the meaning and effect of the contractual terms: see, for example, *Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd* [2000] ScotCS 330 (Lord Caplan); *Tim Butler Contractors Ltd v Merewood Homes Ltd* (unreported, High Court (Eng), Technology and Construction Court, 12 April 2000). In my view, in enacting the adjudication provisions in the 1996 Act, parliament intended that adjudicators such as the first respondent could and should determine the meaning and import of the terms of the construction contract under which the dispute arises, including any contractual terms directed to dispute resolution procedures.

The court at [26] of its judgment concluded thus:

> Accordingly I consider that the adjudicator in the present case had the power to determine the meaning and import of the sub-contract terms, even where such an exercise resulted in his determining a dispute about the validity of his appointment and in effect his jurisdiction. Not only did he have the power and authority to carry out such an exercise, but a question relating to the proper construction of the sub-contract terms, and thus the validity of his appointment, was expressly put to him by the parties. Accordingly, he was not answering a question which had not been put. The first respondent having had jurisdiction, and having acted within his jurisdiction, the petition in my view falls to be refused.

In order to enable the adjudicator to determine quantum, it appears to be obvious that he or she may have to determine the meaning and import of the contractual terms. Accordingly, it is submitted that the adjudicator would have jurisdiction to fulfil that function: cf Spigelman CJ at [36] of *Chase Oyster Bar*. Following that decision, however, this does not appear to be an issue for the adjudicator to determine.

[SOP22.430] Adjudicator's jurisdiction where contract works have been completed or whether contract has been repudiated

The adjudicator does not lack jurisdiction even where the works have been completed or the contract has been repudiated, see *Connex South Eastern Ltd v M J Building Services Group plc* [2004] EWHC 1518 (TCC).

In *Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd* [2008] NSWSC 1405 at [19], McDougall J noted that in the light of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at 443 [62]–[66], his Honour's earlier decision in *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905 to the opposite effect can no longer be regarded as the law in New South Wales.

It seems to be part of the adjudicator's function to determine whether the contract works have been completed or whether the contract has been repudiated. Accordingly, it seems to be the better view that the adjudicator has jurisdiction to determine whether the contract works have been completed or whether the contract has been repudiated: cf Spigelman CJ at [36] of *Chase Oyster Bar*. Following that decision, however, this does not appear to be an issue for the adjudicator to determine.

[SOP22.440] Adjudicator's jurisdiction where a compromise has been reached

Although the underlying dispute matters may have given rise to an adjudication, once they have been compromised, the compromise is not capable of being referred to adjudication, see *Joseph Finney plc v Vickers (t/as The Mill Hotel)* (unreported, Technology and Construction Court (Eng), Wilcox J, 7 March 2001); *Westminster Building Co Ltd v Beckingham* [2004] BLR 163; [2004] BLR 265; [2004] EWHC 138.

Of course, the same principles do not apply to a variation agreement.

[SOP22.450] Adjudicator's jurisdiction to decide validity of a payment claim

(a) Pre Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

There is Queensland authority to the effect that a court can determine whether an adjudicator has jurisdiction to decide the validity of a payment claim where the validity thereof goes to the jurisdiction of the adjudicator: see the decisions of Fryberg J in *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117; and the decision of Martin J in *Northside Projects Pty Ltd v Trad* [2009] QSC 264. Neither case decided whether or not such jurisdiction could be determined by the adjudicator and whether or not the adjudicator's determination of jurisdiction is subject to curial review.

There seems to have been doubt that whatever the jurisdiction of the adjudicator may be in regard to deciding the validity of a payment claim, whether a court has that power when there is a motion for the curial review of an adjudicator's determination, see *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [82]; *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365 at [28]; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [41]; *Fernandes Constructions v Tahmoor Coal (t/as Centennial Coal)* [2007] NSWSC 381 at [17]–[19].

At [25] of *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 (13 July 2005), Hodgson JA, in referring to the sufficiency of a payment claim said:

> In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim; and in the case of "delay damages" of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to

ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates.

At [26], Hodgson JA continued thus:

> In my opinion, failure adequately to set out in a payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant adequately set out the basis of the claim in submissions put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material (because of the provisions of s 20(2B) and s 22(2)(c) of the Act), he or she is not appropriately satisfied of the claimant's entitlement. Generally however, in my opinion, it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim, and if not, whether on this ground a relevant amount claim should be excluded from the amount of the progress payment determined under s 22(1).

It will be seen that in Hodgson JA's view, with whom Ipp and Basten JJA concurred, the sufficiency of the payment claim is a matter for the adjudicator and cannot be challenged through the courts.

It is respectfully submitted that this holding reposes far too great a power in the adjudicator, who very often is a lay person with no legal training.

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

In *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123; [2008] NTSC 42, it appears from the following extract of Southwood J's judgment that his Honour has taken the view that the essentialia of a valid payment claim are not merely matters for the adjudicator's determination. Once however the essentialia are present, the adjudicator is obliged to proceed with the adjudication. The passages from his Honour's judgment relied on are as follows:

> [66] It was the intention of the legislature that a valid payment claim must be of adequate particularity to enable a principal or head contractor to know the ambit of any potential application for a determination by an adjudicator under the Act if the claim is unpaid or disputed. To do so, a payment claim, must contain sufficient detail to put the principal or head contractor on notice of the precise amount claimed and it must sufficiently identify the obligations said to have been performed under the contract to which the amount claimed relates. If a payment claim does not contain such detail the principal or head contractor cannot determine if the progress claim should be paid, part paid or disputed. It was the intention of the legislature that a principal or head contractor must be given a fair opportunity to determine whether to pay, part pay or dispute a payment claim.
>
> [67] In my opinion the essential requirements of a valid payment claim are as follows:
>
> (1) The payment claim must be made pursuant to a construction contract and not some other contract;
> (2) The payment claim must be in writing;
> (3) The payment claim must be a bona fide claim and not a fraudulent claim;
> (4) The payment claim must state the amount claimed;
> (5) The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.
>
> [68] The above requirements of a valid payment claim are consistent with the definition of payment claim in the Act. They are also consistent with the basic requirements of procedural fairness. Section 28(2) of the Act and r 6 of the *Construction Contracts (Security of Payments) Regulations* contain little particularity about the necessary

details of an application for adjudication. However, s 28(2)(b)(ii) does require the relevant payment claim to be attached to the application for adjudication.

[69] Section 4 of the Act defines payment claim, so far as is relevant, as follows: payment claim means a claim made under a construction contract by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or

[70] The two key elements of the definition of "payment claim" are that a payment claim is a claim made under a construction contract and not some other kind of contract; and a payment claim is a claim made by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract.

[71] The rendering of a payment claim that contains the requirements specified in par [67] above is an essential requirement of the adjudication process described in the Act. It is not merely a matter for the adjudicator's determination. However, an adjudicator is bound to consider if there is a valid payment claim before the adjudicator that contains the requirements referred to in par [67] above.

(b) Post Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

In the light of the decision in *Chase Oyster Bar*, it is submitted that the better view is that an adjudicator does not have jurisdiction to determine the sufficiency of a payment claim. Very simply, if a payment claim does not comply with the relevant section of the Act, a jurisdictional fact is not complied with, and any resultant determination would be void. The major issue is whether a court at the preliminary stage, where the point is taken for the first time that the payment claim fails to comply with the provisions of its enabling section, will then intervene or wait until the determination has been made.

The *Chase Oyster Bar* decision was explained by McDougall J in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2010] NSWSC 1367.

It is submitted that a more practical solution would be that the issue as to the adequacy of the payment claim should be raised by the respondent as a preliminary point, and be determined by a court at that stage.

However, at [14] of *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165, Ball J was of the opinion that the determination of the parameters of a payment claim was a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the determination.

With very great respect to his Honour, it is difficult to follow the logic of that decision.

At [58] of *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430, McDougall J came to a similar conclusion. His Honour said:

> If the adjudicator made an error in determining that the amount of the progress payment to which Bradshaw was entitled included an amount for work done before the arrangement was made, that was to my mind a mistake within jurisdiction. I rely on the analysis that I gave in *Clyde Bergemann Senior Thermal Pty Ltd v Varley Power Services Pty Ltd* [2011] NSWSC 1039 at [35] to [53]. Of the many cases referred to in those paragraphs, I will mention only the analysis of Spigelman CJ in *Chase Oyster Bar Pty Ltd Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at, in particular, [43] where his Honour drew attention to the distinction between facts to be adjudicated upon in the course of enquiry and facts that are an essential preliminary to the commencement of the enquiry.

By a majority of Macfarlan JA and Tobias AJA, with Basten JA dissenting, the appeal against McDougall J's decision, at first instance in this matter, was dismissed with costs: see *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399.

For a discussion on Macfarlan JA's decision, in which Tobias AJA concurred, see [SOP25.570].

[SOP22.470] Adjudicator's jurisdiction to determine sufficiency of payment schedule

(a) Pre Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

Similarly, in New South Wales, prior to the decision in *Chase Oyster Bar*, it was held that an adjudicator has jurisdiction to determine the validity of a payment schedule: see *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems* [2008] NSWSC 858 at [44] where Einstein J said:

> [44] Even if the Adjudicator had in fact erred in relation to the proper construction of the requirements of section 14(3), such error did not render the present determination a nullity. In short:
>
> i Where the basic and essential requirements of the Act have been complied with, an error of law by the Adjudicator, even in interpreting the Act itself, does not invalidate the adjudication [*Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at 398 [46] per Hodgson JA].
>
> ii Whether Perform complied with the requirement in section 14(3) that the Payment Schedule "must indicate … the respondent's reasons for withholding payment" is a matter that the Adjudicator has power to determine.
>
> iii The requirement in section 14(3) is relevantly analogous and complementary to the requirement in section 13(2)(a) that a payment claim "identify" the construction work or related goods and services [*Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*(2005) 21 BCL 364; [2005] NSWCA 229 at [25] per Hodgson JA]. That requirement has been found to be a matter for the Adjudicator to determine [*Coordinated Construction Co Pty Ltd v JM Hargraves (NSW) Pty Ltd* (2005) 63 NSWLR 385, cf Basten JA dissenting at 404 [73]; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [26]; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 at [30] per Hodgson JA]. Similarly White J has suggested that the "quarantining" of part or all of an adjudication response is within jurisdiction [*Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* [2006] NSWSC 375 at [73]].
>
> iv In this case the factors militating in favour of the Adjudicator having power to determine the question are [by analogy with the reasoning of Basten JA in relation to section 13(2) in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [44]]:
>
> a) what is or may be a sufficient indication of reasons falls within the special experience of a qualified adjudicator;
> b) that decision requires a process of evaluation by the Adjudicator dependent on that experience and professional judgment;
> c) the requirement relates to a procedural step in the claim process, rather than some external criterion;
> d) the overall purpose of the Act is to provide a speedy and effective means to ensure progress payments are made without undue formality or resort to the law.
>
> v Relevant to the first two factors are the observations of Palmer J in Luikens that a payment claim and payment schedule are [*Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [76], quoted with approval by McDougall J in *Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714 at [36]].
>
> … given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history

of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim.

vi The need for the Adjudicator in evaluating both payment claims and payment schedules necessarily to have regard to the contextual background of the building industry reinforces the view that this is a matter requiring the application of the Adjudicator's special expertise and therefore an issue within his jurisdiction.

vii That section 14(3) was not one of the essential requirements cited by the Court of Appeal in *Brodyn* reinforces this reasoning. Indeed the position of section 14(3) appears to sit in the matters described by Hodgson JA in *Brodyn* as "more detailed requirements" not requiring exact compliance [*Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [53] to [55]. See also *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521 at [54] per Hodgson JA].

Einstein J's decision in *Perform* above as to the question whether or not the adjudicator can determine the sufficiency of the payment schedule has been confirmed on appeal in *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009) per Giles JA, McColl JA and Young JA at [45] ff.

In *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349 at [23], Rein J said:

> [23] It may be unfortunate that a party dissatisfied with an adjudication can precipitate a further examination of the issue of whether there was a construction contract and hence preclude the speedy outcome that the Act had been designed to achieve, but it follows from the Fifty Properties approach to Brodyn, which I adopt, that Dr Olbourne is entitled to challenge the conclusion of the Adjudicator that there was a construction contract within the meaning on the Act, between himself and Excell. It follows too, that the evidence to which objection was taken is admissible.

At [67] of *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), Giles JA, with McColl JA and Young JA, said that it was a matter for the adjudicator to determine what a payment schedule indicated as to the reasons for the scheduled amount being less than the claimed amount and the reason for withholding payment. Their Honours added that if an adjudicator makes an error in that respect, the adjudication is not invalidated. Their Honours said *inter alia* "there is no reason to regard a correct view of what a payment schedule indicates as more basic and essential to a valid determination than an adjudicator's view of what a payment claim identifies or indicates, or whether a submission has been duly made".

The decisions above in New South Wales are to be contrasted with that of Margaret Wilson J in Queensland in *Skinner v Timms* [2009] QSC 46, where, at [19], her Honour declared an adjudication determination void *inter alia* on the ground that a payment schedule had not been served. It would appear as if the New South Wales decisions above could also extend to the service of a payment schedule.

In the light of the decision in *Chase Oyster Bar*, particularly [36] of Spigelman CJ's judgment, and in which Basten JA and McDougall J concurred, it is doubtful whether this judgment is still good law.

(b) Post Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

The same considerations in regard to the adjudicator's jurisdiction to determine the sufficiency of the payment claim above apply here as well.

[SOP22.490] Adjudicator's jurisdiction to determine ambit of the dispute

(a) Pre Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

At [26] of *J & Q Investments Pty Ltd v ZS Constructions (NSW) Pty Ltd* (2008) 24 BCL 401; [2008] NSWSC 838 McDougall J said:

Mr Bellamy accepted that it was open to the adjudicator to determine the scope of the payment schedule and the identification of submissions to be made in support of it. He was correct to do so: see the decision of Court of Appeal in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19. Hodgson JA, with whom Beazley JA agreed, made the point at [55] that if the adjudicator does consider the matters that he thinks are relevant and the submissions made in support of them, then an accidental or erroneous failure to consider something would not wholly or in part invalidate a determination. Basten JA, who agreed with the orders proposed by Hodgson JA but gave separate reasons, said at [71] that the scope of the dispute was not a matter for the court to determine objectively, but for the adjudicator.

(b) Post Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

It is submitted that the same considerations apply here, and that the adjudicator does not have jurisdiction to determine the ambit of the dispute.

[SOP22.510] Adjudicator's jurisdiction to extend time limits

An adjudicator has no jurisdiction to extend any time limits fixed in the Act, except by consent in regard to the time which the adjudicator has under the Act for making the adjudication determination. But it is an entirely different issue as to whether or not he can have regard to a document filed out of time where there is substantial compliance, eg where the service and filing of a payment schedule is one minute late, cf in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394.

It is to be noted that under s 34(3)(a) of the Northern Territory Act, an extension of time within which to make the adjudication determination requires the Registrar's consent. There is a similar provision in s 32(3)(a) of the Western Australian Act.

[SOP22.520] Adjudicator's jurisdiction to award specific performance and other orders other than a determination sounding in money

An adjudicator has no jurisdiction to make a determination other than one sounding in money. An adjudicator cannot for instance order specific performance.

[SOP22.530] Adjudicator's jurisdiction to determine whether submission in s 22(2) has been duly made

For the sake of ease of reference, s 22(2) of the New South Wales Act states:

> In determining an adjudication application, the adjudicator is to consider the following matters only:
>
> (a) the provisions of this Act,
>
> (b) the provisions of the construction contract from which the application arose,
>
> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
>
> (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

At [65] of *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), Giles JA, with whom McColl JA and Young JA concurred, said:

> In *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* (2007) NSWCA 19 whether a submission had been "duly made" (s 22(2) of the Act) was said to be a matter for the adjudicator, whose error in that respect would not invalidate his determination. It was not a matter for objective determination by the Court: see at [57]

per Hodgson JA, with whom Beazley JA agreed, and at [71]–[72] per Basten JA referring to what he had said in *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*.

See further *Broad Construction Services (NSW) Pty Ltd v Vadasz* (2008) 73 NSWLR 149; [2008] NSWSC 1057 and [13] of *Clyde Bergemann v Varley Power* [2011] NSWSC 1039.

Reference must be made to the case of *State Water Corp v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879 per Sackar J, where his Honour undertook an extensive review of all of the relevant authorities. His Honour's judgment is discussed at [SOP22.300].

[SOP22.540] Adjudicator's jurisdiction to consider equitable rights and titles

In *Perform* on appeal, Young JA at [140] doubted whether adjudicators had jurisdiction to consider any equitable rights and titles.

[SOP22.550] Adjudicator's jurisdiction to consider cross claim which might involve other contracts

At [135] of Perform on appeal, Young JA expressed a doubt as to whether or not an adjudicator had jurisdiction to consider cross claims which might involve other contracts.

[SOP22.560] Adjudicator's jurisdiction to determine any part of contract in conflict with s 34 and therefore void

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004] NSWSC 823 (13 September 2004), McDougall J cited the decision of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003) that the adjudicator had jurisdiction to determine whether any part of a construction contract was in conflict with the provisions of s 34, and therefore void. At [34] of that judgment his Honour said:

> [34] I interrupt to note that I respectfully agree with, and accept, his Honour's analysis. Applied to the present case, it means (contrary to the submission for the Minister) that the adjudicator had power to determine whether the contractual provisions relied upon by the Minister to defeat Contrax' claim were rendered void by the operation of s 34 of the Act. That is no more than determining that (by reference to Palmer J's examples) that a term had been waived or could not be relied upon because of some estoppel.

[SOP22.570] Adjudicator's jurisdiction to determine whether time limits have been complied with

It is implicit in Hodgson JA's decision in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 that an adjudicator has jurisdiction to determine whether or not time limits have been complied with. All that is required of the adjudicator is for the adjudicator *bona fide* to apply his/her mind to the question, and in that event, his/her determination cannot be void.

Mildren J at [50] of *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46 (14 November 2008) applied the same reasoning and came to the same conclusion in regard to a dispute before his Honour under the Northern Territory Act.

Vickery J at [62] of *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 came to the same conclusion, where his Honour held:

> The time regime set out in s 18(3) of the Act is not a basic and essential requirement resulting in an invalid adjudication if the initiating adjudication application is not made within time. The Act confers jurisdiction on the appointed adjudicator to determine the question of his or her jurisdiction, including the question of compliance with the time limits provided under s 18(3). The adjudicator may determine the question wrongly and may commence the adjudication. However, this is not a matter which should be the

subject of an objective determination by a court, and even if it is, and the matter is determined against a finding of jurisdiction made by the appointed adjudicator, the outcome will not render the adjudication determination invalid.

[SOP22.580] Victoria – adjudicator's jurisdiction

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 23 of the amendment Act substitutes new provisions for some of the provisions in s 23 of the principal Act.

Of significance are the new subss 23(2A) and (2B) which provide as follows:

(2A) In determining an adjudication application, the adjudicator must not take into account –

(a) any part of the claimed amount that is an excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

(2B) An adjudicator's determination is void –

(a) to the extent that it has been made in contravention of sub-section (2);

(b) if it takes into account any amount or matter referred to in sub-section (2A), to the extent that the determination is based on that amount or matter.

The new s 23(2B) settles the debate as to some of the issues that have attracted the attention of the New South Wales courts. The question that arises is whether or not the express position that an adjudicator's determination is void for the reasons set out in s 23(2B) will be so interpreted as to preclude voidness on any other ground, for example, a failure by the adjudicator to comply with the requirements of the new s 23(3) which provides:

(3) The adjudicator's determination must be in writing and must include –

(a) the reasons for the determination; and

(b) the basis on which any amount or date has been decided.

[SOP22.590] Adjudicator's jurisdiction to correct reasoning methodology

In *Uniting Church in Australia Property Trust (Qld) v Davenport* [2009] QSC 134, the issue before Daubney J was whether or not an adjudicator had jurisdiction to correct an adjudication which he or she had made having regard to the reasoning methodology adopted by the adjudicator in his or her reasons, and from which the adjudicator made a decision. His Honour, at [39], said:

> My conclusion that the course proposed to be adopted by the adjudicator does not fall within any of the discrete circumstances specified in s 28(1) means that any purported exercise by the adjudicator of the power to correct under s 28(2) would be an act in excess of the discretionary power conferred on him by that subsection, and thereby constitute an act of jurisdictional error on his part: See, generally, *Musico v Davenport* [2003] NSWSC 977 at [28]-[31] Absent any statutory prohibition, it seems to me that in a case such as the present, in which the adjudicator has clearly articulated his intention to commit jurisdictional error by acting beyond power, it is clearly available to the Court to prevent the adjudicator from committing that error by granting appropriate relief, whether declaratory or, if necessary, injunctive. As McDougall J said in Musico: at [54] "relief will lie where jurisdictional error, including jurisdictional error of law on the face of the record, is shown". Semble, in my view, where, as here, it is demonstrated that a jurisdictional error is about to be committed.

[SOP22.600] Adjudicator's jurisdiction to determine whether or not a statutory declaration (a precondition to obtaining payment) was false

At [70] of *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235, Vickery J noted that reliance was placed on *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 where the New South Wales Court of Appeal held at [120]:

> …. A declaration, which is in fact untrue, will justify the withholding of a payment …

At [14] of *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 *FPM*, the Court of Appeal stated:

> … If a statutory declaration was not provided, or the statutory declaration which was provided was ineffective because false, the Principal was entitled to withhold payment and in its discretion could make direct payment pursuant to cl 43.4. …

The issue as to whether or not the statutory declaration referred to was false or not was hotly contested.

At [81] of *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 *470 St Kilda Road*, Vickery J held:

> The Adjudicator did not have the advantage of having Mr Robinson cross-examined or directly challenged on his Statutory Declaration. Such a forensic tool, which is a traditional means of determining controversial issues of fact by courts, is not appropriate for adjudications conducted under the Act. Adjudications are ill-equipped to deal with controversial issues of fact in this way, particularly within the tight time frames permitted for the delivery of Adjudication Determinations. The interim determination which results from an adjudication determination can always be tested, and indeed reversed or modified in the appropriate case, following a later court hearing in the matter. This is clearly the appropriate forum to determine contractual entitlements founded upon controversial issues of fact. As for the approach of the Adjudicator to such issues, each must do the best they can to arrive at a level of positive satisfaction one way or the other based on the documentary material before them.

[SOP22.610] Western Australia — Adjudicator's jurisdiction

(a) Statutory provisions — generally

Under s 31(2)(b), the adjudicator is empowered to determine whether or not any security (retention moneys) should be returned. An adjudicator in any other jurisdiction but the Northern Territory does not have such a power.

Under s 36(b) of the Western Australian Act, the determination is to be prepared in accordance with, and contain the information prescribed by, the regulations. Section 36(a)–(g) prescribe, in addition to the regulations, the contents of the adjudication determination and certain procedural matters. Under s 36(e), a provision which is also not contained in any other similar Act states that the adjudicator, in his determination, must "identify any information in it that, because of its confidential nature, is not suitable for publication by the Registrar under section 50".

One of the earliest decisions in Western Australia on the question of an adjudicator's jurisdiction is in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [2005] WASAT 269 (4 October 2005).

The major matters decided in that case are as follows:

(a) The determination as to whether or not a payment claim under the Western Australian Act was made is a matter for the adjudicator without there being any right to review that issue in the State Administrative Tribunal. Accordingly, under s 46(2) of the *Construction Contracts Act 2004* (WA) (the CC Act), the

tribunal reversed the adjudicator's decision and referred the matter back to the adjudicator to make a determination under s 31(2)(b) of the within 14 days.

(b) The proceedings before the tribunal, in accordance with the principle of open administration of justice, should be held in public.

(c) The whole scheme of the CC Act was inconsistent with the concept of a hearing de novo within the ordinary meaning of s 27(1) of the SAT Act. It was accordingly necessary to read s 27(1) down to the extent necessary to remove that inconsistency. Accordingly, any material provided to the tribunal that was not before the adjudicator would be disregarded, see [69]-[71].

(b) Jurisdiction — power and obligation to dismiss

Under s 31(2) of the Western Australian Act, an adjudicator must, within the prescribed time, or any extension of it made under s 32(1)(a), dismiss the application without making a determination of its merits if:

(i) the contract concerned is not a construction contract;

(ii) the application has not been prepared and served in accordance with section 26;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason.

Under s 31(2)(a)(iii), it is provided that the adjudicator must dismiss the application if "an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application". The question that arises is whether this sub-section means that even if an adjudication has commenced, once there is any determination by any other body, as provided for in the sub-section, the adjudication application must, in Western Australia, be dismissed.

Of particular significance is s 31(2)(b) which requires the adjudicator, if the adjudication application proceeds, to make a determination "on the balance of probabilities". This is a very sensible provision which is not found in any of the other comparative legislation. Obviously, a failure to decide on the balance of probabilities will strike at the very heart of a Western Australian adjudication determination.

In *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217, it was decided per Martin CJ, McLure P and Murphy JA in the Western Australian Court of Appeal that the failure or refusal to dismiss an adjudication application was not amenable to a judicial review for non-jurisdictional error of law. At [118] it was held as follows:

> Finally, although it is unnecessary to resolve in this appeal the scope of judicial review in respect of determinations under s 32(1)(b), I agree with Beech J in *O'Donnell* [102], with whom Corboy J has also expressed agreement in *Thiess v MCC* [59], that an appointed adjudicator's determination under s 31(2)(b) is not amenable to judicial review for non-jurisdictional error of law. I agree that the scheme and purpose of the Act, which, as the long title indicates, is 'to provide a means for adjudicating payment disputes arising under construction contracts', is more consistent with an appointed adjudicator being akin to an inferior court rather than an administrative tribunal for *certiorari* purposes, when exercising the power to make a determination under s 31(2)(b).

As held in *Perrinepod*, and for which see also [27] of *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, s 46(3) of the *Construction Contracts Act 2004* of Western Australia is not a privative clause which excludes the

supervisory jurisdiction of the Court in respect of jurisdictional error. At [28] of *Cape Range*, Pritchard J noted that the use of the word "review" in s 46(3) of the Act refers only to a review by the State Administration Tribunal of the kind referred to in s 46(1) of the Act.

At [30] of *Cape Range*, his Honour went on to say:

> Clearly, an application to this court for a declaration as to the invalidity of a determination made by an adjudicator is not a review of the kind contemplated by s 46(1) of the CC Act. Accordingly, s 46(3) does not preclude Austral's application for declaratory relief in respect of the Determination on the ground that the determination is invalid. Counsel for Cape Range ultimately accepted, albeit reluctantly, that this was so.

[SOP22.620] Northern Territory — Jurisdiction — power and obligation to dismiss an adjudication application

Under s 33 of the Northern Territory Act, there are provisions substantially similar to those which are to be found in the Western Australian Act referred to above. Under s 39, an adjudicator must give written notice of the dismissal decision and reasons for it to the parties. There is a review of a dismissal decision under s 48 by an application to the local court.

[SOP22.630] Excess jurisdiction as a ground for curial review

See [SOP22.265].

[SOP22.640] *"… rate of interest payable on any such amount …"*

An adjudicator cannot "award" interest on his/her determination, but must fix the rate of interest payable on the amount of the progress payment. The rate of interest is discussed in the notes to s 11(2) and for which see [SOP11.60].

[SOP22.650] Victoria — *"… rate of interest …"*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

In Victoria, interest runs under s 27(2)(a)(ii) on the adjudicated amount from the relevant date until judgment at the rate fixed under the *Penalty Interest Rates Act 1983* (Vic).

The relevant date is the date fixed by the adjudicator or, absent any date so fixed, 4 business days after the determination under s 23. Apparently if the amount is secured under s 25(1)(b), no interest runs.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 27 was repealed by s 26 of the amendment Act.

Section 13 of the amendment Act inserts s 12(2) into the principal Act. That section provides for the rate of interest on unpaid progress payments that have become due and payable in accordance with s 12(1) that the greater of the rate provided for in s 2 of the *Penalty Interest Rates Act 1983* (Vic) or the rate specified under the construction contract.

[SOP22.660] Western Australia — *"…rate of interest …"*

Under s 19, interest on overdue payments runs in accordance with the provisions of Sch 1 Div 6, which are implied in a construction contract that does not have a written provision about interest to be paid on payments that are not made at the time required by the contract.

[SOP22.670] Northern Territory — *"… rate of interest …"*

Under Div 6 cl 7 of the Schedule, as read with s 20 of the Act, unless there is a written term to the contrary, interest is payable on an amount that is payable under the contract and which remains unpaid after the due date at a rate prescribed by the regulations.

[SOP22.680] *"… same value as that previously determined …"*

Under s 22(4) of the New South Wales Act, in any subsequent adjudication application that involves the determination of the value of the work or of the goods and services, the subsequent adjudicator is mandated to give the work or the goods and services the same value as that previously determined, unless the claimant or respondent satisfies the adjudicator concerned that the aforesaid value has changed since the previous determination. It is for the subsequent adjudicator to determine whether or not s 22(4) is limited to circumstances where an adjudicator determines the value of construction work or whether it extends to circumstances where an adjudicator makes a decision without valuing the work.

What the meaning of these obscure words is is difficult to determine. Values cannot change, values are constant. It is only the determination of "value" that can change if the previous determination/s was/were wrong. Does the section authorise an adjudicator to depart from previous values determined in prior and previous adjudications if that adjudication process resulted in an incorrect value? As with a lot of provisions of this Act, this provision is particularly obscurely worded and constitutes an invitation to litigation.

In *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151, McDougall J noted at [43] that a determination under the NSW Act may involve both questions of quantification and questions of entitlement or it may involve one or the other. McDougall J then stated at [44]:

> In my judgment, s 22(4) itself makes it clear that an adjudication determination need not necessarily include the valuation of construction work: the use of the introductory word "If" makes this clear. Subsection (4) therefore only applies where a component of a determination – that is to say, in terms of s 22(1)(a), of the determination of the amount of the progress payment (if any) to be paid – includes a determination of the value of construction work. Where it does, then subs (4) applies. Where it does not (either because the work has not at all been valued before or because the value of the work has changed) then s 10(1) applies. But there is nothing in these considerations that indicates that the phase "construction work" when used in s 22(4) should be construed in any way other than the way that it is used throughout the Act.

In *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798, McDougall J considered again his Honour's judgment in *Rothmere* on this issue and confirmed the conclusion to which he had arrived.

In *ACN 060 559 971 v O'Brien* [2008] 2 Qd R 396; (2007) 23 BCL 421; [2007] QSC 91 (19 April 2007), Mullins J concurred with the judgment of McDougall J on this point.

See Einstein J's judgment in *Shorten v David Hurst Constructions Pty Ltd* (2009) 25 BCL 188; [2008] NSWSC 546 at [50], where his Honour said:

> [50] I note the plaintiffs' submissions that the first defendant's approach obscures the proposition that is it is for the adjudicator to determine whether or not s 22(4) is limited to circumstances where an adjudicator determines the value of construction work or whether it extends to circumstances where an adjudicator makes a decision without valuing work [for example where a claim is rejected in its entirety because it is time barred]. Hence the plaintiffs' contention that even had Ms Durham not determined the value of construction work in the manner described above and found by McDougall J in *David Hurst Constructions v Durham,* it still would have been a matter *solely* within the province of Mr Hillman's jurisdiction to determine the manner in which s 22(4) would be applied.

[SOP22.690] New South Wales — Is adjudicator required to follow superintendent's certificate?

(a) The debate

Fundamental to the operation of the Act is the correct principle to be applied, having regard to the two diametrically opposed approaches discussed below, as to whether or not the adjudicator is obliged to follow the superintendent's certificate, and whether or not his/her failure to do so constitutes a ground for setting aside the adjudication determination.

Master Macready (as his Honour then was) in *Transgrid v Siemens Ltd* [2004] NSWSC 87 came to the conclusion that an adjudicator is bound by a superintendent's certificate unless there is fraud and/or collusion.

However, when this decision was appealed, *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004), Hodgson JA stated at [34]:

> … even if "amount calculated in accordance with the terms of the contract" were, on the true construction of s 9(a) and of the contract, the amount certified by the Superintendent, a decision to the contrary by the adjudicator would be a mere error of law, and not such as to render the determination invalid.

The New South Wales Court of Appeal in *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004), discussed more fully at [SOP25.450], has dealt with this very issue. The Court of Appeal set aside a long list of earlier decisions of a number of Judges of the Supreme Court of New South Wales, in which judgment the New South Wales Supreme Court held that an adjudicator's adjudication could be set aside in *certiorari* proceedings on the ground of jurisdictional error. See further the developments dating from the decision of the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [SOP1.130], [SOP4.50], [SOP8.50], [SOP10.80], [SOP13.100], [SOP14.90], [SOP14.120], [SOP15.80](d), [SOP17.110], [SOP17.140], [SOP17.180], [SOP20.60], [SOP20.70], [SOP20.80], [SOP20.90], [SOP22.60], [SOP22.160], [SOP22.280], [SOP22.290], [SOP22.310], [SOP22.330], [SOP22.400], [SOP22.470], [SOP22.490], [SOP22.770], [SOP25.70], [SOP25.465], [SOP27.50], [SOP31.50], [SOP34.59].

(b) The failure to follow a certifier's certificate may, at the most, be an error of law not susceptible to judicial review

What is significant in regard to the point here discussed is the Court of Appeal's conclusion that even if a failure by the adjudicator to follow the superintendent's certificate was an error of law, that was not a ground which attracted any curial remedy under the scheme of the Act. At [34]–[35] of *TransGrid* on appeal to the Court of Appeal, the Court of Appeal said:

> [34] In this case, there is no suggestion that the adjudicator did not consider the provisions of the Act and the provisions of the contract. However, the Master found that he made a jurisdictional error, because he did not determine the amount calculated in accordance with the terms of the contract, as required by s 9(a). In my opinion, even if "amount calculated in accordance with the terms of the contract" were, on the true construction of s 9(a) and of the contract, the amount certified by the Superintendent, a decision to the contrary by the adjudicator would be a mere error of law, and not such as to render the determination invalid. To that extent, I disagree with the views expressed by McDougall J in *Musico v Davenport* [2003] NSWSC 977 (31 October 2003). Similarly, if it be the case that, on the true construction of the contract, there could be no entitlement to a progress payment in respect of a variation not approved in writing by the Superintendent, the inclusion of such a progress payment would likewise be an error of law, and not a matter which would render the determination invalid.

> [35] Accordingly, it is not necessary to decide whether, on the true construction of s 9(a) and the contract, the amount "calculated in accordance with the terms of the contract" is the amount certified (cl 42.2 of the contract) or the value of the work less deductions (cl 42.3 of the contract). However I would express the view that the latter follows from what I think is a preferable interpretation of s 9(a) and the contract, consistent with the use of the word "calculation" and consistent with the provisions against contracting out (s 34); that is, on this matter, I prefer the view of McDougall J in *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027 to that tentatively expressed by the Master in the present case.

It must be emphasised that the observations at [35] were obiter.

The pivotal decision on this issue in the Court of Appeal was that a mere error of law was insufficient to attract curial review on any basis.

No more can be said at this stage as to whether an error of law can vitiate an adjudicator's adjudication, as would appear to be the position in Queensland, if the Queensland Court of appeal follows the *Hervey Bay* decision. See further the position in regard to the Northern Territory and Western Australia, which is dealt with at the end of this paragraph.

But the question is whether or not the failure by an adjudicator to follow a contractual provision under which the superintendent fixes value, is a mere error of law, or something more fundamental, eg the failure to follow a basic requirement of the Act, still remains a very debatable point.

In case the matter should go further or be the subject of decisions in the other Appellate Courts of those States/Territories that have adopted, or may adopt similar legislation, the two divergent approaches to this difficult question which were taken by Master Macready (now Macready AJ) in *Transgrid v Siemens Ltd* [2004] NSWSC 87 (25 February 2004), on the one hand, and McDougall J and other Judges of the New South Wales Supreme Court, on the other, are discussed below.

(c) The failure to determine value, but merely following the certifier's certificate — has the adjudicator failed to undertake a fundamental task under the Act?

In *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027 (14 November 2003), the proprietor contracted with a builder to refurbish certain office premises in the city. It was a term of the contract that progress payment claims could be submitted from time to time and those would become payable once certified by the architect administering the contract.

In response to a payment claim under the Act, the proprietor, in its payment schedule, referred to the architect's certificate, admitted liability for the amount stated therein, and denied liability for any amount in excess of the amount stated in the certificate. The adjudicator determined the amount owing as the aggregate of the admitted amount, an amount for variations, on-site costs and back charges.

Abacus sought relief in the nature of *certiorari* to quash Mr Davenport's determination. It relied on five asserted errors of law that it contended were apparent on the face of the record.

The issues before McDougall J at [11] of *Abacus* were:

(a) Does relief in the nature of prerogative relief in principle lie against the determination of an adjudicator made under the Act?

(b) If the answer to that question is "yes", on what grounds will that relief rely?

(c) If the answer to that question is "yes", are any grounds for relief made out on the facts of this case?

At [19], McDougall J was inclined to the view that submissions to the adjudicator should form part of the record of the case.

Further, McDougall J said:

> [30] Although it is not clear from the summons, *Abacus' case*, so far as I could understand it (and I interpose that my understanding was hindered by the failure of Abacus specifically to address its submissions, written or oral, to the individual errors of law and jurisdictional errors asserted in the summons) was that the five errors of law that I have set out constituted jurisdictional errors of law. That was said to be the case because the Act did not permit an adjudicator "to step into the shoes of architect [sic]". In other words, as I understood the submission, it was *Abacus' case* that where, under a contractual mechanism such as cl 10.03, the architect (or person fulfilling the role of the architect) had certified the amount of a progress claim, the builder's only entitlement was to the progress claim so certified, and an adjudicator under the Act had no power to re-evaluate the architect's certification.

His Honour added:

> [35] It cannot be correct to say that an adjudicator under the Act is bound by the terms of any progress certificate issued, under a contractual regime of the kind that I have described, by the architect or someone in the position of the architect. That would mean that an adjudicator could not make a determination that was inconsistent with a certificate that was (for example) manifestly wrong. Indeed, it would mean that an adjudicator could not make a determination that was inconsistent with a certificate that had been issued in bad faith, or as the result of fraudulent collusion to the disadvantage of the builder.
>
> [36] Further, as was submitted for Renascent, it is not uncommon for building contracts to provide that it is the proprietor, or someone who is the proprietor's alter ego or agent, to occupy the certifying role that, under the form of contract presently under consideration, is occupied by the architect. In those circumstances, if the submission for Abacus be correct, an adjudicator would be bound by a certificate issued by a proprietor, or by its agent or alter ego, in bad faith, or one that flatly and obviously disregarded the rights of the builder.
>
> [37] Such a construction would undermine in a very serious way the evident intention of the legislature that is embodied in the Act. It would enable an unscrupulous proprietor (either by itself, if the contract so permitted, or with the collusion of an unscrupulous certifier) to set at nought the entitlement to progress payments that the Act provides and protects.
>
> [38] I do not think that the construction advocated by Abacus is required by the Act. It is correct to say that the amount of a progress payment is to be "the amount calculated in accordance with the terms of the contract" where the contract makes provision for that matter (s 9(a)). It is equally correct to say that construction work is to be valued "in accordance with the terms of the contract" where the contract makes provision for that matter (s 10(1)(a)). However, a reference to calculation or valuation "in accordance with the terms of the contract" is a reference to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who, under the contract, is to make that calculation or valuation. In the present case, it means that Mr Davenport was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr Davenport was bound by the architect's earlier performance (or attempted or purported performance) of that task.
>
> [39] In the present case, what Mr Davenport was required to do was to undertake for himself the task that the architect had purported to undertake. He was not required simply and only to apply his rubber stamp and initials to the results of the architect's labours.

It was held at [30] of *Abacus* that the failure to follow a valid superintendent's certificate could be set aside in *certiorari* proceedings on the ground of jurisdictional error because "the Act did not permit an adjudicator 'to step into the shoes of architect' [sic]".

McDougall J's decision in *Abacus* was followed by Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 (3 December 2003) at [73].

At [72], Einstein J held that any view to the contrary "had the potential to frustrate the operation of the Act whenever the relevant construction contract requires certification of a progress claim and payment of the amount certified".

In *Transgrid v Walter Construction Group* [2004] NSWSC 21 (6 February 2004), it was submitted before McDougall J that *Abacus* and *Leighton Contractors* were wrongly decided, and McDougall J was urged to reconsider *Abacus*. McDougall J declined to do so. He stated at [53]:

> … if the legislature intended the decision of the Superintendent (or someone in the Superintendent's contractual position) to be determinative in any case to which ss 9(a) and 10(1)(a) applied, there would be no utility whatsoever in putting in place the mechanism for adjudication. That is because, by hypothesis, the claimant would have a contractual right to the amount of the payment and the determination of the adjudicator could do no more than recognise that right.

At [52], McDougall J observed that parliament had not intended "that the scheme that it sought to construct should be dependent upon an assumption that a person is bound (either as a matter of express stipulation or implication) to act reasonably and in good faith and, *a fortiori*, that acceptance of the plaintiff's submissions in this respect would leave undamaged the proposition that the adjudication process 'could be set at nought by an honest but manifestly wrong exercise of a contractual power of certification'".

It was pointed out that in *Transgrid v Siemens Ltd* [2004] NSWSC 87 (25 February 2004), Macready AJ, in obiter dicta, appeared to take a view different from that expressed on this issue by McDougall J in *Abacus* and Einstein J in *Transgrid v Walter Construction Group* above. This case is discussed below.

As pointed out below, the decision of Macready AJ in *Transgrid v Siemens Ltd* [2004] NSWSC 87 above has been upheld by the Court of Appeal, but on entirely different grounds, and the very issue raised in this paragraph was dealt with.

McDougall J, in his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004), at pp 21–23, summarised the basis upon which Macready AJ, in *Transgrid v Siemens Ltd* [2004] NSWSC 87, took a view on this issue different from that which McDougall J took in *Abacus* and Einstein J in *Transgrid v Walter Construction Group* [2004] NSWSC 21 (6 February 2004).

McDougall J said:

(a) The words of s 9(a): at [30], Macready AJ observed that the words "in accordance with the terms of the contract" in s 9(a) appear also in s 8(2)(a) in respect of the concept of reference dates. In that paragraph, however, the relevant expression is a "date determined by or in accordance with the terms of the contract", whereas in s 9(a) the phrase is "calculated in accordance with the terms of the contract". His Honour said that "a date determined 'by' the contract is one fixed self-referentially by its terms", but that a "date determined 'in accordance with' the contract [is one] which can be ascertained by some external mechanism performed pursuant to the contract". On this approach, therefore, McDougall J's construction of s 9(a) would sit more comfortably with the words of the provision were it to bind a person's entitlement to a progress payment to an amount "determined by" the contract, whereas the use of the phrase "calculated in accordance with" the contract could be said to denote the active fixing of a sum by the deployment of the relevant contractual mechanism.

(b) Freedom of contract: at [31], Macready AJ emphasised that "[i]n adopting their contract regime parties are, of course, free to adopt any particular mechanism for determination of progress payments". Should they elect to repose a discretion in the contract superintendent to determine entitlements to progress payments, therefore, general principle dictates that external

authorities in the form of adjudicators or courts should be slow to interfere with the exercise of that discretion. (It does not appear that his Honour was asked to consider, in this context, the operation of s 34.)

(c) The objects of the Act: in emphasising the interim nature of adjudications and the Act's general focus on speed in obtaining progress payments, Macready AJ stated (at [51]) that "where there is a need, because of the contractual entitlement, to engage in a process which involves a determination of the contractual entitlement to a progress payment it seems strange that that whole process could be opened up again under the statutory regime".

(d) The reasons for the approach in *Abacus*: for Macready AJ, the possibility of a "flatly wrong" decision by the superintendent as a basis for holding that the adjudicator is not bound by the former's certificate is questionable on two bases. First, probability dictates that the superintendent's determination is less likely to be tainted by error than the adjudicator's, given that the former "is someone who has extensive experience with the contract and works" and the latter is a "stranger to the contract … who may only see the matter on one occasion", in addition, the superintendent may not be under the time pressures applied to the statutory adjudication process (at [53]). Second, as "the parties have it in their own hands to choose their remedies" (at [65]), general principles of freedom of contract dictate that (in the absence of fraud or collusion) they be held to the outcome of a contractual mechanism to which they have expressly agreed.

McDougall J observed on p 23 of his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004), this fundamental divergence of principle will have to be resolved in due course by the Court of Appeal and that the no contracting out provisions of s 34 of the Act may well be relevant.

What is here relevant are the very apposite observations at [60] of *Beckhaus Civil Pty Ltd v Brewarrina Council* [2002] NSWSC 960 (18 October 2002), set out by Einstein J at [71] of *Leighton*:

> The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), (4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words "person who is entitled to a progress payment under a construction contract" in s 13(1) refers to a contractual entitlement.

This passage was cited with approval by Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 at [75].

Hodgson JA, with Beazley and Basten JJA agreeing, followed the same line of reasoning in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19.

At [38] of *John Holland*, Hodgson JA said:

> I note that in *Transgrid v Siemens Ltd* [2004] NSWCA 395, (2004) 61 NSWLR 521 at [35], I expressed the view (obiter) to the effect that "calculated in accordance with the terms of the contract" meant calculated on the criteria established by the contract, and did not mean reached according to mechanisms provided by the contract; and I adhere to that view as being more in accord with the use of the word "calculated" and with the

> prohibition in s 34 of the Act on contracting out of the effect of the Act. On the other view, contractual provisions denying progress payments for construction work otherwise than as certified by a superintendent or in accordance with review procedure provided by the contract could in my opinion have the effect of restricting the operation of the Act, and thus be made void by s 34. I do not think the legislature intended to make such usual provisions void.

At [77] of *John Holland* Basten JA said:

> A further fact which gives support to the conclusion set out above is that, as explained by Hodgson JA at [40], Part 2 of the *Building Payment Act*, and in particular the right to a progress payment conferred by s 8 and the calculation of the amount in accordance with ss 9 and 10, suggests that the statutory right to payment is unaffected by calculations undertaken by Superintendent or other authority appointed to value work under the contract. In other words, the statutory regime is, partly, though not of course wholly, independent of the terms of the construction contract and is intended to operate according to its own statutory terms: see the prohibition on contracting out in s 34.

At [24] of *Hervey Bay (JV) Pty Ltd v Civil Mining and Constructions Pty Ltd* (2010) 26 BCL 130; [2008] QSC 58, McMurdo J was not persuaded that the "interpretation of the equivalent of s 13 of the *Building and Construction Industry Payments Act 2004*, and in particular the expression 'amount calculated under the contract' is wrong." Ultimately, McMurdo J's decision in *Hervey Bay* turned on the true construction of cl 35.5A of the construction contract. At [33]–[35] of his Honour's judgment, he analysed the relevant terms, including the terms relating to the powers and obligations of the superintendent. At [37], his Honour said:

> … So in the present case, in applying the reasoning from Peninsula Balmain, the adjudicator construed this contract as imposing an obligation upon the Superintendent under cl 35.5A. The Principal argues that this was in error because it is contrary to the words of the clause. In particular it is inconsistent with the express provision in this clause that the Superintendent is under no obligation. Further, it is inconsistent with the express provision here that the Superintendent's discretion is "absolute".
>
> That submission of the Principal should be upheld. Accepting the correctness of Peninsula Balmain and the cases which have followed it, in this contract however the parties have substituted different terms and the expressed intention was to confer a power on the Superintendent without imposing any obligation as to the exercise of that power. Indeed the deletion of the relevant paragraph in cl 35.5 and the addition of cl 35.5A and cl 35.5B appear to have been drafted with Peninsula Balmain in mind. In my view there is no tenable construction of cl 35.5A by which the Superintendent could be said to be under any obligation and in particular an obligation to extend time if it would be fair to do so. Absent such an obligation there was no entitlement in any sense to an extension of time, if there had not been compliance with cl 35.5. So in the adjudicator's calculation, he was wrong to have included delay costs for which extensions of time have not been granted and for which there was no entitlement to an extension under cl 35.5 or cl 35.5A. This error resulted in the adjudicated amount being excessive by about $740,000.

In Queensland, following *Hervey Bay*, it would appear therefore as if the answer to the question as to whether or not an adjudicator is obliged to follow a superintendent's certificate, must first be addressed by determining the true construction of the relevant contractual terms relating to the superintendent's obligations.

It is to be stressed, that it is not the purpose of the Act to alter the parties' contractual regime. It is submitted that if an adjudicator fails to follow the certifier's certificate, the adjudicator in fact is "altering the parties' contractual regime". This he has no jurisdiction to do and, because of the excess of jurisdiction, it should be held that the adjudication is void and falls to be set aside. Any other approach, it is respectfully submitted, does violence to the legislative intent, and Einstein J's ultimate conclusion, despite what his

Honour held at [71] of his judgment, that an adjudicator is not bound by the certifier's certificate, regrettably, does just that. See the further discussion at [SOP9.50], [SOP10.50] and [SOP25.70].

In *PPK Willoughby v Eighty Eight Construction* [2014] NSWSC 760, as McDougall J held that at the time the superintendent issued his progress certificate he was not aware of the allegations by the developer in regard to defects. McDougall J at [83] said:

> The Superintendent did not raise any question of a set off for defective work. Nor did Mr To. It may be accepted that, at the time these events happened (including the time of certification of payment claim 13), the Superintendent had no knowledge of the contents of the Tyrrells report. But it is clear, from the Superintendent's statement that was part of the adjudication response given to the adjudicator, that the Superintendent was, at the time of certification, aware that there were (or at least might be) substantial defects in the work performed by Eighty Eight.

At [45], his Honour noted that the adjudicator reasoned, in substance, that as the amount of the payment claim had to be assessed to the date of the claim, and as at that date there was no amount certified by the superintendent to be owing by the builder to the developer for defect rectification, there was no contractual basis for allowing the amounts claimed as a set off against the value of the work.

At [46], McDougall J continued thus:

> It matters not whether the adjudicator was correct, or incorrect, in his construction and application of cl 42.1 (and cl 42.8). If he were incorrect (and I am not to be taken as indicating even a tentative view that he was), it was no more than a mistake made within jurisdiction. It is now well settled that the determinations of adjudicators are not susceptible to review simply because there is an error of law in the reasoning process that they adopt. (It is another matter, of course, if the error of law causes the adjudicator to mistake in some fundamental way the jurisdiction that she or he is required to exercise, but that is another matter. So, too, is jurisdictional error arising otherwise than out of an error of law.)

It is submitted that this does not merely constitute as a mistake within jurisdiction, but an abdication of a fundamental duty under the Act.

At [66] of his Honour's judgment, under the heading "Decision", McDougall J set out the fourth proposition which his Honour said was the primary method of calculation of a progress payment, ie by reference to the terms of the contract. In this regard, his Honour relied on s 9(a) of the New South Wales Act, and went on to state that it is only if the contract makes no express provision for calculation that the alternative in s 9(b) applied.

His Honour at [67] said:

> The fifth proposition is that valuation of construction work is to be undertaken primarily by reference to the terms of the contract: s 10(1)(a). Again, it is only if the contract makes no express provision for this that the alternative in s 10(1)(b) applies.

It would appear as if his Honour has misconstrued ss 9(a) – 9(b) and ss 10(1)(a) – 10(1)(b) of the New South Wales Act, more particularly, the phrase "in accordance with terms of the contract". It is submitted that that phrase, correctly construed, on the overwhelming balance of authority, does not oblige or entitle the adjudicator to follow a superintendent's valuation in determining the adjudicated amount under a payment claim, and relates only to matters such as a schedule of rates in the contract, but does not embrace a fundamental obligation which rests on the shoulders of the adjudicator to determine value for him/herself.

The words "properly construed" mean no more than that the adjudicator must calculate the amount of the payment claim in regard to any schedule of rates set out in the contract, but does not oblige or entitle the adjudicator to obviate his/her duty to determine value.

It is further submitted that, in the course of this exercise, the fact that a superintendent issued a progress claim determined by him/her in the ignorance of allegations of defects is, with respect, quite immaterial. Further, it is submitted that what the superintendent did or failed to do, has no bearing on the determination of value. Simply put, no contractual term entitles the adjudicator to abdicate his or her duty to determine the value of the work, the subject matter of the payment claim.

This duty has to be fulfilled either in accordance with the provisions of s 10(1)(a) of the New South Wales Act or, in the absence of some mechanism set in the contract for the determination of value, by taking into account the various factors set out in s 10(1)(b), one of which is provided for in s 10(1)(b)(iv)), ie "if any of the work is defective, the estimate costs of rectifying the defect". One cannot, read into s 10(1)(b)(iv) words to the effect that defective work is to be ignored, if the cost of rectification had not been determined at the date of the superintendent's certificate.

It is respectfully submitted that the PPK judgment is wrongly decided.

[SOP22.700] The effect of a final certificate

In *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* [2009] QCA 329, the contract contained a clause to the effect that the final certificate would be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations, with the exception of unresolved issues which were then the subject of any notice of dispute pursuant to the dispute resolution provisions of the contract. It was held that the certificate gave Martinek a contractual right to payment of the amount stated in it, but did not constitute a final settling of accounts which subsumed or suspended the adjudicator's determination.

With the Chief Justice and Holmes JA concurring, Keane JA, said:

> ... Once a dispute in compliance with the contract has occurred in respect of the Final Certificate it cannot be said that the Final Certificate has finality so as to bring into play the allowance provisions in s 100 of the *Payments Act*. The Adjudication Decision stands until the final position has been reached between the parties.

The Court of Appeal distinguished the contractual provisions in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2006) 66 NSWLR 624; [2006] NSWSC 874 where the contract provided that the superintendent's final payment schedule was conclusive evidence of the final amount owing by one party to the other until the contrary was established as a fact. In such a case, the superintendent's final payment schedule trumped the effect of the adjudication determination. This matter was revisited by *Margaret Wilson J in Leighton Contractors v Vision Energy* [2010] QSC 353, and for which see [26]–[27] in particular.

At [16] of the Court of Appeal judgment in *Martinek* above, it was held that it may be accepted that s 100(1)(a) of the Queensland Act, which reads as follows:

> (1) Subject to section 99, nothing in part 3 affects any right that a party to a construction contract--
>
> (a) may have under the contract; or …

This had the result that an adjudication determination would have to yield to "any right that a party to a construction contract may have under the contract".

See further [SOP22.730] below and the decisions of the Western Australian courts on this issue.

[SOP22.720] Victoria — *"... the same value as that previously determined ..."*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

There is no similar provision in the prinicipal Victorian Act

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 23(4) of the amendment Act brings the principal Act in line with s 22(4) of the New South Wales Act above.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 25 of the amendment Act introduces new s 24(3) and (4).

Section 24(4) provides that an adjudicator cannot make a correction in the determination if an application has been made under Div 2A of Pt 3 of the Act for a review of the determination.

[SOP22.730] Western Australia — Is an adjudicator obliged to follow a certifier's certificate?

There has been an attempt to resolve the issue raised at paragraph [SOP22.690] under the Western Australian Act in s 35(1) and (2). Under s 35(1), it is provided that s 35 applies if the construction contract provides for a certifier of the contractor's obligations, or the amount payable to the contractor, and such a certificate is provided by a party to an adjudicator in the course of the adjudication.

Under s 35(2)(a), it is provided that if the certificate relates to the final payment under the contract and has the effect of finalising the contract, that certificate is taken to be conclusive evidence of its contents. Under s 35(2)(b), it is provided that otherwise the certificate has evidentiary weight which the adjudicator considers appropriate.

The difficulty, however, is to correlate the provisions of s 35 with the provisions of cl 5(3)(a) of the Schedule to the Western Australian Act, which states:

> In the case of a claim by the contractor, the amount claimed in a payment claim:
>
> (a) must be calculated in accordance with this contract …

The deficiency in the Western Australian provision above, which at least attempts, unlike that in the other jurisdictions (but for the Northern Territory) to address the problem, is that nothing is spelt out as to the consequences of an adjudicator ignoring a final certificate or giving insufficient weight to any other certificate. One can see that s 35, which as stated above, at least attempts to address the situation, is going to give rise to considerable litigation.

[SOP22.740] Queensland — *"… the same value as that previously decided …"*

For these provisions, see s 27 of the Act.

[SOP22.750] Northern Territory — *"… contractor is entitled to be paid a reasonable amount …"*

Under Div 2, cl 2 of the Schedule, there is an implied provision, picked up by s 17, that the contractor is entitled to be paid a reasonable amount for performing its obligations. It would appear as if the parties can contract out of this provision in writing. This provision is to be read subject to s 37, which deals with the evidentiary value of certificates of completion and amounts payable.

Clause 5(2) of Div 4 of the Schedule to the Northern Territory Act contains the following very sensible provisions for the determination of value:

> (2) For a claim by a contractor, the amount claimed must be calculated in accordance with this contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be –

(a) if this contract states that the principal must pay the contractor one amount (the "contract sum") for the performance by the contractor of all of its obligations under this contract (the "total obligations") – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations;

(b) if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or

(c) otherwise – a reasonable amount for the obligations performed and detailed in the claim.

The New South Wales, Victorian and Queensland Acts could well follow those sensible provisions.

[SOP22.760] Northern Territory specifically — Is an adjudicator obliged to follow a certifier's certificate?

There has been an attempt to resolve the issue raised at paragraph [SOP22.690] under the Northern Territory Act in s 37(1) and (2). Under s 37(1), it is provided that s 37 applies if the construction contract provides for a certifier of the contractor's obligations, or the amount payable to the contractor, and such a certificate is provided by a party to an adjudicator in the course of the adjudication.

Under s 37(2)(a), it is provided that if the certificate relates to the final payment under the contract and has the effect of finalising the contract, that certificate is taken to be conclusive evidence of its contents. Under s 37(2)(b), it is provided that otherwise the certificate has evidentiary weight which the adjudicator considers appropriate.

The difficulty, however, is to correlate the provisions of s 37 with the provisions of Div 2, cl 2 of the Schedule to the Act, which provides that a contractor is entitled to be paid a reasonable amount. It is to be assumed that the provisions of s 37 will take precedence over the provisions of the Schedule.

The deficiency in the Northern Territory provision, which at least attempts, unlike that in the other jurisdictions to address the problem, is that nothing is spelt out as to the consequences of an adjudicator ignoring a final certificate or giving insufficient weight to any other certificate. One can see that s 37, which as stated above, at least attempts to address the situation, is going to give rise to considerable litigation.

[SOP22.770] *"... to consider ..."* – s 22(2) of the New South Wales Act

In *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [56], Hodgson JA said:

> … [I]t is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or *bona fide* addresses the requirements of s 22(2) as to what is to be considered.

This aspect of the *Brodyn* decision in the Court of Appeal has not been the subject of any adverse comment in the subsequent decision of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

The holding of Hodgson JA in *Brodyn* above embraces two aspects. Firstly, a failure to consider any matter referred to in s 22(2), and secondly, where the adjudicator bona fide addresses the requirements of s 22(2) as to what is to be considered.

In regard to the first aspect, it would now appear, in the light of *Chase Oyster Bar*, that there has been a failure of a jurisdictional fact, and the adjudication would be void.

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142, a submission was made by Contrax in its adjudication response that countered a submission

made by the Minister in his payment schedule to the effect that Contrax was not entitled to any payment by reason of certain specific clauses of the contract. Contrax's response was that these clauses were struck down by s 34 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the no contracting out provision). The adjudicator considered those submissions and held accordingly. This led to the question being agitated before the New South Wales Court of Appeal as to whether or not the adjudicator was permitted to consider the submissions set out above in the adjudication application.

The Court of Appeal upheld the contention that the adjudicator was within his rights to consider those submissions which, in effect, were a reply to a point taken for the first time in the Minister's payment schedule.

Contrax was referred to in detail by Daubney J in *Thiess Pty Ltd t/as Theiss John Holland v Civil Works Australia Pty Ltd* [2011] 2 Qd R 276; [2010] QSC 187, where his Honour at [33] – [37] said:

> [33] The only challenge to the primary judge's decision on the second and third issues identified above was to the effect that the primary judge erred in holding that Contrax was entitled to rely on s 34, when that matter had not been raised in its payment claim. This contention relied on John Holland, and also on a suggested anomaly arising from the prohibition in s 20(2B) on a respondent relying on reasons not included in its payment schedule.
>
> [34] In my opinion, this suggested anomaly loses force when one considers the true effect of s 22(2). It is true that paragraph (d) of s 22(2) limits the submissions of the respondent that can be considered *under that paragraph* to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration under that paragraph, reasons included in the adjudication response that were not included in the payment schedule.
>
> [35] However, paragraphs (a) and (b) of s 22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can taken them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d).
>
> [36] Similarly, in my opinion, an adjudicator could take into account a contention of an applicant that a term of the contract is void by reason of s 34, when considering matters under paragraphs (a) and (b), even if that contention could not be taken into account under paragraph (c).
>
> [37] However, I agree with the primary judge that the circumstance that s 34 was not mentioned in the payment claim, and was mentioned for the first time in the adjudication application, does not have the consequence that it cannot be considered under paragraph (c) of s 22(2). I agree with the primary judge that this is not an addition to the payment claim or a departure from it that could be affected by the considerations given weight to in *John Holland*.

In regard to the second aspect, a *bona fide* attempt to consider probably constitutes considering that aspect, even if the adjudicator got it wrong. There will probably be no basis to claim that the determination is void.

What follows below is a discussion of a number of cases pre *Chase Oyster Bar*. These cases, and the commentary thereon, have been retained in case courts in States and Territories, other than New South Wales, are persuaded to take a different view, but they should all be considered carefully in the light of the *Chase Oyster Bar* decision.

In *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19 at [55], Hodgson JA looked at the requirements of s 22(2), and summarised it as requiring an adjudicator to "consider the provisions of the Act, the provisions of the contract and submissions duly made".

His Honour went on to say "that if an adjudicator did consider those matters, then 'an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract or a particular submission' would not invalidate the determination".

In *John Holland* (at [63]), his Honour said:

> The legislature plainly entrusts to the adjudicator the role of determining whether submissions are or are not duly made, and thus of determining whether a submission contained in an adjudication response is one that should not be there because of the effect of s 20(2B). If an adjudicator addresses that question and comes to a conclusion that the submission was not duly made, I cannot see that the adjudicator has then failed to afford the measure of natural justice contemplated by the Act.

See further the judgment of McDougall J in *Broad Construction Services (NSW) Pty Ltd v Vadasz* (2008) 73 NSWLR 149; [2008] NSWSC 1057.

In *Timwin Construction Pty Ltd v Facade Innovations Pty Ltd* (2005) 21 BCL 383; [2005] NSWSC 548 at [39] and [40], McDougall J dealt with the content of the obligation in s 22(2) "to consider". His Honour said:

> [39] That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).
>
> [40] As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322; 25 ALR 497 (Mason J) and in *Evans v Marmont* (1997) 42 NSWLR 70, 79–80 (Gleeson CJ and McLelland CJ in Eq).

McDougall J reverted to this aspect in *Veolia Waters Solutions v Kruger Engineering* [2007] NSWSC 46. His Honour said:

> [24] To that may be added a reference to *Azriel v New South Wales Land and Housing Corp* [2006] NSWCA 372; see Basten JA, with whom Santow and Ipp JJA agreed, at [49] and [51]:
>
> > [49] Judicial review is concerned only with the legality of an administrative decision, in the sense of whether or not the decision-maker has exceeded the legal boundaries of his or her powers. Those boundaries are defined, in part, by reference to the consideration of matters which are legally impermissible and the failure to consider matters to which the law requires that consideration be given. The requirement of consideration is not satisfied by formalistic reference. In *Weal v Bathurst City Council* (2000) 111 LGERA 181 Giles JA, with whom Priestley JA agreed, stated at [80]:
> >
> > > Taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance of

> the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration ….

Mason P commented at [9]:

> There is little point in searching for a definitive statement of what is involved in taking something into consideration. I am however, attracted to Gummow J's formulation of "proper, genuine and realistic consideration upon the merits". This was in the context of s 5(2)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (see *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292). The formulation has been carried across to the proper consideration ground of review and now appears to have a general acceptance in the Federal Court of Australia (see *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 at 64 where the authorities are collected by Merkel J).
>
> …
>
> [51] At least in relation to findings of primary fact, the weight to be given to any particular matter is for the decision-maker and is not reviewable by the court. As Spigelman CJ noted in *Bruce v Cole* (1998) 45 NSWLR 163 at 186D–E, the scope for assessing whether the decision-maker has given proper, genuine and realistic consideration to a mandatory matter must be approached with caution, so as to avoid the court impermissibly reconsidering the merits of the decision. Indeed, the language adopted by Gummow J in *Khan* was not expressly directed to mandatory considerations, but to the merits of a case, and would extend to all material matters raised by an applicant, failure to consider which in the manner described is now treated as a question of procedural unfairness: see *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24] (Gummow and Callinan JJ) and [87] and [88] (Kirby J).

[SOP22.780] *"… only …"*

(a) A general discussion on the meaning of the word "only"

The above matters are the only matters which an adjudicator can consider but apparently he or she may take into account his/her own experience, *Transgrid v Walter Construction Group* [2004] NSWSC 21 (6 February 2004), where at [45] McDougall J said:

> I see no reason why Mr Sullivan erred, let alone erred in a jurisdictional sense, in adopting the approach that he did. He had a considerable volume of material before him, that was capable of substantiating, in appropriate detail, the various claims that were made. He was entitled to think that TransGrid would have taken any proper and available objection to the claims that were made. (Indeed, it is difficult to see how he could have had any other understanding.) On that basis, I see no reason why it was not open to Mr Sullivan, applying his own expertise to the material before him, to come to the view that if the various challenges were not made out then, in effect by necessity, what was left was a reasonable, or at least a justifiable, valuation of the work. Nor do I see any reason for concluding, specifically, that in those circumstances it was not open to Mr Sullivan to conclude, in terms of cl 40.5(c), that the rates or prices that Walter used in pricing the variations were reasonable.

What is to be seriously queried is whether an adjudicator can legitimately take into account his or her own experience. All sorts of questions arise and these include whether the experience referred to is general or special and/or whether or not there would be a breach of procedural fairness if the adjudicator does not put this experience to the parties and give them an opportunity of dealing with it, and if so, in what manner, that is, by putting further facts before the adjudicator, which he or she may not be permitted to consider in any event. This observation by McDougall J puts the adjudication process on a fairly slippery slope.

In *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, Einstein J, referring to s 21(4) of the Act at [26] of his judgment, emphasised that the written submission called for by the adjudicator did not permit a radical departure from the statutory scheme. The provisions of s 21(4) merely entitled the adjudicator to seek clarification of previous submissions, these earlier submissions being constrained in the manner set out in the sections above.

In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 (8 November 2005), Brereton J, at [35], explained the dual function of s 22(2):

> Section 22(2) has a duel function: it prescribes matters to which the adjudicator is required to have regard, and it identifies those as the only matters to which the adjudicator is to have regard, on its face making the list exclusive [*Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228, [65] (Basten JA)]. One of the prescribed matters is "the provisions of the construction contract from which the application arises".

His Honour proceeded to analyse the impact that a failure to consider a matter, consideration of which is required by the adjudicator, has on the validity of an adjudication determination. *Holmwood* was cited with approval by Sackar J at [58] of *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123.

See further [71]–[74] of *Veolia Waters Solutions v Kruger Engineering* [2007] NSWSC 46 (19 January 2007).

It is however appropriate to refer to the observations of Associate Justice Macready in the matter of *Roads & Traffic Authority (NSW) v John Holland Pty Ltd* [2006] NSWSC 567 (3 July 2006) at this point.

At [46], his Honour raised the question as to whether or not a respondent in the adjudication proceedings, the plaintiff in the case before him, could and, presumably, should have dealt with certain jurisdictional matters in the payment schedule and not in the adjudication response.

At [48], his Honour said:

> [48] The decision in *Brookhollow* is very much on point and I should follow it unless I think it is plainly wrong. However, there is a problem with the decision as His Honour was not referred to an ongoing disagreement in the Court of Appeal. That contention begins with *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 which concerned a failure to raise matters in a payment claim. The case was decided on the ground that the error – if it existed – did not render the determination void. Hodgson JA in obiter dicta, dealt with an argument that the first respondent was not entitled to raise new issues not included in its payment claim. He said:
>
> > [33] The only challenge to the primary judge's decision on the second and third issues identified above was to the effect that the primary judge erred in holding that Contrax was entitled to rely on s 34, when that matter had not been raised in its payment claim. This contention relied on *John Holland*, and also on a suggested anomaly arising from the prohibition in s 20(2B) on a respondent relying on reasons not included in its payment schedule.
> >
> > [34] In my opinion, this suggested anomaly loses force when one considers the true effect of s 22(2). It is true that para (d) of s 22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration *under that paragraph*, reasons included in the adjudication response that were not included in the payment schedule.
> >
> > [35] However, paras (a) and (b) of s 22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my

> opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paras (a) and (b), even if they cannot be considered under para (d).
>
> [36] Similarly, in my opinion, an adjudicator could take into account a contention of an applicant that a term of the contract is void by reason of s 34, when considering matters under paras (a) and (b), even if that contention could not be taken into account under para (c).
>
> [37] However, I agree with the primary judge that the circumstance that s 34 was not mentioned in the payment claim, and was mentioned for the first time in the adjudication application, does not have the consequence that it cannot be considered under para (c) of s 22(2). I agree with the primary judge that this is not an addition to the payment claim or a departure from it that could be affected by the considerations given weight to in *John Holland*.

His Honour then referred, at [50], to *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228, where he pointed out that Hodgson JA, at [50] thereof commented on of what might have been an important error in the judgment of the primary judge, but which did not bear upon the outcome of the case. At [51] of that judgment, Hodgson JA said:

> An adjudicator is bound to consider the provisions of the Act, the provisions to the construction contract, the payment claim and payment schedule and submissions made by the claimant and respondent respectively and the results of any inspection: s 22(2). It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process. The adjudicator would be bound to determine the matter on the basis of the material to which she or he could properly have regard; and if the adjudicator decided that all the reasons advanced by the respondent were invalid, the adjudicator would determine the amount of the progress payment in favour of the claimant.

Macready ASJ, in *RTA*, went on, at [51], to point out that:

> That passage could be read as asserting that, if a respondent to a payment claim does not raise any relevant grounds for denying or reducing the progress claim made by the claimant, then the adjudicator automatically determines the progress claim at the amount claimed by the claimant. My tentative view is that such an assertion would be incorrect.

It is respectfully submitted that if Macready AsJ were to have had the matter to be decided before him post *Chase Oyster Bar*, he would simply have held that whether or not a point is taken in a payment schedule, if there has been a failure of a jurisdictional fact, the adjudication is void.

In *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19 (26 February 2007), Hodgson JA, with Beazley JA agreeing, held that the phrase "duly made" in s 22(2)(d) engaged s 20(2B) and that under s 20(2B), reasons for withholding payment are any reasons justifying the non payment of the amount claimed. The fact that submissions were expressed as concerning the adjudicator's jurisdiction, did not prevent them from being reasons for withholding payment.

John Holland was referred to by Peter Lyons J at [112] of his judgment in *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] QSC 292, where his Honour quoted from [54]–[55] of the *John Holland* decision.

At [113] of *QCLNG*, his Honour noted that two days after the judgment in *John Holland* above, a differently constituted Court delivered the judgment in *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32, and noted further that Giles JA at [26]–[27] of *Halkat* said:

> [26] With respect to the trial judge, I consider that the fundamental vice in the adjudicator's determination can be shortly explained without embarking on an exegesis of the reference in *Brodyn Pty Ltd v Davenport* to a bona fide attempt to exercise the statutory power. Section 22 of the Act required that the adjudicator determine an adjudicated amount (s 22(1)) by considering particular matters (s 22(2)). The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters. But that is what the adjudicator did. He stated expressly in his reasons that he did not have evidence on which he could independently arrive at the value of the completed work, and that he adopted the appellant's valuation in preference to that of the respondent because of the respondent's unmeritorious challenges to the validity of the payment claim.
>
> [27] On the face of the determination, the adjudicator simply did not perform the task required by the Act, and his purported determination was not given greater respectability by the reference to his inclination "to believe the claimant rather than the respondent": the unmeritorious challenges were not a basis for belief or disbelief, and in any event it was not correct to speak of believing a corporate body. The adjudicator did not comply with an essential precondition to the existence of a valid determination.

Halkat was cited with approval by Sackar J at [59] of *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123.

In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems* [2008] NSWSC 858 (19 August 2008), Einstein J at [33]–[43] considered that it was strongly arguable that an adjudicator was not entitled to consider materials extrinsic to the payment schedule, but went on to hold that even if the adjudicator was in error, the determination was not thereby a nullity, because it was for the adjudicator to decide whether the "indication" in the payment schedule of reasons, extended to what was in an earlier payment schedule.

The question as to whether or not an adjudicator's error in considering materials extrinsic to a payment claim would result in a nullity of the adjudication determination would, now, in the light of *Chase Oyster Bar* clearly be a matter for the court, and would be beyond the jurisdiction of the adjudicator to determine

At [45]–[53] of *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), Giles JA recorded his disagreement with Einstein J's observation that the scheme of the Act did not allow the incorporation by reference of materials extrinsic to the payment schedule.

At [50]–[53] of *Perform* on appeal, Giles JA said:

> [50] In my opinion, indication within s 14(3) does not exclude what the adjudicator described as incorporation by reference of material extrinsic to the payment schedule. The adjudicator appears to have thought that provision involving physical receipt meant that regard could not be had to anything not physically received with the payment schedule. That can not be so. As a simple illustration, a payment schedule will commonly refer to provisions of the construction contract; it would make no sense that the construction contract, or the relevant provisions, had to be set out in full or attached

> although known to the parties and the basis for their relationship. It would equally be neither common sense nor a practical application of s 14(3) to deny indication by reference to correspondence in which reasons have been fully set out simply because a copy of the correspondence is not physically attached to or provided with the payment schedule.
>
> [51] The respondent submitted to the effect that the meaning of "indicate" was informed by s 20(2B) in its reference to reasons which have been "included in the payment schedule provided to the claimant". It said that the Act contemplated a single document within which the reasons were included, and that uncertainty in what was included through incorporation by reference was contrary to the "fast track" process for which the Act provided. I do not see textual enlightenment in the reference to inclusion of reasons – they are included because indicated. Questions of certainty come within whether what is done is indication.
>
> [52] It will be a question of fact whether, in the particular circumstances, reference to material extrinsic to the payment schedule is an indication of reasons. Reference to a memorandum internal to the provider of the payment schedule could not indicate reasons for the purposes of s 14(3) reference to a conversation, without giving its substance, is unlikely to do so; reference to a long-past letter not readily to hand might not do so; but there is no reason why reference to a recent and specific letter received by the recipient of the payment schedule should not do so. The recipient is thereby informed, and can decide whether or not to pursue the claim and understand the case it will have to meet in an adjudication, and being informed in that way is well within the meaning of "indicate".
>
> [53] In *Pacific General Securities Ltd v Soliman and Sons Pty Ltd* [2006] NSWSC 13; (2006) 196 FLR 388 at [71] Brereton J was "inclined to accept, without deciding, that a payment schedule may 'sufficiently indicate' reasons for withholding payment by reference to reasons previously advanced in an earlier payment schedule, if appropriately worded". His Honour's inclination was correct, as was his observation that it was not sufficient to incorporate reasons advanced in previous payment schedules, adjudication responses or otherwise so that the claimant could not know whether all or any and if so which of the grounds previously advanced were now relied on. In the present case, in my opinion the March payment schedule indicated as reasons for the $nil being less than the claimed amount and for withholding payment the reasons in the February payment schedule, in substance, the claimed backcharges, at the least as in relation to the $209,968.68 if not as to the entirety of the claimed amount.

Regard should be had to the impact of the *Chase Oyster Bar* case on the issues discussed in the authority referred to in the immediately preceding paragraph, and for which see the discussion in the preceding paragraphs.

At [45] of *South East Civil & Drainage Contractors Pty Ltd v AMGW Pty Ltd* [2013] 2 Qd R 189; [2013] QSC 45, Jackson J held:

> The conclusion to which I would come, uninstructed by authority, is that a respondent's failure to take the point of non-compliance with s 17(4) in a payment schedule does not authorise an adjudicator to ignore the point, where it is apparent on the face of the material which the adjudicator is obliged to consider under s 26(2).

(cf *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1; *GW Enterprises Pty Ltd v Xentex Industries Pty Ltd* [2006] QSC 399; *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119).

(b) The adjudicator's consideration of the respondent's submissions containing a statutory declaration

In *Austruc Constructions Ltd v ACA Developments Pty Ltd* (2005) 21 BCL 191; [2004] NSWSC 131 (11 March 2004), McDougall J held at [65]–[69] that it was within the bounds of s 22(2) that the respondent's submissions could contain a statutory declaration. His Honour said:

> [65] I do not think that the word "submissions", in either s 17(3) or s 22(2), should be limited as Mr Corsaro submitted. Firstly, I do not think that the ordinary English meaning of the word "submission" is limited in the way that ACA contends. It is certainly correct to say that one of the definitions given by the *Shorter Oxford English Dictionary* is "[t]he theory of a case put forward by an advocate". However, the same dictionary also defines the word to mean "the act of submitting a matter *to* a person for decision or consideration"; and it gives other definitions as well. Further, the *Macquarie Dictionary* defines "submission" as including "the act of submitting … the condition of having submitted … submissive conduct or attitude … that which is submitted … *law* an agreement to abide by a decision or obey an authority in some matter referred to arbitration …"
>
> [66] It is apparent from the definitions given by both dictionaries that the "ordinary English meaning" for which ACA contends is a specific application of the more general meaning, to the effect of "that which is submitted for decision or consideration".
>
> [67] Secondly, I think that the better view of s 17(3) is that it does not limit the matters that may be put to an adjudicator in an adjudication application. In this context, I think that the contrast between the mandatory language of paras (a) to (g), and the discretionary language of paragraph (h), is clear.
>
> [68] Thirdly, and in any event, I think that it is s 22(2) that governs the situation. It will be recalled that that subsection specifies the only matters that an adjudicator may take into account. Those matters include, through para (c), the relevant payment claim "together with all submissions (including relevant documentation) …". Not only do the parenthesised words show that the legislature had in mind that the word "submissions" was not to be construed narrowly, as ACA contends; they show specifically that the submissions may include relevant documentation in support.
>
> [69] It follows, I think, that if a claimant chooses to include, as part of the relevant documentation supporting its payment claim, a statutory declaration whereby relevant matters are, in effect, verified, then that statutory declaration will form part of the material to be considered by the adjudicator. Equally, if a claimant includes such a statutory declaration in its adjudication application, that is part of the "submission" to be considered.

It is submitted that as the adjudicator cannot call for or receive evidence, it is not in the spirit and intent of the Act, that he or she should receive and consider evidence by way of a statutory declaration. It would only spawn a contested set of facts, and there is no mechanism in the Act for the resolution of any such dispute. In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), it was held that material may properly be incorporated by reference in a payment schedule.

[SOP22.800] Queensland — matters which an adjudicator must consider in Pt 3, Div 2, s 26(2) of the Queensland Act

In Pt 3, Div 2, s 26(2) of the *Queensland Building Services Authority Act 1991*, it is provided:

> (2) In deciding an adjudication application, the adjudicator is to consider the following matters only –
>
> (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, Part 4A;

(b) the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;

(d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

In *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd* [2011] QSC 293, Daubney J considered these provisions within the context of an application seeking to declare the adjudication determination void where Syntech, in its "adjudication response", submitted a number of spreadsheets not previously supplied in the adjudication process. The adjudicator, on the facts found by his Honour, had no regard to these documents in the adjudication process.

Following the judgment of Hammerschlag J in *Austruc Constructions Ltd v ACA Developments Pty Ltd* (2005) 21 BCL 191; [2004] NSWSC 131, and having regard to the observations of Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205, in which Applegarth J said at [18]:

> The Courts have recognised that an adjudication decision is void if:
>
> 1. it fails to comply with the basic requirements of the Act; or
> 2. it is not a bona fide attempt by the adjudicator to exercise the relevant power; or
> 3. there has been a substantial denial of natural justice to a party;
>
> and only a declaration regarding its invalidity (and perhaps injunctive relief, if necessary) is needed to give it its quietus.

Daubney J concluded at [42] of *Syntech* that it seemed to him that:

> ... in unilaterally discarding the spreadsheets without giving the parties notice of his intention of doing so, the adjudicator did commit a substantial breach of natural justice. It is clear enough from the terms of the adjudication that the matters contained in the spreadsheets went to issues which were directly germane or material to the adjudicator's decision in respect of the matters raised under each of Reason # 6 and Reason # 12. At the very least, Syntech had a substantial argument that the spreadsheets were properly receivable under s 26(2)(d), but it was denied the opportunity to advance that argument. It is not, in my view, a matter of mere speculation that if it had been able to advance that argument, this might have persuaded the adjudicator not to exclude consideration of the spreadsheets.

[SOP22.805] Western Australia and Northern Territory - power of adjudicator to dismiss an application for adjudication

Section 31 of the *Construction Contracts Act 2004* and s 33 of the *Construction Contracts (Security of Payments) Act 2004*, provide the power to dismiss an application without making a determination of its merits.

At [118] of *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217, Murphy JA noted his agreement with Beech J at [102] of *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, and with whom Corboy J, in *Thiess v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80 at [59], also expressed agreement, that an adjudicator's determination under s 31(2)(b) is not amenable to judicial review for a non-jurisdictional error of law.

This paragraph from *Perrinepod* was referred to at [18] of *Re David Scott Ellis; Ex Parte Triple M Mechanical Services Pty Ltd (No 2)* [2013] WASC 161, where E M Heenan J said:

> [18] The limited rights of review permitted under the Act are described in s 46. They include a right to apply to the State Administrative Tribunal (SAT) but only respect of a decision made under s 32(2)(a) to dismiss an application without making a determination of its merits. This means that if an adjudicator wrongly dismisses an application without proceeding to an adjudication a way is open for the adjudication to take place under s 31(2)(b) within 14 days of the decision of SAT. Otherwise by s 46(3) a decision or a determination of an adjudicator cannot be appealed or reviewed. This is not regarded as an exclusion of judicial review - *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217 but, as shall be seen, it is an indication that the structure of the Act regards reviews as limited and restricted. It will be necessary to consider this further.

[SOP22.850] Section 22(5) of the New South Wales Act — the slip rule

The provisions of s 22(5) seek to import into the adjudication process the slip rule as that concept is recognised and implied in arbitrations.

In England, in *Shimizu Europe Ltd v LBJ Fabrications Ltd* [2003] BLR 381; [2003] EWHC 1229 (TCC) (29 May 2003), it was held that a request to an adjudicator to correct his decision under the slip rule is inconsistent with seeking curial review of that decision.

The slip rule was invoked in *Austruc Constructions Ltd v ACA Developments Pty Ltd* (2005) 21 BCL 191; [2004] NSWSC 131 (11 March 2004).

In England it has been held that invoking the slip rule may result in a challenge to an adjudication being waived: *Total M & E Services Ltd v ABB Building Technologies Ltd* [2002] CILL 1857; [2002] EWHC 248 (26 February 2002).

In *Holdmark (Aust) Pty Ltd v Melhemcorp Pty Ltd* [2009] NSWSC 305 per Macready AsJ, Holdmark submitted that the obligation cast upon an adjudicator to *bona fide* exercise the power to determine an adjudication application extended also to exercising the power under s 22(5) of the Act to correct the determination on the adjudicator's own initiative or on the application of a party because of the slip rule. This submission was rejected.

Macready AsJ said at [54]:

> Further reference was made to *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205, where Einstein J made reference to the power of the Court to grant injunctive relief in circumstances where a judgment had been entered following an adjudication determination which contained a material miscalculation (refer [30]–[37]). After referring to the decision of the Court of Appeal in *Khoury v Hiar* [2006] NSWCA 447, his Honour said at [41]:
>
> "There is particular relevance in the reference (at [50]) to the ability of the Court to turn to its armoury of relief and to control by injunction enforcement of the judgment so as to permit enforcement only to the extent of the entitlement. An injunction was ordered restraining the First Opponent from enforcing the judgment entered in the District Court save to the extent of his entitlement".

His Honour accordingly made the following order at [55]:

> In my view it is appropriate to grant an injunction restraining Melhemcorp from entering or enforcing a judgment in a Court for a sum greater than $167,074.76. I direct the parties to bring in short minutes and deal with costs.

[SOP22.860] Victoria – slip rule

A slip rule is provided for in s 24 of the Act.

Section 23(4) of the amendment amendment Act brings the principal Act in line with s 22(4) of the New South Wales Act.

Section 25 of the amendment Act introduces new s 24(3) and (4).

Section 24(4) provides that an adjudicator cannot make a correction in the determination if an application has been made under Div 2A of Pt 3 of the Act for a review of the determination.

[SOP22.870] Western Australia – slip rule

Under s 41(2), a slip rule is provided in the Western Australian Act. This is limited to:

(a) an accidental slip or omission;

(b) a material arithmetic error; or

(c) a material mistake in the description of any person, thing or matter …

The slip rule may be activated by the adjudicator on the application of a party, or after notifying the parties, on the adjudicator's own initiative. It will be seen that the provisions of the Western Australian slip rule differ substantially from the New South Wales slip rule, which is to be found in s 21(5) of the New South Wales Act.

[SOP22.880] Queensland – slip rule

The Queensland slip rule is to be found in s 28 of the Queensland Act. That follows the New South Wales model.

[SOP22.890] Northern Territory – slip rule

The Northern Territory slip rule is to be found in s 43(2) of the Northern Territory Act, and that is limited to:

(a) an accidental slip or omission;

(b) a material arithmetic error;

(c) a material mistake in the description of any person, thing or matter.

[SOP22.900] South Australia – slip rule

The slip rule is to be found in s 22(5) of the South Australian Act, which provides:

(5) If the adjudicator's determination contains—

(a) a clerical mistake; or

(b) an error arising from an accidental slip or omission; or

(c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter referred to in the determination; or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

[SOP22.910] Tasmania – slip rule

Section 25(8) of the Tasmanian Act makes provision for the slip rule to be employed, where there is:

(a) a clerical mistake in a determination under this section; or

(b) an error arising from an accidental slip or omission in a determination under this section; or

(c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter referred to in a determination under this section; or

(d) a defect of form in a determination under this section.

[SOP22.920] Australian Capital Territory – slip rule

Section 24(5) of the Act provides for a slip rule to be activated by the adjudicator on his or her own initiative or on the application of either party. The slip rule may be employed where there is:

(a) a clerical mistake or defect of form; or

(b) a material miscalculation of figures or a material mistake in the description of any person, thing or matter mentioned in the decision.

23 Respondent required to pay adjudicated amount

(1) In this section:

relevant date means:

(a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned, or

(b) if the adjudicator determines a later date under section 22(1)(b)—that later date.

(2) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

[S 23 subst Act 133 of 2002, s 3 and Sch 1[37]]

SECTION 23 COMMENTARY

[SOP23.50] *"… must pay …"*

The New South Wales and Queensland legislations require the respondent to pay the adjudicated amount, whereas under s 25(1)(b) and (2) of the principal Victorian Act (prior to its amendment from 30 March 2007), provision is made, under certain circumstances and subject to certain conditions, for security to be provided for the adjudicated amount. Section 26 of the Victorian Act specifies the designated trust account for the purpose of providing security.

One of the conditions under s 25(2) is the commencement of proceedings including arbitration proceedings.

Under s 25(5) and (6) of the Victorian Act it is provided as follows:

(5) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least 2 business days after any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined.

(6) For the purposes of subsection (5), a determination becomes final –

(a) in the case of a determination from which there is no right of appeal or review, when the determination is made; or

(b) in the case of a determination from which there is a right of appeal or review –

(i) when the right of appeal or review expires; or

(ii) if the determination becomes subject to appeal or review proceedings, when those proceedings have been finally disposed of.

It is unclear what s 25(6), under these circumstances means by the phrase "right of appeal". It may mean that there is no right of appeal from an arbitral award, and therefore the security provided can be called up, or it may mean that it is only when leave is refused by the final court that may adjudicate on the grant of leave, that the security can be called up.

It is also unclear as to what is meant by "review". Does that word include an application to set aside an award under ss 42 and 44 of the *Commercial Arbitration Act 1984* (NSW).

It is respectfully submitted that the provision in the Victorian Act for giving security rather than paying the amount is far fairer and operates to provide some protection to the unsuccessful respondent in otherwise draconian legislation.

In *Belmadar Constructions Pty Ltd v Environmental Solutions International Ltd* (2005) 23 ACLC 337; [2005] VSC 24, Belmadar was the successful party in an adjudication against ESI. ESI neither paid the amount nor challenged the adjudication. Belmadar moved the court, pursuant to s 27(2) for judgment of the amount so adjudicated. In the meantime, ESI was placed under administration. Belmadar sought leave, both before a master and before a judge in the Supreme Court, to proceed against ESI under s 444E(3) of the *Corporations Act 2001* (Cth), but this leave was refused on the ground that if granted, the statutory scheme of distribution under the *Corporations Act 2001* would be disturbed.

[SOP23.60] Victoria — *"... respondent required to pay adjudicated amount ..."*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 25(1)(b) and (2) of the principal Victorian Act have been repealed by s 26 of the amendment Act.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Division 2B of Pt 3 of the amendment Act deals with payment and recovery of adjudicated amounts. Under s 28M(2), the "relevant date" means:

(a) the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent under s 23A; or

(b) if the adjudicator determines a later date under s 23(1)(b), that later date.

Section 28N provides for payment after a review determination. That section reads as follows:

1. If the respondent is required by a review determination to pay an amount to the claimant, the respondent must pay that amount on or before the date for that payment determined by the review adjudicator under section 28I(6)(f).
2. If the claimant is required by a review determination to pay an amount to the respondent, the claimant must pay that amount on or before the date for that payment determined by the review adjudicator under section 28I(6)(f).

[SOP23.70] Western Australia — *"... liable to pay ..."*

Under s 39(1) of the Western Australian Act, a party that is liable to pay an amount under a determination, must do so on, or before, the date stated in the determination.

[SOP23.80] Queensland — *"... respondent required to pay adjudicated amount ..."*

Under s 29 of the Queensland Act, it is provided as follows:

1. If an adjudicator decides that the respondent is required to pay an adjudicated amount, the respondent must pay the amount to the claimant on or before the relevant date.
2. In this section –

relevant date means –

(a) the date that is 5 business days after the date on which the adjudicator's decision is served on the respondent; or

(b) if the adjudicator decides a later date under section 26(1)(b) – the later date.

[SOP23.90] Northern Territory — *"… liable to pay …"*

Under s 41(1) of the Northern Territory Act, a party that is liable to pay an amount under a determination, must do so on, or before, the date stated in the determination. There is no provision for the giving of security.

[SOP23.100] South Australia — *"… respondent required to pay adjudicated amount …"*

Under s 23 of the South Australian Act, it is provided that:

1. In this section –

relevant date means –

(a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned; or

(b) if the adjudicator determines a later date under section 22(1)(b) – that later date.

2. If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

[SOP23.110] Tasmania — *"… respondent required to pay adjudicated amount …"*

Under s 26(1)(a)–(b) of the Tasmanian Act, it is provided that:

1. If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant before –

(a) the end of the period of 5 business days immediately after the date on which the adjudicator's determination is served on the respondent; or

(b) a later date, if any, determined under section 25(1)(b)(ii).

[SOP23.120] Australian Capital Territory — *"… respondent must pay adjudicated amount …"*

Under s 25 of the ACT Act, the respondent must pay an adjudicated amount on or before:

(a) the day 5 business days after the day the adjudicator's decision is given to the respondent; or

(b) if the adjudicator decides a later day under section 24(1)(b) of the ACT Act – the later day.

24 Consequences of not paying claimant adjudicated amount

(1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:

(a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and

(b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(2) A notice under subsection (1)(b) must state that it is made under this Act.

(3) An adjudication certificate must state that it is made under this Act and specify the following matters:

(a) the name of the claimant,

(b) the name of the respondent who is liable to pay the adjudicated amount,

(c) the adjudicated amount,

(d) the date on which payment of the adjudicated amount was due to be paid to the claimant.

(4) If any amount of interest that is due and payable on the adjudicated amount is not paid by the respondent, the claimant may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate. If it is specified in the adjudication certificate, any such amount is to be added to (and becomes part of) the adjudicated amount.

(5) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount (the ***unpaid share***), the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate. If it is specified in the adjudication certificate, any such unpaid share is to be added to (and becomes part of) the adjudicated amount.

[S 24 subst Act 133 of 2002, s 3 and Sch 1[37]]

SECTION 24 COMMENTARY

[SOP24.50] New South Wales – *"If the respondent fails to pay the whole or any part of the adjudicated amount …"*

In *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19 (26 February 2007), the New South Wales Court of Appeal made the following observations in regard to the role of an adjudicator:

> [72] As I sought to explain in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [43]–[48], in my view the power to resolve these questions has been conferred on the adjudicator.
>
> [73] In considering the correctness of this approach, the focus must again be on the particular circumstances of the present case. Thus, the complaint is that the adjudicator failed to consider an assertion that the rights of John Holland were limited in law, and hence the adjudicator's powers were limited, to a payment in accordance with the determination of the superintendent under the contract. It is not, for example, asserted that the adjudicator was the recipient of a corrupt payment from another party. Thus, bearing in mind the limitation of the argument, the following statutory provisions are relevant. The first provides that the result of an adjudication is an "adjudication certificate" and, if the adjudicator determines that the respondent is required to pay an amount, must identify the "adjudicated amount", which the respondent is then required to pay: section 23(2). If the amount is not paid, it can be enforced as a debt by filing the adjudication certificate in any court of competent jurisdiction: section 25(1). Section 25(4) recognises that a respondent may be entitled to commence proceedings to have the judgment set aside, but states that the respondent:
>
> (a) is not, in those proceedings, entitled:
>
> (i) to bring any cross-claim against the claimant, or
>
> (ii) to raise any defence in relation to matters arising under the construction contract, or
>
> to raise any defence in relation to matters arising under the construction contract, or
>
> (iii) to challenge the adjudicator's determination …

[SOP24.60] Victoria — *"If the respondent fails to pay the whole or any part of an adjudicated amount ..."*

Section 28O(1)(a) provides that if the respondent fails to pay the whole or any part of an adjudicated amount in accordance with ss 28N or 28M, the claimant may obtain an adjudication certificate under s 28Q.

Under s 28O(1)(b), the claimant may serve on the respondent notice of the claimant's intention to suspend carrying out the construction work or the supply of the related goods and services.

Under s 28O(2), a notice under subs (1)(b) must state that it was made under s 28O(1) of the Act.

Under s 28O(3), a claimant cannot serve the notice under subs (1) until the end of the period allowed for making an adjudication review application under s 28D.

Under s 28O(4), if the claimant has made an adjudication review application in respect of any part of the adjudicated amount, the claimant may not give a notice under subs (1)(b) until the adjudication review is completed.

Section 28P entitles the claimant who has not been paid the whole or any part of the adjudicated sum to request the authorised nominated authority to provide an adjudication certificate under s 28Q. Section 28Q prescribes the criteria for a valid adjudication certificate.

Section 28R(1)–(8) deals with proceedings to recover the amount payable under ss 28M or 28N, and provides:

1. If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.
2. A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court –
    (a) the adjudication certificate; and
    (b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.
3. If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.
4. Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.
5. If a person commences proceedings to have the judgment set aside, that person –
    (a) subject to subsection (6), is not, in those proceedings, entitled –
        (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or
        (ii) to raise any defence in relation to matters arising under the construction contract; or
        (iii) to challenge an adjudication determination or a review determination; and
    (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.
6. Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.
7. A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.
8. Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

Of significance is the provision in s 28Q(6) of the Victorian Act.

s 23-24

[SOP24.70] Western Australia — *"... does not pay in accordance with determination ..."*

Under s 42 of the Act, if the principal does not pay in accordance with the determination, the contractor, after giving notice under s 42(2), may suspend the performance of its obligations.

Under s 43(2), a determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect. There is no provision, as is the case in the other States and Territories, with the exception of the Northern Territory, for a certificate from the appointor or a registrar. Nor is there any provision in the Western Australian Act to the same effect as s 25(4) of the New South Wales Act.

In *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, Mitchell J dealt with a situation where the respondent in an application under s 43(2) asserted a set off.

In *NRW Pty Ltd v Samsung C & T Corporation* [2015] WASC 372, Master Sanderson held that that was not ordinarily sufficient to avoid the refusal of leave to enforce an adjudication determination in the same manner as a judgment or order of the court to the same effect. His Honour said:

> [5] Although s 43(2) is couched in permissive terms it is difficult to see in what circumstances registration of a judgment could be refused. Perhaps in circumstances where a judicial review has been undertaken or where a party has exercised its limited rights of appeal under s 46. But otherwise there seems little basis for refusing registration of a determination and thereby undermining the intent of the Act.
>
> [6] Here the defendant says that it has a substantial setoff against the determination in favour of the plaintiff and that is grounds for refusal to register the judgment and giving leave to enforce it. There is some support for that submission in the decided cases. In *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, Mitchell J put the position as follows:
>
> > The fact that a debtor alleges the existence of claims against the other party which could be set off against the determination will not ordinarily justify the refusal of leave. Nor is an application for leave to enforce a determination ordinarily the occasion for challenging the correctness of the determination or, in the absence of a pending application for judicial review, its validity. There are no closed categories of circumstances that may be relevant to the question of whether leave should be granted [259]. (footnotes omitted)
>
> [7] Similar statements of principle to be found in the decision of Pritchard J in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304 and in a decision of Beech J in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* (2008) 36 WAR 479; [2008] WASC 58. For my part I have difficulty seeing circumstances other than the two instances I have referred to above where registration of a judgment might be refused. But whether or not the categories are closed and there may be instances where the circumstances are such registration is refused the mere existence of a setoff is not in my view one of them. In this case the defendant went to considerable lengths to put before the court evidence that a setoff exists. I do not propose to undertake an examination of that evidence. Even if the defendant had made out that proposition I am not satisfied it provides grounds for refusing to register the judgment.

Beech J, in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* (2008) 36 WAR 479; [2008] WASC 58 (dealing with s 43(2) of the Western Australian legislation), noted the following at [13]:

> The *Construction Contracts Act* does not expressly identify the matters relevant to whether leave should be granted under s 43(2). Consequently, in exercising the power to grant leave, regard must be had to the context, objects, purpose and policy of the legislation, so far as these may be discerned from the legislation and relevant secondary materials. I start with an outline of the salient features of the *Construction Contracts Act*.

At [38], his Honour extracted the following from the Minister's Second Reading Speech:

> When a party to a construction contract believes it has not been paid in accordance with the contract, the Bill provides a rapid adjudication process that operates in parallel to any other legal or contractual remedy. The rapid adjudication process allows an

> experienced and independent adjudicator to review the claim and, when satisfied that some payment is due, make a binding determination for money to be paid. The rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. The process is kept simple, and therefore cheap and accessible, even for small claims. In most cases the parties will be satisfied by an independent determination and will get on with the job. If a party is not satisfied, it retains its full rights to go to court or use any other dispute resolution mechanism available under the contract. In the meantime, the determination stands, and any payments ordered must be made on account pending an award under the more formal and precise process.

At [42], his Honour noted that the language of s 43(2) is substantially identical to the language of s 33 of the *Commercial Arbitration Act 1985* (WA), and which provides that:

> An award made under an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect, and where leave is so given, judgment may be entered in terms of the award.

After a fairly extensive examination of the relevant authorities referring to s 33 of the *Commercial Arbitration Act 1985* (WA) and the New South Wales counterpart, at [44] of O'Donnell Griffin above, Beech J noted that the judgment of Rolfe J in *Cockatoo Dockyard Pty Ltd v Commonwealth of Australia* (1994) 35 NSWLR 689, where Rolfe J discussed the principles regarding a s 33 application in New South Wales, more particularly that s 33 does not provide another method whereby a party may call in question the arbitral award. Beech J noted at [45] that various aspects of Rolfe J's decision in Cockatoo were referred to in *Diploma Construction Pty Ltd v Windslow Corporation Ltd* [2005] WASC 74 [7] - [9], [17]; *Doric Building Pty Ltd v Marine & Civil Construction Co Pty Ltd* [2005] WASC 155 [64] - [65]; *Premium Grain Handlers Pty Ltd v Elite Grains Pty Ltd* [2005] WASC 103 [8]-[9]; *Devaugh Pty Ltd v Lamac Developments Pty Ltd* [2000] WASC 314 [14], [16]; *Miles v Palm Bridge Pty Ltd* [2001] WASC 113 [7].

Beech J rejected the submission that the adjudication award should not be implemented by a court order as the defendant intimated that it would immediately seek a stay of any such court order.

Keen DCJ, in *Kuredale Pty Ltd v John Holland Pty Ltd* [2015] WADC 61, revisited many of the authorities in regard to a s 43 application. His Honour *inter alia* referred to and analysed: *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91; *Diploma Construction Pty Ltd v Windslow Corporation Ltd* [2005] WASC 74; *Hamersley Iron Pty Ltd v James* [2015] WASC 10; *House v The King* (1936) 55 CLR 499; [1936] HCA 40; *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* (2008) 36 WAR 479; [2008] WASC 58; *Sheraz Pty Ltd v Vegas Enterprises Pty Ltd* [2015] WASCA 4; *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80.

At [134] of *Kuredale*, Keen DCJ reiterated what Corby J noted in *Thiess Pty Ltd* and that is that there must be a sufficient reason for declining to grant leave having regard to the scheme and policy of the CC Act.

See further the discussion by Martin CJ, with McLure P and Newnes JA agreeing, in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2016] WASCA 130 at [55]-[56].

At [58] of Laing O'Rourke, Martin CJ referred with approval to the following passage from Philip McMurdo J's judgment in *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2014] QSC 80, where Philip McMurdo J said:

> [29] To determine an application, an adjudicator must identify the relevant terms of the contract upon which the claim is made and then apply the facts, as he or she finds them to be, to those terms upon their proper interpretation. The identification of the terms and the interpretation of those terms are thereby questions which the adjudicator must

s 23-24

answer in the exercise of his jurisdiction. It follows that an error in the identification of the terms or in their interpretation will not be a jurisdictional error: *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228 at [52]; (2011) 63 NSWLR 385 at 399 per Hodgson JA.; *Clyde Bergemann Senior Thermal Pty Ltd v Barley Power Services Pty Ltd* [2011] NSWSC 1039 at [44] per McDougall J; *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346 at [8] per Applegarth J, whose reasons on this point were not criticised on appeal: *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394; see also *Watpac Construction (Qld) Pty Ltd v KLM Group Ltd* [2013] QSC 236 at [21] to [24].

[30] However, where it appears that an adjudicator is not meaning to apply the contract, as he or she interprets it, but is instead allowing the claim upon some other basis, the position is different, because the adjudicator is thereby misunderstanding the scope of the adjudicator's jurisdiction …

Martin CJ stated further:

I do not read the last paragraph quoted above as expressing the view that an adjudicator will not make a jurisdictional error so long as he or she means to apply the contract. Rather, the passage provides one example of how an adjudicator may commit jurisdictional error by misunderstanding the scope of his or her jurisdiction. Nor do I understand these decisions to deny that a misconstruction of a contractual provision might amount to a jurisdictional error in circumstances where the error gives rise to an inference that the adjudicator has misunderstood the nature or scope of his or her statutory function. …

[SOP24.80] Queensland — *"... consequences of not paying claimant the adjudicated amount ..."*

Section 30 of the *Building and Construction Industry Payments Act 2004* (Qld) has been amended by s 16 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld) . (The Act was assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)). The amendments to the Queensland Act are set out at the end of this paragraph. Under s 30(1) of the Queensland Act, if the respondent fails to pay the whole or any part of the adjudicated amount to the claimant, as provided for in s 29(2), ie within five business days after the date on which the adjudicator's decision is served on the respondent, or if the adjudicator decides a later date under s 26(1)(b) – the later date, the claimant may ask the nominating authority to provide an adjudication certificate, and may serve on the respondent notice of the claimant's intention to suspend, under s 33, the carrying out of the construction work or the supply of the related goods and services. Section 30(2)–(7) prescribes the details that have to be inserted in a notice under subs (1)(b) and other procedural aspects. Section 16 of the Amendment Act amends s 30 of the Queensland Act as follows:

(a) s 30(1)(a) – omit "authorised nominating authority to whom the adjudication application was made" and replace with "registrar";

(b) s 30(4) – omit "request the authorised nominating authority" and replace with "ask the registrar";

(c) s 30(6) – omit "authorised nominating authority" and replace with "registrar".

The Act does not say what the consequence is of the Adjudicator not making a determination in the time stipulated in those sections referred to above.

It is to be noted that Under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI

2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

Under s 31, an adjudication certificate may be filed as a judgment for a debt, and may be enforced in a court of competent jurisdiction. Section 31(2), requires an affidavit stating that the whole or part of the adjudicated amount has not been paid. Section 31(4), as is provided for in s 25(4) of the New South Wales Act, states:

> (4) If the respondent commences proceedings to have the judgement set aside, the respondent –
>
> (a) is not, in those proceedings, entitled –
>
> (i) to bring any counterclaim against the claimant; or
>
> (ii) to raise any defence in relation to matters arising under the construction contract; or
>
> (iii) to challenge the adjudicator's decision; and
>
> (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final decision in those proceedings.

[SOP24.90] Northern Territory — *"... determination may be enforced as a judgment ..."*

Under s 44 of the Act, a contractor may suspend its obligations for the principal's non-compliance.

Under s 45(1), it is provided that a determination may be enforced as a judgment for a debt in a court of competent jurisdiction. It is to be noted that s 45(1) differs from s 43(2) of the Western Australian Act, under which a determination may be enforced "with the leave of a court".

Section 45(1) of the Act makes no reference to any appointor's or registrar's certificate grounding in themselves the right to obtain a judgment. It seems however that it was the intention of the Northern Territory legislature under s 45(2) that a determination signed by an adjudicator, and certified by the registrar as having been made by a registered adjudicator, may be simply filed in court in the same manner as a certificate from the appointer or registrar in other jurisdictions.

It is to be noted that under the Northern Territory Act, there is no provision similar to that contained in s 25(4) of the New South Wales Act.

[SOP24.100] South Australia — *"... consequences of not paying claimant the adjudicated amount ..."*

Sections 24 and 25 of the Act follow ss 24 and 25 of the New South Wales Act.

[SOP24.110] Tasmania — *"If a respondent does not pay to the claimant all of the adjudicated amount ..."*

Sections 26 and 27 of the Act follow ss 24 and 25 of the New South Wales Act.

[SOP24.120] Australian Capital Territory — *"... failure to pay adjudicated amount ..."*

Sections 26 and 27 of the Act follow ss 24 and 25 of the New South Wales Act.

25 Filing of adjudication certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

[S 25 subst Act 133 of 2002, s 3 and Sch 1[38]]

SECTION 25 COMMENTARY

Filing of adjudication

Curial review

[SOP25.50] The obtaining of a premature adjudication certificate under s 24 of the New South Wales Act

In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1, it was conceded that the adjudication certificate issued under s 24 of the New South Wales Act was obtained prematurely. Nevertheless, at [88]–[93] of his Honour's judgment, Palmer J saw no utility in setting aside the adjudication certificate, as a new one would simply follow. Consequently, in his Honour's discretion, he refused an injunction to preclude the successful party in the adjudication from proceeding with the judgment it had obtained in the District Court.

Brookhollow Pty Ltd v R & R Consultants Pty Ltd [2006] NSWSC 1 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

In *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235, Vickery J said:

> [45] In *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141; [2010] VSC 199 [71]–[114] the Court was called upon to consider the validity of a payment claim that had been served prematurely, that is before the appointed "reference date" as defined in s 9(2) of the Act. In the course of considering the issue I observed at [101]:
>
> > … under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons "who claim to be entitled" to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.
>
> [46] In the light of the authorities I have cited in these reasons, which were not referred to the Court in Metacorp, on reflection and with the benefit of full argument on the matter, I am persuaded that I was wrong insofar as it is said in that case that a payment claim, whether served prematurely before the due reference date or served on and from each reference date, must be made bona fide in order to be valid, and I decline to follow myself.

In *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141; [2010] VSC 199, it was contended that the payment claim had not been served as required by s 14(1) of the.

Vickery J noted:

> [84] As was pointed out by the Lord Chancellor in *Hope v Hope* (1854) 4 De GM & G 328; 43 ER 534 at 342 (De GM & G):
>
> > The object of all service is of course only to give notice to the party to whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done as required.
>
> [85] To like effect were the observations of *Holroyd J in Rudd v John Griffiths Cycle Co Ltd* (1897) 23 VLR 350 where his Honour, in the course of delivering a dissenting judgment of the Full Court, after referring to the common law history of personal service, went on to say (at 354):
>
> > Before the *Common Law Procedure Act 1852*, 15 and 16 Vict., c. 76 came into operation the Courts of England were in general very strict in their interpretation of what constituted personal service, but still on several occasions they declined to set aside the service where the copy of the writ had been delivered at the party's residence to a servant or relative of his and from the facts the Judge thought it fair

> to infer that it came into his hands or to his knowledge so that he did or could, if he pleased, become acquainted with its contents.
>
> [86] These passages were cited with approval by McInerney J in *Pino v Prosser* [1967] VR 835 at p 837, who observed that it would be:
>
> > … remarkable to the point of seeming absurdity, in that the defendant who, on his own affidavit admits that he received the writ … should be held not to have been served.

His Honour concluded at [114] that it was not a purpose of the Act that service of a premature payment claim should be invalid.

A similar result was achieved in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183. It is to be noted that *Seabay* appealed the court's decision but subsequently went into liquidation, and accordingly this decision is the current authority in Victoria.

In paragraph 12 of his Speech "Security of Payment Legislation in Australia, Differences between the States – Vive la Différence?", Building Dispute Practitioners Society, 12 October 2011, the Honourable Justice Peter Vickery noted:

> A common feature of the Security of Payment legislation in Australia is that an entitlement to payment of a statutory payment claim, arises only on a "reference date". In Victoria this is provided for in s 9(1) as follows:
>
> > 9. A common feature of the Security of Payment legislation in Australia is that an entitlement to payment of a statutory payment claim, arises only on a "reference date". In Victoria this is provided for in s 9(1) as follows:
> >
> > (1) On and from each reference date under a construction contract, a person-
> >
> > (a) who has undertaken to carry out construction work under the contract;
> >
> > or
> >
> > (b) who has undertaken to supply related goods and services under the contract –
> >
> > is entitled to a progress payment under this Act, calculated by reference to that date.

In paragraph 21, his Honour noted that a different approach was first taken by Macready AJ in *Beckhaus Civil Pty Ltd v Brewarrina Council* [2002] NSWSC 960 and then by Nicholas J in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [52]–[60].

In paragraphs 23 – 26, his Honour went on to say:

> 23 His Honour's analysis and conclusions in Beckhaus Civil Pty Ltd v Brewarrina Council [2002] NSWSC 960*Beckhaus* were consistent with the opinion of Heydon JA (as he then was) in *Fyntray Constructions Pty Ltd v Macind Drainage and Hydraulic Services Pty Ltd* (2002) 18 BCL 402; [2002] NSWCA 238 at [51]:
>
> > Fourthly, the two limbs of that part of the definition of "reference date" appearing in section 8(2)(a) reveal a legislative intention to permit payment claims to be made either by reference to a contractual date for making a claim (that is, under clause 42.1) or by reference to a contractual date by reference to which the amount of the progress payment is to be calculated (that is, taking into account clause 42.2). … While clause 42.1 compels monthly claims, section 8 contemplates entitlements to progress payments arising not only by reason of the dates for making claims under cl 42.1, but by reason of a date by reference to which the amount of the progress payment is to be calculated under cl 42.2, and the latter date includes periods which may be greater than the preceding month.
> >
> > [Emphasis added by underlining].
>
> (See also Hodgson JA paras 74, 75).

> 24 A similar approach was adopted by Lyons J in *F K Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2006] QSC 243 In that case, his Honour considered the Queensland *Building and Construction Industry Payments Act 2004* (Qld) in the context of the service of a payment claim before the applicable reference date. His Honour accepted that the applicant's purported payment claim was not a valid claim pursuant to the Act. It was reasoned that there is no entitlement to make a payment claim prior to the contractual reference date which was 28 June 2006 and this view was supported by the decisions of Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* and *Beckhaus v Brewarrina Council*. Accordingly it was held that the machinery under the Act for the payment of the claim could not be engaged.
>
> 25 The relevant legislation was in the same form as it is in Victoria, however, his Honour came to a different conclusion to that in *Metacorp* and *Seabay*.

However, in *Metacorp* an important difference was noted between the text of s 13(1)*Building and Construction Industry Security of Payment Act 1999* (NSW) and its Victorian counterpart s 14(1). Unlike the New South Wales legislation, the Victorian Act included as a person entitled to serve a payment claim a person "who claims to be entitled to a progress payment" in addition to a person who is so entitled. On this basis, the observations made by Nicholas J in *Walter Construction Group* to the effect that a payment claim which is served before time is invalid, was able to be distinguished.

In regard to seeking an injunction against the filing of a s 25 certificate, see [SOP25.70].

[SOP25.60] Certificate filed as judgment – whether final or interlocutory – whether leave to appeal against judgment required – s 25 of New South Wales Act

In *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd* [2011] VSCA 99, Tate JA and Hargrave AJA held that a judgment pursuant to s 16 of the Victorian Act was not final, but merely interlocutory, and as such leave to appeal was required in Victoria in an appeal to the Court of Appeal under such judgment.

At [18], their Honours held:

> I accept the submissions made on behalf of Concorp Construction. The judgment sought to be appealed from does not finally dispose of the rights of the parties to the construction contract. It provides only interim relief and may be subject to adjustment in subsequent proceedings in a court or tribunal, or in arbitral or other dispute resolution proceedings pursuant to the contract. Accordingly, the appeal as filed is incompetent. Before leaving that issue, however, I should note that in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409. Hodgson JA appeared to accept that an order granting summary judgment for the amount of a payment claim under the equivalent New South Wales legislation "would appear to finally dispose of the rights of the parties and thus not be interlocutor." In that case, an application had been made for leave to appeal. The application was treated by a three judge Court of Appeal as the hearing of the appeal. Accordingly, it was unnecessary to decide whether leave to appeal was necessary. In the circumstances, the Court granted leave to appeal and dismissed the appeal. In Queensland, the practice would appear to be that summary judgment based upon a payment claim under the Queensland equivalent of the Act is treated as interlocutory, thus requiring leave: this was the approach adopted in *T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd* [2010] QCA 381.

Where applicable, similar or mirror provisions on this issue in the other States and Territories are set out below:

Australian Capital Territory - s 27

Northern Territory – s 45

Queensland – s 31

South Australia – s 25

Tasmania – s 27

Victoria – s 28R

Western Australia – s 43

Careful attention must be paid to the exact wording of the relevant sections, more particularly those of the Northern Territory and Western Australia which follow the West Coast security of payment legislation.

[SOP25.65] Application for an injunction to preclude a New South Wales s 24 certificate – requirement of promptness

In *Coordinated Construction Co Pty Ltd v JM Hargreaves Pty Ltd* [2004] NSWSC 1206 (30 November 2004), Palmer J issued a stern warning to the profession that if an injunction was sought to prevent the filing of an adjudication certificate as a judgment for a debt, as provided for in s 25(1), the injunctive proceedings should be instituted promptly and not left to the last moment.

[SOP25.70] *"... not entitled … to challenge the adjudicator's determination ..."*

(a) The constitutional validity of s 25(4)(a)(i) – (iii)

Subsections 16(2)(a)(i) and 16(4)(b)(i) and 16(4)(b)(ii) of the Victorian Act were considered by Warren CJ, Tate and McLeish JJA in *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247. In their obiter judgment on this point and for the reasons more fully discussed in [SOP3.130] *(b)* above, their Honours concluded as follows:

> [179] In our opinion, the test articulated in the first proposition in *Victoria v Commonwealth*, as affirmed in *Telstra v Worthing*, is satisfied, namely, that ss 16(2)(a)(i) and 16(4)(b) "alter, impair or detract from" the operation of s 553C of the *Corporations Act*. Once a company has gone into liquidation, and where there are mutual dealings so that s 553C is engaged, a payment claim cannot be enforced by means of a summary judgment under s 16(2)(a)(i) of the *BCISP Act*, and there is no scope for the ousting of the cross-claims or defences under s 16(4)(b) of the *BCISP Act*.
>
> [180] We consider that s 16(2)(a)(i) and ss 16(4)(b)(i) and 4(b)(ii) of the *BCISP Act* are inconsistent with s 553C of the Corporations Act and are invalid to the extent of the inconsistency.

Their Honours' observations may well apply to the question of the constitutional validity of s 25(4)(a)(i)–(iii) above, and it is submitted that they do.

(b) Generally

The provisions of s 25(4)(a)-(b) of the NSW Act have been held by Master Macready (as his Honour then was) in *Max Cooper v Booth* (2003) 47 ACSR 696; 202 ALR 680; [2003] NSWSC 929 to apply only to proceedings actually brought to set aside a judgment debt and not where, in separate proceedings, a plaintiff seeks to set aside a statutory demand made in respect of such debt. Master Macready's decision in that regard has been followed by Brereton J in *Re Douglas Aerospace Pty Ltd* (2015) 294 FLR 186; [2015] NSWSC 167 at [70]. See also *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186; *New South Wales Netball Association Ltd v Probuild Construction (Aust) Pty Ltd* [2015] NSWSC 1401 at [20] per Ball J.

At [61] of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, Hodgson JA noted that a judgment based on a void adjudication was not in itself void, but where the adjudication was void, an application to set aside the judgment could be made on the basis that, in truth, there was no determination. His

Honour noted that such an application would not be contrary to the provisions of s 25(4)(a)(iii) and that the court in which the judgment is recovered may deal with any such application on its merits.

His Honour also noted, at [60], that the same applied, not only in respect of the adjudication but in respect of any judgment based thereon, where the determination had been procured by the fraud of the claimant in which the adjudicator was not involved.

The point that the builder was not licensed cannot be taken at this stage of the proceedings.

At [9] of *Cant Contracting Pty Ltd v Casella* [2006] QSC 242, de Jersey CJ said:

> Mr Burnett rightly conceded that had the defendants wished to rely on the absence of the requisite licence in response to the plaintiff's claim, as made in its "payment claim" under s 17 of the *Building and Construction Industry Payments Act 2004* (Qld), the defendants could have done so in a "payment schedule" under s 18. The issue is whether, the defendants' having failed to deliver a payment schedule, the defendants can resist the plaintiff's apparent right to judgment under s 19(2)(a) by subsequently raising the licensing issue; in other words, whether the ultimate operation of the mechanism established by the *Building and Construction Industry Payments Act 2004* (Qld) is to be read as subject to a supervening qualification arising from s 42 of the *Queensland Building Services Authority Act 1991* (Qld).

The *Brodyn* judgment above preceded *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1 and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190. In the light of these two cases, Hodgson JA's judgment above cannot stand. Very simply, if the adjudication is void, nothing that follows it is valid: see further *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2010] NSWSC 1367.

By a majority of Macfarlan JA and Tobias AJA, with Basten JA dissenting, the appeal against McDougall J's decision, at first instance in this matter, was dismissed with costs: see *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399.

For a discussion on Macfarlan JA's decision, in which Tobias AJA concurred, see [SOP25.570].

But what is the position in those States and Territories which have not or will not follow *Chase Oyster Bar*, where there has been an excess of jurisdiction. Apparently on the authority of *Brodyn* the answer is no. What an unsatisfactory and harsh conclusion. It is to be hoped that *Chase Oyster Bar* will be followed throughout Australia.

(c) Jurisdictional error and where an adjudicator acts in excess of his/her jurisdiction

Commentary on this can be found at [SOP22.265].

(d) "... is required to pay into court as security the unpaid portion of the adjudicated amount ..." – s 25 of the New South Wales Act

Subsequent to judgment having been entered under s 25(1) of the New South Wales Act and without seeking to set that judgment aside, and without providing security under s 25(4)(b) by paying the unpaid portion of the adjudicated sum into court, in *Jem Developments Pty Ltd v Hansen Yuncken Pty Ltd* (2006) 68 NSWLR 100; [2006] NSWSC 1087, Jem Developments sought a declaration that the judgment was a nullity. The builder moved to have the employer's summons seeking a nullity set aside by reason of the failure to provide security under this subsection. The builder's counsel submitted that on a purposive construction of s 25(4)(b), its provisions could not be bypassed by an applicant seeking a nullity declaration. Einstein J, after referring to the matters underpinning s 32 of the Act, and for which see [SOP32.50] ff, rejected the challenge and refused to set aside the judgment.

(e) The availability of certiorari to challenge an adjudicator's adjudication on the ground that it is void for an excess of jurisdiction in NSW – pre Kirk v Industrial Relations Commission of New South Wales and Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd

There are a number of decisions in support of the principle that, under s 69(1) of the *Supreme Court Act 1970* (NSW), that court has power to set aside an adjudicator's adjudication for jurisdictional error, on the basis that the adjudicator's adjudication is amenable to judicial review, specifically, relief akin to *certiorari* under s 69 of the *Supreme Court Act 1970* (NSW).

In McDougall JA's paper delivered to the LexisNexis 5th Annual Construction Law Review, Singapore, November 2004 *Judicial Interference with Determination of Adjudicators Made Under the Building and Construction Industry Security of Payment Act 1999 (NSW)* (Singapore Construction Law Paper) at [1], his Honour observed:

> It was thought until recently that relief in the nature of *certiorari* would lie against the determination of an adjudicator made under the *Building and Construction Industry Security of Payment Act 1999* ("the Act") on the grounds of denial of natural justice, jurisdictional error of law on the face of the record, or fraud: *Musico v Davenport* [2003] NSWSC 977; *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027; *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140. Indeed, that position was so well established (by a series of first instance decisions of which those referred to are a relatively small proportion), that in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* (2004) 20 BCL 276; [2004] NSWSC 116 (4 March 2004), Barrett J noted at [4] that the defendant conceded that the relevant power "had been exercised in so many analogous instances … that there was no real point in its seeking to make submissions on the matter".

All of the decisions holding that a remedy akin to *certiorari* on the basis of jurisdictional error on the part of the adjudicator would, in appropriate circumstances, be available, have now been swept away in New South Wales by two decisions of the New South Wales Court of Appeal, *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004) and *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004), and are dealt with more fully below.

In para 2 of the Singapore Construction Law Paper, McDougall J said:

> That received wisdom has been overturned by two recent decisions of the Court of Appeal: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395. In those decisions, the Court of Appeal held that relief in the nature of *certiorari* would not lie against the determination of an adjudicator that was vitiated by jurisdictional error of law on the face of the record, or by denial of natural justice. The court held that where a determination was void, or vitiated by fraud or denial of natural justice, the appropriate relief was by way of injunction and declaration. Further, the Court of Appeal has outlined (although apparently not in an exhaustive way) the circumstances that will make a determination void.

The case of *Musico v Davenport* [2003] NSWSC 977 (31 October 2003) and other cases which followed it, viz, *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* [2003] NSWSC 1019 (6 November 2003); *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027 (14 November 2003); *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003); *Transgrid v Walter Construction Group* [2004] NSWSC 21 (6 February 2004); *Transgrid v Siemens Ltd* [2004] NSWSC 87 (25 February 2004); *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2004] NSWSC 85 (25 September 2003) and *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 (3 December 2003), have been held to be incorrect to the extent to which it was held that relief in the nature of *certiorari* could be granted to quash an

adjudication which was not void. The Court of Appeal held that if an adjudication was void because of the non-satisfaction of some pre-condition made essential by a provision of the Act, such a determination was void and relief was available by way of a declaration and injunction.

At first instance, in *Brodyn*, Dasein (the Builder) was the successful party in the adjudication in which it was determined that Brodyn (its principal) owed it $180,059 in respect of a particular payment claim.

Dasein, armed with an adjudication certificate, obtained judgment in the District Court pursuant to s 25 of the Act.

Gzell J, who heard an application by Brodyn for relief in the nature of prerogative relief, held that the decision of the adjudicator was tainted by reviewable error, but took the view that the judgment, having been obtained pursuant to s 25, barred Brodyn from an attack on the adjudication.

The Court of Appeal in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004), Hodgson JA, and with whom Mason P and Giles JA concurred, held that Gzell J's judgment was affected by error. Their reasoning process was that the adjudication certificate, an essential step in obtaining judgment, could not, under s 23, have been obtained or issued until 5 business days after the service of the adjudication determination. In fact, it was issued the day after the determination. The Court of Appeal unanimously concluded that this fact would be a ground for setting aside the judgment in the District Court. Their Honours went on to hold that if the judgment was set aside, then the fact that the determination had been quashed or declared void, would preclude the obtaining of another judgment and, even in the absence of such a remedy, Brodyn could seek to set aside the judgment on the ground that there never was a determination.

These matters were dealt with by Gzell J at [38]–[42] as follows:

> [38] In my opinion, there was error by the primary judge … If the determination was quashed by the Supreme Court, or declared by the Supreme Court not to be an adjudicator's determination within the meaning of the Act, this could have substantial utility.
>
> [39] Under s 24 of the Act, a claimant may request the nominating authority to provide an adjudication certificate, if the respondent fails to pay any part of the adjudicated amount in accordance with s 23, that is, within a time that is at least five business days after service of the determination. In this case, the adjudication certificate was issued the day after the determination was made, and thus was irregularly issued; and this in turn meant that the ex parte injunction obtained on 23 October 2003 was ineffective because the adjudication certificate had already been filed as a judgment.
>
> [40] In my opinion, this irregularity could be a ground for setting aside the judgment: plainly, such a judgment can be set aside on appropriate grounds, whether this be considered as being authorised by rules of court allowing for the setting aside of judgments obtained in the absence of the other party, or implied by s 25(4) itself. If the judgment were set aside, the fact that the determination had been quashed or declared void would preclude the obtaining of another judgment by subsequent compliance with the requirements of ss 24 and 25. Accordingly, such an order would have utility.
>
> [41] Further, in my opinion an order of the Supreme Court quashing the determination or declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator's adjudication within s 25(4): this wording assumes that there is a determination which is challenged.
>
> [42] Indeed, even in the absence of such an order quashing the determination or declaring it void, the respondent could in my opinion seek to have the judgment set

> aside on the ground that there never was a determination. If for example a respondent could show that the document that was filed as being an adjudicator's determination was a forgery, that would not be challenging the adjudicator's determination. Similarly, in my opinion, if the respondent could show that for some other reason recognised in law a purported adjudicator's determination did not amount to an adjudicator's determination within the meaning of the Act, that would not be challenging an adjudicator's determination: this, as indicated above, assumes that there is such a determination to be challenged. Conceivably, the availability of that remedy could itself be a ground for refusing relief in the Supreme Court, on the basis that the same matter could more conveniently be relied on in an application to set aside the judgment; but that was not a matter relied on by the primary judge.

As Gzell J's discretion had miscarried, it was open to the Court of Appeal whether to grant or refuse relief or whether to remit the matter.

The judgment in *Brodyn* was delivered on the same day as the judgment in *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004).

For better or for worse, whilst *Brodyn* stood intact, the New South Wales Court of Appeal definitively answered the question "what errors vitiate an adjudicator's determination?"

In *Brodyn*, the Court of Appeal said at [51]–[57]:

> [51] I agree with McDougall J that the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss 3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss 3(3), 25(4). The remedy provided by s 27 can only work if a claimant can be confident of the protection given by s 27(3): if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s 27 would be prohibitive, and s 27 could operate as a trap.
>
> [52] However, it is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of *certiorari*.
>
> [53] What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:
>
> 1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).
> 2. The service by the claimant on the respondent of a payment claim (s 13).
> 3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).
> 4. The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and 19).
> 5. The determination by the adjudicator of this application (ss 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).

[54] The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

[55] In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390–91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf *R v Hickman; Ex parte Fox* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.

[56] It was said in the passage in *Anisminic* quoted by McDougall J that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 at 177 the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s 22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s 22(2), especially in paras (b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant, if not contained in the adjudication application (s 17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss 20(1), 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered. To that extent, I disagree with the views expressed by Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003).

[57] The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by

> these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity. On this basis, I agree with the result reached in *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66; *Durayappah v Fernando* [1967] 2 AC 337; [1967] 2 All ER 152; *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 at 233; *Calvin v Carr* [1980] AC 574 at 589–90; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 at 630–34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void.

Hodgson JA, at [30] of *Transgrid* on appeal to the Court of Appeal, reaffirmed what was said in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* [2003] NSWSC 1019.

In regard to jurisdictional facts, see the discussion in [SOP23.80].

In her article, "The application of administrative law standards to the Security of Payment Act" (2006) 22 BCL 162, Julia Murray, at 166, says:

> The grounds upon which *certiorari* will issue are: jurisdictional error; breach of natural justice; fraud; and error of law on the fact of the record.
>
> While the first three grounds represent fundamental flaws sufficient to invalidate a decision, the fourth operates as an exception and is commonly referred to as a form of "illegality falling short of invalidity", see Aronson et al, n 22, pp 166–168, or non-jurisdictional error, see Shaw JW and Gwynne FJ, "*Certiorari* and Error on the Face of the Record" (1997) 71 ALJ 356 at 357. It has therefore been carefully defined to ensure that review of what is essentially authorised public conduct is restricted to serious errors warranting judicial intervention, see, eg *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338 at 352; [1952] 1 All ER 122; *R v Tennant; Ex parte Woods* [1962] Qd R 241 at 258. Hence, the requirement for the court to restrict itself to those materials constituting "the record" when reviewing decisions under this ground: *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 at 176. See also Creyke and McMillan, *Control of Government Action: Text, Cases and Commentary* (Butterworths, 2005), n 21, p 811.
>
> The distinction between jurisdictional and non-jurisdictional error has assumed primary importance in the case law relating to the Act. However, the distinction has proved somewhat elusive, with the scope of jurisdictional error alternating between broad and narrow archetypes. The "narrow notion" of jurisdictional error espouses that only a failure to satisfy a "condition precedent" to the exercise of a decision-maker's jurisdiction will amount to a jurisdictional error, Hotop SD, *Principles of Australian Administrative Law* (6th ed, Lawbook Co., 1985), n 21, p 248. Under the "broad notion", errors made after the conditions precedent have been satisfied may be jurisdictional, Hotop, n 21, p 255. In general, recent decisions have favoured the broad notion, with the High Court in *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 at 179 stating that jurisdictional error will occur where:
>
> > [A]n administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion.

In *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* (2005) 22 BCL 426; [2005] NSWSC 545 (16 June 2005) (Technology and Construction List), Master Macready (now Macready AsJ) dealt with the word "substantial" referred to at [55] of Hodgson JA's judgment in *Brodyn*, at [24] of *Reiby* as follows:

> [24] In argument it was suggested that the use by his Honour of the word "substantial" inserted some quantitative notion into the extent of any apprehended bias. There is some suggestion that not all the rules of natural justice will lead to a remedy. See *Aronson on Judicial Review* Third Edition p 457. That may be the case with some of the rules as to natural justice. However, I would have thought that in the case of apprehended bias either one would conclude that it would exist in accordance with the test to which I am about to refer or that it did not.

It is appreciated that there are substantial differences between the English and Australian legislation, but it is interesting to note that, in England, courts may be developing a more interventionist approach to the process of enforcement of an adjudicator's decision by characterising adjudicator's errors as jurisdictional matters. This approach is completely at odds with *Brodyn*, see cases such as *C & B Scene Concept Design Ltd v Isobars Ltd* [2002] BLR 93; [2002] EWCA Civ 46 (20 June 2001).

Apparently on the authority of *Brodyn*, as applied by McDougall J in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 21 BCL 312; [2005] NSWSC 77, discussed at [SOP5.60], if there is an exercise (quite wrongly) of a purported jurisdiction by an adjudicator, the answer is "so what, you have to live with that – that is the intent and purpose of the Act". That conclusion brought about harsh and disastrous consequences.

An appeal to the Court of Appeal in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 21 BCL 312; [2005] NSWSC 77 *sub nom Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 (13 July 2005) was dismissed with costs.

At [19] of *Over Fifty Mutual Friendly Society Ltd v Smithies* [2007] NSWSC 291, Einstein J provided the following useful summary of the grounds that are available in New South Wales for challenging an adjudicator's adjudication:

i. It is now settled law that the Act excludes the availability of judicial review on the basis of non-jurisdictional error of law: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [51].

ii. Of the five essential requirements identified by the Court of Appeal in *Brodyn* at [53] only one is relevant – the existence of a construction contract to which the Act applies. In addition, what is required for a valid Adjudication Determination is a bona fide attempt to exercise the Adjudicator's power and no substantial denial of the measure of natural justice afforded by the provisions of the Act: *Brodyn* at [55] and [57].

iii. A mere failure by the Adjudicator through error to consider a provision of the Act, the contract or a submission does not invalidate the Adjudication Determination: *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19 at [54] and [55]. There Hodgson JA observed that an omission by the Adjudicator to consider a submission could not even conceivably justify a finding that the Adjudicator did not make a bona fide attempt to exercise the relevant power: *John Holland* at [58].

iv. An Adjudicator is required to make a determination within the parameters of the payment claim, but the determination of the parameters of the payment claim is a matter for the Adjudicator and a reasonable but erroneous decision does not invalidate the Adjudication Determination: *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49.

[Subparagraphs v and vi are not relevant to this issue.]

The useful gloss on *Brodyn* was articulated by Brereton J in *Fifty Property Investments Pty Ltd v O'Mara* (2007) 23 BCL 35; [2006] NSWSC 428, where his Honour, at [4], said:

> [4] In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, I expressed the view that *Brodyn* was correctly to be understood as

> saying that mere error of fact or law, including in the interpretation of the Act or contract, does not invalidate an adjudicator's determination, and endeavoured to explain that although Hodgson JA eschewed the terminology of jurisdictional error – at least in the context of when non-compliance with what his Honour called the "more detailed requirements", as distinct from the "basic and essential requirements", would result in invalidity – the concept of jurisdictional error remains a useful one in identifying which requirements were intended to be essential pre-conditions to a valid determination, since traditionally jurisdictional error results in the decision being void, and, although the Act contains no privative clause, *Brodyn* limits the availability of judicial review to decisions which are void (*Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2006] NSWCA 125, [45]–[51]).

In *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd* [2007] NSWSC 1340, Berem sought a declaration that the adjudication determination was void, in that there was no evidence of any contract between the plaintiff and the defendant. At [26] of her Honour's judgment, she said:

> [26] The Adjudicator was invited effectively not to proceed with the Determination because of the plaintiff's claim that it was not a party to a construction contract. In determining the existence of such a contract, the Adjudicator did not refer to the correspondence, that I have referred to, in any specific way. Indeed, it would appear that some of the correspondence (that dated 17 January 2007) may not have been before the Adjudicator.

This judgment seems to run contrary to all other decisions of the New South Wales courts to the effect that an adjudicator has the power to determine his/her own jurisdiction and provided that determination is made in good faith, it is not subject to judicial review.

In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [58], Hodgson JA said:

> [58] In each of those cases, natural justice was denied because submissions duly made were wholly disregarded, rather than, as in this case, being addressed and considered irrelevant. Further, it appears that in *Firedam* the adjudicator, having decided the respondent's submissions should be disregarded, simply adopted the amount specified by the claimant in the payment claim. If so, that would be a failure to perform the task required of determining the amount of the progress payment (if any) to be paid, having regard to the consideration in s 22(2): see *Minister for Commerce v Contract Plumbing NSW Pty Ltd* [2005] NSWCA 142 at [33]–[37]; *John Holland* at [45]–[50]; *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 at [26]–[27].

As pointed out in [SOP4.50], although an adjudicator is not a court, an adjudicator is nevertheless amenable to *certiorari*. As observed by Vickery J at [18] of *Director of Housing of the State of Victoria v Structx Pty Ltd (t/a Bizibuilders)* [2011] VSC 410, an adjudicator appointed under the Act is exposed to fall into jurisdictional error in a broader range of circumstances than a court.

Vickery J, in the written version of his Speech - *Security of Payment Legislation in Australia, Differences between the States – Vive la Différence?*, Building Dispute Practitioners Society, 12 October 2011, addressed the conflicting approaches to this question in the Australian Courts in various States and Territories.

His Honour's comments begin at paragraph 49 of his Speech. In paragraphs 50 – 51, his Honour said:

> 50 In Victoria, the obiter in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 was confirmed in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426 to the effect that – "relief in the nature of *certiorari*, on all of the grounds available under the

writ, including error on the face of the record, is not excluded either expressly or by implication under the Act in Victoria."

51 In so doing, the New South Wales Court of Appeal decision in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 was not followed. What gave rise to a departure from an authority of such standing, particularly in the light of the desirable goal of achieving uniformity with similar interstate legislation?

His Honour added in paragraphs 59 – 61, the following:

59 However, the Court in *Grocon (No 2)* found itself compelled to take a different course after undertaking a close examination of the Victorian Act and relevant provisions of the Victorian Constitution reflected in the *Constitution Act 1975*, insofar as it makes provision for the powers and jurisdiction of the Supreme Court. The Victorian Act expressly refers to s 85 of the *Constitution Act 1975* in relation to two of its provisions.

Section 51 of the Act provides for the required constitutional s 85(5)(a) references in two instances where the jurisdictional power of the Supreme Court has been qualified.

60 Critically, there is no reference in the Victorian Act to altering or varying s 85 of the Constitution Act in relation to any other matter, including the grant of relief by way of *certiorari*. It followed, in the opinion of the Court, that no implication could arise in construing the Act which had this effect.

61 Accordingly, it was determined in *Grocon (No 2)* that it was not the intention of the Legislature to limit the Court's jurisdiction by excluding or restricting judicial review by the Court, whether by *certiorari* or otherwise, of a determination of an adjudicator under the Act.

An extremely useful analysis of the effect of *Kirk* on *Brodyn* is contained in paragraphs 66 – 69, where his Honour said:

66 On 24 September 2010, the New South Wales Court of Appeal handed down its decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190. The Court was called upon to decide whether, in light of the decision of the High Court in *Kirk* the decision in *Brodyn* should not be followed or was incorrectly decided so far as it held that:

(a) the Supreme Court of New South Wales was not required to consider and determine the existence of jurisdictional error by an adjudicator in reaching a determination under the Act;

(b) an order in the nature of *certiorari* was not available to quash or set aside a decision of an adjudicator under the Act;

(c) the Act expressly or impliedly limited the Supreme Court of New South Wales's power to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the Act.

67 The importance of *Kirk* lies in the centrality afforded to the distinction between jurisdictional and non-jurisdictional error as identified by the High Court in *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58. As observed in *Chase Oyster Bar* [at 29]:

> [Kirk] has given this distinction a constitutional dimension in State law, to the same general effect as had earlier been established for Commonwealth law. That has placed this distinction at the centre of Australian administrative law jurisprudence, in a manner which is not consistent with the reasoning in *Brodyn*, on one view of that reasoning.

68 In *Chase Oyster Bar* the Court of Appeal returned to the position as it was before Brodyn (on one view of this case) in relation to setting aside an adjudicator's determination on the ground of jurisdictional error. It is now clear

that *certiorari* now runs in New South Wales to achieve this outcome. The challenge remains in that State to determine what in each case constitutes jurisdictional error?

69 On the other hand, in Victoria the position remains that *certiorari* is available as a remedy for both jurisdictional error and error on the face of the record.

In regard to the consequences of the adjudicator exceeding his/her jurisdiction, see the discussion at [SOP25.510].

In respect of the *certiorari* remedy in Western Australia, Pritchard J held in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304 as follows:

> [82] The third consideration is the nature of the decision-maker required to undertake the task of determining whether the criteria in s 31(2)(a) are met. The CC Act does not make express provision in relation to an adjudicator's jurisdiction to authoritatively determine the questions of law, or mixed law and fact, which may arise in relation to whether the criteria in s 31(2)(a) are met in a given case. However, in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*, Beech J concluded that the nature and effect of an adjudication under the CC Act, having regard to the scheme of the CC Act as a whole, supported the conclusion that an adjudicator has authority to decide questions of law authoritatively and wrongly, and that an adjudicator was therefore more analogous to an inferior court. In *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd*, Corboy J agreed with that conclusion. So, too, did Murphy JA (with whom Martin CJ agreed) in *Perrinepod*. I also respectfully agree with that characterisation for the reasons given by Beech J.
>
> [83] The fact that an adjudicator under the CC Act is analogous to an inferior court provides some support for the conclusion that the Parliament did not intend that the jurisdictional fact in s 31(2)(a)(ii) would be a jurisdictional fact in the "narrow" sense.
>
> [84] In my view, the criterion in s 31(2)(a)(ii) of the CC Act should not be characterised as a jurisdictional fact in the "narrow" sense. For present purposes, therefore, the question is not whether the criterion in s 31(2)(a)(ii) in fact existed. Rather, the focus is on the conclusion drawn by the Adjudicator that the criterion in s 31(2)(a)(ii) was met, and on the process by which the Adjudicator came to that conclusion.

As held by Refshauge J in *Steel Contracts Pty Ltd v Simons* [2014] ACTSC 146, despite the conditions of s 43 of the Australian Capital Territory Security of Payment Act, a court has power to grant prerogative relief in respect of an adjudication decision within the Act, for example, an order in the nature of *certiorari*. His Honour referred to the detailed reasons given for this by Master Mossop at [26]-[29] of *Pines Living Pty Ltd v O'Brien* [2013] ACTSC 156.

Refshauge J, relying on the decision of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; held that the existence of a construction contract between the claimant and respondent was an essential condition for an arbitrator's determination.

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At [47] of *Steel Contracts*, his Honour added:

In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, the court held that the adjudication determination of an adjudicator under the NSW equivalent Act to the Security of Payment Act is amenable to orders in the nature of *certiorari* for jurisdictional error and that the pre-conditions to such a determination are jurisdictional facts that, despite the statutory limitation on review of

the determination, may be reconsidered by the Court on application for prerogative review. See also *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426; at 194; [78].

For the position in the other States and Territories, see Western Australia [SOP25.740], Queensland [SOP.750], Northern Territory [SOP25.760], South Australia [SOP25.770], Tasmania [SOP25.780] and the Australian Capital Territory [SOP25.790].

(f) Some criticisms of Brodyn and Transgrid

Their Honours, in the Court of Appeal in *Brodyn* and *Transgrid*, clearly intended to lay down simplified and easily applied guidelines for permissible curial review of an adjudicator's adjudication. There are however a number of problems that present themselves, and for that reason, it is hoped that the judges in the other States and Territories where mirror legislation has been adopted, or the High Court, should a New South Wales case end up in that jurisdiction, will not follow and/or will set aside the *Brodyn* and *Transgrid* principles. The difficulties and problems are as follows:

As set out at [SOP25.70], the Court of Appeal, at [53], of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004), listed five basic and essential requirements for the validity of an adjudication, but made it clear that that list may not be exhaustive. Their Honours clarified this holding to the extent that it was not every non-compliance which amounted to jurisdictional error. The test was whether, on a proper construction of the relevant statutory provision, a particular legislative requirement is an essential pre-condition for the making of a valid adjudication determination, see, in particular, the extract of [55]–[57] of the *Brodyn* judgment above.

At [58] and [59] of *Brodyn*, Hodgson JA applied his Honour's mind to the question of whether an adjudication that was infected by a defect, but not void, could be made the subject of an order in the nature of *certiorari*. He said that it could not. For the sake of ease of convenience, [58] and [59] are set out below:

> [58] The question then is whether there is available a remedy in the nature of *certiorari*, in circumstances where the determination is not void by reason of defects of the kind I have been discussing. In my opinion it is not, because the availability of *certiorari* in such circumstances would not accord with the legislative intention disclosed in the Act that these provisional determinations be made and given effect to with minimum delay and minimum court involvement; and because it is by no means clear that an adjudicator is a tribunal exercising governmental powers, to which the remedy in the nature of *certiorari* lies.
>
> [59] For these reasons, I disagree with the view expressed in *Musico* and the cases which followed it, to the extent that they hold that relief in the nature of *certiorari* is available to quash a determination which is not void.

The determination of what is or what is not an essential pre-condition for the existence of a valid adjudication is still an open question, and rather than the Court of Appeal's judgments in *Brodyn* and *Transgrid* answering this question, the judgments are in fact an open invitation to further litigation.

The problem that arises is how a court determines whether or not fraud has taken place. Why should fraud be dealt with on a different basis than bias, or a perception of bias?

Brodyn and *Transgrid* do not exclude all judicial intervention. They hold that such intervention by declaratory and injunctive relief, rather than by prerogative relief, is the appropriate method of curial review.

As pointed out by McDougall J, at [24] of his Singapore Construction Law Paper:

> The practical effect of this is questionable, since (as the decisions indicate) the real question is not so much the head of power by which relief is granted, but the basis upon which (howsoever styled and formulated) it may be granted.

If jurisdictional error gives rise in most administrative law cases generally to the determination being void, it is difficult to see why that principle of law does not obtain with equal force in the context of seeking a curial remedy against an adjudicator's adjudication.

In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 (13 July 2005), the majority refused leave to re-argue *Brodyn*. However, Basten JA, in his Honour's minority judgment at [49]–[52] said:

> [49] For my part, I am not persuaded that there are grounds to give leave to re-argue the first question identified above; but in any event, for reasons already given, even if *certiorari* could issue for error of law on the face of the record, it would not issue in this case. I would not give leave in this case to re-argue *Brodyn*.
>
> **Possible error of primary judge**
>
> [50] Before concluding, I wish to note what I believe may be an important error in the judgment of the primary judge, not bearing on the outcome of the case. In the second half of [51] of his judgment, the primary judge said this:
>
> > An adjudicator is bound to consider the provisions of the Act, the provisions to the construction contract, the payment claim and payment schedule and submissions made by the claimant and respondent respectively and the results of any inspection: s 22(2). It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process. The adjudicator would be bound to determine the matter on the basis of the material to which she or he could properly have regard; and if the adjudicator decided that all the reasons advanced by the respondent were invalid, the adjudicator would determine the amount of the progress payment in favour of the claimant.
>
> [51] That passage could be read as asserting that, if a respondent to a payment claim does not raise any relevant grounds for denying or reducing the progress claim made by the claimant, then the adjudicator automatically determines the progress claim at the amount claimed by the claimant. My tentative view is that such an assertion would be incorrect.
>
> [52] The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [33]–[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.

In the result, his Honour was correctly, with respect, persuaded that *Brodyn* should be reconsidered.

In *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941, Hammerschlag J, at [30], provided a very useful summary of the relevant principles governing judicial review of an adjudicator's determination in New South Wales. Because of the extreme usefulness of the list of grounds provided by his Honour, notwithstanding their length, they are for their usefulness and ease of reference, set out below:

a. the Act seeks to facilitate speedy resolution of claims to progress payments without excessive formality or intervention by the court and the scope for invalidity for non-jurisdictional error is limited: *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 at [81];

b. an adjudicator's determination is reviewable for jurisdictional error where the determination is not a determination within the meaning of the Act because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; [2004] NSWCA 395 at 539 (NSWLR);

c. whether a failure by an adjudicator to meet a requirement imposed by the Act makes the determination void depends on whether that requirement was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination: *Transgrid v Siemens Ltd* at 539 to 540; *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* at 441;

d. the existence or otherwise of essential pre-conditions to a valid claim, as well as determination of the parameters of the payment claim, are matters for the adjudicator, not for objective determination by a court: *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238; *Downer Construction (Australia) Pty Ltd v Energy Australia;*

e. an erroneous decision by an adjudicator that an essential pre-condition has been satisfied, when in truth it has not, can be a jurisdictional error making the determination reviewable. When there is present such jurisdictional error the determination is void and relief by way of declaration and injunction is available: *Transgrid v Siemens Ltd* at 539;

f. ss 13, 17, 18, 19, 21 and 22 of the [New South Wales] Act contain certain basic requirements as well as more detailed requirements. The legislature did not intend exact compliance with all of the more detailed requirements to be essential to the existence of a determination. What was intended to be essential was compliance with the basic requirements, a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to that power, and no substantial denial of the measure of natural justice that the Act requires to be given: *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* at 442; *Transgrid v Siemens Ltd* at 540;

g. if the basic requirements of the Act are not complied with, or if a purported determination lacks a bona fide attempt by the adjudicator to exercise the relevant power, or if there is a substantial denial of the measure of natural justice required, a purported determination will be void because then there will not be satisfaction of a requirement that the legislature has indicated to be essential to the existence of a determination: *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* at 442; *Transgrid v Siemens Ltd* at 540; *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* [2006] NSWSC 375 at [73]–[75]; *Lansky Constructions Pty Ltd v Noxequin Pty Ltd (in liq) t/a Fyna Formwork* [2005] NSWSC 963 at [20]; *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [90]–[92];

h. the requirement of good faith is not a reference to dishonesty or its opposite but to the necessity for there to have been an effort to understand and deal with the issues in the discharge of the statutory function: *Timwin Construction Pty Ltd v Facade Innovations Pty Ltd* (2005) 21 BCL 383; [2005] NSWSC 548 at [38];

i. an adjudicator is only required to consider submissions which are "duly made" under s 22(2)(d) [of the New South Wales Act]. A submission which is included in an adjudication response contrary to the requirements of s 20(2B) of the Act is not duly made within s 22(2)(d), although it could be duly made if made in response to a request under s 21(4)(a) or in a conference by an adjudicator under s 21(4)(c): *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* (2007) 23 BCL 205; [2007] NSWCA 19 at [31] and [51];

j. s 14(2) [of the New South Wales Act] provides that the payment schedule must identify the payment claim to which it relates and must indicate the amount of the payment (if any) that the recipient of the payment claim proposes to make. Section 14(3) requires the respondent to indicate why payment in full is withheld and the reasons for doing so. The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication under the Act ensues: *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391 at [45];

k. both ss 22(2)(c) and (d) make reference to "submissions (including relevant documentation)". The parenthesised words show that the legislature had in mind that the word submissions was not to be construed narrowly and that the submissions may include relevant documentation in support: *Austruc Constructions Ltd v ACA Developments Pty Ltd* [2004] NSWSC 131 at [68]–[69];

l. under s 22(2) the adjudicator is required to consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission is not sufficient to invalidate the determination. This is either because an accidental or erroneous omission does not amount to a failure to comply with s 22(2) so long as the specified classes of consideration are addressed or because the intention of the legislature cannot have been to invalidate the determination for this kind of mistake: *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* at [55]; and

m. the legislature entrusts to the adjudicator the role of determining whether submissions are or are not duly made and if the adjudicator addresses that question and comes to the conclusion that a submission was not duly made, a failure to take account of that submission is not a failure to afford the measure of natural justice contemplated by the Act: *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* at [63] and [71]; *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229.

At [31] of the judgment, his Honour correctly, with respect, said that the application of these principles to the circumstances of any given case, involved matters of fact and degree and that was not a simple exercise.

At [33] of *Trysams*, his Honour said:

> It is accordingly necessary to consider the nature, gravity and effect of the errors, if any, made by the adjudicator, and to assess, in the context of the purpose and operation of this particular statute, whether the adjudicator breached a basic and essential requirement of the Act by not considering submissions duly made or by failing to make a bona fide attempt to exercise his powers under the Act, or whether the plaintiff was denied natural justice to a degree sufficient to void the adjudication.

Trysams was referred to with approval by Ann Lyons J at [116] – [120] of *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2012] QSC 373.

The question might well be asked whether the judgment of Emmett AJA in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770 has somehow put a dent in the *Brodyn/Transgrid* thinking. See the discussion in subparagraph ***(u)*** below. At [19] of *Maxcon Constructions P/L v Vadasz & Ors (No 2)* [2016] SASC 156, Stanley J noted that there was no comparative section to s 69 of the *Supreme Court Act 1970* (NSW) in the *Supreme Court Act 1935* (SA) or in the rules. At [20], his Honour noted:

> It was the operation of s 69 that was central to the reasoning of the court in *Probuild* in holding that judicial review was available to quash a determination by an adjudicator infected by a non-jurisdictional error of law. The absence of an equivalent provision in South Australia renders inapplicable in this State the reasons in *Probuild* for concluding that non-jurisdictional error of law, except error of law on the face of the record, is amenable to judicial review.

At [22], his Honour added:

> I also agree with the reasoning of McDougall J in *Musico v Davenport* [2003] NSWSC 977 at [54] and Hodgson JA in *Brodyn Pty Ltd v Davenport & Anor* [2004] NSWCA 394; (2004) 61 NSWLR 421 at 440 – 441, with whom Mason P and Giles JA agreed, that the scheme of the Act contraindicates the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with a minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise. The procedure contemplates a minimum of opportunity for court involvement. The remedy provided by s 28 which permits a claimant to suspend work is only effective if a claimant can be confident of the protection given by that section. If the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, the risks involved in acting under s 28 would be prohibitive and s 28 could operate as a trap.

It appears from [23] of Stanely J's judgment that his Honour differed from Emmett AJA's view on this point in *Probuild* above. His Honour noted:

> While Emmett AJA in *Probuild* was of a different view, the analysis of Hodgson JA was adopted by Mason P and Giles JA in *Brodyn*. Subsequently, the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 revisited the correctness of the judgment in *Brodyn* in light of the High Court's reasons in *Kirk* and while it reversed the conclusion in *Brodyn* that determinations by adjudicators are not amenable to judicial review for jurisdictional error, the Court of Appeal did not criticise the conclusion in *Brodyn* that judicial review would not lie for non-jurisdictional error of law on the face of the record.

(g) Subsequent decisions indicating the NSW judicial trend

In *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151, McDougall J, in an ex tempore judgment delivered on 26 November 2004 and revised on 29 November 2004, held that a failure to comply with s 22(4) should not be added to the list of matters that were essential preconditions for the existence of a valid adjudication:

> (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:
>
> (a) the value of any construction work carried out under a construction contract; or
>
> (b) the value of any related goods and services supplied under a construction contract;
>
> the adjudicator (or any other adjudicator) is, in any subsequent adjudication

> application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

Rothnere was cited with approval by Mullins J in *ACN 060 559 971 v O'Brien* [2008] 2 Qd R 396; (2007) 23 BCL 421; [2007] QSC 91 (19 April 2007) at [34], where his Honour concurred with the view expressed by McDougall J in *Rothnere* in the construction of s 22(4) of the NSW Act, and which he applied to the comparative section of the Queensland Act.

In *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801 (5 August 2005), McDougall J, at [27], held that the determination of the question as to whether or not the payment claim was served within the period determined by or in accordance with the terms of the construction contract was a matter for the adjudicator to determine. His Honour added:

> If it is a matter for the adjudicator to determine, then, consistent with the approach indicated in *Brodyn* at 441, [54], it is a matter that, prima facie does not fall within the "basic and essential requirement".

The statement of law by McDougall J in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801, more particularly his Honour's reasoning at [20]–[24], may well have to be revisited in the light of the judgment of the Court of Appeal in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 (23 November 2005), as explained by the judgment of Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1. For a discussion on those cases and their impact on *Brodyn*, see [SOP13.100], particularly subparagraph *(e)*.

Even the failure to comply with the statutory requirements of a payment claim, is no ground for setting aside an adjudication determination, see *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 together with the authorities therein cited.

In *Fifty Property Investments Pty Ltd v O'Mara* (2007) 23 BCL 35; [2006] NSWSC 428, Brereton J provided a useful summary of the grounds, as acknowledged by the New South Wales courts, for seeking to set aside an adjudicator's determination. His Honour, at [2]–[4], said:

> [2] The grounds upon which an adjudication determination under the Act can be impugned in judicial review proceedings were considered by the Court of Appeal in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; McDougall J concisely distilled their essence in *Timwin Construction Pty Ltd v Facade Innovations Pty Ltd* (2005) 21 BCL 383; [2005] NSWSC 548, [1], where his Honour said that judicial review was available in the following circumstances:
>
> - First, where an adjudicator fails to comply with the basic and essential requirements prescribed in the Act for there to be a valid determination;
> - Secondly, where the adjudication determination does not amount to an attempt in good faith to exercise the relevant power, having regard to the subject matter of the legislation;
> - Thirdly, where a party has been denied natural justice (for which purpose the narrow statutory scheme limits the extent of natural justice required); and,
> - Fourthly, where the adjudication determination was procured by fraud in which the adjudicator was complicit.
>
> [3] Where any of those circumstances apply, an adjudicator's determination is not a "determination" within the meaning of the Act at all, and is not merely voidable, but void (*Brodyn*, [52]).

> [4] In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, I expressed the view that *Brodyn* was correctly to be understood as saying that mere error of fact or law, including in the interpretation of the Act or contract, does not invalidate an adjudicator's determination, and endeavoured to explain that although Hodgson JA eschewed the terminology of jurisdictional error – at least in the context of when non-compliance with what his Honour called the "more detailed requirements", as distinct from the "basic and essential requirements", would result in invalidity – the concept of jurisdictional error remains a useful one in identifying which requirements were intended to be essential pre-conditions to a valid determination, since traditionally jurisdictional error results in the decision being void, and, although the Act contains no privative clause, *Brodyn* limits the availability of judicial review to decisions which are void (*Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2006] NSWCA 125, [45]–[51]).

Hammerschlag J's observations below in [39] of *Nazero Group Pty Ltd v Top Quality Construction Pty Ltd* [2015] NSWSC 232 on the distinction between the analytical approaches in *Brodyn* and *Chase Oyster Bar* is addressed. His Honour said:

> The difference in analytical approach between *Brodyn* and *Chase Oyster Bar* to determining a dispute as to whether an adjudication can stand or not has little or nothing to do with the procedures adopted by this Court to ensure just, quick and cheap disposition of the issue. The different approach in the *Brodyn* era did not mean that there were not areas of appropriate attack available to a respondent. Perhaps against Nazero's position is the consideration that under *Brodyn*, adjudications which did not pass muster were void, whereas under *Chase Oyster Bar* they need to be quashed.

(h) The availability of certiorari to challenge an adjudicator's adjudication on the ground that it is void for an excess of jurisdiction in NSW – post Kirk v Industrial Relations Commission of New South Wales and Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd

In essence, *Kirk* held at [96]–[100] that:

> [96] In considering State legislation, it is necessary to take account of the requirement of Ch III of the Constitution that there be a body fitting the description "the Supreme Court of a State", and the constitutional corollary that "it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description": *Forge* [2006] HCA 44; (2006) 228 CLR 45 at 76: See, for example, *Re McBain; Ex parte Australian Catholic Bishops Conference (2002)* 209 CLR 372; [2002] HCA 16).
>
> [97] At federation, each of the Supreme Courts referred to in s 73 of the Constitution had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England: *Australian Courts Act 1828* (IMP) (9 Geo 4 c 83), s 3, which conferred jurisdiction on the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land; *Supreme Court Act 1890* (Vic), s 18; *Supreme Court Act 1867* (Qld), ss 21, 34; Act No 31 of 1855-56 (SA), s 7; *Supreme Court Act 1880* (WA), s 5, picking up *Supreme Court Ordinance 1861* (WA), s 4. It followed that each had "a general power to issue the writ [of *certiorari*] to any inferior Court" in the State: *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 440. Victoria and South Australia, intervening, pointed out that statutory privative provisions had been enacted by colonial legislatures seeking to cut down the availability of *certiorari*. But in *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442, the Privy Council said of such provisions that:
>
> > It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. **There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of**

> **Queen's Bench will grant a** *certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it (emphasis added).

That is, accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant *certiorari* for jurisdictional error was not denied by a statutory privative provision.

> [98] The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, *certiorari* and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, "with such exceptions and subject to such regulations as the Parliament prescribes", s 73 of the Constitution gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the "Federal Supreme Court" in which s 71 of the Constitution vests the judicial power of the Commonwealth.
>
> [99] There is but one common law of Australia: *Lipohar* [1999] HCA 65; (1999) 200 CLR 485 at 505. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of "distorted positions": (1957) 70 *Harvard Law Review* 953 at 963. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.
>
> [100] This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

This theme was taken up in *Chase Oyster Bar*, in which it was held that even in an adjudication, a writ of *certiorari* was available to correct a decision which followed jurisdictional error.

It is submitted that the decision of Boddice J at [13] of *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 223 sums up, with respect, accurately, the present state of the law on this point. His Honour held:

> The adjudication process is subject to review by this court, which exercises a supervisory jurisdiction with respect to any adjudication decision found to be infected by jurisdictional error: *Northbuild* per McMurdo P at 537-538; Chesterman JA at 542-543 and White JA at 555-556. The concept of jurisdictional error includes an erroneous denial or assertion of jurisdiction, misapprehension or disregard of the nature or limits on the jurisdiction, considering a matter or making a decision that lies wholly

or partly outside those limitations and proceeding in the absence of a jurisdictional fact or in disregard of a requirement of the relevant statute: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1 at 573-574.

For the position in the other States and Territories, see Western Australia [SOP25.740], Queensland [SOP.750], Northern Territory [SOP25.760], South Australia [SOP25.770], Tasmania [SOP25.780] and the Australian Capital Territory [SOP25.790].

(i) Fraud – impacting on an adjudicator's determination

Proceedings to set aside a judgment obtained by fraud are equitable in nature and are appropriately dealt with in the Equity Division of the court: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 537 per Kirby P.

It will be noted that in Hodgson JA's view, in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, fraud to render an adjudication determination void is required to be fraud involving the adjudicator in the adjudication process.

(j) Misleading or deceptive conduct during adjudication – impact on adjudication determination

In *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2004] NSWSC 85 (27 February 2004) Master Macready (now Macready AsJ) at [30] held that information in an attachment to a payment claim provided to an adjudicator, was not sent in trade or commerce and did not give rise to a Trade Practices cause of action.

But whether or not this conclusion is correct, what is the position of a payment claim that is false or misleading and leads to the appointment of an adjudicator where no appointment should have been made in the first instance.

An example is where the claimant says in its payment claim that the claim related to a s 5 or 6 claim, and it in fact does not, and as a consequence the respondent is put to a substantial cost in opposing it, and or where the respondent is the subject of an erroneous adjudication which cannot be attacked under the Act, is required to pay out a substantial sum of money that was not in truth owing, and has suffered untold losses and/or damage?

As has been established in the case of *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238, discussed more fully above, Master Macready's (as his Honour then was) judgment should not be allowed to protect such a claimaint from a Trade Practices suit.

Where the respondent has failed to provide a payment schedule to the claimant within the time allowed by s 14(4) and thereafter fails to pay the whole or any part of the claimed amount, the claimant may, under s 15(2)(a)(i), recover the unpaid portion of the claimed amount from the respondent as a debt due to the claimant.

As provided for in s 15(4)(b), the respondent in those proceedings is not entitled to bring any cross-claim against the claimant or to raise any defence in relation to the matters arising under the construction contract.

In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238 (28 August 2006), the claimant's payment claim stated that a copy was being sent to the architect to whom power was given to act as agent for the proprietor generally for the administration of the contract.

In two earlier payment claims, copies had been provided to the architect who had dealt therewith. The Court of Appeal accepted that there was a reasonable defence going to the non service of the payment schedule, on the basis that the statement in the payment claim that a copy thereof had been sent to the architect, may give rise to conduct that was misleading or deceptive within the provisions of s 52 of the *Trade Practices Act 1974* (Cth), as it then was (see now s 18 of the Australian Consumer Law, contained in Sch 2 to the CCA), in that, that was a possible explanation for the non provision by the respondent of a payment schedule.

Basten JA, with whom Hodgson JA and Tobias JA concurred, said the following in [124]–[125]:

> [124] The result is that s 15(4)(b)(ii) does not preclude the Appellants raising, by way of a defence to a claim based on a failure to provide a payment schedule, a contention that the service was not effective because it involved misleading or deceptive conduct.
>
> [125] Alternatively, if that contention can only be raised by cross-claim, s 15(4)(b)(i), to the extent that it prevents the taking of that course in reliance on a complaint of misleading and deceptive conduct in breach of s 52 of the *Trade Practices Act*, is invalid.

In the circumstances, the Court of Appeal upheld the appeal and set aside the judgment of the District Court entering judgment for the claimant and remitted the matter to the District Court to allow the appellants to defend the proceedings on the basis that the misleading and deceptive conduct of Parkline had caused them to fail to provide a payment schedule within the period allowed by the Act.

An analysis of the fairly lengthy judgment shows that the Court of Appeal paid no regard to the authority above, which cast doubt on the applicability of remedies under the then *Trade Practices Act 1974* (Cth) (see now the *Competition and Consumer Act 2010* (Cth)) to the provisions of the BCISP (the New South Wales Act). The judgment also does not touch upon the question as to whether or not a making of a payment claim constitutes conduct in the course of trade and/or commerce, a fact which impacted on the minds of the courts which previous to that judgment held that it did not do so.

Whether the Court of Appeal has now, by implication overruled all of the authority to the contrary or has or will seek to distinguish those cases, is a difficult question to answer. There can, however, be little difference between the insertion of a misleading claim in a payment claim and a misleading statement made therein to the effect that a copy of thereof had been sent to the architect.

It is respectfully submitted that Trade Practices defences should be available across the board to misleading and deceptive conduct constituted by making such statements in a payment claim.

At [141]-[143] of *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, Warren CJ, Tate and McLeish JJA referred to Basten JA's judgment in *Bitannia* with approval. See further the discussion in [144]-[149] of *Facade*.

See the further discussion on this issue at [SOP15.80](d) and [SOP25.460]

At [45]–[58] of *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* (2005) 226 ALR 362; [2005] NSWSC 1143 (25 November 2005), Campbell J (as his Honour then was) held the opposite of that which is submitted above. His Honour held thus:

> [45] The plaintiff's contentions raise an alternative ground upon which it seeks an injunction. It is that the second payment claim was likely to be submitted, in trade or commerce, to an adjudicator, that to do so would be conduct that is misleading or deceptive, or likely to mislead or deceive, and that the *Trade Practices Act 1974* (Cth) provides a basis for the granting of an injunction to prevent that conduct. To deal with that question, an additional preliminary question has been formulated, namely:
>
> 3. Whether, if the defendant were to submit the second payment claim to an adjudicator for adjudication under the Act, so doing would constitute, in trade or commerce, conduct which was misleading or deceptive or likely to mislead or deceive, contrary to the *Trade Practices Act 1974* (Cth).
>
> That question was formulated because, if answered in the negative, it would terminate the plaintiff's claim on that head. It was not possible for the totality of the defendant's case concerning whether an injunction should be granted to be tried, because by the time of the hearing it had not had adequate time to gather material relevant to discretionary defences which it wished to present.

[46] The plaintiff's summons was in the form prescribed for the Technology & Construction List. Thus, it contained a detailed statement of the plaintiff's contentions, in a form analogous to that found in a pleading. Those contentions alleged that the second payment claim was misleading or deceptive or likely to mislead the adjudicator in two respects. The first was that it represented that the work done in removing the dynabolts was a variation under the contract for which the defendant was entitled to be paid a progress payment subsequent to the progress payment to which the defendant had become entitled on the practical completion milestone. The second was that it represented that 31 August 2005 was a reference date under the contract.

[47] Directions were given for the plaintiff to serve an outline of submissions before the hearing. Those submissions repeated in substance the contentions which had been made in the summons on the topic of contravention of the *Trade Practices Act 1974* (Cth).

A Misleading or Deceptive claim?

[48] The plaintiff does not claim that it is in any way misled by the second payment claim. That the second payment claim is alleged to be one which has a tendency to mislead the adjudicator, rather than the plaintiff, is not in itself a reason why it cannot be misleading and deceptive within the meaning of s 52. However, the second payment claim does not purport to be a statement of anything more than what the *defendant claims* it is owed by the plaintiff. The defendant really does claim that it is owed the amount of money referred to in the second payment claim. Insofar as the second payment claim sets out facts, they are the basis upon which the claim to payment is made. The two matters which the plaintiff alleges are misleading are not simple matters of fact, but mixed conclusions of fact and law. In the context in which they are made in the second payment claim, they are not likely to be read by an adjudicator as anything other than a contention by the defendant. Nor are they the sort of contention that is likely to be simply accepted by the adjudicator, without applying his or her own mind to whether it ought to be accepted.

[49] Further, assuming for the moment that the second payment claim will lead to an adjudication, it is a claim which will be dealt with by the adjudicator in a context where it will be fully open to dispute and argument. There has been an opportunity for the plaintiff to serve a payment schedule, which can point out anything which it contends is an error. The second payment claim will not be acted upon by the adjudicator in any way until the plaintiff has had the opportunity to serve a payment schedule within the time allowed by s 14 of the Act. The adjudicator will not issue a determination until the plaintiff has also had an opportunity to lodge an adjudication response with the adjudicator within the time allowed by s 20 of the Act.

[50] Finally, I accept the plaintiff's argument that anyone reading the payment claim who had knowledge of the background to the contract would realise that it was an attempt to overcome the ways in which the earlier adjudication was not entirely successful so far as the defendant was concerned. Any adjudicator who might be appointed to consider the second payment claim would come to be in a situation of having that knowledge of the background to the contract.

[51] For these reasons, I do not accept that the payment claim is misleading and deceptive or likely to mislead and deceive the adjudicator, within the meaning of s 52 of the *Trade Practices Act 1974* (Cth).

Made in trade or commerce?

[52] The defendant also contended that the payment claim was not one which would be submitted to an adjudicator in trade or commerce. The defendant relied on the judgment of Master Macready (as his Honour then was) in *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2004] NSWSC 85 at [30]–[31]. There, some remarks of Lee J in *Merman Pty Ltd v Cockburn Cement Ltd* (1988) 84 ALR 521 at 532 were quoted:

> The test of whether conduct has the characteristic of activity in trade or commerce is not difficult to apply. For example, the issue of legal proceedings or the commencement of arbitration proceedings would be acts that do not on their face bear the stamp of acts in trade or commerce and do not become so merely because a person engaged in trade or commerce has resorted to their use.

That learned Master applied those remarks to the supplying of a payment claim to an adjudicator under the *BACISOP Act*, and held that such a supplying of the payment claim was not in trade or commerce.

[53] Those remarks of Lee J in *Merman Pty Ltd v Cockburn Cement Ltd* (1988) 84 ALR 521 were not the ratio of that case. *Merman* concerned an application for striking out or staying of a statement of claim which alleged misleading and deceptive conduct in the making of a submission to the Australian Customs Service seeking the imposition of an anti-dumping duty – not in the commencement of proceedings of any kind. As well, the outcome in *Merman* was that the statement of claim was not struck out or stayed. Further, as Von Doussa J noted in *Chapman v Luminis Pty Ltd (No 5)* (2001) 123 FCR 62; [2001] FCA 1106 at [185] *Merman* was decided before the High Court had given its decision in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 64 ALJR 293. Thus, I shall consider the question for myself.

[54] In *Concrete Constructions* Mason CJ, Deane, Dawson and Gaudron JJ, at 603, expressed their preference for a meaning of "in trade or commerce" in s 52:

> [A]s referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character.

[55] Their Honours said, at 603–4:

> Indeed, in the context of Pt V of the Act with its heading "Consumer Protection", it is plain that s 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct "in trade or commerce" may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character.

[56] Applying that test, the submitting to an adjudicator – a person appointed under statutory authority and given statutory powers – of a payment claim which has been disputed, for the purpose of the adjudicator making an adjudication upon the correctness of that payment claim, is not conduct "in trade or commerce" within the meaning of s 52 of the *Trade Practices Act 1974* (Cth).

[57] For these reasons, the plaintiff's contention that the submitting of the Second Payment Claim to an adjudicator would contravene s 52 of the *Trade Practices Act 1974* (Cth) is rejected. Preliminary question 3 will be answered "no".

Unconscionable conduct?

[58] At the hearing, the plaintiff also sought to submit that the making of the second payment claim amounted to unconscionable conduct within the meaning of either s 51AA or s 51AB of the *Trade Practices Act 1974* (Cth). The plaintiff had sought, and been granted, an urgent final hearing. There had been no foreshadowing, prior to the

> hearing, that any such claim would be made. It is an allegation which is dependent upon the factual context in which the second payment claim came to be made. The defendant has had no opportunity to come to understand the basis upon which the plaintiff contends that the conduct is unconscionable, or to prepare its own factual case about why it is not unconscionable. At the hearing I informed Mr Doyle that I did not need to hear him on the unconscionability point. I decline to permit the issue to be raised at the late stage at which it was raised.

Reliance upon a breach of the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974*) in respect of conduct by the successful party to adjudication, where that conduct preceded the adjudication process has ultimately been acknowledged as a valid ground for seeking relief from an adverse determination.

In *Katherine Pty Ltd v The CCD Group Pty Ltd* [2008] NSWSC 131, the facts were that the party against whom an adjudication determination was made complained that the enforcement thereof would result in the enforcement of a penalty and that the defendant's conduct in proposing and insisting upon that penalty, and in utilising the mechanisms given by the Act was unconscionable. McDougall J, at [15] summarised the conclusion arrived at in *Bitannia* above as follows:

> [15] In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238, the Court of Appeal held that a judgment founded on a determination under the NSW Act could be stayed if the determination had been procured by misleading or deceptive conduct in breach of s 52 of the *Trade Practices Act*. That stay could be granted pursuant to s 87 of the *Trade Practices Act* on the application of the party alleging the use of misleading or deceptive conduct. Alternatively, the judgement creditor could be restrained pursuant to s 80 (if there were a "proceeding" in which that relief was sought) or s 87 (on application for that relief) from enforcing the judgment.

His Honour, at [43] of *Katherine Pty Ltd*, held that, on the facts, the defendant was guilty of unconscionable conduct under the unwritten law triggering the provisions of former s 51AA of the *Trade Practices Act 1974* (see now s 20 of the Australian Consumer Law (ACL)). His Honour did not go on to consider the impact of that conduct on former s 51AC (see now ACL s 22). At [47], his Honour held that it would be an injustice to permit the defendant to have the full benefit of a bargain that, through its incorporation of a penalty, resulted in unconscionable conduct. The remedy which his Honour fashioned was to preclude the enforcement of the judgment to the extent of the penalty contained therein.

(k) Misleading and/or deceptive conduct preceding adjudication – impact on determination

In *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2004] NSWSC 85 (27 February 2004) Master Macready (now Macready AsJ) at [30] held that information in an attachment to a payment claim provided to an adjudicator, was not sent in trade or commerce and did not give rise to a Trade Practices cause of action.

But whether or not this conclusion is correct, what is the position of a payment claim that is false or misleading and leads to the appointment of an adjudicator where no appointment should have been made in the first instance?

An example is where the claimant says in its payment claim that the claim related to a s 5 or 6 claim, and it in fact does not, and as a consequence the respondent is put to a substantial cost in opposing it, and/or where the respondent is the subject of an erroneous adjudication which cannot be attacked under the Act, is required to pay out a substantial sum of money that was not in truth owing, and has suffered untold losses and/or damage.

It is to be seriously doubted that Master Macready's judgment should be allowed to protect such a claimant from a Trade Practices suit.

In *M & D Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553 (11 June 2004) Campbell J at [20] said: "It is not possible, however, for the terms of a Commonwealth Act

to be construed, or limited, by reference to the intention implicit in a State Act." What has not been explored in any litigation seeking to quash an adjudicator's adjudication thus far, is the impact of s 52 of the *Trade Practices Act 1974* (Cth) (see now s 18 of the Australian Consumer Law (ACL)). The operation of ACL s 18 cannot be limited by the object of this Act viz to maintain a builder's cash-flow without determining the ultimate rights of the parties.

The relevant elements of a cause of action under ACL s 18 are:

(a) conduct (an act or omission);
(b) that is misleading and/or deceptive, or likely to mislead or deceive;
(c) in the course of trade or commerce;
(d) and a causal connection between such conduct and loss and/or damage suffered by the plaintiff.

But, it is submitted, that a claim for a progress payment, which could well consist of an invoice appropriately endorsed, is "in trade or commerce", and would attract the provisions of s 52.

Demir has been cited with approval by Young CJ in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* (2005) 21 BCL 443; [2004] NSWSC 1230 and by Martin J in *Reid Construction (Qld) Pty Ltd v Dellsun Pty Ltd* [2010] 2 Qd R 481; [2009] QSC 263.

This question was discussed in *Diploma Constructions (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91, where Pullin JA (with whom the other Judges of the Court of Appeal of Western Australia agreed) said:

> There is no doubt that the recipient of a statutory notice may successfully apply to set aside a statutory demand based on an adjudicator's determination or a consequent judgment if it has offsetting claims arising from transactions separate from those that gave rise to a judgment debt based upon an adjudication under the Act: *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 533 (at [17]) (per Campbell J).

These authorities have been referred to further by Daly AsJ at [9] of *Scrohn Pty Ltd v Newearth Constructions Pty Ltd* [2015] VSC 254.

In *Dasein* it was held that the provisions of the Commonwealth Act, allowing a set off under s set aside a statutory demand based on an adjudicator's determination or a consequent judgment if it has offsetting claim

In *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, the Victorian Court of Appeal, per Warren CJ, Tate and McLeish JJA, addressed the constitutionality of ss 16(2)(a)(i), 16(4)(b)(i) and 16(4)(b)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic). For a discussion on this aspect, see [SOP3.130] *(b)* above.

In *Lucas Stuart Pty Ltd v Sydney City Council* [2005] NSWSC 840 (23 August 2005), Lucas Stuart brought proceedings in which it sought summary judgment under s 15(2)(a)(i) above.

The council, who had not served a payment schedule, sought to defend the proceedings by alleging estoppel and defences under the then *Fair Trading Act 1987* (NSW) (see now the *Competition and Consumer Act 2010* (Cth)).

At [37], [38] and [39] of his judgment, Einstein J said:

> [37] It is unnecessary to repeat the analysis of estoppel to be found in the judgment of Mason CJ in *Commonwealth v Verwayen* (1990) 170 CLR 394; 64 ALJR 540; 95 ALR 321; [1990] Aust Torts Reports 67,952 (81-036); [1990] ANZ ConvR 600 at 409–413. Suffice it to say that the overarching doctrine of estoppel:
>
> > [P]rovides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the

> assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid, it would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption [per Mason CJ at 413].
>
> [38] Even taking the council's evidence at its highest the evidence does not raise an arguable case that Lucas Stuart can by its submission of the payment claim in the circumstances be seen to have unjustly departed from an assumption as to a present or future state of affairs which that conduct caused the council to adopt or accept. The whole of the environment involved as an important backdrop, the parties respective contractual rights, as well as the parties rights and obligations accruing by the very fact that the Act contained provisions regulating the interim fast track adjudication procedure. Further and independently of what has been said above, the council has not, taking its evidence at its highest, raised an arguable case that the estoppel contended for would achieve the necessary proportionality between the remedy and the detriment which is its purpose to avoid. The council's case here amounts to what would be a disproportionate making good of the relevant assumption. The case is entirely inchoate as to the period during which Lucas Stuart would have been disentitled from submitting a payment claim under the Act. In short taking its evidence at its highest, the council's estoppel case is not an arguable case in the environment of the Act.
>
> [39] Likewise the *Trade Practices Act 1974* (Cth)/*Fair Trading Act 1987* (NSW) which rests upon the same central foundation is not an arguable case in the environment of the Act.

This case was cited with approval by Mullins J in *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd* [2008] 1 Qd R 139; [2007] QSC 20 (13 February 2007).

The *Lucas Stuart Pty Ltd v Sydney City Council* [2005] NSWSC 840 was analysed by Adrian Bellemore in his article "Topic of Interest" (2005) 21 BCL 425. The learned author's conclusion at p 427 reads as follows:

> What is impermissible by the terms of s 15(4)(b)(ii) is for the respondent "to raise any defence *in relation to matters arising under the construction contract*" (emphasis added). If, therefore the respondent wanted to raise a defence that was not one that related to matters "arising under the construction contract", then it would seem that the legislation permits such a defence.
>
> It is suggested that the words "arising under the construction contract" mean that what is prohibited by the Act is limited to any defence that arises solely out of the contract, its terms or its execution. Any defence that arises in a manner similar to the facts of *Lucas Stuart* would, it is suggested, be permissible.
>
> The suggestion that what is prohibited by way of defence is limited in this manner is supported in the Second Reading of the amendment to the Act, whereby the terms of the Act limiting defences were added. In that reading, the Minister for Public Works and Services (Mr Iemma) noted that delay has been caused to claimants by respondents "raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work".
>
> Insofar as what is impermissible by the terms of s 15(4)(b)(ii) being a defence relating to matters *arising under* the construction contract, it would appear that Einstein J's words, ie that a defence of estoppel "flies in the face of s 15(4)(b)(ii)", may well be arguable, as is (probably) any defence that does not relate to matters arising under the construction contract.

There is much force in this submission which again underlines the difficulties one has in construing the Act.

In *Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd* [2009] 1 Qd R 505; [2009] QSC 1, Dutney J considered an application for summary judgment under s 19(4) of the BCIPA (the Queensland Act), where the respondent raised two discrete defences, the second of which was as follows:

> … the dealings between the applicant and the respondent's architect at the time the payment claimant (sic) was served constituted misleading or deceptive conduct in contravention of the Trade Practices Act 1974 ("TPA") or that such dealings amounted to unconscionable conduct under the TPA. In either case, it is submitted that, in consequence, the respondent is entiled to avoid the consequences of failing to deliver a payment schedule.

Dutney J upheld this defence as one of the grounds for rejecting the summary judgment application. His Honour's judgment contains substantial reference to the case law in regard to misleading and deceptive conduct under the TPA.

Austruct Qld was cited with approval in *Baxbex Pty Ltd v Bickle* [2009] QSC 194.

In *Baxbex Pty Ltd v Bickle* [2009] QSC 194, the respondent submitted that the applicant for summary judgment needed to provide a valid payment claim before any such payment schedule under s 18 of the Act was required. Daubney J upheld that submission.

Baxbex Pty Ltd v Bickle [2009] QSC 194 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

It will be noted, it is still an open question, if appropriately taken, whether ss 51AA and/or 51AB of the *Trade Practices Act 1974* may be used as grounds for impugning an adjudication determination.

In *Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd* [2009] 1 Qd R 505; [2009] QSC 1 at [4], Daubney J states as follows:

> Section 19 of the BCIPA [**Building and Construction Industry Payments Act 2004** (Qld)] provides for the consequences of not paying the claimant where there has been no payment schedule served. Relevantly it provides as follows:
>
> 1. This section applies if the respondent–
>
> (a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and
>
> (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
>
> 2. The claimant–
>
> (a) may–
>
> (i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or
>
> (ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and
>
> (b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.
>
> 3. A notice under subsection (2)(b) must state that it is made under this Act.
>
> 4. If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt–

(a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled–

(i) to bring any counterclaim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

No payment schedule was provided. This was then followed by an application for summary judgment. In the application for summary judgment, the defendant sought to argue that there was a breach of s 52 of the *Trade Practices Act 1974* (Cth), and further that part of the claim was outside the scope of the contract. Daubney J found that there was misleading and deceptive conduct and then went on to say:

> [64] The impact of this conclusion on a payment claim was discussed by the Court of Appeal in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238. One of the issues in that case was whether a claim under the TPA could be raised to defeat an applicant's claim to summary judgment under the NSW equivalent of s 19 of the BCIPA. At [8], Hodgson JA remarked:
>
> > The basic complaint of the appellants is that one element of the cause of action brought against them, namely the non-service of a payment schedule, came about as a result of Parkline's breach of s 52; and that if a remedy is not provided by the Trade Practices Act, they suffer the substantial damage of having a judgment against them which is obtained by Parkline in reliance on its own misleading conduct. The Trade Practices Act discloses a legislative intention that persons should have a remedy to protect them from damage from the misleading conduct of a corporation, or to recover from the corporation compensation for such damage; and it would not be in accordance with that intention that a corporation should be permitted to obtain a judgment against a defendant on a cause of action one essential element of which has been created by that corporation's misleading conduct against that defendant. Subject to discretionary questions, it would in my opinion be appropriate for a court to give effect to that legislative intention by granting an injunction under s 80, or by making an order pursuant to s 87 dismissing proceedings (noting that the orders made available by s 87 include orders mentioned in s 87(2), but are not restricted to those orders).
>
> And at [17], Tobias JA said:
>
> > I have had the benefit of reading in draft the judgments of Hodgson JA and Basten JA. I agree with their Honours for the reasons each has given, that s 15(4)(b) of the Building Payment Act does not prevent the appellants from raising by way of defence to the respondent's proceedings in the District Court to recover the amount of its payment claim pursuant to s 15(2)(a)(i) of that Act, the contention that their failure to provide a payment schedule with respect to that claim was induced by the respondent's misleading or deceptive conduct in breach of s 52 of the Trade Practices Act.
>
> [65] It seems to me to be now established that s 19(4)(b)(ii) of the BCIPA does not preclude reliance on s 52 of the TPA to prevent the entry of summary judgment where a payment schedule is not delivered. I am satisfied that it would be improper to permit the applicant to take advantage of the respondent's failure to deliver a payment schedule in circumstances where that failure was brought about by the applicant's misleading conduct.

It will be noted that Daubney J sanctioned the trade practices defence in regard to the adjudication process. His Honour did not go so far as to say that misleading and/or deceptive conduct anterior to the making of the construction contract could give rise to a trade practices defence.

In the light of his Honour's finding, it was not necessary to deal with the further defence, and the application for summary judgment was dismissed.

(l) Serious allegations against an adjudicator should not be lightly made

At [57] of the *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), Giles JA, with whom McColl JA and Young JA agreed, said that allegations of a wholesale departure from an adjudication according to the Act as in *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32, should not be lightly charged against an adjudicator.

See the commentary on *Halkat Electrical* by McDougall J at [42]–[43] of *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [SOP4.50].

(m) Where there has been a failure of natural justice or procedural fairness

Because of the draconian remedies allowed under the Act, it is essential to a valid adjudication that there be strict compliance with the principles of natural justice. Some examples where natural justice has failed, and an adjudication determination would be liable to be quashed are at [620.310] ff in *Commercial Arbitration Law and Practice* (Thomson Reuters, subscription service). Some of the more detailed grounds below are just the other side of the same coin.

Generally, the principles of natural justice apply to the adjudication procedure, see McDougall J in *Musico v Davenport* [2003] NSWSC 977 (31 October 2003), where in [106]–[108], his Honour said:

> [106] As to two of those matters – namely, those referred to in paras 3(a) and 3(d), Grosvenor's position appears to be that, although the matters were not explicitly raised, nonetheless, because, in effect, Mr Davenport was required to consider the provisions of the contract, the provisions of the payment schedule and the provisions of the Act, it was open to him to reach the view that he did, notwithstanding that Grosvenor had not advanced or contended for those views in its adjudication application.
>
> [107] If that be Grosvenor's position it is, in my opinion, wrong. It may readily be accepted that the Act provides for a somewhat rough and ready way of assessing a builder's entitlement to progress claims. It may also be accepted that the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality and expense. Nonetheless, what an adjudicator is required to do is to decide the dispute between the parties. Under the scheme of the Act, that dispute is advanced by the parties through their adjudication application and adjudication response (which, no doubt, will usually incorporate the antecedent payment claim and payment schedule). If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it. In my opinion, this is a purpose intended to be served by s 21(4) of the Act (although the functions of s 21(4) may not be limited to this).
>
> [108] It follows, in my opinion, that where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have "a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it". (See Lord Diplock in *O'Reilly* at 279.)

At [119], McDougall J added:

> [119] The more difficult question is whether the impugned determinations, or conclusions, amounted to jurisdictional error. In my opinion, Mr Davenport did fall into jurisdiction error. By ss 9(a) and 10(1)(a) of the Act, the adjudication in this case was to be carried out by reference to the relevant provisions of the contract. As

> Mr Davenport recognised, the relevant provision was, on the face of things, cl 10.02. That directed his attention to the Architect's certification. But because of the errors in approach that I have identified at [72] to [84] above, and because of the additional errors that I have identified at [86] to [100] above, Mr Davenport failed to have regard to the relevant provisions of the contract. He therefore failed to carry out the task that the Act requires to be carried out in the manner that the Act requires it to be carried out. It must follow that Mr Davenport failed to exercise the jurisdiction given to him by the Act.

In *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* (2005) 22 BCL 426; [2005] NSWSC 545 (16 June 2005) (Technology and Construction List), Master Macready (now Macready AsJ) dealt with the word "substantial" at [55] of Hodgson JA's judgment in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [24] as follows:

> [24] In argument it was suggested that the use by his Honour of the word "substantial" inserted some quantitative notion into the extent of any apprehended bias. There is some suggestion that not all the rules of natural justice will lead to a remedy. See *Aronson on Judicial Review* Third Edition page 457. That may be the case with some of the rules as to natural justice. However, I would have thought that in the case of apprehended bias either one would conclude that it would exist in accordance with the test to which I am about to refer or that it did not.

However, at [75] of *Brodyn*, Hodgson JA in considering an "omission" in the adjudicator's reasoning said that this "… appears to flow, not from his not having regard to Brodyn's submissions, but from either misinterpreting them or misapplying the law".

His Honour considered that that did not amount "… to a denial of natural justice; and certainly not to one which would render the determination void".

Generally, the failure to comply with the provisions of natural justice as a ground for curial review of an award in New South Wales (save for the *Brodyn* qualification referred to above) is consistent with decisions in the English courts.

Brereton J, at [50] of *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388; [2006] NSWSC 13 (31 January 2006), said:

> [50] The ambit of the measure of natural justice required by the Act extends beyond the "basic and essential requirements" which are preconditions to validity, to the particular process during the adjudication of receipt and consideration of the submissions referred to in the Act (*Tolfab Engineering Pty Ltd v Tie Fabrications Pty Ltd* [2005] NSWSC 326, Macready AsJ). Thus a denial of natural justice (or procedural fairness) will invalidate an adjudication, but only if the procedure falls short of that measure of natural justice to which a party is entitled under the scheme of the Act. Failure to serve notice of an adjudication application to the extent that the Act requires service would ordinarily be a denial of that measure of natural justice to which a respondent is entitled under the scheme of the Act.

In *TQM Design & Construct Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1216 (3 December 2004), McDougall J held that there had been a significant denial of natural justice, first, as the adjudicator was given material including both evidence and submissions that were withheld from TQM and secondly, the adjudicator did not consider the adjudication response provided by TQM.

In *Glen Eight Pty Ltd v Home Building Pty Ltd (in liq)* [2005] NSWSC 907 (6 September 2005) at [9], the conditions of contract contained special condition 29, which included:

> 29.2 Despite any other provision of this contract, the principal may pay all of the money due to the contractor to the subsidiary, and such payment will be in full and final satisfaction of the principal's obligation to pay money to the contractor.
>
> 29.3 Prior to or in relation to any such payment, the principal may:
>
> (a) require evidence that all subcontractors have been paid; or

(b) elect to pay direct to the subcontractors instead of to the subsidiary (which direct payment will constitute a pro rata discharge of the obligation of the principal to pay the contractor under this contract); or

(c) require such other arrangements that the principal reasonably specifies to ensure the payment is applied first in payment of all subcontractors and second in payment of any other creditors for the subsidiary.

The adjudicator construed cl 29.3, that once the power under cl 29(3)(a) had been exercised and subcontractors had been paid, the plaintiff had made an election not to exercise any of the remaining powers under that clause. As held by Campbell J at [10] of his judgment:

> The construction of cl 29.3, whereby its limbs were mutually exclusive, had not been put to the adjudicator by either party. Nor did he seek submissions from the parties on whether that construction was the correct one. His adopting that construction resulted, so the plaintiff contends, in the adjudicator making a decision of law on a matter which was very important for the conclusion arrived at. It is apparent that the adjudicator did not allow credit for any of the $5.7 million which had been paid to the various subcontractors.

The plaintiff contended that there was a breach of the requirements of natural justice.

At [13], Campbell J held that there was such a serious question to be tried, ie whether as a matter of fairness, the point should have been put to the parties, under the administrator's power to seek submissions, for their consideration. An injunction was accordingly granted on certain conditions.

The English statutory scheme brought into sharp focus the necessity to apply the principles of natural justice, see *Balfour Beatty Construction Ltd v Lambeth LBC* [2002] BLR 288; [2002] EWHC 597. See also *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (Technology and Construction Court). Each party must be given a fair opportunity to present its case. Within these parameters, it must be emphasised that it is important for adjudication to be conducted strictly in accordance with the statutory time limits, and consequently the time available for submissions on any particular matter might have to be severely restricted.

It is also important to note that the adjudication procedure was designed and intended to be as simple and as informal as possible, and the application of the procedural fairness principle should not place any undue burden on either the adjudicator or the parties.

Within the context of the adjudication procedure, no breach of the rules of natural justice takes place where the adjudicator uses his own knowledge and experience in deciding questions in dispute. However, if the adjudicator uses his own knowledge and experience in such a way as to advance and apply propositions of fact or law that have not been considered by the parties, before doing so, the adjudicator should make those propositions known and should invite submissions. Although this is the general principle, it is not invariably so, see *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 (6 February 2003).

In *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207; (2001) 3 TCLR 11, Judge Humphrey Lloyd QC, said at [20]:

> It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit.

In *Discain Project Services Ltd v Opecprime Development Ltd* [2000] BLR 402; *Discain Project Services Ltd v Opecprime Development Ltd (No 2)* [2001] BLR 285, Bowsher J agreed with that formulation.

At [67] and [68] of *Discain*, Bowsher J added thus:

> [67] Section 108(3) of the 1996 Act provides:
>
> > The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.

> Paragraph 23(2) of the Scheme does make such a provision repeating substantially those words.
>
> [68] So the parties have entered into a compulsory agreement that the decision of the adjudicator is binding until the dispute is "finally determined" by legal proceedings etc. Although I have heard a trial of an action, I have not "finally determined" the dispute that was before the adjudicator. This action is brought only to enforce the decision of the adjudicator and there has been no examination of the merits of what lay behind that decision. On the face of the Act and the Scheme, therefore, the decision is still binding on the parties. However, just as the court will decline to enforce contracts tainted by illegality, so I do not think it right that the court should enforce a decision reached after substantial breach of the rules of natural justice. I stress that an unsuccessful party in a case of this sort must do more than merely assert a breach of the rules of natural justice to defeat the claim. Any breach proved must be substantial and relevant. I also repeat the words of Judge Humphrey QC:
>
> > It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit.

The qualification in the latter part of that sentence is important.

In *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390, a determination failed where the adjudicator failed to give the parties an opportunity to comment on a final expert report which he had commissioned, although he had invited the parties to comment on a draft thereof.

The failure to conduct an inspection does not constitute a failure of natural justice, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003) per Palmer J at [88].

In *Musico v Davenport* [2003] NSWSC 977 (31 October 2003) a submission was made that there was a failure of natural justice because a party was denied the right to make further submissions on a point in issue. This in principle also applies even where the adjudicator fails to understand a party's submission, *Transgrid v Walter Construction Group* [2004] NSWSC 21 (6 February 2004) per McDougall J at [69]. Einstein J in *Brambles Australia Ltd v Davenport* [2004] NSWSC 120 (12 March 2004), rejected a submission that a failure by a party to ask for an apportionment of costs constituted a failure of natural justice.

In England it has been held that an adjudicator's decision on his/her own jurisdiction does not affect the parties rights and the principle of natural justice need not be complied with in making such a decision, *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 All ER 723; [2004] EWCA Civ 1418 (28 October 2004).

At [135] of *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 (8 November 2005), Brereton J said:

> If an adjudicator proposes to make a determination on a basis for which neither party had contended and which has not been addressed, than natural justice requires that the adjudicator give the parties notice of what he or she is contemplating, so that they may put submissions on it, and where an adjudicator does not do so, there is a breach of the requirements of procedural fairness [*Musico v Davenport* [2003] NSWSC 977, [107]–[108]; *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, [13]].

In an appeal against Brereton J's decision in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, *sub nom Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 (28 February 2007), Giles J, with whom Santow JA and Tobias JA agreed, said at [26]–[28]:

> [26] With respect to the trial judge, I consider that the fundamental vice in the adjudicator's determination can be shortly explained without embarking on an exegesis

> of the reference in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* to a bona fide attempt to exercise the statutory power. Section 22 of the Act required that the adjudicator determine an adjudicated amount (s 22(1)) by considering particular matters (s 22(2)). The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters. But that is what the adjudicator did. He stated expressly in his reasons that he did not have evidence on which he could independently arrive at the value of the completed work, and that he adopted the appellant's valuation in preference to that of the respondent because of the respondent's unmeritorious challenges to the validity of the payment claim.
>
> [27] On the face of the determination, the adjudicator simply did not perform the task required by the Act, and his purported determination was not given greater respectability by the reference to his inclination "to believe the claimant rather than the respondent": the unmeritorious challenges were not a basis for belief or disbelief, and in any event it was not correct to speak of believing a corporate body. The adjudicator did not comply with an essential precondition to the existence of a valid determination.
>
> [28] That is sufficient for the disposal of the appeal, and it is not necessary to consider failure to have regard to relevant contractual provisions or failure to have regard to the payment schedule. I should not be taken to approve by silence all that the trial judge said.

It will be seen that, for different reasons than that which were given by Brereton J, the appeal was dismissed. *Halkat Electrical* was referred to and explained by the Court of Appeal at [55]–[57] of *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009).

See the commentary on *Halkat Electrical* by McDougall J at [42]–[43] of *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [SOP4.50].

Holmwood and *Halkat* were cited with approval by Sackar J at [58] and [59] of *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123.

Brereton J in *Fifty Property Investments Pty Ltd v O'Mara* (2007) 23 BCL 35; [2006] NSWSC 428 at [44]–[45], (18 April 2006), said:

> (i) A denial of natural justice, to the extent that natural justice is to be afforded as contemplated by the procedure established by the Act, invalidates an adjudication [*Brodyn* [57]];
>
> (ii) The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions and, in my opinion, such is the importance generally of natural justice that one can infer a legislative intent that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity.
>
> The ambit of the measure of natural justice required by the Act extends beyond the "basic and essential requirements" which are preconditions to validity, to the particular process during the adjudication of receiving and considerating the submissions referred to in the Act [*Tolfab Engineering Pty Ltd v Tie Fabrications Pty Ltd* [2005] NSWSC 326, Macready AsJ]. Thus a denial of natural justice will invalidate an adjudication, but only if the procedure falls short of that measure of natural justice to which a party is entitled under the scheme of the Act.

His Honour, at [53], with respect, makes certain aspects of the failure of nature justice/procedural fairness issue that much clearer. In that paragraph his Honour said:

> [53] The result of a denial of natural justice is that the decision is void, even if the decision would not have been affected by any submissions which might have been

made had an opportunity to make them been afforded. While, as a matter of discretion, relief might be declined if it can be shown that the denial of natural justice could not possibly have made a difference to the outcome, all that a plaintiff need establish is that the denial of natural justice deprived it of the possibility of a better outcome, and in order to negate that possibility it is necessary to conclude that a properly conducted adjudication could not possibly have produced a different result [*Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; *Kioa v West* (1985) 159 CLR 550 at 633; *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224 at 250–251; *Barwick v Council of Law Society (NSW)* (2004) Aust Torts Reports 81-730; [2004] NSWCA 32 at [111]–[121]; *Stanoevski v Council of the Law Society of New South Wales* [2005] NSWCA 428 at [54]].

Similar observations were made by Einstein J in *Shorten v David Hurst Constructions Pty Ltd* (2009) 25 BCL 188; [2008] NSWSC 546 at [23]–[25] where his Honour said:

> [23] This decision makes clear that relief may be declined if it can be shown that the denial of natural justice *could not possibly* have made a difference to the outcome. It is important to recall that on the authorities, cases in which procedural fairness "could have made no difference" to an outcome "will be a rarity": *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 130-131 [131]. Gaudron and Gummow JJ observed at 91 [17] as follows: "[I]f there has been a breach of the obligation to accord procedural fairness, the consequences of the breach were not gainsaid by classifying the breach as 'trivial' or non-determinative of the ultimate result".
>
> [24] Kirby J said (at 130-131 [131]), "It is only where an affirmative conclusion is reached, that compliance with the requirements of procedural fairness *'could have made no difference' to the result* that relief will be withheld. *This Court has emphasised that such an outcome will be a rarity. It will be 'no easy task' to convince a court to adopt it*" (citations omitted, emphasis added).
>
> [25] An example of such a rarity is where it is obvious and certain that even in the absence of the breach of procedural fairness, the same result would have been reached. *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399, discussed below, is an example of such a case

In *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205 (29 March 2006), Einstein J, under the heading "The Requirements of Natural Justice", at [10], said:

> (v) The content of the rules of natural justice are variable.
>
> (vi) *Musico v Davenport* [2003] NSWSC 977 is authority for the proposition that an adjudicator breaches the requirements of natural justice where an application is determined upon a basis not advanced by either party.
>
> (vii) McDougall J's reasoning in *Musico v Davenport* [2003] NSWSC 977 was predicated on the proposition that an adjudicator under the Act stands in the same position as a tribunal: see his Honour's reference to *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124; [1982] 3 WLR 1096 at [31] and [45] of the judgment.
>
> (viii) The decision in *Emergency Services Superannuation Board v Davenport* [2004] NSWSC 697 is to the same effect.
>
> (ix) Mason J observed in *Kioa v West* (1985) 159 CLR 550 at 585 that the real question in most cases has now become what the hearing rule requires, rather than when it applies. The hearing rule is a requirement of procedural fairness, but the Act prescribes the procedure that is to apply in connection with an adjudication determination. The legislature, having addressed itself to the question as to how a claimant and the respondent to adjudication application are heard by an adjudicator, the Act makes it clear that that is the limited opportunity of the hearing which is to be given and there is no warrant to vary that

legislative scheme: see eg *Twist v Randwick Municipal Council* (1976) 136 CLR 106; 51 ALJR 193 per Barwick CJ at 110 (CLR).

(x) The adjudicator has a broad discretion as to how to establish the facts that are relevant in the valuation of a disputed payment claim. He is entitled to make use of the material submitted by the parties, and provided the parties are given the relevant notice to enable material to be placed before the adjudicator, the requirements of natural justice in the Act are satisfied. There is no other requirement as is established by applying the simple rules of construction.

(xi) This is consistent with the court's statements on the natural justice issue in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* at [57], by specific reference only to ss 17(1), (2), 20, 21(1) and 22(2)(d) of the Act.

> [S]uch is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions [namely occasioned by the failure to give notices], the determination is a nullity.

(xii) The requirements of fairness require an adjudicator to determine the value of a contested payment claim only by reference to the specific submissions made by the parties, and if the adjudicator is minded to move outside those submissions, the adjudicator must give the parties the opportunity to make further submissions.

(xiii) The Act contains the particular measure of natural justice which is a pre-condition to validity: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* at [57], which requires no resolution as to whether the failure to accord procedural fairness is void or voidable.

(xiv) A failure by an adjudicator to have regard to relevant facts may amount to a denial of natural justice under the Act. The rationale is clear: "Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice". According to Gleeson CJ, this alone was sufficient to dismiss the complaint of lack of procedural fairness in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; 77 ALJR 699 at 13–14 (CLR).

Einstein J's judgment in *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205 (29 March 2006) was cited with approval by Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205 at [33].

In *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798 (14 August 2006), McDougall J restated the principle stated by Einstein J in *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205 that an adjudicator breaches the requirements of natural justice where he determines an application upon a basis addressed by neither party.

At [42] of *John Goss*, McDougall J pointed out that "the concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case".

His Honour reverted to this aspect again at [78] of *Veolia Waters Solutions v Kruger Engineering* [2007] NSWSC 46 (19 January 2007).

At [57] of *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798, McDougall J, by reference to *Holmwood*, said that as the concept of good faith, referred to in [SOP25.70], was unsettled, it was preferable to deal with most applications on the basis of a denial of natural justice. McDougall J said, in this regard:

> [57] The content of the concept of good faith (in the *Brodyn* sense, if I may call it that) is unsettled – see the judgment of Brereton J in *Holmwood Holdings Pty Ltd v Halkat*

> *Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [63] and following. There is possibility for that concept to overlap with the reference to "good faith" in s 30(1). In those circumstances, I think that courts should be slow to decide applications on the basis of a lack of "*Brodyn*" good faith unless it is necessary to do so. In many cases, it will be possible to decide an application on the basis of denial of natural justice; and if this is so, then that should be sufficient.

McDougall J's observations above, were cited by Gzell J, with approval, in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* [2006] NSWSC 1202.

In *Veolia Water Solutions & Technologies v Kruger Engineering Australia Pty Ltd* [2006] NSWSC 1406, McDougall J held that it would be a potentially very serious, and probably irremediable, prejudice to the plaintiff and consequently a breach of the provisions of natural justice, if an adjudication were permitted to proceed on the basis of a prior payment claim in circumstances where that outcome would be dictated by what the adjudicator had already determined and where there was a *bona fide* challenge on foot to that determination.

In *Vis Constructions Ltd v Cockburn* [2006] QSC 416 (15 December 2006), Jones J did an extensive review of the relevant principles of natural justice in considering that requirement within the context of the Queensland Act.

At [34], his Honour noted that there was a continuing debate as to whether only a "substantial" denial of natural justice would trigger the court's review or whether any breach of the rules of natural justice would suffice. His Honour referred to the reservations of Basten JA in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 (13 July 2005).

Jones J held:

> [37] A clear breach of the statutory requirements to accord natural justice undoubtedly results in invalidity of the decision. The builder here contends that there was also a breach of the general rules of natural justice by reason of the builder not being heard on some issues. The legislative scheme obviously limits the extent to which the rules of natural justice apply. But in the determination of the jurisdictional fact which may have financial and reputational consequences for the person affected there is nothing in the legislation which excludes resort to these principles. In *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, the relevant Act laid down a particular framework for the conduct of that Tribunal in its review of a delegate's decision. The issue in that case was whether because of a general lack of procedural fairness a writ of prohibition would issue pursuant to s 75 of the Constitution. From the joint judgment of Gaudron and Gummow JJ (Gleeson CJ agreeing) the following appears (at [59]):
>
> > However, the conditioning of a statutory power so as to require the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction. The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures. Unless the limitation ordinarily implied on the statutory power is to be rewritten as denying jurisdictional error for "trivial" breaches of the requirements of procedural fairness, the bearing of the breach upon the ultimate decision should not itself determine whether prohibition under s 75(v) should go. The issue always is whether or not there has been a breach of the obligation to accord procedural fairness and, if so, there will have been jurisdictional error for the purposes of s 75(v).
>
> [38] McHugh J said (at [101]):
>
> > One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be

> decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding.
>
> [39] I should refer to the statement of the majority (Mason CJ, Deane and McHugh JJ) in *Annetts v McCann* (1990) 170 CLR 596; 65 ALJR 167; 97 ALR 177 where the following appears:
>
> > It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.
>
> [40] It seems to me that a breach of a fair hearing rule on the determination of the jurisdictional fact is apt to allow for the quashing of an adjudicator's decision under the *Judicial Review Act* ("JRA").

It would appear that his Honour was, correctly so, more inclined to the minority view of Basten J than the view of the majority in *Co-ordinated Construction*.

The failure to give any consideration to the plaintiff's adjudication response (except in respect of a limited question) is in the opinion of Austin J, at [84] of his Honour's judgment in *Firedam Civil Engineering Pty Ltd v KJP Construction Pty Ltd* [2007] NSWSC 1162, a sufficient breach of the rules of natural justice to justify a declaration that the adjudication determination is void. A similar conclusion was arrived at by Hammerschlag J in *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941.

For a fuller discussion of the *Trysam* judgment see [SOP25.70].

In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [58], Hodgson JA said:

> [58] In each of those cases, natural justice was denied because submissions duly made were wholly disregarded, rather than, as in this case, being addressed and considered irrelevant. Further, it appears that in Firedam the adjudicator, having decided the respondent's submissions should be disregarded, simply adopted the amount specified by the claimant in the payment claim. If so, that would be a failure to perform the task required of determining the amount of the progress payment (if any) to be paid, having regard to the consideration in s 22(2): see *Minister for Commerce v Contract Plumbing NSW Pty Ltd* [2005] NSWCA 142 at [33]–[37]; *John Holland* at [45]–[50]; *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 at [26]–[27].

See the commentary on *Halkat Electrical* by McDougall J at [42]–[43] of *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [SOP4.50].

Care should be taken in charging an adjudicator with a lack of *bona fides*. At [107] of *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), Giles JA, with whom McColl JA and Young JA concurred, said:

> It should be said at once that there is no substance in this ground. As with charging wholesale departure from adjudication according to the Act, an allegation of lack of bona fide exercise of powers should not lightly be made. Brereton J in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [97] cited, from *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 261; (2002) 194 ALR 749 that "an allegation of bad faith is a serious matter involving personal fault on the part of the decision-maker". As noted by McDougall J in *John Goss Projects Pty Ltd v Leighton Contractors* (2000) NSWSC 798; (2006) 66 NSWLR 707 at [58], s 30(1) of the Act dealing with an adjuducator's protection from liability involves acting "in good faith"; the concepts in their contexts may differ but this adds to the restraint to be exercised in alleging that an adjudicator

has not bona fide exercised the power under the Act. In the present case the lack of substance is such that the allegation should not have been made against the adjudicator.

In *Shorten v David Hurst Constructions Pty Ltd* (2009) 25 BCL 188; [2008] NSWSC 546, Einstein J, after considering all the evidence before him in an application for an injunction to preclude the entry of judgments in respect of two adjudicators' determinations on the ground that there was a denial of natural justice in the adjudication process, held on the authority of *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798, that natural justice does not require an adjudicator to give parties an opportunity to make submissions on matters that were not "germane" to the adjudicator's determination. His Honour further held however that a failure by the applicants in the adjudication process to provide the respondents in that process with a full copy of the adjudication application, did constitute a denial of natural justice material to the outcome of the adjudication application, and consequently the adjudications were void, and that the applicants were entitled to the injunction they sought.

Einstein J's judgment in *Shorten v David Hurst Constructions Pty Ltd* (2009) 25 BCL 188; [2008] NSWSC 546 was cited with approval by Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205.

Further authorities on this point are the judgments of McDougall J in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 347 and that of Vickery J in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd (No 2)* [2010] VSC 255.

Ball J, in *Anderson Street Banksmeadow Pty Ltd v JCM Contracting Pty Ltd* [2014] NSWSC 102, provided a very useful summary of the essential principles going to the issue as to whether or not an adjudicator was in breach of the requirements of natural justice/procedural fairness and further, if so, whether that was a ground for setting aside an adjudication award. His Honour said:

> [46] There is no doubt that an adjudicator is bound by the rules of natural justice. However, the content of the obligation to comply with the rules of natural justice is affected by the nature of the process to which the rules apply. As McDougall J explained in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 at [142]:
>
> > Any entitlement to natural justice must accommodate the scheme of the Act, including the extremely compressed timetable provided for the submission of payment schedules, adjudication applications, and adjudication responses; and the limited time (subject to the consent of the parties, which they may give or withhold at their will) for an adjudicator to determine an application. It must also accommodate the fact that, in many cases, claimants and respondents will prepare their documents themselves, and will not avail themselves of legal advice in doing so.
>
> See also *Maxstra NSW Pty Ltd v Blacklabel Services Pty Ltd* [2013] NSWSC 406 at [79] per Rothman J.
>
> [47] Moreover, for the court to grant relief in respect of a failure to follow the requirements of natural justice, the failure must be material. The concept of materiality was explained in these terms by McDougall J in *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399 at [52]:
>
> > ... the concept of materiality is inextricably interlinked with the concept of natural justice, insofar as the latter concept is relevant to the determinations of adjudicators under the Act. On my view, that flows not only from Hodgson JA's use of the adjective "substantial" in *Brodyn*, but also from the point made by Gleeson CJ in *Lam*: that the law is concerned with the practical effect of the alleged denial of an opportunity to be heard. Thus, the concept of materiality requires some analysis of at least:

(1) the importance or otherwise of the relevant subject matter (as to which, it is said, there was a denial of an opportunity to put submissions): in particular, its significance to the actual determination; and

(2) whether or not there were submissions that could properly have been put that, as a matter of reality and not mere speculation, might have affected the determination.

Similarly, in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205 at [40], Applegarth J, after reviewing the authorities in New South Wales, said:

> The adjective "substantial" has been used in the relevant authorities to capture the principle that the opportunity denied was material, namely that the matter about which the adjudicator did not provide an opportunity to be heard was a point upon which the adjudicator based his or her decision and was significant to the actual determination. In addition, the Court's concern is with the practical effect of the alleged denial of natural justice. Reference to the High Court's decisions in *Stead v State Government Insurance Commission* and *Ex parte Aala* supports the proposition that even if the Court is satisfied that there has been a denial of natural justice, relief may be denied if it can be shown that compliance with the requirements of natural justice could have made no difference to the outcome. It is probably sufficient in this regard for the applicant for relief to show that there were substantial submissions that, as a matter of reality and not mere speculation, might have persuaded the adjudicator to change his or her mind. [Citations omitted]

In *Metacorp* above, Vickery J said at [16]:

> I have arrived at the same conclusion as McDougall J in Watpac. If there is a substantial denial of the measure of natural justice required to be given by an adjudicator appointed to make an adjudication determination under the *Building and Construction Industry Security of Payment Act 2002* (Vic), whether by not following the procedural requirements of the Act, or by not adhering to the principles of procedural fairness recognised by the common law, the decision will be a nullity.

Vickery J, in *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300, addressed the question of natural justice in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426, where his Honour said:

> [139] If therefore an issue arises for consideration which is required to be determined beyond the material before the adjudicator pursuant to s 23(2), or that which can be reasonably inferred from such material, it would be incumbent on the adjudicator to seek the provision of further submissions (including relevant documentation) on the point from both parties pursuant to the adjudicator's power to do so under s 22(5).
>
> [140] Further, in the event that it becomes necessary to make an adverse finding as to the credit of a party or a witness in order to determine an issue, as a matter of procedural fairness, if the adverse finding on credit might significantly impact upon the personal reputation of the person involved, the facility to provide further submissions under s 22(5) should be utilised.
>
> [143] Nevertheless, in approaching the question of procedural fairness in the decision making of an adjudicator under the Act, not too finer point should be taken in relation to what is done. The shortcomings of the statutory procedure provided for in the Act point to the need for a large measure of practicality, flexibility and commonsense being observed to make it work. The procedures will call for adaptation in each case in the light of the clear legislative intention of the Act, namely that adjudicator's determinations are to be

> carried out informally: s 22(5A); and speedily: s 22(4); and "on the papers": s 23 and s 28I; and bearing in mind that there is always the facility for erroneous determinations to be corrected upon a final hearing of the issues in dispute between the parties: s 47(3).

In *Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd (No 2)* [2010] QSC 166, McMurdo J declared an adjudicator's determination void for want of natural justice where the adjudicator decided a substantial part of the claim upon a basis which neither the applicant nor the respondent had addressed.

Transfield Services (Australia) Pty Ltd v Nortask Pty Ltd [2012] QSC 306 restates the principle that the lack of procedural fairness may not necessarily lead to the quashing of an adjudication determination where this has no impact on the ultimate result: see [10]–[12] of that decision.

A breach of natural justice may have the potential to amount to a reasonable apprehension of bias with the result that an adjudication determination infected by it may be rendered void: see *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84 at [186]; *Discain Project Services Ltd v Opecprime Development Ltd* [2000] BLR 402 at 404-405 per Judge Bowsher QC; *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* (2005) 22 BCL 426; [2005] NSWSC 545 at [22]–[29] per Master Macready.

At [189] of *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84, Blue J said:

> It is a general principle of fairness that a party cannot unilaterally select the decision-maker. When parties agree to independent determination of a dispute, the person selected to determine the dispute usually has to be agreed by both parties or a person independent of both parties agreed by the parties. This applies typically to the selection of an arbitrator or expert, who is to be agreed by the parties or selected by the president of a relevant professional association. Where there is to be a judicial determination of an dispute, usually one party cannot unilaterally select a particular judicial officer to hear and determine the matter.

(n) Failure to determine the amount calculated by the adjudicator in accordance with the terms of the contract as required by s 9(a) of the New South Wales Act

At [34]–[35] of *Transgrid* in the Court of Appeal, Hodgson J, with whom Mason P and Giles JA agreed, said:

> [34] In this case, there is no suggestion that the adjudicator did not consider the provisions of the Act and the provisions of the contract. However, the Master found that he made a jurisdictional error, because he did not determine the amount calculated in accordance with the terms of the contract, as required by s 9(a). In my opinion, even if "amount calculated in accordance with the terms of the contract" were, on the true construction of s 9(a) and of the contract, the amount certified by the Superintendent, a decision to the contrary by the adjudicator would be a mere error of law, and not such as to render the determination invalid. To that extent, I disagree with the views expressed by McDougall J in *Musico v Davenport* [2003] NSWSC 977. Similarly, if it be the case that, on the true construction of the contract, there could be no entitlement to a progress payment in respect of a variation not approved in writing by the Superintendent, the inclusion of such a progress payment would likewise be an error of law, and not a matter which would render the determination invalid.
>
> [35] Accordingly, it is not necessary to decide whether, on the true construction of s 9(a) and the contract, the amount "calculated in accordance with the terms of the contract" is the amount certified (cl 42.2 of the contract) or the value of the work less deductions (cl 42.3 of the contract). However I would express the view that the latter follows from what I think is a preferable interpretation of s 9(a) and the contract, consistent with the use of the word "calculation" and consistent with the provisions against contracting out (s 34); that is, on this matter, I prefer the view of McDougall J

in *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027 to that tentatively expressed by the Master in the present case.

This is a draconian consequence, and will remain so, excepting in New South Wales, in light of *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1 and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, as it has the result that a building owner or developer, even in the short term, may have to find a substantial amount of money to comply with the adjudicator's award where it was not obliged in advance to make provision for that sum by arranging the appropriate finance at that point of time.

The decision of the New South Wales Court of Appeal in Transgrid does not appear to have influenced McMurdo J's decision in *Hervey Bay (JV) Pty Ltd v Civil Mining and Constructions Pty Ltd* (2010) 26 BCL 130; [2008] QSC 58, where the issue before his Honour was whether or not the adjudicator erred in law in allowing a very substantial amount for delay costs. It is clear from McMurdo J's decision that his Honour concluded that there was an error of law on the part of the adjudicator, justifying the setting aside of a substantial part of the adjudicator's determination. See the further discussion at [SOP9.50], [SOP10.50], [SOP22.690] and [SOP25.70].

See further the discussion in [SOP22.690] on the decision of McDougall J in *PPK Willoughby v Eighty Eight Construction* [2014] NSWSC 760.

(o) Bias – on part of adjudicator, impact of on adjudication determination

There are a number of cases in England where adjudicator's decisions have been attacked on the ground of imputed bias.

If fraud and a lack of *bona fides* were to give rise to grounds for curial intervention in an adjudication, it is submitted that imputed bias should do so as well. It cannot be said that if there is imputed bias, that an adjudicator will be acting in good faith.

(i) In *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207; (2001) 3 TCLR 11 (11 February 2001), it was held at [15] and [16] that an adjudicator was obliged to act impartially in carrying out his duties.

(ii) In *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* (2004) 20 Const LJ 338; [2004] EWHC 393 (Technology and Construction Court), the adjudicator had acted as an adjudicator in an earlier adjudication between the same parties, and in which he had ordered Whitefriars to pay Amec a substantial amount of money. Whitefriars objected to the adjudicator's appointment in the second adjudication.

At [113], the court said:

> As is demonstrated by two previous decisions of this court, each case must be considered on its own merits. I agree with his Honour Judge Bowsher QC, in *RG Carter Ltd v Edmund Nuttall Ltd* [2002] BLR 359, that the mere fact that an adjudicator is reappointed to consider a dispute which had already been referred to and decided by him, does not inevitably lead to a conclusion of a serious risk of bias.

At [115], the court referred to *Pring & St Hill Ltd v CJ Hafner (t/a Southern Erectors)* [2002] EWHC 1775; (2004) 20 Const LJ 402 (Technology and Construction Court) (1 May 2003), where the adjudicator had first adjudicated a dispute between the head contractor and the subcontractor, and was then asked to adjudicate on the same facts in the dispute between the same subcontractor and a sub-subcontractor. In that case the court said:

> In my view there is a very real risk that an adjudicator in the position of Mr Riches would be carrying forward from an earlier adjudication not merely what he had seen or been told, but also the judgments which he had formed and the opinions which he had reached which led him to conclude that that sum was the correct measure of Alpine's damages recoverable from PSH.

In the first adjudication in *AMEC*, the adjudicator had received certain legal advice in relation to a particular issue. At [124], the court held that there was a very real risk that the adjudicator would carry this advice forward into the second adjudication and that, in itself, amounted to a breach of natural justice.

At [126], the court emphasized that where an adjudicator sought advice from a third party, it was essential that he informed the parties in advance and:

> … that he notifies the parties of how he has formulated the question on which the advice has been sought, so that the parties can evaluate the advice in context, and finally, he discloses the substance of the advice which he has been given and gives the parties an opportunity to comment on it before he reaches his decision. This did not happen in this case.

At [127], the court added:

> I am very conscious that the time limits may dictate the manner in which the steps are carried out, but it seems to me that justice demands that the parties should be informed of the questions asked of the third party expert, of the answers given by the expert and that an opportunity should be given to comment on the advice given by the expert in advance of the adjudicator's decision. I can see no distinction between expert advice given on the question of jurisdiction and advice which goes to the merits. See, for example, *Discain Project Services Ltd v Opecprime Development Ltd (No 1)* [2000] 8 BLR 402 at 405 per his Honour Judge Bowsher QC.

(iii) In *Pring & St Hill Ltd v CJ Hafner (t/a Southern Erectors)* [2002] EWHC 1775 it was held that adjudicators may conduct multiple adjudications on connected or related matters, but where there was a risk that an adjudicator would be in possession of knowledge concerning a dispute which he would be unable to pass on to both parties in an adjudication, there may be a perception of bias and he should decline the appointment.

(iv) In *Specialist Ceiling Services Northern Ltd v ZVI Construction (UK) Ltd* (unreported High Court of Justice, Queens Bench Division, Leeds District, Technology and Construction Court, 27 February 2004) per Grenfell J, a without prejudice communication by ZVI was disclosed to the arbitrator. ZVI immediately objected to the inclusion of this communication in the material before the adjudicator and invited the adjudicator to withdraw. In a court challenge, the court held that the approach of the adjudicator who stressed that the inclusion of the material would not influence his decision, was correct and the objection was dismissed.

In *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* (2005) 22 BCL 426; [2005] NSWSC 545 (16 June 2005) (Technology and Construction List), per Master Macready (now Macready AJ), it was held that imputed bias on the part of the adjudicator gave rise to a finding that the adjudication was void. This decision is consistent with all of the English decisions above. By citing it, it is however not to be assumed that there is an acceptance that the facts set out in the judgment should have given rise to an attack on the adjudicator's award on this ground.

A failure to give notice of an adjudication application to a respondent constitutes a failure of natural justice and invalidates the application: *Brodyn* at [57]; *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388; [2006] NSWSC 13 (31 January 2006) at [49]–[50].

Einstein J, in *Allpro Building Services Pty Ltd v Micos Architectural Division Pty Ltd* [2010] NSWSC 474, appeared to elide apprehension of bias with considerations of a breach of the rules of procedural fairness.

At [15] of Einstein J's judgment, his Honour sets out an extract from the adjudicator's determination. The adjudicator said *inter alia* that the respondent's representative had a

history of requesting "disqualification of an adjudicator". In my experience [the adjudicator], and I understand the experience of other adjudicators, confirms this to be true.

At [16], Einstein J held that reference to the experience of other adjudicators constituted a breach of natural justice, and in any event exhibited a reasonable apprehension of bias.

His Honour declared the adjudication determination to be void.

(p) Failure to decide the entire dispute – impact of on adjudicator's determination

In *Buxton Building Contractors Ltd v Governors of Durand Primary School* [2004] EWHC 733 (Technology and Construction Court) per HHJ Thornton QC, 12 March 2004, the adjudicator failed to take account of or consider all the material and submissions before him and fell into serious error. It was held that he had exceeded his jurisdiction by so doing, that he had acted unfairly and in each case was in breach of [7]–[20] of the Scheme [Eng]. Accordingly, it was held that the decision was unenforceable at least by way of summary judgment. There is a fine line between the concepts of a failure of natural justice for which the adjudication can be set aside, and an error of law. Perhaps a failure to decide the entire dispute would be akin to legal/technical misconduct, the concept of which is founded on a lack of procedural fairness, and the adjudication may be able to be set aside for that reason.

See further McDougall J's decision in *Cornerstone Danks Street v Parkview Constructions* [2014] NSWSC 866, where his Honour said:

> [29] There is a distinction between the primary function of determining the matters set out in sub-s (1) and the obligation to justify that determination in writing and with reasons, being the obligation imposed
>
> [30] In performing the obligation to determine (among other things) the amount of the progress payment (if any) to be paid, it was necessary for the adjudicator to go through all the disputes and, in a rational and considered way, to deal with them. It was then necessary for the adjudicator to reduce his reasons for doing so to writing, along with the determination
>
> [31] The determination that the adjudicator produced clearly recognised this. It contained two separate sections, one headed "Determination" and one headed "Reasons". Clearly enough, as will be seen from what I have set out above, it was the former of those sections that the adjudicator intended to be his performance of the s 22(1) task, on the facts of this particular case. Equally clearly, what follows was intended to comprise his reasons, for the purposes of s 22(3)(b).
>
> [32] The essential point, however, is that the adjudicator could not have determined the amount of the progress payment without working his way through all the disputed issues that the parties had raised. What is equally apparent is that, as at 13 May 2014, he had not completed that task in respect of item 25 (profit and overhead), variation 57 and shop front deletions.

(q) Adjudicator failing to decide certain matters before him/her

In Scotland, in *Ballast plc v Burrell Co (Construction Management) Ltd* [2001] SLT 1039; [2001] BLR 529, it was held that adjudicators must decide the matters referred to them, otherwise their decisions may be rendered unenforceable.

In applying the *Brodyn* principles to this situation, it may well be that in New South Wales a similar result will obtain.

Allied to this question is the question as to whether or not an adjudicator's determination can stand where the adjudicator failed to address the merits of the claim. In *Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd* [2006] NSWSC 94 (6 March 2006), Bergin J, at [21] said:

> In *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, Hodgson JA referred to what the adjudicator must do in fairly general terms, that is, that the adjudicator must "address the merits" of the claim. In *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388; [2006] NSWSC 13, Brereton J went further to suggest that "as a minimum" that would involve the adjudicator determining "whether the construction work identified in the payment claim had been carried out, and what is its value". The plaintiff submitted that amongst the matters relevant to addressing the merits of the claims and determining their value in this case are: (1) whether the claimant had established a nexus between delays and costs said to have been incurred; (2) if so whether *all* delay costs were necessarily and reasonably incurred; (3) whether the claim included inter-state construction work or related goods and services; (4) whether all the rates claimed were reasonable; (5) whether the adjudicator agreed with the "subjective judgment" of the defendant as to its methodology; and (6) whether the plaintiff had already paid the defendant amounts referable to delay damages. The defendant did not demur to this submission, however, it submitted that the adjudicator did consider these matters and did address the merits of the claims. I will now consider each of these matters in turn except the third item, which I will consider later in relation to the transport claim.

In the light of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, the decision of Bergin J in *Shell* above, based on Brodyn, cannot stand.

In *Energy Australia v Downer Construction (Australia) Pty Ltd* [2006] NSWSC 52 (15 February 2006), it was held, at [114], that the adjudicator failed to determine Downer's payment claim on the basis put forward. He determined a substantially different claim. The result was that there had not been an adjudication of that claim within the meaning of the Act and the determination was accordingly void.

The decision of Nicholas J in *Energy Australia v Downer Construction (Australia) Pty Ltd* [2006] NSWSC 52 was reversed under the name of *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 (19 March 2007). At [80]–[89], Giles JA, with whom Santow and Tobias JJA agreed, said:

> [80] More fundamentally, as Hodgson JA observed in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* at [24], if the adjudicator makes an error which can be seen as taking a determination outside the parameters of the payment claim, that does not necessarily invalidate the determination.
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> [81] In *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* at [55] Hodgson JA, with whom Mason P and I agreed, noted as essentials to the existence of a determination compliance with the basic requirements laid down by the Act and "a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject-matter of the legislation and reasonably capable of reference to this power". An adjudicator's determination may be incorrect, but it can still be a valid determination. Many cases have recognized that a determination under the Act is of an interim nature, often made in "pressure cooker" circumstances; that the purpose of the Act is to enable speedy resolution of claims to progress payments without excessive formality or intervention by the courts; and that the scope for invalidity for non-jurisdictional error is limited: for example: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* at [51]; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* at [45]; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 at [44].
>
> [82] An adjudicator's exercise of the statutory power includes addressing the parameters of the payment claim. Basten JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* observed at [44] that a determination will not necessarily be set aside if the determination "goes beyond the parameters of the claim, properly understood", and that –

> Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard: see *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391 (Dixon J). A factor favouring that approach is "the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact": *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWSLR 55; (1999) 102 LGERA 52; [1999] NSWCA 8 at 72 (Spigelman CJ).

[83] His Honour said at [51] that, for the reasons earlier set out –

> … It was for the adjudicator to determine the scope and nature of the payment claim. Furthermore, if the adjudicator had been inclined to determine the claim on the basis of a contractual entitlement other than that asserted by the claimant, he would have been required to make the relevant findings of fact and law to support his conclusion. If, in accordance with *Brodyn* and as suggested above, those matters are entrusted to the adjudicator by the Act, it is not open to the Court to form a view on those matters and act upon the view so formed, even to demonstrate that the adjudicated amount may be upheld on a different basis. The circumstances in which a court exercising a power of judicial review can reach a conclusion different from that reached by the repository of the power will be extremely rare: see *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559 at 579.

[84] See also Hodgson JA at [26], stating that generally it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim and if not whether an amount should be excluded from the determined amount.

[85] Ipp JA in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* at [76] stated that whether a claim complies with s 13(2) of the Act is "a matter for determination under s 17". In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238 Basten JA referred to the cases concerning compliance with s 13 and said, at [71], that the existence of essential preconditions to a valid claim "are matters for the adjudicator, not for objective determination by a Court". It is not easy to see why determination of the parameters of the payment claim should be in a different position.

[86] It may be added that in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19, decided after the hearing of the present appeals and cross appeal, whether a submission had been "duly made" (s 22(2)) was said to be a matter for the adjudicator, whose error in that respect would not invalidate his determination. It was not a matter for objective determination by the Court, see per Hodgson JA, with whom Beazley JA agreed, at [57] and Basten JA at [71]–[72]: the latter referred to what he had said in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*.

[87] In my opinion, determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the determination. In the present case, in determining the amount of the progress payment (if any) to be made it was for the adjudicator to decide whether the water ingress fell within latent conditions for the purpose of the contract, and the parameters of the payment claim in that respect. He did so. As to both, it could not be said that the adjudicator's decision was without foundation, and if the adjudicator addressed the matters and came to his decisions, even if other decisions could have been come to, he did what the Act required – he determined the adjudicated amount. As was stated in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005]

NSWCA 142 at [49] –

> … an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act.

[88] There is good reason for leaving determination of the scope and nature of the payment claim to the adjudicator, apart from the purpose of the Act earlier mentioned. The scope and nature of the payment claim will often be, and in the present case was, open to be elucidated and evaluated with the benefit of the adjudicator's specialised knowledge.

[89] Accordingly, I am unable to agree with the trial judge's conclusion that the adjudicator failed to determine Downer's payment claim, but instead determined a different claim. The adjudicator determined the payment claim, and the court should not by judicial review engage with the questions decided by him in doing so.

(r) Adjudicator answering the wrong question – impact of on adjudicator's determination

In *C & B Scene Concept Design Ltd v Isobars Ltd* [2001] CILL 1781, it was stated at [39] and [40]:

> [39] In reaching this decision, I am mindful of Mr Constable's submissions about what has repeatedly been said about the purpose of HGCRA, and the adjudication process for which it provides. Adjudications are meant to be swift and conclusive, unless and until the issues decided are reopened in litigation or arbitration. They are not susceptible of attack on the grounds of error of fact or law, however obvious. See for example *Bouygues UK Ltd v Dahl-Jensen UK Ltd* (2000) BLR 522; *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93; *Northern Developments (Cumbria) Ltd v J & J Nichol* (2000) BLR 158; [2000] EWHC 176; *VHE Construction plc v RBSTB Trust Co Ltd* (2000) BLR 187; [2000] EWHC Technology 181 and *Sherwood & Casson Ltd v Mackenzie* (unreported, 30 November 1999), cited in *Northern Developments Cumbria Ltd v J & J Nichol* (unreported, 24 January 2000, TCC).
>
> [40] But in my judgment the dicta in these cases, strong as they are, have no application to a case where the Adjudicator's decision is based exclusively on consideration of a contractual provision which did not apply to the agreement between the parties to the adjudication. In the case of *Bouygues* the Court of Appeal approved the test formulated by Knox J in *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 EGLR 103; [1991] 28 EG 86 ("If he has answered the right question in the wrong way his decision will be binding. If he has answered the wrong question, his decision will be a nullity"). In my judgment it is (to put it at its lowest) fairly arguable that that dictum applies here, and the Adjudicator did indeed consider an irrelevant question.

See further, *Levolux AT Ltd v Ferson Contractors Ltd* [2003] All ER (D) 172 (Jan); [2003] EWCA Civ 11; [2003] 1 All ER (Comm) 385 (22 January 2003).

But it must always be remembered that an error of law will not be sufficient to set aside an adjudication.

(s) Adjudicator answering the right question the wrong way – impact of on adjudicator's determination

In *Watson Building Services Ltd, Re Application for Judicial Review* [2001] ScotCS 60 (13 March 2001) dealing with the relevant provisions of the HGCR [Eng], the court at [16] said:

> Where an adjudicator answered the right question in the wrong way, the court should not interfere, even where the error was blatant: *Allied London & Scottish Properties plc v Riverbrae Construction Ltd* [1999] ScotCS 170; 2000 SLT 981; *Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd* [2000] ScotCS 330 per

Lord Caplan; *C & B Scene Concept Design Ltd v Isobars Ltd* (unreported, High Court, Technology and Construction Court (Eng), 20 June 2001).

As the same legislative philosophy is to be found in the Australian legislation, the same principles should obtain.

(t) Adjudicator's failure to take account of matter of defence – impact of on adjudicator's determination

Where an adjudicator fails to address an important matter of defence, this is not a matter which goes to the adjudicator's jurisdiction, but goes to the conduct of the proceedings. It was so held in *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] BLR 49; [1999] EWHC Technology 182 (17 December 1999); *Farebrother Building Services Ltd v Frogmore Investments Ltd* (unreported, High Court of Justice, QBD, Technology and Construction Court, Gilliland J, 20 April 2001). Given that an adjudicator has a wide discretion in regard to procedural matters, there is a reasonable argument that the failure to address any such issue would not give rise to a valid basis for a declaration of nullity in regard to an adjudication.

However, there is also a reasonable argument that the failure might give rise to a lack of procedural fairness, with a declaration of nullity following, this is particularly so in the light of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

Where an adjudicator fails to address the merits, and presumably this would also obtain in regard to the failure to take account of a matter of defence, the determination has been held in Australia to be incapable of standing. See the discussion on *Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd* [2006] NSWSC 94 (6 March 2006) in [SOP25.70]. The decision in Shell [2006] NSWSC 94 was cited with approval by Brereton J in *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61 at [34].

It must be remembered however that there is a distinction between the failure to refer to a specific defence or specific defences in an adjudication determination and a failure overall to address in good faith the issues raised by the parties.

Palmer J addressed this issue in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [57]:

> [57] Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 22(2)(c) and (d). Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties.

Palmer J's judgment was cited by Gzell J, with approval, in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* [2006] NSWSC 1202 (17 November 2006) and has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

In *State Water Corp v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879, Sackar J noted:

> [65] To summarise, the general position is that it is for the adjudicator to determine whether submissions made by a respondent were "duly made" and in compliance with s 20(2B). However, that does not necessarily place the adjudicator's decision beyond review. If the adjudicator formed his or her opinion by taking into account irrelevant considerations, or by misconstruing

> the terms of the Act, or the adjudicator's opinion simply cannot be described as reasonable, or is without foundation, that may provide a basis for the intervention of the court.
>
> [66] Applying the principles to this case, there is, in my view, no basis whatsoever for the view that State Water's submissions were "duly made", as they clearly and obviously advanced reasons for non-payment which were not included in State Water's payment schedule. It is possible that the adjudicator did not actually turn his mind to the requirement, but simply, as a matter of practice, said that he did so.

In doing an in depth analysis of jurisdictional error in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, Mitchell J, relying on the authorities below, said at [102]:

> … Grounds of review such as taking irrelevant considerations into account, or failing to take relevant considerations into account, are based on a construction of legislation as either prohibiting or requiring that regard be had to those matters: *Minister for Aboriginal Affairs v PekoWallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39 40; *A v Corruption and Crime Commission* [2013] WASCA 288; (2013) 306 ALR 491 [88] - [90]. …

It is to be doubted whether this principle has any relevant to the West Coast security of payment legislation.

(u) Adjudicator making an error of law and/or fact – impact of on adjudicator's determination

(i) **Prior to *Chase Oyster Bar v Hamo* [2010] NSWCA 190**

Whether or not an adjudicator has made an error is a question to be determined by the Court, making up its own mind having regard to the material before it.

Ball J at [20] of *Reitsma Constructions Pty Ltd v Davies Engineering Pty Ltd t/as In City Steel* [2015] NSWSC 343 held as follows:

> … It is, however, entitled to give weight to the opinion of the Adjudicator: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; 136 LGERA 288; [2004] NSWCA 422 at [88], [105] per Spigelman CJ.

An error of law within jurisdiction, however obvious (and for which see the discussion below), does not constitute a ground for setting aside the adjudicator's adjudication, see for example: *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] BLR 49; [1999] EWHC Technology 182 (17 December 1999); *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] 37 EG 173; [1999] BLR 93; *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] BLR 158; [2000] EWHC 176; *VHE Construction plc v RBSTB Trust Co Ltd* [2000] BLR 187; [2000] EWHC Technology 181; *Sherwood & Casson Ltd v Mackenzie* (unreported, Technology and Construction Court (Eng), Thornton J, 30 November 1999), cited in *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] EWHC 9 (24 January 2000)) and *SL Timber Systems Ltd v Carillion Construction Ltd* [2001] Scott CS 167; [2002] SLT 997 (27 June 2001); *Unifor Australia Pty Ltd v Katrd Pty Ltd* [2012] QSC 252 per Daubney J at [34]; *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd* [2013] QSC 293.

See further *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [32], [51], [52] and [56], where it was held that although an adjudicator erred in law in his approach, he nevertheless filled his statutory task set in s 22 and attended to the task of dealing with the adjudication claim by dealing with the matters required in that section. The court noted at [31], [32], [51] and [52] that the adjudicator's error was brought about by the way the parties conducted the matter before him. It was noted however at [32] that there may be occasions where a tribunal, despite dealing with the matter on the basis of the approach taken by the parties can be seen to have failed to attend to its required task.

For this principle the court relied on *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 54 FLR 334; 35 ALR 186.

In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 (31 October 2008), Allsop P, Giles JA and Hodgson JA drew attention to the fact that there may be occasions though the case on appeal was not one, where a tribunal despite dealing with a matter on the basis of a common approach of the parties could be seen to have failed to attend to its required task. In this regard, their Honours referred to *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 54 FLR 334; 35 ALR 186.

Plaza West was referred to and the principles contained therein restated by Giles JA, McColl JA and Young JA at [74] of *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009).

Prior to *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 in New South Wales, it appeared to be beyond doubt that an error of fact or law does not constitute a ground for setting aside an adjudicator's determination. For further authority to this effect: see *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142; *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395; *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228; *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394.

However, Basten JA appears to have left the question open at [102] of *Chase Oyster Bar,* in which his Honour said the following in regard to a decision which is arbitry, capricious or irrational, or where the adjudicator's determination is not open to a reasonable person, correctly understanding the meaning of the law in question:

> If the last conclusion be wrong, and the practical considerations should be considered determinative, the decision of the adjudicator in respect of the validity of an adjudication application would not be beyond review. The opinion of the Tribunal that its jurisdiction was engaged cannot be arbitrary, capricious or irrational and must be an opinion open to a reasonable person correctly understanding the meaning of the law under which authority is conferred: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; [1944] HCA 42 at 430 and 432 (Latham CJ); *Buck v Bavone* (1976) 135 CLR 110; [1976] HCA 24 at 118–119 (Gibbs J); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; [1999] HCA 21 at [133]–[135] (Gummow J); *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 78 ALJR 992; [2004] HCA 32 at [37]–[38] (Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 84 ALJR 369; [2010] HCA 16 at [23]–[24] (Gummow ACJ and Kiefel J, dissenting as to the result) and at [102]–[103] (Crennan and Bell JJ). Although, as noted by Gibbs J in *Buck v Bavone*, the Court may be slow to intervene where authority depends upon a matter of "opinion or policy or taste", that will not be so where authority depends upon a straightforward calculation of time, as in the present case.

(ii) **Subsequent to *Chase Oyster Bar v Hamo* [2010] NSWCA 190**

It is submitted that the better view now in New South Wales is that a determination, based on an error of law or fact of the nature referred to by Basten JA in [102] above, constitutes an excess of jurisdiction.

At [74] of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770, Emmett AJA gave strong support for this submission by stating:

> I do not consider that there is a clear indication or implication to be found in the Security of Payment Act that the jurisdiction conferred by s 69 of the Supreme Court Act is intended to be excluded. It is by no means clear that a claimant who has not been paid the adjudicated amount and who has served a notice of intention to suspend work, and then takes that step, would be liable for any loss or damage from which the claimant would otherwise be protected by s 27(3). In circumstances where the

> determination is later quashed by the court in the exercise of the jurisdiction conferred by s 69, the inference, if any, that may be drawn from the language of s 27(3) is insufficient to demonstrate an intention to remove the court's jurisdiction. I consider, on balance, that judicial review under s 69(3) is available to quash a determination made by an adjudicator where an error of law that leads to an adjudicated amount that is different from the amount that would have been determined but for the error of law appears on the face of the record.

It is submitted that that decision, coupled with the decisions below, state the correct position in respect of errors of law leading to an incorrect adjudicated amount being the subject of curial review.

It is significant that Emmett AJA arrived at his Honour's conclusion without debating any of the authorities referred to in this paragraph on the basis that the conclusion to which his Honour arrived at seemed to be a self-evident proposition.

The line of authority referred to above has been followed in the Northern Territory and for which see the judgment of Kelly J in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 1; [2009] NTSC 48, where his Honour said:

> [33] In relation to the contention that it was an essential requirement for a valid determination that the application be made within 90 days after the payment dispute arises, Mr Wyvill conceded (as he must) that the adjudicator is free to make a factual error in answering the question whether the application was made within 90 days after the payment dispute arose, (this was determined by Mildren J in *Independent Fire Sprinkers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [47] and [48]), but says that if the adjudicator gets the wrong answer to this question as a result of an error of law, his decision is void.
>
> [34] It is clear, for the reasons set out above, that the adjudicator in the present case did make an error of law in the process of determining that the application was made within 90 days of the payment dispute arising. However, I see no reason to distinguish between factual errors and errors of law made by the adjudicator in determining whether the Application was made within 90 days after the payment dispute arose. As Mildren J said in *Independent Fire Sprinkers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [48]:
>
> > If the adjudicator has jurisdiction to determine whether or not the 90 day time limit has been complied with, his decision cannot be void. In *Brodyn*, Hodgson JA specifically held that that the legislature did not intend that exact compliance with that provision was essential to the existence of a determination. I consider that the structure and purposes of the Act do not support a conclusion that an adjudication is void if the adjudicator wrongly concludes that the time limits have been complied with. *[reference omitted]*.

At [84] of *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235, Vickery J was of the opinion that although an adjudicator may have made a wrong finding of fact, and it was open to him to have arrived at a different conclusion on the issue at the time of the determination, and where there was some evidence upon which the adjudicator could have arrived at a disputed finding, the determination could not be challenged on the basis of an error of fact.

Douglas J at [35] of *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4, referred with approval to the judgment of Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205 at [57] where Applegarth J said:

> The statutory scheme may permit an adjudicator to make unreviewable errors of law in quickly deciding complex legal issues in adjudications of the present kind after

> considering the parties' submissions. The statutory scheme does not permit an adjudicator to determine an adjudication on the basis of a view of the law for which neither party has contended.

With very great respect to both Douglas J and Applegarth J that statement of the law can no longer be correct in the light of the decision in *Chase Oyster Bar* above.

Matrix was, however, cited with approval by McDougall J at [6] of *Class Electrical Services v Go Electrical* [2013] NSWSC 363.

In *Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd* [2014] NTSC 22 (6 June 2014), after noting the provisions of s 33(1) of the Northern Territory Act and the decisions in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14; [2009] NTSC 4 per Mildren, Riley and Southwood JJ; *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1; [2011] NTCA 1 per Southwood and Kelly JJ and Olsson AJ concluded with the following observations:

> [37] However, Southwood J was in the minority in that matter and no other judge expressed agreement with His Honour's qualification of what he had previously said in *AJ Lucas*. Rather (from [125]) Kelly J discussed the qualification in some detail and provided persuasive reasons why she disagreed with it and why she considered that "the approach in *AJ Lucas* was correct" (See particularly [135], [139], [140], [142], [143] and [145]). At [144] her Honour affirmed that in her view the correct construction of s 33(1) is that set out by Southwood J at [32] of AJ Lucas. The other judge, Olsson AJ, did not express a view on this point. I consider that the approach espoused by Southwood J in AJ Lucas, with the agreement of Riley J, is binding on this court.
>
> [38] Needless to say I agree with the submission made on behalf of the first defendant that it is for the adjudicator to determine if the matters in s 33(1)(a) exist and that judicial review is only available in respect of those matters where he made an error of law in reaching his state of satisfaction or where his satisfaction was unreasonable. A mere error of fact would not invalidate a determination unless it is demonstrated that the adjudicator's state of satisfaction in relation to that fact was unreasonable.

At [64] of *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84, Blue J said:

> I reject Tali's contention. For the reasons set out below, the adjudicator only has jurisdiction if the payment claim objectively complies with section 13. It is not sufficient merely that the adjudicator forms an opinion that the payment claim complies with section 13.

At [62] of *SC Projects Australia Pty Ltd v Field Deployment Solutions Pty Ltd* [2015] WASC 339, Mitchell J, after referring to his Honour's own judgment in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, again reiterated that an adjudicator may make errors of law including errors in the construction of contractual terms without falling into jurisdictional error. His Honour said added at [63]:

> In *Laing O'Rourke*, jurisdictional error was established because the adjudicator in that case failed to resolve the payment dispute by reference to the terms of the Subcontract which were before him, thereby misapprehending the nature of his function. There is no such contention here, and the adjudicator's reasons in the present case resolve the dispute by reference to express and implied terms of the Agreement which he identifies and the arguments which were advanced in the adjudication.

See also the judgment of Emmett AJA in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770.

(v) A possible qualification in regard to questions of errors of law and/or fact – impact of on adjudicator's determination

At [47] of *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229, Basten JA expressed a possible qualification:

> It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [(1994) 69 CLR 407; [1944] HCA 42 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu*; (1999) 197 CLR 611; [1999] HCA 21 at [133], was to the following effect:
>
> > If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.
>
> Thus, as noted in Brodyn, an essential element in the formulation of such an opinion is that is must be undertaken in good faith, but that is not a sufficient condition of validity.

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), Giles JA, with whom McColl JA and Young JA concurred, referred to the paragraph above from Basten JA's judgment, but did not appear to suggest it was incorrect.

At [102] of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, Basten JA, with whom Spigelman CJ and McDougall J concurred, noted that:

> If the last conclusion be wrong, and the practical considerations should be considered determinative, the decision of the adjudicator in respect of the validity of an adjudication application would not be beyond review. The opinion of the Tribunal that its jurisdiction was engaged cannot be arbitrary, capricious or irrational and must be an opinion open to a reasonable person correctly understanding the meaning of the law under which authority is conferred: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407 at 430 and 432 (Latham CJ); *Buck v Bavone* [1976] HCA 24; 135 CLR 110 at 118–119 (Gibbs J); *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [133]–[135] (Gummow J); *Minister for Immigration and Multicultural Affairs v SGLB* [2004] HCA 32; 78 ALJR 992 at [37]–[38] (Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 84 ALJR 369 at [23]–[24] (Gummow ACJ and Kiefel J, dissenting as to the result) and at [102]–[103] (Crennan and Bell JJ). Although, as noted by Gibbs J in Buck v Bavone (1976) 135 CLR 110; [1976] HCA 24*Buck v Bavone*, the Court may be slow to intervene where authority depends upon a matter of "opinion or policy or taste", that will not be so where authority depends upon a straightforward calculation of time, as in the present case.

It is therefore an open question in New South Wales, but probably correct to say that arbitrary or unreasonable errors of law and/or fact may constitute an excess of jurisdiction, and this would be *a fortiori* the position when an arbitrator took into account irrelevant considerations or otherwise misconstrued the terms of the relevant legislation.

An adjudication determination on the basis that the adjudicator's opinion was reached by taking into account irrelevant considerations or otherwise misconstruing the terms of the relevant legislation.

This took place in *Hervey Bay (JV) Pty Ltd v Civil Mining and Constructions Pty Ltd* (2010) 26 BCL 130; [2008] QSC 58, where the issue before McMurdo J was whether or not the adjudicator was bound by the superintendent's certificate. His Honour held that that question in turn depended upon the true construction of the contractual terms. After his Honour examined that issue, he differed from the decision of the adjudicator on that point and declared that that aspect of the adjudication was void.

A reading of the judgment does not disclose that there was any finding that the adjudicator failed to apply his mind in a *bona fide* manner to the issue. One wonders whether the same conclusion would have been arrived at in New South Wales, or whether it would have been held by the courts in New South Wales that once the adjudicator had applied his mind *bona fide* to the issue, a court will not interfere. In *Bergemann v Power* [2011] NSWSC 1039 (9 September 2011), McDougall said at [43]:

> For the reasons that I gave in *Musico* at [47] and following (which I will not repeat, because they are summarised at [52] set out at [33] above), I remain of opinion that, where matters are entrusted to adjudicators for decision, a decision involving error of law is not, for that reason alone, a decision beyond jurisdiction. Any other conclusion would be, as I said and as Hodgson JA agreed in *Brodyn*, inconsistent with the statutory scheme. In this context, I note that in Chase at [55], Spigelman CJ observed that "the purpose of the legislative scheme [of the Act] is best served by restricting the scope of intervention by the courts".

As noted by Vickery J in *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300 at [79]:

> As observed in *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 at [123] – [124], there is no error of law on the face of the record simply in making a wrong finding of fact. Further, even if the reasoning of the tribunal in arriving at its conclusion of fact was demonstrably unsound, this would not amount to an error of law on the face of the record. As to inferences of fact, provided that the particular inference is reasonably open, there will be no error. Indeed a finding of fact will only be open to challenge as erroneous in law if there is no probative evidence to support it.

At [21] of *John Holland Pty Ltd v Walz Marine Services Pty Ltd* [2011] QSC 39, Margaret Wilson J considered the impact of a possible error of law by asking the following questions:

> (a) whether the adjudicator erred in not applying his mind to the task of valuation of the claims as he was required to do;
>
> (b) if he erred in that way, whether his error was jurisdictional; and
>
> (c) whether he erred in his interpretation of the contract.

See also the judgment of Emmett AJA in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770.

(w) The adjudicator asserting a power exercised for a purpose not authorised by the relevant act – impact of on adjudicator's determination

At [102] of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, Mitchell J, in his Honour's in depth analysis of the consequences of jurisdictional excess said:

> … A ground of review which asserts improper purpose asserts that a power was exercised for a purpose not authorised by the relevant Act: *Thompson v Randwick Corporation* [1950] HCA 33; (1950) 81 CLR 87; *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170, 186, 233; *Hunter v Minister for Planning* [2012] WASC 247 [24]. …

It is respectfully submitted that this statement, although directed at the Western Australian model, may also be of significance generally.

(x) Misapprehension of by adjudicator the nature or limits of relevant statutory power - impact of on adjudicator's determination

Mitchell J at [102], of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, said:

> … A ground which asserts misapprehension of the nature or limits of the relevant statutory power: *Kirk v Industrial Court (NSW)* [2010] HCA 1 [72]; (2010) 239 CLR

531; *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 177 178 reflects a requirement of the law that a decisionmaker understand his or her statutory powers and obligations.

(y) Adjudicator making late decision – impact of on adjudicator's determination

In *MPM Constructions Pty Ltd v Trepcha Constructions Pty Ltd* [2004] NSWSC 103 (18 February 2004), because of the simple and honest mistake on the part of the adjudicator in calculating the number of days available to him to hand down his adjudication, he was late in so doing.

In an application to set aside the adjudication on the basis that it was late, McDougall J, relying on *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 72 ALJR 841 (28 April 1998) at 380–390 [91]–[93] (CLR), held that the test was whether it was the intention of the legislation that the fact of handing down a late award should be visited with invalidity. Furthermore, McDougall J relied at [97] of *Project Blue Sky*, where the High Court noted that it was an established principle that it was unlikely that it was a legislative purpose that an act done in contravention of a statutory provision should be visited with invalidity, if, as a result, there would be public inconvenience.

The fact that a decision is made subsequent to the statutory cut off time, does not render it invalid, *Barnes & Elliott v Taylor Woodrow Holdings Ltd* [2004] BLR 111; [2003] EWHC 3100 (Technology and Construction Court) (20 June 2003); *Ritchie Bros PWC Ltd v David Philip (Commercials) Ltd* [2004] SLT 471; [2004] BLR 379 per Lord Eassie. In *St Andrews Bay Developments Ltd v HBG Management Ltd* [2003] ScotCS 103, 4 April 2003, Lord Wheatley referred at [21] to *Ballast plc v Burrell Co (Construction Management) Ltd* [2003] SC 279; [2003] SLT 137, where Lord Reed said:

> [39] Balancing the various considerations to which I have referred, I have come to the conclusion that the Scheme should be interpreted as requiring the parties to comply with an adjudicator's decision, notwithstanding his failure to comply with the express or implied requirements of the scheme, unless the decision is a nullity; and it will be a nullity if the adjudicator has acted ultra vires (using that expression in a broad sense to cover the various types of error or impropriety which can vitiate a decision) for example because he had no jurisdiction to determine the dispute referred to him, or because he acted unfairly in the procedure which he followed, or because he erred in law in a manner which resulted in his failing to exercise his jurisdiction or acting beyond his jurisdiction.

Lord Wheatley continued at [21]:

> I respectfully agree with that view. While the failure of an adjudicator to produce a decision within the time limits is undoubtedly a serious matter, I cannot think that it is of sufficient significance to render the decision a nullity. The production of a decision two days out with the time limited provided is not such a fundamental error or impropriety that it should vitiate the entire decision. Such a failure is a technical matter, and it is of significance in the present case that no challenge is offered to the merits of the adjudicator's decision. I am somewhat reinforced in that view by the clear nature of the compliance provisions in paras 39B.2 and 39B.3 of the standard contract. While this view of the statutory and contractual provisions may be thought in some respects to be unsatisfactory, and in particular offers no sanctions against an adjudicator who fails to produce a decision within the time limits, that is not something which alters my opinion. No doubt any adjudicator who fails to comply with time limits is unlikely to find favour with those who are seeking suitable persons to adjudicate on their disputes. However, this is not relevant to my conclusions. In all circumstances therefore I have decided that there is not a good arguable case which might suggest that this petition for judicial review would succeed.

Compare *Simons Construction Ltd v Aardvark Developments Ltd* [2004] BLR 117; [2003] CILL 2053; (2003) 93 Con LR 114, in which it was considered whether a late decision might constitute repudiation of the adjudication process by the adjudicator.

The issue was recently revisited by McDougall J in *Allpro v Micos* [2010] NSWSC 453, in which case, his Honour reaffirmed his decision in *MPM Constructions Pty Ltd v Trepcha Constructions Pty Ltd* [2004] NSWSC 103. His Honour held however that it would be inappropriate in the circumstances of the late decision for the adjudicator to seek any fees.

At [61]–[62] of *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430, McDougall J, after referring to his Honour's decision in *MPM* above, reiterated that the requirements of s 23(1) of the Act, were not jurisdictional, and accordingly a late decision could not be visited with a declaration of voidness.

At [63] of *Cranbrook*, his Honour said:

> To my mind, it would be quite extraordinary if the legislature intended that a builder or subcontractor who had got through the various hurdles that the Act imposes, in the path of obtaining a successful determination, up until the point of receipt of the adjudicator's reasons, should be disqualified from the benefit of a determination in its favour simply because the adjudicator did not comply with the statutory time limit.

(z) Adjudicator making early decision – impact of on adjudicator's determination

An adjudication determination made before the time limits above have expired is void, *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 988 (26 September 2003). But what if the adjudication response is served and filed before the expiration of the time limits, and the adjudication then follows. Surely in those circumstances the adjudication determination will stand.

(aa) Adjudicator's failure to give adequate reasons – impact of on adjudicator's determination

See the discussion at [SOP22.65].

(bb) Adjudicator deciding the matter on a basis neither party has submitted – impact of on adjudicator's determination

If an adjudicator decides a matter on a basis neither party has advanced or addressed, this may amount to a breach of natural justice, *Musico v Davenport* [2003] NSWSC 977 (31 October 2003), per McDougall J where his Honour at [107]–[108] said:

> [107] If that be Grosvenor's position it is, in my opinion, wrong. It may readily be accepted that the Act provides for a somewhat rough and ready way of assessing a builder's entitlement to progress claims. It may also be accepted that the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality and expense. Nonetheless, what an adjudicator is required to do is to decide the dispute between the parties. Under the scheme of the Act, that dispute is advanced by the parties through their adjudication application and adjudication response (which, no doubt, will usually incorporate the antecedent payment claim and payment schedule). If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it. In my opinion, this is a purpose intended to be served by s 21(4) of the Act (although the functions of s 21(4) may not be limited to this).
>
> [108] It follows, in my opinion, that where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have "a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it". (See Lord Diplock in *O'Reilly* at 279.)

This judgment was brought into some doubt because of *Brodyn* in the Court of Appeal, but as pointed out elsewhere, to a not inconsiderable extent, the principles stated in Brodyn

itself, are considerably watered down in the light of the decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

In fact, what McDougall J said on this point in *Musico* has been followed by Einstein J in *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205, where the following appears:

> authority for the proposition that an Adjudicator breaches the requirements of natural justice where an application is determined upon a basis not advanced by either party.

At [33] of *Ball Construction Pty Ltd v Conart Pty Ltd* [2014] QSC 124, Douglas J cited Peter Lyons J's decision in *Walton Construction Pty Ltd*, where his Honour said:

> [59] A number of the New South Wales decisions referred to by Applegarth J in *John Holland*, 315, held that there is a substantial denial of the measure of natural justice of the legislation required to be given, when an adjudicator has decided a dispute on a basis for which neither party has contended: See also *Spankie James Trowse Constructions Pty Ltd* [2010] QCA 355 at [10]. Again, this proposition was not in issue in these proceedings.
>
> [60] In *John Holland*, Applegarth J held that there was a substantial denial of the required measure of natural justice, when the matter about which the adjudicator did not provide an opportunity to be heard was a point on which the adjudicator's decision was based, and was significant to the actual determination: *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205; [2010] 1 Qd R 302 at, 315 and [40]. This proposition, too, was not in issue. It may well encompass the proposition from the New South Wales cases referred to by Applegarth J.

At [34] of *Ball Construction*, Douglas J continued:

> The principal that natural justice requires an adjudicator to notify the parties of an intention to decide a dispute on a basis for which neither party has contended does not necessarily vitiate a decision where the issue is not material to the decision made: *Shorten v David Hurst Constructions Pty Ltd* [2008] NSWSC 546 at [27]- [28]. Conart submitted that, here, the adjudicator did not decide the issue in a manner not contended for by either party. Rather, she decided that the causes of delay stipulated by Conart affected the progress of works as it had claimed but she did not accept Conart's quantification of delay costs. The submission was that there was no material denial of natural justice because the issue was not decided in a way not contended for by either of the parties.

Including *Walton Construction Pty Ltd*, *John Holland* and *Spankie James* above, Douglas J cited most, if not all, of the cases listed below with approval in his judgment in *Ball Construction: BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394, followed; *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421; *David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd (No 2)* [2010] QSC 166; *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205; *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205; *McNab NQ Pty Ltd v Walkrete Pty Ltd* [2013] QSC 128; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22; *Olsson v Dyson* (1969) 120 CLR 365; [1969] HCA 3, considered; *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWCA 356; *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd* [2009] NSWSC 320; *Shorten v David Hurst Constructions Pty Ltd* [2008] NSWSC 546; *South East Civil & Drainage Contractors Pty Ltd v AMGW Pty Ltd* [2013] QSC 45; *Spankie James Trowse Constructions Pty Ltd* [2010] QCA 355; *Walton Construction (Qld) Pty Ltd v Salce* [2008] QSC 235.

In *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205, Applegarth J referred to a number of New South Wales decisions to the effect that there

was a substantial denial of the measure of natural justice where an adjudicator decided a dispute on the basis for which neither party contended. See further *Spankie James Trowse Constructions Pty Ltd* [2010] QCA 355 at [10].

At [22] of *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 491, Stevenson J cautioned that a breach of natural justice must not only be "material" but had to be considered in the light of the procedures dictated by the Act. His Honour stressed that a decision by the adjudicator on facts in respect of which one party had not made any submissions would have to be "germane" to the adjudicator's decision. In support of this, his Honour cited *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798 at [42] (NSWLR) per McDougall J.

At [30] of *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd* [2014] QCA 232, the Supreme Court of Queensland – Court of Appeal said:

> In *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205; [2010] 1 Qd R 302, Applegarth J applied several judgments of the Supreme Court of New South Wales, including *Musico v Davenport* [2003] NSWSC 977, which had held that a denial of natural justice will occur when an adjudicator decides a dispute on a basis for which neither party has contended, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result. That it was appropriate for his Honour to have done so in the BCIPA context was implicitly endorsed by McMurdo J in *David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors (No. 2)* [2010] QSC 166 at [10], [11]. In that case an adjudicator found against a claim for liquidated damages upon an interpretation of a contractual provision which he had adopted without seeking submissions from the parties. McMurdo J held at [*ibid* at 17] that on that account, the adjudicator had not accorded natural justice with the consequences that an essential condition for a valid determination was not satisfied and therefore the adjudication was of no effect.

(cc) Where contract had been terminated or purportedly terminated before the payment claim was served – impact of on adjudicator's determination

McDougall J, in *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905, was discussed and explained by Vickery J at [157]–[158] of *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, where his Honour held:

> [157] In *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905 ("Holdmark"), McDougall J considered the effect of termination upon a payment claim made under the Act. In that case, the sub-contract between the parties was made on 19 February 2003. The provisions of the New South Wales Act applied to the contract. The sub-contract came to an end on 12 March 2004 no work was done pursuant to it after that date. On 13 March 2004, the day after the contract came to an end, the contractor served what purported to be a payment claim made pursuant to the New South Wales Act. That document claimed for formwork of various kinds, allowed for amounts paid and retention, and claimed a balance of $1,430,047.78. Thereafter the contractor made three further claims purporting to be payment claims made under the Act. The second was made on 3 April 2004 and claimed $424,283.14. The third was made on 28 May 2004 and claimed $1,355,960.50. The fourth, which ultimately became the subject of the challenged adjudication, was made on 27 July 2004 and claimed $6,870,981.09. As found by McDougall J, each of the payment claims related, of necessity, to the same work. That is because no further work was done under the subcontract after 12 March 2004.
>
> [158] It is important to note that when Holdmark was decided, the New South Wales Act was the subject of amendment which took effect on 3 March 2003. Of relevance to the present matter, the definition of a "progress payment" contained in the definition

section, being s 4 of the New South Wales Act in its original form, was amended from – "'progress payment' means a payment to which a person is entitled under section 8" – to its current form which now provides:

> *progress payment* means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):
>
> (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or
>
> (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or
>
> (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

At [159], his Honour noted that the Victorian Act had not been amended, as it had been in New South Wales, until the introduction of amendments which operated from 30 March 2007, and for which see s 4 of the new Victorian Act, which mirrors s 4 of the New South Wales Act in relation to the definition of "progress payment".

At [163], Vickery J noted that McDougall J in *Holdmark* was of the view that following a termination of the contract, a contractor was still entitled to submit a payment claim under the Act in respect to progress payments due under the contract. However, there was a limitation, and that was that the contractor's claim could only be made for a final payment for construction work carried out under a construction contract, and was limited to making only one such claim with the reference date stated in either under the contraction statutory regime occurring, or which would have occurred, next after termination or cessation of the work.

At [164], Vickery J took notice of the New South Wales Court of Appeal in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, and determined that *Holdmark* was wrongly decided.

At [86] of *Brodyn*, Hodgson JA delivering the judgment of the Court of Appeal said:

> In the present case, there could be discretionary factors in favour of a stay of execution in favour of Brodyn. Windeyer J, in his judgment of 23 August 2004, said that the execution of a deed of company arrangement had the effect of bringing into being a statutory set off of the claims between Brodyn and Dasein. We had no submissions about this, but conceivably that could be one basis for a stay of the District Court judgment. The circumstances that the adjudicator has, by force of the Act, disregarded a claim for damages for delay of over $116,000.00, and (apparently in error) has disregarded a claim of deficiencies and defects amounting to about $90,000.00, and also that money paid over may well be irrecoverable, could be further grounds for granting a stay. There is the further point that the adjudicator could not take into account Brodyn's objections to Dasein's claim for over $50,000.00 for items left on the site, because these objections were not raised in the payment schedule: s 20(2B) of the Act. In my opinion, the circumstance that significant objections of a respondent have not been taken into account because they were not raised in the payment schedule could not itself be a ground for resisting reliance on an adjudicator's determination or enforcement of a resulting judgment; but just possibly it could in this case add to the discretionary considerations in favour of Brodyn.

Vickery J, at [166] of *Gantley*, pointed out distinctions between the New South Wales Act and the Victorian Act in its unamended form, and said that that, in his opinion, justified his Honour departing from *Brodyn*. His Honour went on to discuss differences between the provisions of the old Act in Victoria and the new Act.

In *Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd* [2008] NSWSC 1405 at [19], McDougall J noted that in the light of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at 443 [62]–[66] (NSWLR), his Honour's earlier decision in *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004]

NSWSC 905 to the opposite effect could no longer be regarded as the law in New South Wales, until the decision of the Court of Appeal in *Chase Oyster Bar*, discussed elsewhere in this service in greater detail, and which substantially eroded the *Brodyn* principles.

The question now is whether or not, in the light of the provisions of the New South Wales Act, an adjudicator, who determines that a payment claim can be made after termination in respect of pre-termination work, is correct.

It is submitted that, in the light of Vickery J's observations on this issue in respect of the New South Wales Act, and in particular s 4 thereof, the answer is probably in the affirmative.

See generally the discussion in [SOP25.70] in regard to the failure of natural justice or procedural fairness.

In *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269, Applegarth J distinguished the Queensland legislation on this issue from the provisions in the New South Wales Act. At [24], his Honour stressed the use of the expression "under a construction contract" in s 12 of the Act. His Honour held that this supports the general proposition that a reference date is unlikely to arise for the purpose of an Act once the contract has been terminated, unless the contract makes express provision for a reference date to arise after termination. In note [10] of the judgment, his Honour said:

> As to the limited circumstances in which legislation of this kind might permit a progress payment to be served after termination see *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [171]–[175] in respect of earlier Victorian legislation.

At [52], his Honour held:

> I accept that submission. HPL's contention that it had the right to make a payment claim after the determination of 18 March 2013 and that 25 March 2013 was a "reference date" under a "construction contract" is met by the fact that the statutory right to a progress payment requires an arrangement under which a party undertakes to carry out construction work or supply related goods and services. The obligation (and the opportunity) for HPL to undertake such construction work or to supply related goods and services no longer existed as at 25 March 2013 because of the determination.

At [9] of *Kellett Street Partners Pty Ltd v Pacific Rim Trading Co Pty Ltd* [2013] QSC 298, [Douglas J referred to the judgment of Peter Lyons J in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2011] QSC 67 in which the Court, in distinguishing the situation in New South Wales from that provided by the Queensland legislation, held that there was difficulty in concluding that a reference date occurs after termination. In *Walton Construction* above, Peter Lyons J held:

> [41] Thus, s 8(2) of the New South Wales Act commences, "reference date, in relation to a construction contract ...." The definition in the BCIP Act commences, "reference date, under a construction contract ....." Further, paragraph (b) of s 8(2) of the New South Wales Act commences with the words "if the contract makes no express provision with respect to the matter"; whereas paragraph (b) of the definition in the *Building and Construction Industry Payments Act 2004* (Qld) uses a different expression, as noted, relating to whether the contract "provide(s) for the matter".
>
> [42] The use of the expression "under a construction contract" found in the Queensland definition makes it somewhat more difficult to conclude that a reference date occurs after termination. There is then no longer a contract "under" which there might be a reference date (in *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, Vickery J appears to have adopted similar reasoning in relation to the operation of the relevant Victorian statutory provisions: see [171], [175]). The conclusion that a reference date does not occur after termination of a contract is, in my view, also

consistent with the general nature of the payments for which provision is made by the *Building and Construction Industry Payments Act 2004* (Qld), that is to say, payments which are of a provisional nature, made over the life of the contract (*Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [17]; cited in Gantley at [172]).

[43] The second difference which I have noted between the two definitions is also of significance. The language used in the *Building and Construction Industry Payments Act 2004* (Qld) gives greater primacy to the provisions of the contract dealing with the making of a claim for a progress payment than does the language of the New South Wales Act.

[44] For these reasons, I am not prepared to adopt the statement from the judgment of Hodgson JA in Brodyn as reflecting the effect of the definition of the expression "reference date" in the *Building and Construction Industry Payments Act 2004* (Qld).

See the Queensland decisions on this point in [SOP8.100].

(dd) A failure to comply with s 13(2) of the New South Wales Act — the essentialia of a payment claim

In regard to an alleged failure to comply with s 13(2) of the New South Wales Act, Basten JA at [47] of *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229, said:

It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 at [133], was to the following effect:

> If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.

Thus, as noted in Brodyn, an essential element in the formulation of such an opinion is that is must be undertaken in good faith, but that is not a sufficient condition of validity.

However, in the light of *Chase Oyster Bar*, it seems to be clear that a valid payment claim is a jurisdictional fact. It follows that an adjudication determination where the payment claim fails to follow the requirements of s 13(2) of the New South Wales Act, is void.

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

(ee) A failure to comply with s 22(4) of the New South Wales Act – the essentialia of a payment claim

For the sake of ease of reference, s 22(4) of the New South Wales Act is set out below:

If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:

(a) the value of any construction work carried out under a construction contract, or

(b) the value of any related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the

claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

In *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151, McDougall J, in an ex tempore judgment delivered on 26 November 2004 and revised on 29 November 2004 in the Supreme Court of New South Wales, held that a failure to comply with s 22(4) should not be added to the list of matters that were essential preconditions for the existence of a valid adjudication

In the light of *Chase Oyster Bar*, it would appear as if Rothnere needs to be revisited.

(ff) A failure to comply with the provisions of clause 5(1) of Division 4 of the Schedule to Northern Territory Act — the essentialia of a payment claim

In *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123; [2008] NTSC 42, two of the issues before Southwood J were whether the Act was complied with and, if not, whether there could be a curial review of the adjudicator's determination.

At [56] of his judgment, Southwood J referred to Basten JA's judgment at [47] of *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 above.

At [57] of *Trans Australian*, Southwood J noted that the provisions of the Northern Territory Act differ from those that were considered by Basten JA in *Coordinated Construction*.

At [65] of *Trans Australian*, Southwood J referred to his judgment in *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5, where his Honour had said:

> [16] The *Construction Contracts (Security of Payments) Act 2004* establishes a summary dispute resolution process that facilitates the rapid resolution of payment disputes arising under a construction contract and a mechanism for the rapid recovery of payments under a construction contract: s 3(2). Relevantly a payment dispute arises, *inter alia*, when the amount claimed in a progress claim is due to be paid under the contract and the amount has not been paid: s 8. The adjudicator's determination is final in the sense that the adjudicator cannot subsequently amend or cancel the dispute and a party to the dispute cannot later apply for adjudication of the dispute: s 43. The adjudicator's determination is binding on the parties to the construction contract under which the payment dispute arose even if other proceedings relating to the payment dispute have been started before an arbitrator or another person or a court: s 400; a party that is liable to pay an amount under a determination must do so on or before the date stated in the determination: s 41(1); and the determination may be enforced as a judgment for a debt in a court of competent jurisdiction: s 45.
>
> [17] However, payments made by a principal in accordance with the determination of an adjudicator are payments on account: s 42. Payment of the amount of the determination is taken to be an advance towards the total amount payable under the construction contract by the principal to the contractor: s 42(2). The provisions of the *Construction Contracts (Security of Payments) Act 2004* do not prevent a party to a construction contract from starting proceedings before an arbitrator, another person or a court in relation to a dispute or other matter arising under the construction contract. An arbitrator or other person or a court dealing with a matter arising under a construction contract may make an order for the restitution of the amount paid or any other appropriate order relating to the determination: s 47(1) and (4). Except for a review a determination to dismiss an application without making a determination of its merits, a decision or determination of an adjudicator arguably cannot be appealed or reviewed: s 48(3).
>
> [18] The *Construction Contracts (Security of Payments) Act 2004* is primarily concerned with maintaining a contractor's cash flow, not with determining its ultimate

rights: *Demir Pty Ltd v Graf Plumbing Pty Ltd* (above) at par [19]. The Act does not affect the ultimate recovery of final amounts due between the parties based on their legal rights: *CCD Group Pty Ltd v Premier Drywall Pty Ltd* (above) at par [48].

In any event, *Chase Oyster Bar* supports Southwood J's view.

Mildren J at [44]–[50] of *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46 came to the same conclusion.

A similar conclusion was arrived at in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 1; [2009] NTSC 48.

(gg) Complexity of dispute inappropriate for adjudication

In *CIB Properties Ltd v Birse Construction Ltd* [2005] 1 WLR 2252; [2005] BLR 173; [2004] EWHC 2365 (TCC), Birse sought to avoid the enforcement of the adjudicator's award on a number of grounds, including the ground that the adjudication was inappropriate in a dispute of that complexity.

As noted by Judge Toulmin CMB QC at [2] of the judgment "This is a defence which goes to the root of the adjudication process. The point has not previously been decided."

At [199], his Honour said:

> I have already considered the question of whether there are some disputes, including this one, which are so complex that they are not suitable for adjudication. I conclude that this issue is governed by the Act. There is a general right under s 108(1) for a party to a construction contract to refer a dispute or difference to adjudication. There is a duty on the Adjudicator to read a decision provided that the conditions in s 108(2) are met. This means that the Adjudicator must be able to discharge his duty to reach a decision impartially and fairly within the time limit stipulated in s 108(2)(c) and (d). A defendant is not bound to agree to extend time beyond the time limits laid down in the Act even if such a refusal renders the task of the Adjudicator to be impossible.

In *John Holland Pty Ltd v Walz Marine Services Pty Ltd* [2011] QSC 39, Margaret Wilson J made the following relevant observation at [58]:

> A great deal of time and expenditure was undoubtedly invested in the preparation of the claim and payment schedule and the adjudication application and adjudication response. The thoroughness with which they were presented bordered on prolixity. I understand that this is a feature of many adjudications under BCIPA. While I appreciate that the quantum of progress claims made under the Act can be very high, and that the outcome of the adjudication can have serious consequences for the liquidity of either or both parties, I doubt that the Legislature envisaged such a development. The adjudication process may be more suited to comparatively small, uncomplicated claims than to large, complex claims.

It is doubtful whether this approach will be followed in any Australian jurisdiction.

(hh) Where there is a complex payment claim

Provisions dealing with complexity were inserted in the Queensland Act by the *Building and Construction Industry Payments Amendment Act 2014*, and commenced on 15 December 2014: see s 18A (time requirements for payment schedules), s 24 (adjudication responses), s 24A (time requirements for adjudication response), s 25A (time requirements for adjudication proceedings) and s 25B (extension of time requirements by adjudicator) of the Queensland Act, and to which reference should be made when dealing with a Queensland claim.

However, none of these sections deal with an application to set aside an award on the basis of complexity.

There is no statutory provision in Australia dealing with complexity as a ground for moving to set aside an adjudication determination.

(ii) Failure to comply with an essential step set out in the Act

At [24] of *FK Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2007] 1 Qd R 10, Lyons J said:

> The Act sets up a statutory regime for the recovery of progress claims and it is dependent on a series of steps being completed. There must be a valid statutory entitlement to a progress payment before a payment claim can be made and then if a payment schedule does not issue within time the unpaid portion of the claim becomes a debt. Such a statutory regime depends on strict compliance with the provisions in the Act.

Douglas J cited Gardner*FK Gardner* in *Tailored Projects Pty Ltd v Jedfire Pty Ltd* [2009] QSC 32 at [21], with approval.

(jj) Adjudicator viewing without prejudice communication – impact of on adjudication

In *Specialist Ceiling Services Northern Ltd v ZVI Construction (UK) Ltd* (unreported, High Court of Justice, Queens Bench Division (TCC), Grenfell J, 27 February 2004), ZVI alleged that reference had been made to a without prejudice offer of settlement by ZVI to SCSN in the latter's documents placed before the adjudicator. The adjudicator was asked to consider whether having seen the offer he could properly continue with the adjudication process. The adjudicator referred to the well-known fact that parties to a dispute often discuss matters on a without prejudice basis and stressed that knowledge of that fact would not have any impact upon his impartiality. The court upheld his approach.

(kk) Adjudicator failing to apply his/her mind in "good faith" as to the issues before him/her and determine the true construction of the contract and the Act and the true merits of the claim

At [38]–[43] of *Timwin Construction Pty Ltd v Facade Innovations Pty Ltd* (2005) 21 BCL 383; [2005] NSWSC 548 McDougall J said the following:

> [38] There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in *Brodyn*. Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in *Roberts v Hopwood* [1925] AC 578 at 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which [sic] they administer".
>
> [39] That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).
>
> [40] As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322; 25 ALR 497 (Mason J) and in *Evans v Marmont* (1997) 42 NSWLR 70 at 79–80 (Gleeson CJ and McLelland CJ in Eq).
>
> [41] In the present case, I think that an available, and better, inference is that the adjudicator did not consider, in the sense that I have just explained, the submissions for the parties in which the ambit of the dispute that was intended to be raised in relation to variations was explained. Had he turned his mind to those submissions, he would have known what it was the parties understood the dispute to be; what it was that they were arguing. Because he did not, as it appears, turn his mind to those submissions, he did not deal with the real dispute.

> [42] It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, did he do so in the context of dismissing them (on this issue) because of s 20(2B). Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that the adjudicator did not have regard to, or consider, the relevant submissions.
>
> [43] I therefore conclude that the adjudicator did not attempt in good faith to exercise the power given to him by the Act because he did not attempt in good faith to consider the submissions put by the parties to understand what, in relation to variations, the real dispute was.

In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 (13 July 2005), Hodgson JA, at [52]–[53] said:

> [52] The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [33]–[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.
>
> [53] Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.

See further the judgment of Associate Justice Macready at [15] of *Lanskey Constructions Pty Ltd v Noxequin Pty Ltd (in liq)* [2005] NSWSC 963.

In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 (8 November 2005), Brereton J, at [35]–[62] has thoroughly and exhaustively referred to all of the relevant authorities on the impact which a failure by adjudicator to have regard to matters which he or she is required to consider under s 27(2), has on the validity of the adjudication determination.

At [44], his Honour, after referring to the judgment of Basten JA at [79] of *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228, where Basten JA citing *R v National Joint Council for Craft of Dental Technicians; Ex parte Neate* [1953] 1 QB 704 at 707–708 (Lord Goddard CJ), 709 (Croom-Johnson J), 710 (Pearson J); *Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen* (1999) 21 WAR 158 at 189 (Malcolm CJ); *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [23] (Palmer J) held that "relief by way of *certiorari* has been held available in relation to decisions of arbitrators", concluded:

> [T]hat an adjudicator not being a court, the broader scope of jurisdictional error appropriate to tribunals, rather than the narrower scope appropriate to inferior courts, would *prima facie* be applicable.

In the light of the decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, Palmer J's statement above, it is respectfully submitted, is open to serious doubt. In *Chase Oyster Bar*, the Court of Appeal made no fine distinction between jurisdictional error appropriate to tribunals on the one hand, and jurisdictional error of inferior courts.

At [46], Brereton J continued thus:

> The statement in *Brodyn* that compliance with the requirements of s 22(2) is not a precondition to the existence of authority to make a decision, and that non-compliance does not result in invalidity if an adjudicator *either* considers (only) the matters referred to in s 22(2), *or* bona fide addresses the requirements of s 22(2) as to what is to be considered [*Brodyn*, [56]] appears to proceed on the assumption that s 22(2) requires (though not as a condition of validity), not merely consideration of the matters (and only the matters) identified in that section, but also reaching a legally correct conclusion on those matters [*Hargreaves*, [74] (Basten JA)]. [As Basten JA has observed, the section does not require that: statutory directions to decision-makers to take into account (only) certain specified parameters, including legal parameters to be found in statutes and/or contracts, may not mean that the decision-maker must, as a condition of validity, correctly apply those parameters; so long as he or she takes them into account, an incorrect understanding of their principles does not amount to a failure to have regard to them, though it may amount to non-jurisdictional error of law.] But my understanding of what Hodgson JA was saying in *Brodyn* is to the effect that mere error of law by an adjudicator in the consideration and application of the specified considerations does not invalidate a determination. As Basten JA has suggested, *Brodyn* may be correctly understood as saying that the structure of the Act demonstrates that, contrary to the general rule with respect to administrative tribunals, an adjudicator is authorised to determine a payment claim so long as he or she takes into account the legal parameters prescribed by the Act and the contract – whether or not the decision actually reflects a correct understanding and application of them [*Hargreaves*, [78]].

At [50], his Honour stressed that there was no requirement under s 22(2)(b) that the adjudicator consider every single provision of the contract. The requirement to consider the contract was limited to the relevant provisions thereof.

At [51], his Honour said:

> Accordingly, I conclude that a failure by an adjudicator to have regard to a provision of the construction contract which is relevant to the adjudication under consideration is jurisdictional error, resulting in invalidity of the determination.

Brereton J's observations above appear to be supported by the subsequent decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190.

In regard to the requirement that the adjudicator, in arriving at his decision, makes a "bona fide attempt" to address all relevant considerations, Brereton J, at [69]–[71] of *Holmwood*, analysed the position thus:

> [69] Thus in this context, the phrase "bona fide attempt" describes an implied condition of validity of discretionary decisions. This is not the same as the use of the concept of "bona fide" as an express statutory condition of immunity or exemption, in which context it is also used [cf *Local Government Act 1993* (NSW), s 733(1); *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290; 81 LGERA 104; *Forbes Shire Council v Pace* (2002) 124 LGERA 37; [2002] NSWSC 966; *Lamont v Wyong Shire Council* (unreported, Sup Ct, NSW, Palmer AJ, 13 December 1991); *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 79 ALJR 1511; 221 ALR 1; [2005] HCA 46. Thus the concept in the present context is one derived directly from *Hickman*. It is not necessarily the same concept of good faith as is involved as a condition of the immunity conferred on an adjudicator by s 30(1) of the Act. But the

cases just mentioned show that, even as a statutory condition of immunity from liability, "honest ineptitude" may not be enough for good faith.

[70] The role of "good faith" as a minimum criterion of validity appears to have had its origin in the dissenting speech of Lord Lindley in *General Assembly of Free Church of Scotland v Lord Overtoun* [1904] AC 515, 695:

> I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred. If, therefore, a synod or council, under cover of exercising their authority, were to destroy the church which they were appointed to preserve, or were to abrogate the doctrines which they were appointed to maintain, their acts would be ultra vires and invalid in point of law; and it would be the duty of every court in the United Kingdom so to hold if the question ever involved a controversy as to civil rights and so arose for judicial decision.

[71] That passage is [sic] apparently provided the foundation for what was said by Isaacs J in *Baxter v New South Wales Clickers' Assoc* (1909) 10 CLR 114, 162, and in turn by Dixon J in *Hickman*. It therefore provides important contextual illustration of what in this context was originally intended by the concept of "bona fides". It is notable that it focuses on the concept of "bona fide for the purposes for which the power was conferred".

His Honour, after referring to a substantial number of relevant decisions on this issue, held at [74], that none of the cases suggested that deficiencies in reasoning "even of an egregious character" meant that the decision was not in good faith. His Honour said:

> [W]hat they seem to require produce that result is that the purported exercise of power be foreign to the purpose for which it was conferred.

In an appeal against Brereton J's decision in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, *sub nom Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 (28 February 2007), Giles J, with whom Santow JA and Tobias JA agreed, said at [26]–[28]:

> [26] With respect to the trial judge, I consider that the fundamental vice in the adjudicator's determination can be shortly explained without embarking on an exegesis of the reference in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* to a bona fide attempt to exercise the statutory power. Section 22 of the Act required that the adjudicator determine an adjudicated amount (s 22(1)) by considering particular matters (s 22(2)). The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters. But that is what the adjudicator did. He stated expressly in his reasons that he did not have evidence on which he could independently arrive at the value of the completed work, and that he adopted the appellant's valuation in preference to that of the respondent because of the respondent's unmeritorious challenges to the validity of the payment claim.
>
> [27] On the face of the determination, the adjudicator simply did not perform the task required by the Act, and his purported determination was not given greater respectability by the reference to his inclination "to believe the claimant rather than the respondent": the unmeritorious challenges were not a basis for belief or disbelief, and in any event it was not correct to speak of believing a corporate body. The adjudicator did not comply with an essential precondition to the existence of a valid determination.
>
> [28] That is sufficient for the disposal of the appeal, and it is not necessary to consider failure to have regard to relevant contractual provisions or failure to have regard to the payment schedule. I should not be taken to approve by silence all that the trial judge said.

It will be seen that, for different reasons than that which were given by Brereton J, the appeal was dismissed.

See the commentary on *Halkat Electrical* by McDougall J at [42]–[43] of *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [SOP4.50].

In *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205, Einstein J, under the heading "Bona fide attempt to exercise powers under the Act", at [10], held as follows:

(xv) If a statute confers a power and directs how it is to be exercised, a decision made in breach of a directory provision does not invalidate the power exercised in breach of a directory provision: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 72 ALJR 841 and particularly the judgment of Brennan CJ at 374–5.

(xvi) In *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* the Court of Appeal construed the Act as containing the following preconditions for the valid exercise of an adjudicator's power, which the Court of Appeal described as the Act's "basic requirements":

(a) the existence of a construction contract [required by s 13 of the Act];

(b) a valid payment claim [required by s 17 of the Act];

(c) a valid adjudication application [required by s 21 of the Act]; and

(d) the Act of reference and the subsequent determination of the amount of the progress payment due and the rate of interest [as required by s 22 of the Act].

(xvii) It is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered: see *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* at [56], in expressing disagreement with the earlier views of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140.

(xviii) In *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, Hodgson JA stated at [55] said:

> In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390–91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), *a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power* (cf *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, and no substantial denial of the measure of natural justice that the Act requires to be given. If *the basic requirements are not complied with*, *or if a purported determination is not such a bona fide attempt*, or *if there is a substantial denial of this measure of natural justice*, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but *if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance*.

The question of the adjudicator being required to apply his/her mind in good faith to the issues to be adjudicated arose for determination by White J in *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* [2006] NSWSC 375 (5 May 2006). At [69], White J

found that the adjudicator erred in not having had regard to a site instruction nor to the adjudication response, insofar as it contained certain submissions in support of the reasons indicated in the payment schedule for rejecting a certain claim.

At [66], White J raised the question:

> [66] What is the position if the adjudicator in good faith, but mistakenly, decides that the payment schedule does not include reasons in documents referred to in the schedule which had been supplied to the claimant, or decides that he or she is not permitted to consider submissions of the claimant or the respondent because he or she forms the view they have not been "duly made" in support of the claim or the schedule?

At [67]–[72], his Honour, in developing an answer to this question in his Honour's judgment, said:

> [67] This issue only arises in terms of *Brodyn* if the adjudicator acts bona fide. RSA submitted that he did not act bona fide in that he did not "*put* [his] *mind to the comprehension and* [his] *will to the discharge of* [his] *duty*" (*Timwin Construction Pty Ltd v Facade Innovations Pty Ltd* (2005) 21 BCL 383; [2005] NSWSC 548 at [39], citing *Roberts v Hopwood* [1925] AC 578 at 603). The submission assumed that the adjudicator simply did not turn his mind to RSA's submissions (*Timwin Construction* at [42]).
>
> [68] However, I do not think this does justice to the adjudicator's reasons. He did not ignore RSA's adjudication response. He decided that he should not consider it at all because it contained some information not included in the payment schedule. His reasoning appears to have been that because in one respect, or some respects, the adjudication response did not comply with s 20(2B), no part of it could be considered. A cursory examination was sufficient to show that it contained information not included in the payment schedule. This would be sufficient to exclude the whole of the adjudication response if that were the effect of s 20(2B).
>
> [69] Winterton did not seek to support this reasoning. Such a construction of s 20(2B) is untenable. Subsection 20(2B) does not prohibit the making of an adjudication response if it contains reasons going beyond those in the payment schedule. It prohibits the inclusion of such additional reasons. The consequence of a respondent's breaching s 20(2B) is that such additional reasons may not be considered under s 22(2)(d) (*Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [34]). Hence s 22(2)(d) requires and permits the adjudicator only to consider such submissions in the adjudication response as are "duly made". This implies that the adjudication response may include some submissions which are duly made and some which are not. The latter are not to be considered under s 22(2)(d). But the adjudication response is not wholly invalid because some reasons additional to those in the payment schedule are included in it.
>
> [70] The question of the bona fides of an adjudicator's determination was extensively discussed in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129. Brereton J concluded (at [109], [110], [115] and [119]) that, in the sense in which the term "good faith" was used in *Brodyn*, it did not encompass recklessness in the exercise of the adjudicator's powers or capriciousness. Hence his Honour held that an adjudicator did not make a genuine or conscientious attempt to perform his function, but acted capriciously, where he accepted the claimant's submissions on one topic solely because he had rejected the respondent's submissions on other topics as unmeritorious.
>
> [71] The adjudicator's rejection of the adjudication response after a "cursory examination", and his failure to explain why its inclusion of information not included in the payment schedule rendered it wholly irrelevant, might suggest a capricious or reckless exercise of his powers. On the other hand, his statements are consistent with a mistaken view of the effect of s 20(2B) which would enable a rejection of the whole of the adjudication response after such a cursory examination. Errors in reasoning, even

> egregious errors, do not equate to an absence of bona fides. (*SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749 at 756, [45]–[46]). I do not conclude that the adjudicator did not act in good faith, even in the broad sense described in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2006] NSWCA 125.
>
> [72] In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2006] NSWCA 125 at [45]–[49], [120]–[123], Brereton J, after analysing *Brodyn*, held that if an adjudicator fails to consider matters required by subs 22(2) at all, as distinct from not considering them accurately, the adjudicator will not have complied with conditions essential to his or her authority to make a determination. (See also *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388; [2006] NSWSC 13 at [66]). Brereton J so decided having had regard to the statement in *Brodyn* at [56] that with the requirements of s 22(2) compliance was not a pre-condition to an adjudicator's authority to make a decision. When read with the balance at [56] of *Brodyn*, this meant that a decision was not void for non-compliance with the requirements of s 22(2) if there had been a bona fide attempt to comply. But the position was otherwise if the requirements were disregarded.

At [57] of *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798, cited with approval, by Gzell J in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* [2006] NSWSC 1202, McDougall J said that as the concept of good faith was unsettled, it was preferable to deal with most applications on the basis of a denial of natural justice. His Honour said:

> [57] The content of the concept of good faith (in the *Brodyn* sense, if I may call it that) is unsettled – see the judgment of Brereton J in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [63] and following. There is possibility for that concept to overlap with the reference to "good faith" in s 30(1). In those circumstances, I think that courts should be slow to decide applications on the basis of a lack of "*Brodyn*" good faith unless it is necessary to do so. In many cases, it will be possible to decide an application on the basis of denial of natural justice; and if this is so, then that should be sufficient.

Holmwood and *Halkat* were cited with approval by Sackar J at [58] and [59] of *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123.

The concept of good faith within the *Building and Construction Industry Payments Act 2004* (Qld) was considered by White JA, with whom Margaret McMurdo P and Chesterman JA concurred, at [81]–[96] of *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22. After citing numerous authorities on the point, the Court was inclined to the view that the absence of "good faith" may not be the exact converse of bad faith. At [92], their Honour's, cited Applegarth J's judgment in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205 at [66]–[67]:

> … in circumstances in which adjudicators are required to determine complex legal issues quickly, the detection of flaws in reasoning or poorly expressed reasons in an adjudication decision do not compel the conclusion that the adjudicator did not attempt to understand and apply the contract. Adjudicators provide their determinations in a "somewhat pressure cooker environment". In some instances the adjudicator "cannot possibly, in the time available and in which the determination is to be brought down, give the type and care and attention to the dispute capable of being provided upon a full curial hearing". The Court should be slow to conclude that adjudicators who work under the very tight deadlines imposed by the Act, and who, in seeking to do their best, make a mistake, have not acted in good faith.

In *Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq)* [2010] QCA 7, Holmes JA, with whom Fraser JA and Fryberg J concurred,

considered one of the controversies between the parties, ie whether the good faith requirement had to be considered against a broad or narrow test.

MKG contended for a broad approach, relying *inter alia* on a series of decisions of the Full Court of the Federal Court, viz *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749; [2002] FCAFC 361; *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431; *Minister for Immigration and Multicultural and Indigenous Affairs v NAOS* [2003] FCAFC 142. QBWSA contended for a narrow approach, taken at first instance in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129.

As the Queensland Court of Appeal came to the conclusion that whatever test be applied, the appeal should be dismissed, it was not necessary for their Honours definitively to determine what the correct test should be.

In the *Queensland Bulk Water* case, at first instance, *sub nom Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2009] QSC 165, Peter Lyons J said at [32]:

> It may be correct to say that a decision which displays an extreme degree of unreasonableness akin to that described in *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223, is not a decision for the purposes of s 26 of the *Payments Act*. Otherwise, I do not consider an adjudicator's decision purporting to be made under the *Payments Act* will be invalid if it is not "reasonable". The *Payments Act* seeks to provide a mechanism for obtaining a decision which will be quick, but in a sense, provisional. It does not seem to me, consistent with the general object and tenor of the Act, to impose a requirement of "reasonableness".

It seems however clear, at least in New South Wales, in the light of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, that the failure of an adjudicator to apply his or her mind in good faith to the matters before him/her, constitutes a failure to comply with jurisdictional facts, and there is now a strong reasonable argument that any such decision would be void.

In *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 491, Stevenson J said the following:

> [51] Mr Carey submitted that the Adjudicator had not determined what work had been carried out in respect of the Variations, or its value, and had therefore not addressed the merits of the claim. In effect Mr Carey submitted that the Adjudicator had not made a bone fide attempt to exercise her statutory power under the Act (see Hodgson JA in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [55]).
>
> [52] In *Laing O'Rourke Australia Construction v H & M Engineering & Construction* [2010] NSWSC 818, McDougall J, after reviewing the authorities, held that the obligation of good faith required "at least that adjudicators should turn their minds to, grapple with and form a view on all matters that they are required to 'consider'" (at [34]).

(ll) Good faith as a requirement of a payment claim

In *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235, Vickery J analysed and commented on all of the relevant authorities where it was submitted that good faith was an essential requirement for a valid payment claim under the statute. His Honour referred to and discussed *inter alia* the following authorities: *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 [49], [76]; *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141; [2010] VSC 199 [101]; *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103, [78]–[79]; *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238 at

[57]; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [43]–[46]; *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [63]–[117]; *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 at [70]–[71].

(mm) Where the adjudication application is made out of time but the adjudicator (in good faith) holds either expressly or by implication that the adjudication application was made in time

The decision by McDougall J in *Multipower Corp Pty Ltd v S & H Electrics Pty Ltd* [2006] NSWSC 757 (10 July 2006) rests on a curious set of facts. It was contended by the unsuccessful party in the adjudication in injunction proceedings to restrain the successful party from pursuing its rights under the determination, that the application for adjudication was out of time. McDougall J held, in [41], that it necessarily followed from what Hodgson JA said in *Brodyn*, that as the adjudicator's implicit conclusion was that the adjudication application was timeously brought, the determination was not void. His Honour held that, at the most, and assuming that the adjudicator's decision was in error, that error would have been within the scope of jurisdiction entrusted to adjudicators, and a mistake that the adjudicator was entitled to make.

The question which now arises is whether McDougall J's decision above would have been the same if *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 had been decided at that time. Two questions arise:

(a) whether bringing the application out of time rendered the adjudication proceedings void; and (b) whether the question as to whether or not the adjudication application was out of time was a matter which could be determined finally by the adjudicator.

(b) whether the question as to whether or not the adjudication application was out of time was a matter which could be determined finally by the adjudicator.

It is submitted that in regard to the first question, in the light of the *Chase Oyster Bar* decision, the answer should now be that the adjudication determination would be void.

In regard to the second question, and that is whether or not this issue was one for the adjudicator, either at an interlocutory stage or finally to determine, the answer would also be in the negative.

What would the result have been if there was no implicit conclusion in the adjudicator's determination that the adjudication application was out of time and if it, in fact, was? The judgment does not touch on this point. It is submitted that, under those circumstances, the determination would have been void.

In *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* [2006] NSWSC 375 above, White J, at [63] said:

> [63] … If it were clear that there was no possibility that the adjudicator's determination would have been different if the reasons indicated in the payment schedule and the submissions duly made had been considered, then the failure to consider the submission would not affect the validity of the determination (*Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 88, [4]; 122, [104]; 130, [130]; 153, [211]; and compare the reasons of Gaudron and Gummow JJ at 91, [17] and 109, [58]–[60]).

This passage was quoted with approval by Mr Associate Justice Macready in *Roads & Traffic Authority (NSW) v John Holland Pty Ltd* [2006] NSWSC 567 (3 July 2006).

See further the discussion by McDougall J of the words "to consider" in *Veolia Waters Solutions v Kruger Engineering* [2007] NSWSC 46 (19 January 2007) in [SP22.780].

(nn) Error in wrongly determining who the contracting parties are

In *Wooding v Eastoe* [2006] NSWSC 277 (12 April 2006), Young CJ (as his Honour then was), at [14] made reference to *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR

369; [1938] ALR 119 per Dixon J, and said:

> [14] The leading case in this area is *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369. At 389 Dixon J said:
>
> > The clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, *certiorari*, or appeal. But, if there be want of jurisdiction, then the matter is *coram non judice*. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable.

At [15], his Honour said:

> [15] In *Ex parte Hulin; Re Gillespie* (1965) 65 SR (NSW) 31; [1965] NSWR 313; (1965) 82 WN (Pt 2) (NSW) a decision of the Full Court of this Court constituted by Sugerman, Maguire and Nagle JJ, Sugerman J said at 33 that there was a very real distinction between the absence of some essential preliminary, and an objection "that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try". Nagle J, in a separate judgment, came to the same view.

In reliance on those decisions, Young CJ (as his Honour then was) concluded that a *bona fide* attempt by the adjudicator to determine who the parties to a contract were was not a subject which, in the light of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 was capable of judicial review. In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009), Young JA referred to his Honour's judgment in *Wooding* above and adhered to it.

It is submitted that in the light of the *Chase Oyster Bar* decision, the answer which would now be given to the question raised in this paragraph, is that it would probably still be a matter for the adjudicator to determine, as having regard to s 22(2)(b) of the Act, one of the functions which the adjudicator has is to consider the terms of the contract, and one of the provisions would undoubtedly be who the parties to the contract are.

(oo) Adjudicator failing to determine the value, where respondent's submissions were rejected

In *JBK Engineering Pty Ltd v Brick & Block Co Pty Ltd* [2006] NSWSC 1192 (14 November 2006), the adjudicator rejected the respondent's submissions, but failed to determine the value of the claimant's work. At [12], Einstein J held:

> [12] These relevant principles are as follows:
>
> i. "the adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act *and the true merits of the claim*": *Coordinated*, at 399 [52] (emphasis added); and
>
> ii. "allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the claim has been performed *and without valuing* it" renders the determination void: *Pacific General Securities*, at [86].

It may be noted that these principles were considered and followed by Brereton J in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388; [2006] NSWSC 13 at [86], where his Honour said:

> [86] One of the "basic and essential requirements of validity" with which Brodyn requires compliance is "the determination by the adjudicator of [the adjudication application]" [*Brodyn*, [53]]. Hodgson JA allowed, in *Brodyn* (at [55]) and later in *Contrax Plumbing* (at [46]), that the list of basic and essential requirements identified in *Brodyn* may not be exhaustive. I have endeavoured to explain above the minimum content of an adjudication: the absence of relevant material from a respondent does not

> entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value. Adoption of the other approach by an adjudicator – by allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the claim has been performed and without valuing it – would bespeak a misconception of what is required of an adjudicator. In traditional terms, it would be jurisdictional error resulting in invalidity. In the terminology of *Brodyn*, it would best be accommodated under the rubric, not of want of good faith – because it falls short of capriciousness [cf *Holmwood v Halkat*, [117]] – but of failure of a basic and essential element, namely adjudication of a payment claim (which requires as a minimum determination of whether the construction work the subject of the claim has been performed, and of its value). In short, there would not have been an adjudication, within the meaning of the Act, of the payment claim, but only a rejection of the respondent's contentions. Accordingly, I respectfully agree with Hodgson JA's tentative view that for an adjudicator to determine a progress payment at the amount claimed simply because he or she rejects the relevance of the respondent's material is such a failure to address the task set by the Act as to render the determination void.

His Honour said at [82] of *Pacific General* above:

> I therefore respectfully agree with the view tentatively expressed by Hodgson JA in *Hargreaves*: the adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim, and while the adjudicator may very readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.

Vickery J in *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300, cited the above passage from Brereton J's judgment at [82] of *Pacific General* with approval. This case was followed by his Honour's in his judgment in *Claude Neon Pty Ltd v Rhino Signmakers Pty Ltd* [2010] VSC 619.

In *Integral Energy Australia v Kinsley & Associates Pty Ltd* [2009] NSWSC 64, the issue in contention before Hammerschlag J and, in respect of which reliance was placed on what Hayne J said in *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816; 221 ALR 402; [2005] HCA 57 at [129]–[132] was that the adjudicator did not engage in any process of valuation, ie any assessment of the reasonable value of the work the subject matter of admitted variations. Hammerschlag J held that the adjudicator was not obliged to undertake an assessment of the fair and reasonable value of the variations, in that, that issue had not been raised in the payment schedule which was confined to the assertion that the unapproved variations were not permitted.

His Honour said at [40] that it followed that because of s 20(2) of the Act, *Integral Energy* could not legitimately include in its adjudication response a reason for withholding payment that the amount of the variations did not represent a fair and reasonable valuation of the claims.

The matter was argued before Hammerschlag J on the basis that the adjudicator had failed to give sufficient reasons in his adjudication determination.

That, with respect, was an inappropriate basis for challenging the adjudication determination. It should have been challenged on the basis that the adjudicator had to satisfy himself in regard to all aspects of the claim including the fair and reasonable valuation of the variations and that it was inappropriate for the adjudicator to proceed on a basis akin to a default judgment in respect of this aspect of Kinsley and Associates' claim.

It is further submitted that Hamerschlag J erred, in any event, in not holding that it was an insufficient compliance with the essential requirements of the Act for the adjudicator to accept any aspect of a claim, even if not challenged by the respondent, without applying his or her own mind to the question as to whether or not the claimant was entitled to succeed in the adjudication determination. See the further discussion at [SOP9.50], [SOP10.50], [SOP22.690] and [SOP25.70].

See further the discussion in [SOP22.690] on the decision of McDougall J in *PPK Willoughby v Eighty Eight Construction* [2014] NSWSC 760.

(pp) An abuse of adjudication process — approbating and reprobating

In *Hitachi Ltd v O'Donnell Griffin Pty Ltd* [2008] QSC 135, Skoien AJ made new law by holding that a ground for setting aside an adjudication determination was constituted by what his Honour referred to as an abuse of process. The facts of the matter, very simply stated, were that there were two adjudications involving the same parties. The adjudicator in the first matter was a Mr Davenport. The Adjudicator in the second matter was a Mr O'Sullivan. Hitachi, in making submissions to Mr Justice Lyons, who heard and determined an application to set aside the determination by Mr Davenport, submitted that Mr Davenport, in his determination, did not value any more than 6 of the variation claims and that consequently that adjudication was void. In the second adjudication proceedings, before Mr O'Sullivan, Hitachi submitted to the contrary, namely that Mr Davenport had valued all of the variation claims before him and that, therefore, all of the variation claims before Mr Davenport had been taken up in his determination of the relevant payment claim.

In the application to set aside Mr O'Sullivan's determination, Skoien AJ said the following in paras [93]–[96]:

> [93] I regretfully come to the conclusion that the substantial change in the Hitachi submissions from the early submissions to the later submissions carried great significance. It meant that at the same time as arguing before Justice Lyons and before me that Mr Davenport did not value any more than six of the variation claims, and that consequently the adjudication was void, Hitachi submitted to Mr O'Sullivan that Mr Davenport valued all of the variation claims before him in the payment claim 17 and therefore all of the variation claims before him in payment claim 18 had been valued. In my opinion, that was a classic case of approbation and reprobation, the impropriety of which was referred to by Fitzgerald JA in *VACC Insurance Co Ltd v BP Australia Ltd* (1999) 47 NSWLR 716 at 724.
>
> [94] Were the later submissions material to Mr O'Sullivan's decision? It goes without saying that they were, because he obviously adopted them in reaching his decision to value at nil the variation claims in progress claim 18. His reasons make that clear.
>
> [95] Was the predominant purpose of Hitachi in adopting the new submission to obtain a favourable decision from Mr O'Sullivan? It must have been. Had Hitachi put the early submissions to him he would have had no argument before him at all that the variation claims had all been valued. The early submissions were that on Davenport's error lay in his not valuing more than a handful of claims. The later submission, constituting the abuse of process must have been put forward to sway him to a result favourable to Hitachi.
>
> [96] I am satisfied that Hitachi has committed a material abuse of process in the O'Sullivan adjudication which led to a denial of natural justice to ODG. The adjudication decision cannot stand.

The fact that his Honour was prepared to chart new territory and void an adjudication determination on grounds that have not been determined before is obviously welcome, but the question remains as to whether or not his Honour's judgment will survive.

One of the first hurdles in upholding the judgment is that, as held in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [46],

Hodgson JA observed that "[t]here is a real question whether an adjudicator is properly considered a tribunal exercising governmental powers".

It is respectfully submitted that Hodgson JA, in his observation above, asked the incorrect question.

At [10] of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, Spigelman CJ said:

> The critical issue is whether the relevant decision-maker is exercising public power, relevantly, a statutory power. There is no longer a requirement that there be an identifiable, additional element that the relevant decision-maker has a duty to act judicially before that decision-maker is amenable to the prerogative writs. I do not share the doubt expressed by the learned authors Mark Aronson, Bruce Dyer and Matthew Groves Groves, *Judicial Review of Administrative Action*, 4th ed (2009) Lawbook Co at [12.120] as to whether the superadded duty has been authoritatively rejected in Australia.

His Honour added at [14]–[15]:

> [14] There is no scope in this formulation for a superadded duty. (For subsequent acceptance of this formulation see, eg, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272; *Abebe v The Commonwealth of Australia* [1999] HCA 14; (1999) 197 CLR 510 at [195]; *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at [43]; *Minister for Immigration and Multicultural Affairs v Yusuf*[2001] HCA 30; (2001) 206 CLR 323 at [73]; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at [25]; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 84 ALJR 369 at [19], [116].)
>
> [15] Secondly, there are many judgments which have rejected the relevance of characterising decision-makers as "executive" on the one hand and "judicial" or "quasi-judicial" on the other hand. (See, eg, *Salemi v Mackeller (No 2) [1977] HCA 26; (1977) 137 CLR 396* at 419; *Bread Manufacturers of New South Wales v Evans* [1981] HCA 69; (1980) 180 CLR 404 at 415-416; *FAI Insurances Ltd v Winneke* [1982] HCA 26; (1982) 151 CLR 342 at 409–410; *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 583–584, 616–617; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 64; *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 365–366; *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; (1996) 185 CLR 149 at 158–159; *Abebe v The Commonwealth of Australia* [1999] HCA 14; (1999) 197 CLR 510 at [112]–[113].)

Further authority supports the general thrust of Skoien AJ's judgment in *Hitachi* above. In *Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd* [2009] 1 Qd R 505; [2009] QSC 1, Daubney J upheld a defence to a summary judgment application under s 19(4) of the BCIPA, where the defendant had invoked the relevant provisions of the TPA. Further, there is the judgment of Daubney J in *Baxbex Pty Ltd v Bickle* [2009] QSC 194. *Baxbex Pty Ltd v Bickle* [2009] QSC 194 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

In *Katherine Pty Ltd v The CCD Group Pty Ltd* [2008] NSWSC 131, the facts were that the party against whom an adjudication determination was made complained that the enforcement thereof would result in the enforcement of a penalty, and that the defendant's conduct in proposing and insisting upon that penalty was unconscionable.

In summarising the mechanisms provided by s 87 of the *Trade Practices Act 1974* (Cth), McDougall J, at [15] of *Katherine*, summarised the conclusion arrived at in *Bitannia* as follows:

> In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238 at 67 NSWLR 9, the Court of Appeal held that a judgment

> founded on a determination under the NSW Act could be stayed if the determination had been procured by misleading or deceptive conduct in breach of s 52 of the Trade Practices Act. That stay could be granted pursuant to s 87 of the Trade Practices Act on the application of the party alleging the use of misleading or deceptive conduct. Alternatively, the judgement creditor could be restrained pursuant to s 80 (if there were a "proceeding" in which that relief was sought) or s 87 (on application for that relief) from enforcing the judgment.

At [43] of *Katherine*, his Honour held that, on the facts, the defendant was guilty of unconscionable conduct under the unwritten law triggering the provisions of s 51AA of the *Trade Practices Act 1974*. His Honour did not go on to consider the impact of that conduct on s 51AC.

At [47] of *Katherine*, his Honour held that it would be an injustice to permit the defendant to have the full benefit of a bargain that, through its incorporation of a penalty, resulted in unconscionable conduct. The remedy which his Honour fashioned was to preclude the enforcement of the judgment to the extent of the penalty contained therein.

At [9] of *Filadelfia Projects Pty Ltd v EntirITy Business Services Pty Ltd* [2010] NSWSC 473, it was stated:

> Finally, taking into account in particular the pressures of time, and other constraints, for which the Act provides in relation to adjudication determinations, it may be arguable that for a claimant knowingly to withhold a material document is akin to an abuse of process. It may be arguable that, given the matters to which I have referred, it is incumbent on a claimant, in much the same way as it is incumbent on an applicant for ex parte relief in this Court, to ensure that all material matters are put before the Adjudicator. That, however, is not the ground on which I rest my view that there should be some interlocutory relief in this matter.

(qq) An abuse of adjudication process — repetitious and impermissible use of the adjudication process – issue estoppel

It has been held that a repetitious and therefore impermissible use of the adjudication process requiring an adjudicator or successive adjudicators to re-determine claims previously made, constitutes an abuse of process, and will not be permitted. See the discussion in this regard at [SOP8.50].

In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69, progress claims were submitted for amounts the subject of a previous claim. The adjudicator determined that most of the previous claim was maintainable. The question before the Court of Appeal was whether the further claims, based upon the same items, were precluded by the provisions of the Act or the principles of estoppel. It was held at [13]:

> … that there was no warrant under either the contract or the Act, s 8 for permitting a party in Dualcorp's position to create fresh reference dates by lodging the same claim for the same completed works in successive payment claims. That is not the intended operation of the last phrase of s 8(2)(b) "and the last day of each subsequent named month".

At [14] of *Dualcorp*, Allsop P (as his Honour then was) said:

> ... The terms of s 13(5) are a prohibition. The words "cannot serve more than one payment claim" are a sufficiently clear statutory indication that a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment claim under the Act and does not attract the statutory regime of the Act.

Allsop P (as his Honour then was) said at [16]:

> As to s 22(4) I agree with Macfarlan JA's approval of the approach of McDougall J to this section. I also agree that the Act as a whole generally manifests an intention to

> prevent repetitious reagitation of the same issues. The primary mechanism for the effectuation of that intention would appear to be ss 13(5) and 22(4). The former is sufficient to deal with the present controversy. I would leave to another occasion, should it be necessary, the consideration of principles of estoppel to prevent any apparently abusive operation of the Act not specifically covered by ss 13(5) and 22(4).

Macfarlan JA (with whom Handley AJA agreed) said at [68] of *Dualcorp*:

> Thus the primary judge here was correct in considering that "principles akin to res judicata" or "abuse of process" were applicable. Consistent with that broad description, I conclude that the principles of issue estoppel were applicable. Primarily because temporal considerations are of particular significance in relation to progress claims, the analogy between an adjudicator's determination and a completed cause of action which the principles of res judicata would require is an incomplete one. It is best that the applicable principles be recognised to be those of issue estoppel. The more general principle of abuse of process is probably also applicable but it is unnecessary to reach a final view about this. This principle involves a broad concept "insusceptible of a formulation comprising closed categories" (*Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; 80 ALJR 1100; [2006] HCA 27 at [9]) but certainly including within its ambit an attempt to "litigate anew a case which has formerly been disposed of by earlierproceedings" (*Walton v Gardiner* (1992-3) 177 CLR 378; 67 ALJR 485; [1993] HCA 77 at 393).

Dualcorp was cited by Hammerschlag J in *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635 (15 July 2009).

See also [50] of *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502. The High Court has given leave to appeal in this matter. As at the date of the publication of this book, judgment is still reserved.

At [57] et seq of *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous* [2016] QSC 96, Jackson J considered whether issue estoppel precluded re-agitated claims within the context of the Security of Payment legislation. At [59]-[61], his Honour said:

> [59] A helpful discussion of the operation of "issue estoppel" in this context appears in *Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd* [2014] QSC 223, [48]-[55]. Philip McMurdo J said:
>
> > Although Macfarlan JA described the outcome as a result of an issue estoppel, it is clear that his Honour had in mind something less than the operation of the common law doctrine of issue estoppel as it is usually understood. The doctrine of issue estoppel has been said to reflect "a central and pervading tenet of the judicial system [which] is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances". Where the doctrine does apply, then subject to any qualification by legislation or agreement, it precludes the reagitation in any forum of the same issue. Yet, the estoppel for which Allstate contends, in attempted reliance upon Dualcorp, at its highest is one in which the issue could be reagitated in some forums but not others. It is a remarkable species of issue estoppel where, having regard to s 32 of the [NSW Payments Act], the "entitlements inter se under the contract" are unaffected by it. The source of this more limited estoppel must be found, if at all, within the legislation. In my view, the legislation does not provide it. A contrary indication is that such an estoppel would be problematical in many ways. Take, for example, a case where a court declares the effect of the parties' contract, inconsistent with an adjudicator's decision. Is a future adjudicator, dealing with another claim under that contract, bound by the decision of the earlier adjudication (if not set aside) or that of the court?
>
> The limited finality described by Macfarlan JA was founded, as his Honour explained, upon the combined effect of several provisions within this statute. Contrary to the submission for Allstate, the judgment of Macfarlan JA did not hold that the doctrine of issue estoppel applies in this context in all respects. The judgment identifies a finality

> of an adjudicator's decision in the sense of precluding a claimant from pursuing a progress payment inconsistently with determination of an issue by an adjudicator which was fundamental to that decision. (emphasis added) (footnotes omitted)
>
> [60] In Sunshine Coast Regional Council v Earthpro Pty Ltd,[27] Byrne SJA considered the re-agitation in a later payment claim and adjudication decision of an extension of time with costs under cls 35.5 and 36 of the general conditions of AS2124-1992 based on the same factual issues as decided in an earlier adjudication decision for a claim for a variation under cl 40.1. It was held that the adjudicator exceeded his jurisdiction in allowing the re-agitated claim as an extension of time claim. His Honour said:
>
> > "However, the Act inferentially precludes re-agitation of the same issue where that issue was essential to a determination in an earlier adjudication".[28]
>
> [61] Having regard to those cases, any issue estoppel that arises under the Payments Act is a unique species of estoppel. For brevity, I will call it "Dualcorp issue estoppel".

Dualcorp was referred to with approval by Philip McMurdo J in *Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd* [2014] QSC 223.

As noted by McDougall J at [22] of *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602:

> I came to the same conclusion in *Trustees of Roman Catholic Church for Diocese of Lismore v TF Woollam & Son* [2012] NSWSC 1559. Although the reasoning extends over a number of paragraphs, the conclusion that I reached, stated at [49], was founded on what Allsop P (as His Honour then was) had said in *Dualcorp*:
>
> As I have indicated already, any other approach would set at naught the statutory prohibition. And if the statutory prohibition is not to be given effect, then the subsection serves no useful purpose. It would be as though s 13(5) reads to the effect that a claimant cannot serve more than one payment claim in respect of each reference date but, if it does so, the payment claim nonetheless initiates the statutory enforcement or recovery mechanisms.

Also see [17] of *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334, where both this judgment, and that of *Dualcorp v Remo* above were cited with approval by Meagher JA [sitting in Equity].

See further Rein J's judgment in *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems* [2009] NSWSC 416 (5 May 2009); *NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd* [2013] NSWSC 842; *Reitsma Constructions Pty Ltd v Davies Engineering Pty Ltd t/as In City Steel* [2015] NSWSC 343 at [21].

At [172] of *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous* [2016] QSC 96, Jackson J stated with reference to the judgment of Rein J in *Perform* above:

> …
>
> Similarly, in *Perform*, the essence of Rein J's reasons for concluding that there was an abuse of process was that, where an adjudication had been conducted and a determination given, the dissatisfied claimant sought to propound a claim, differently framed, for the very same works, goods or services (see at [42], [46]).
>
> …

At [71] of *Blackadder Scaffolding Services (Australia) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 (30 June 2009), the State Administrative Tribunal of Western Australia followed *Silent Vector Pty Ltd v Squarcini* [2008] WASAT 39 and *Merym Pty Ltd v Methodist Ladies College* [2008] WASAT 164 in holding that once items were included in an earlier payment claim, that claim cannot be revised by mere repetition (presumably in a later payment claim).

Dualcorp and the authorities which followed it are referred to by McDougall J in *Urban Traders v Michael* [2009] NSWSC 1072 at [20]–[41], where his Honour after a detailed

analysis of the principles on which it and the cases which followed rested, said at [41]:

> It does not follow from the decisions to which I have referred that every repetition, in a subsequent payment claim, of a claim made in an earlier payment must amount to an abuse of process. That is so even if that earlier payment claim has been the subject of an adjudicator's determination. The relevant concept is not abuse of process at large. It is abuse of the processes of the Act: specifically, the processes of the Act designed to ensure that builders and subcontractors (and of course others) received prompt and progressive payment for construction work performed or related goods and services provided. The question of whether there has been an abuse the processes of the Act must take into account relevant provisions of the Act. Specifically:
>
> (1) s 13(6) of the Act recognises that a claimant may include in a payment claim an amount that has been the subject of a previous payment claim; and
>
> (2) s 22(4) of the Act deals, to an extent, with a repeated claim by providing that if particular construction work or related goods and services have been valued by an adjudicator, an adjudicator in a subsequent adjudication application is to give them the same value unless satisfied that the value has changed since that previous determination.

At [52] of *Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205, his Honour said:

> The second payment claim, adjudication application and adjudication were oppressive and therefore an abuse of process. They were a means by which Galform sought to evade the conduct of legal proceedings the parties had agreed should determine Galform's right to be paid the judgment sum. It was an attempt to deprive the applicant of the safeguards to its position and to evade the undertaking it gave the court with respect to the judgment it had obtained. It is, of course, ordinarily vexatious and oppressive to sue twice for the same debt. It is clearly so when the debt has already merged in a judgment.

In *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117, Fryberg J considered a matter in which the amount of a final payment claim had been claimed twice. The latter payment claim was identical to an earlier one. Fryberg J dismissed the submission that a claimant cannot serve more than one payment claim in relation to each reference date. His Honour was guided by the reasons given at [64]–[65] of *Brodyn*.

At [18] of *Northside Projects Pty Ltd v Trad* [2009] QSC 264, Martin J, referred to Fryberg J's judgment in Doolan, and said:

> Justice Fryberg concluded that, as the second claim was identical to the first and related to the same reference date, it was not capable of founding the jurisdiction of the adjudicator and, therefore, the order made by him was invalid ["void"].

At [28] of *Urban Traders v Michael* [2009] NSWSC 1072, McDougall J did a critical analysis of the reasons given by Rein J in *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems* [2009] NSWSC 416. McDougall J's paraphrasing of Rein J's holdings was as follows:

(1) a subsequent payment claim seeking to reagitate matters determined in an earlier adjudication "is not...within the intent of the Act" and "is not permitted by the Act", and hence is not a payment claim for the purposes of the Act;

(2) the remedies for abuse of process or issue estoppel are dismissal or permanent stay, remedies that an adjudicator cannot grant;

(3) it is no answer to say that the respondent can raise the issue estoppel before the adjudicator, because requiring, or leaving, the respondent to do that is the very abuse that ought to be restrained;

(4) the Act aims to provide a speedy determination of claims for payment on an interim basis, not to burden parties to construction contracts with a repetitious and quasi-litigious process; and

(5) a determination under the Act is not final, but a means of enforcing interim payment; an unsuccessful party (claimant or respondent) retains all of its rights and remedies at law.

At [11] of *Filadelfia Projects Pty Ltd v EntirITy Business Services Pty Ltd* [2009] NSWSC 1468, Gzell J noted that McDougall J points out at [41] of *Urban Traders* that it does not follow from the decisions that every repetition in a subsequent payment claim of a claim made in an earlier payment claim must amount to an abuse of process, even if that earlier payment claim had been the subject of an adjudicator's determination. The relevant concept is not abuse of process at large, it is the abuse of processes of the Act, specifically the processes of the Act designed to ensure that builders and subcontractors receive prompt and progressive payment for construction work performed or related goods and services provided.

Gzell J proceeded at [16] of *Filadelfia* to state:

> There is, however, in my view a vast difference between the founding of an abuse of process on the non-authorised repetitious appeal to the processes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) and the factual determination in this case of whether *Filadelfia* is a party to a construction contract that would enliven an adjudicator's jurisdiction under the Act.

In *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2010] NSWSC 1367, an adjudication application was withdrawn and the claim was then the subject of a fresh payment claim. McDougall J at [37]–[38] said:

> [37] Of course, that does not mean that the claimant is entirely without remedy. Except where the outer time limit fixed by s 13(4)(b) of the Act has expired, the claimant retains the right to serve a fresh payment claim. That claim may include amounts that were the subject of previous claims (s 13(6)). In the circumstances under consideration, there could be no estoppel or abuse of process, on the principles discussed in cases such as *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69 and *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168.
>
> [38] It is correct to say that, if a fresh payment claim were served, the respondent would have a fresh, and unqualified, opportunity to raise further "defences" in its payment schedule. That, no doubt, is an inconvenience from the claimant's perspective. But the Act's object, to secure cash flow, does not to my mind require that plain words should be given a strained construction so as to enable the claimant to retain some perceived tactical advantage.

As stated above, the principal judgment on appeal was given by Macfarlan JA, with Tobias AJA concurring, and Basten JA dissenting. The principal issue to be determined was summarised by his Honour at [82] of his Honour's judgment as follows:

> Hanave submitted that to construe s 26(1)(b) as applying where an adjudicator issues a purported but void determination is to add a third circumstance to the two circumstances expressly identified in s 26(1) and thereby to depart from the language of the statute.

At [91]–[96], in rejecting the appeal, his Honour reasoned as follows:

> [91] It is of course necessary that the subject provision be construed so that it is harmonious with other provisions of the Act (*Project Blue Sky Inc v Australian Broadcasting Authority* at [70], [80] - [81]) but Cardinal was not able to point to any other provision of the Act which indicates that the construction of s 26 for which it contended should be adopted. Cardinal's submissions did not, and could not, rise higher than a contention that the primary judge's construction might in some circumstances lead to an inconvenient or unjust result.

[92] Even if that contention is correct, it is insufficient to warrant departure from the clear textual meaning of s 26:

> "[I]f the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligently applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust ... On the other hand, if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice (*Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation (Cth)* at 305; see also *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* at 109)."

[93] Consideration of the objects of the Act does not in my view provide any assistance to Cardinal's submissions as to the proper construction of s 26(3) but it is nevertheless appropriate to note the following cautionary observation that Dawson J made in *Mills v Meeking* at 235, which is applicable when a departure from the text of a statute is sought:

> if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 [of the *Interpretation of Legislation Act 1984* (Vic) requiring regard to be had to the purposes or objects of legislation, of which an equivalent provision exists in s 33 of the Interpretation Act 1987 (NSW)] requires a court to construe an Act, not to rewrite it, in the light of its purposes.

[94] To the same effect is the following observation of Basten JA in *Taylor v Centennial Newstan Pty Ltd* at [92]:

> where some variation is sought of the statutory language, it is an essential precondition to any legitimate exercise of the power of statutory construction that it be "possible to state with certainty" what words would have been adopted by the drafter and approved by Parliament had their attention been drawn to the problem: [*Wentworth Securities v Jones* at 107; *R v Young* at [9]–[15] (Spigelman CJ).

[95] This principle constitutes an insurmountable hurdle for Cardinal. Even if (contrary to my view) it could be concluded that the legislature could not have intended that s 26(3) bear its literal meaning that where a void determination has been issued the time for lodging a new adjudication application runs from the expiration of the time allowed by s 21(3), it would not be possible to state with certainty what alternative meaning the legislature intended s 26(3) to have.

[96] Cardinal submitted that s 26(3) should be construed as if it said that time commences to run from the date upon which "the claimant becomes aware that it is entitled to withdraw the previous adjudication application". However it could equally well be contended that, had the legislature's attention been drawn to this issue, it might have instead incorporated the words "the claimant becomes *or ought to have become* aware" in s 26(3) to cover the possibility that the claimant's lack of awareness of its entitlement to withdraw the previous application resulted from its own carelessness.

Tobias AJA, in concurring with Macfarlan JA, said at [117]:

> The problem in the present case is that it is apparent that the legislature simply never envisaged a situation such as the present where a determination is made by an adjudicator within the time limit mandated by s 21(3) but is later set aside or declared invalid. If that situation is to be remedied in a manner that departs from the text of the

> Act, then it is for the legislature and not the courts to achieve that end. I fully appreciate, as Basten JA notes at [53] of his reasons, that the factual situation with which the Court is faced in the present case was not of the appellant's making. Nor was it that of the respondent. There is a lacuna which, in my view, only the legislature can fill. It cannot be filled by a construction of the relevant sections of the Act which in my respectful opinion they cannot reasonably bear.

It would therefore appear, at least in New South Wales, that this issue has now been definitively determined.

However, the issue was revisited by McDougall J in *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602, where the first payment claim was withdrawn. At [17], his Honour recognised the concept of withdrawal of a payment claim, at least by consent, and noted that Hammerschlag J held that a payment claim would be withdrawn by consent in *NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd* [2013] NSWSC 842 at [38] and [39].

McDougall J agreed with Hammerschlag J that it is at least open to a claimant, with the consent of the respondent, to withdraw a payment claim and to substitute it for another one relating to the same reference date without contravening s 13(5) of the New South Wales Act.

Further, McDougall J saw no reason, in principle, as to why a unilateral withdrawal, made clear to the respondent, would be invalid.

Also see [17] of *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334, where this judgment was cited with approval by Meagher JA [sitting in Equity].

At [23] of *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159, Applegarth J noted that he had considered the decision in *Dualcorp* above in *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135, where he followed *Dualcorp*, subject to certain qualifications. The qualifications identified by Applegarth J were to certain general statements in the majority judgment of Macfarlan JA, which Applegarth J considered required qualification for the very reasons given by McDougall J in *Urban Traders* above and *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168.

Applegarth J, at [24] of John Holland noted that he was not referred to the decision of Mullins J in *ACN 060 559 971 v O'Brien* [2008] 2 Qd R 396; (2007) 23 BCL 421; [2007] QSC 91 when he decided the *AE & E Australia* case. His Honour noted at [31] of *John Holland* that Mullins J in O'Brien was not called upon to decide the "same issues" that had arisen in the earlier adjudication in that matter.

His Honour at [37] summed the matter up thus:

> For the reasons given by McDougall J in *Urban Traders* and *Watpac*, certain statements by Macfarlan JA in *Dualcorp* at [53] may require qualification. Section 17(6) of the Queensland Act, like s 13(6) of the NSW Act, permits the inclusion in a later payment claim of an amount that has been the subject of an earlier payment claim. Schneider submits that the reservations expressed by McDougall J in *Watpac* at [60] and which I respectfully adopted in *AE & E*, leave *Dualcorp* on shaky foundations. I do not agree with this submission. The fact that the prohibition in s 13(5) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) does not prevent a claimant from including in a payment claim an amount that has been the subject of a previous claim, and the fact that s 22(4) contemplates that a claimant may seek to have a later adjudicator revalue work on appropriate evidence in certain circumstances, do not alter the essential points made by Macfarlan JA in *Dualcorp* at [52] and [53].

In *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135, Applegarth J undertook a further detailed analysis of the relevant authorities on this point, both in New South Wales and Queensland.

At [15] of *AE & E*, Applegarth J, for the reasons given by McDougall J in *Urban Traders* and *Watpac*, said that the statements made by Hammerschlag J at [51] and [56] of *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635 that Cadence had "exhausted its statutory entitlement to claim the delay costs which were the subject of the first claim" and "the Act gives no right to re-make a payment claim which has earlier been made and adjudicated upon", may require some qualification.

At [30] of *AE & E*, his Honour preferred to determine the matter before him by reference to the doctrine of issue estoppel, including the extended principle of issue estoppel. At [31], his Honour concluded his judgment on this point as follows:

> I will avoid repeating the analysis from the New South Wales authorities of the principles of issue estoppel that apply in connection with determinations by adjudicators under the Act. I respectfully adopt the principles of issue estoppel discussed in *Dualcorp*, *Urban Traders* and *Watpac*. They concern a statute in the same terms as the Queensland Act. The legislation manifests a general intention to preclude re-agitation of the same issues. I should follow the interpretation of identical New South Wales legislation unless I conclude that the interpretation is plainly wrong. I do not. To the extent that certain general statements in the judgments in *Dualcorp*, *Performa* and *Cadence* require qualification for the reasons given by McDougall J in *Urban Traders* and *Watpac*, I respectfully adopt the interpretation of McDougall J. These qualifications do not have any significance upon the disposition of the present application.

Issue estoppel is no ground for resisting or setting aside an adjudication determination unless the issue sought to be re-agitated has earlier been determined: *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159 at [48]–[49]; *VK Property Group Pty Ltd v AAD Design Pty Ltd* [2011] QSC 54 at [21].

Boddice J, in *VK Property Group Pty Ltd v AAD Design Pty Ltd* [2011] QSC 54, noted that Allsop P's (as his Honour then was) reasons in *Dualcorp* above had to be considered in their context, viz that the New South Wales legislation was intended to preclude repetitious adjudication applications designed to allow a party dissatisfied with the result of a prior determination to seek to reignite the adjudication process at will in order to have a further go at it.

His Honour added:

> [24] In any event, s 17(6) of the Act does not impose any restriction upon the generally expressed entitlement in s 17(1), namely an entitlement to claim an unpaid amount of work done earlier before an earlier reference date, whether or not it was claimed in an earlier payment claim. The effect of s 17(6) of the Actis merely to ensure that no implication may be drawn that s 17(5) of the Act precludes a claimant from making a payment claim for an unpaid amount claimed in a previous claim: Spankie per Fraser JA (with whom Holmes JA and Chesterman JA agreed) at [23]. There is no general implication in the Act against "re-agitation" of a payment claim in a subsequent payment claim where there has been no adjudication determination.
>
> [25] What is required, in conformity with s 17(5) of the Act, is that the payment claim should be made in relation to different "reference dates". The second respondent found that payment claim 3 was a valid payment claim properly made in relation to a different reference date. That reference date arose not by reason of the contract, which did not contain any date in relation to any variation, but by reason of the definition of "reference date" in Schedule 2 of the Act. That was a finding open to the second respondent. There was no jurisdictional error in reaching that finding.

The most recent authority, as at January 2012 in New South Wales on this point, is *Rail Corp (NSW) v Nebax Constructions* [2012] NSWSC 6, where McDougall J said:

> [45] The proposition that there may be multiple adjudication applications in respect of different parts of a payment claim seems to me to be completely inconsistent with the underlying objective of the Act, which is to provide an enforceable right to progress payments and a speedy and relatively cheap and efficient means for enforcement of those rights. It also seems to me to be inconsistent, if not directly then at least by implication, with the approach of the plurality (Macfarlan JA and Handley AJA) in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69, where their Honours expressed a clear view against the repetitious lodging of payment claims seeking to enforce the same claim. It may be noted that Allsop P (as his Honour then was)concurred in the result, although for somewhat different reasons.
>
> [46] Thus, it seems to me, the better view of s 17(1) is that there can only be one adjudication application for any one payment claim. To put it another way, it seems to me that s 17(1) does not authorise the lodging of multiple adjudication applications in respect of the one payment claim.

There seems to be some inconsistency between McDougall J's decision in the *Rail Corporation* case on the one hand, and the *Cardinal Project Services* case on the other. It is to be noted that *Cardinal Project Services* was not referred to by his Honour in *Rail Corporation*.

The issue in *State Asphalt Services Pty Ltd v Leighton Contractors Pty Ltd* [2013] NSWSC 528, decided by Stevenson J, was summarised by his Honour at [1] of his Honour's judgment, as follows:

> This case raises for consideration the question of whether it is permissible for a party to a construction contract who has served a payment claim pursuant to s 13 of the Building and Construction Industry Security of Payment Act 1999 ("the Act"), in response to which no payment schedule is served pursuant to s 14, and who subsequently serves an identical payment claim on the counterparty in response to which a payment schedule is served, can recover judgment for the amount of the first payment claim pursuant to s 15(2)(a)(i) (rather than make an adjudication application under s 17 in respect of the second payment claim).

In rejecting the submission that the conduct of the plaintiff constituted an abuse of the process of court, his Honour said:

> [137] As to what constitutes an abuse of process, Mr Rudge referred to *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 at [89] where the High Court stated:
>
> > As the majority pointed out in *Batistatos v Roads and Traffic Authority (NSW)*, "[w]hat amounts to abuse of court process is insusceptible of a formulation comprising closed categories". In Ridgeway v The Queen, Gaudron J noted that the concept extended to proceedings "instituted for an improper purpose", and to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment". In *Rogers v The Queen*, McHugh J concluded that, although the categories of abuse of process are not closed, many cases of abuse can be identified as falling into one of three categories: "(1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute". (citations omitted)
>
> [138] I do not see the present case as falling into any of these (admittedly not closed) categories.

At [25] of *Northside Projects Pty Ltd v Trad* [2009] QSC 264, Martin J referred with approval to a decision of Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd*

[2006] NSWSC 1 in which it was held that if a respondent in an adjudication application wishes to take the point that a subsequent payment claim is invalid because it is contrary to the provisions of s 17(5) of the New South Wales Act and, as such, would not ground the necessary jurisdiction for an adjudication, that would have to be set out in a payment schedule delivered in accordance with the requirements of the Act.

Boddice J in *VK Property Group Pty Ltd v AAD Design Pty Ltd* [2011] QSC 54 addressed the issue of "issue estoppel" at [19] et seq of his judgment. His Honour quoted the principles set out at [32] of *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135 as follows:

> (d) The principle of issue estoppel discussed in the majority judgment in Dualcorp applies when the previous adjudicator does not allow a claim for want of evidence.
>
> (e) The principle of issue estoppel applies when the previous adjudicator determines that an entitlement to be paid has not been made out for one or more of a variety of reasons that include:
>
> (i) there is no entitlement;
>
> (ii) the claimed entitlement is not made out because the basis for it is not demonstrated, or there is insufficiency of proof as to entitlement, valuation or both.

At [48] of *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd* [2013] VSC 552, Vickery J referred to McDougall J's judgment in *Rail Corp (NSW) v Nebax Constructions* [2012] NSWSC 6 where McDougall J considered the provisions of s 13(5) of the New South Wales Act (the equivalent of s 14(8) of the Victorian Act).

Subsection 14(8) and (9) of the Victorian Act provide:

> (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
>
> (9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

At [42] of *Jotham*, Vickery J pointed out that s 14(9) of the Victorian Act had not been specifically considered in any previous case law. His Honour held however at [43] that "[o]n a plain reading s 14(9) provides that, if another and earlier payment claim has been made, but the amount of that earlier claim has not been paid, the unpaid amount may be included in a later and different payment claim which covers different construction work or the supply of different goods and services, calculated by reference to a different reference date under the construction contract".

His Honour pointed out at [44] that "[t]his construction provides consistency with s 14(8)".

At [46], Vickery J added:

> Further, the construction which I have found serves to advance the purpose of the Act. To permit multiple payment claims to be made in respect of the same work (or goods or services) arising from the same contractual reference date, via the mechanism of s 14(9), would be completely inconsistent with the underlying objective of the Act, which is to provide an enforceable right to progress payments supported by an expeditious and efficient means for enforcement of those rights. It would cause the parties to expend needless time and be put to unnecessary expense.

In *Ku-Ring-Gai*, in the first adjudication determination, the adjudicator concluded thus:

> From the information before me and given that the analysis employed in the iSet Report is computer driven, I am unable to replicate the assessment process in order to assess the true extent of [Ichor's] entitlement to an EOT. This should not be interpreted

> to mean that I have assessed it as Nil. I have simply been unable to assess it. It follows, that I am unable to assess the quantum of the delay costs claims.

Ichor Constructions launched a further adjudication determination in which the same facts were re-agitated. At [32] of *Ku-Ring-Gai*, Stevenson J, relying on *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69 at [71] and [72], and *Blair v Curran* (1939) 62 CLR 464 at 532, restated the principle that an issue estoppel can arise only where an issue has been decided.

At [33] of *Ku-Ring-Gai*, his Honour added:

> Whether an adjudicator has "decided" (or, to use the language of s 22(1) of the Act, "determined") a matter must be assessed as a matter of substance, and not of form. Thus if an adjudicator simply states that "I will not value this claim" but has in substance rejected it, the conclusion may well be open that the adjudicator has "decided" or "determined" the issue such as to give rise to an issue estoppel: see for example, *AE & E Australia Pty Ltd Stowe Australia Pty Ltd* [2010] QSC 135 per Applegarth J at [46].

(rr) Abuse of process, and other instances of abuse of adjudication procedure, including concurrent proceedings in Court and under the New South Wales Act

In *Kingston Building (Australia) v Dial D Pty Ltd* [2013] NSWSC 2010, it was contended before McDougall J in an application for a stay of judgment entered into in Kingston's favour, following a successful adjudication, that it was an abuse on the part of Kingston to have obtained that judgment when it had already obtained a judgment in the Supreme Court for a progress payment in respect of essentially the same work.

At [13] of his Honour's judgment, he noted:

> There is no doubt that the doctrine of abuse of process in relation to the *Security of Payment Act* is alive and well. It was suggested by the Court of Appeal in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69, and has been picked up in a number of first instance authorities since that time. If I may be immodest, I will do no more than refer to my own decision in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 where, reviewing a number of first instance decisions, I concluded that the doctrine of abuse of the processes of the *Security of Payment Act* was available, in a case where it was properly raised, to empower the Court to restrain proceedings upon an adjudicator's determination. That was so, I said, because repetitious re-agitation of payment claims could be seen to use the processes of the *Security of Payment Act* other than for the purposes for which the legislature enacted them.

McDougall J continued at [14] by noting that in *Urban Traders v Michael* [2009] NSWSC 1072 he had set out what he considered to be a prohibited abuse of the process established by the *Building and Construction Industry Security of Payment Act 1999* (NSW) to ensure that its declared statutory objective was achieved. His Honour said:

> The doctrine operates to prevent those processes from being used other than for the purposes for which they were given. It is not concerned with abuse of process at large (see *Urban Traders* at [41]).

His Honour summed up his thinking at [18], in which he said:

> In this context it should be noted that there is a series of cases that establish that simply to pursue concurrent rights at law, for example, under the construction contract, and under the *Security of Payment Act* is not of itself an abuse of process. That is taken to have been established by the decision of the Court of Appeal in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; 21 BCL 437; [2005] NSWCA 49. There are first instance decisions to the same effect, including my decision in *Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd* [2008] NSWSC 1405 and the decision of Ball J in *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* [2011] NSWSC 195.

Urban Traders above was referred to by Stevenson J in *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* [2014] NSWSC 1534.

Reference should be made to the decision of Stevenson J in *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* [2014] NSWSC 1534 discussed in the immediately preceding paragraph.

Notwithstanding the fact that Stevenson J held that there was no issue estoppel, his Honour said at [39]:

> McDougall J reviewed the authorities in *Urban Traders* and drew attention to the observations of the High Court in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; [2006] HCA 27 at [9] per Gleeson CJ, Gummow, Hayne and Crennan JJ:
>
> > What amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues.

In *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous* [2016] QSC 96, Jackson J at [172] held as follows:

> The essence of the idea of abuse of process that the applicant seeks to capture on this ground derives from a passage from Urban Traders v Michael where McDougall J said:
>
> > In the context of the Act (ie, when asking whether there has been an abuse of the processes established by the Act), the essence of abuse of process is what Allsop P in *Dualcorp* described as:
> >
> > (1) the "repetitious use of the adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions" (at [2]);
> >
> > (2) the use of the Act "to re-ignite the adjudication process at will in order to have a second or third or fourth go at the process provided by the Act merely because [the claimant] is dissatisfied with the result of the first adjudication" (again, at [2]); or
> >
> > (3) "repetitious re-agitation of the same issues" (at [16]).
>
> …

Stevenson J also summarises the judgment of Allsop P (as His Honour then was) in *Dualcorp* as follows:

> [40] In the context of the Act, Allsop P (as His Honour then was) said in *Dualcorp* that the essence of abuse of process was:
>
> (a) the "repetitious use of the adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions" (at [2]);
>
> (b) the use of the Act "to re-ignite the adjudication process at will in order to have a second or third or fourth go at the process provided by the Act merely because [the claimant] is dissatisfied with the result of the first adjudication" (again, at [2]); or
>
> (c) "repetitious re-agitation of the same issues" (at [16]).

At [41] of *Ku-Ring-Gai* Stevenson J, and referring again to McDougall J's judgment in *Urban Traders*, reasoned at [52]-[53] of *Ku-Ring-Gai*, as follows:

> [52] Sections 13(6) and s 22(4) of the Act do contemplate that, in some circumstances, a payment might include an amount that has been the subject of a previous payment claim and work the subject of one adjudication application might be further considered in a later adjudication application. Further, as McDougall J has observed, mere repetition of a claim does not necessarily bespeak an abuse of process.
>
> [53] However, this case involves more than a mere repetition of a claim earlier made. The reason Ichor is repeating its claim before the Second Adjudicator is that it failed to

> establish the same claim before the First Adjudicator because it deployed evidence inadequate to the task. The Council resisted the First Adjudication Application on the basis of the material then deployed by Ichor in support of it. The First Adjudicator drew attention to the shortcomings in that evidence. Ichor is now making a second attempt to prove its case by supplementing that material with further evidence that, according to its description in the Second Adjudication Application, seeks to overcome the particular problems identified by the First Adjudicator. In effect, Ichor has used the First Adjudicator's observations as an advice on evidence and is now making a second attempt to prove the same case and requiring the Council, for the second time, to meet it. This is in my opinion an abuse of process. It is akin to a party, having read a judge's reasons for rejecting its claim for want of evidence, seeking to re-open to re-agitate the issue and to make good the identified shortcomings in the evidence.

Philip McMurdo J, in *Queensland in Civil Mining & Construction Pty Ltd v Isaac Regional Council* [2014] QSC 231 applied the *Falgat* decision at [15]-[17], and said:

> [15] As for the third factor, CMC's use of the process under cl 47, the Council's argument accepts that ordinarily a claimant may pursue concurrent remedies by claims under the Act and court proceedings, and in particular, it accepts the reasoning of Handley JA (with whom Santow JA and Pearlman A-JA agreed) in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; 21 BCL 437; [2005] NSWCA 49. In that case, a judge had restrained a builder from pursuing its statutory remedies under the equivalent New South Wales Act where the builder had also sued for moneys owing. A proceeding was commenced in the District Court in April 2004 claiming about $400,000 from the proprietor arising from the relevant building construction. A judge ordered the builder to provide security for costs and stayed that proceeding until the security was provided. Without providing that security, the builder then served a payment claim seeking payment of about one half of its claim in the court proceeding. The payment claim became the subject of an adjudication application. Before an adjudicator accepted the appointment, the builder was restrained from pursuing its statutory remedy. But the Court of Appeal dissolved that injunction.
>
> [16] Handley JA discussed the four grounds on which the injunction had been granted. The first was that the statutory claim was vexatious and oppressive, having regard to the concurrent proceedings in the court, although they had been stayed. Handley JA said that there was no basis for holding that the claim was vexatious and oppressive because "the statutory rights are adjudicated on an interim basis and supplement the rights of the parties under the general law which can be finally determined by a court ...". The second ground was that the "statutory adjudication would frustrate the ... Court's task", as to which Handley JA said that in general, this could result if the statutory proceedings "were commenced or carried on close to a trial" but that was not the case there. The third ground was that the builder had made an election by commencing proceedings in the court to which it should be held. Handley JA said that "this necessarily depends upon the view that the builder's rights under the statute are alternative and inconsistent with his rights at common law", for which view there was no basis. The builder was entitled to pursue his rights concurrently provided that this did not interfere with the fair trial of the court proceedings. The final ground was that the judge had said that on a proper construction of the Act, any statutory proceedings had to be completed before court proceedings were commenced, which Handley JA said was an erroneous construction.
>
> [17] Similarly, there is no impediment to the concurrent pursuit of the process under cl 47 of the contract and CMC's remedies under the Act. The ultimate remedies under cl 47 are "arbitration or litigation". There is no basis for supposing that the pursuit of an arbitration is different from litigation for present purposes. An adjudicator's decision is

> an interim one and does not finally resolve the rights of the parties under the contract, as would an arbitration. The remedies may be pursued concurrently.

McMurdo J also distinguished the decision in *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205.

His Honour held at [22] of Civil Mining:

> Of course, as Gaudron J said in *Ridgeway v The Queen* (1995) 184 CLR 19; [1995] HCA 66 at 75:
>
> > Abuse of process cannot be restricted to "defined and closed categories" because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case. (footnotes omitted)
> >
> > But it is for the Council, which seeks to restrain the use of the process under the Act, to demonstrate an abuse. The evident purpose of CMC is to have the benefit of the expeditious nature of the statutory process in pursuit of a claim which, the Council does not suggest, is advanced with no belief in its merit. Undoubtedly there will be a greater burden upon the Council in having to contest this payment claim concurrently with an arbitration. But it is well established that the statutory and other remedies for the same dispute may be pursued concurrently. And other matters upon which the Council relies provide no basis for concluding that the present case falls outside that principle.

(ss) An order staying the process of an adjudication decision or enjoining a claimant proceeding on an adjudication application on the basis of an abuse

At [22] of *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous* [2016] QSC 96, Jackson J noted that the New South Wales Court of Appeal, in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69, 206 at [68], left open the question as to whether or not an order for the staying of process of an adjudication decision, or an order enjoining a claimant from proceeding with an adjudication application, could be made.

At [45] of *Wiggins*, Jackson J, quoted the following extract from McDougall J's judgment in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168:

> There are difficulties in concluding that resubmission of a claim that has been the subject of an earlier claim and adjudication means that the whole of the later claim is not a payment claim for the purposes of the Act, so as to fall within the second of the five categories of basic and essential requirements listed by Hodgson JA in Brodyn at 441 [53]. At most, it seems to me, any invalidity (whether sufficient to bring the matter within the second of those categories or not) could apply only to the extent of the repetition. That seems to follow from the result in Dualcorp, where the Court of Appeal upheld the decision of the primary judge to grant summary judgment for the amount of the two invoices (out of the total of six that had been submitted in each of the earlier and the later payment claims) that had not been the subject of the earlier adjudication.

(tt) Adjudication determination – no requirement for a reasonable decision

In *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 at [87], Giles JA remarked that "a reasonable but erroneous decision by the adjudicator does not invalidate the decision". P Lyons J, at [27]–[33] of *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2009] QSC 165, rejected the submission that to be valid an adjudicator's decision had to be reasonable.

At [19] of *David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd* [2010] QSC 29, McMurdo J noted, with reference to P Lyons J's

judgment above, that "… it may be correct to say that a decision which displays 'an extreme degree of unreasonableness' in a Wednesbury sense would not be a decision for the purposes of s 26 of the Act."

In *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145, Atkinson J collected the relevant authorities as to whether or not reasonableness was a prerequisite for a valid adjudication determination. Her Honour said:

> [21] In *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205 at [21], Applegarth J adopted the earlier comments of P Lyons J in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2009] QSC 165 at [32] - [33]:
>
> > His Honour surveyed authorities to the effect that a condition of validity of the exercise of an adjudicator's power is that the adjudicator act in good faith. His Honour concluded:
> >
> > > It may be correct to say that a decision which displays an extreme degree of unreasonableness akin to that described in *Associated Provincial Picture House Ltd v Wednesbury Corporation*, is not a decision for the purposes of s 26 of the *Building and Construction Industry Security of Payment Act 1999*. Otherwise, I do not consider an adjudicator's decision purporting to be made under the will be invalid if it is not "reasonable". The Payments Act seeks to provide a mechanism for obtaining a decision which will be quick, but in a sense, provisional. It does not seem to me, consistent with the general object and tenor of the Act, to impose a requirement of "reasonableness".
> >
> > > I am therefore of the opinion that the test advanced on behalf of QBWSA is too widely formulated. If the broad test for good faith is to be adopted, then what is required is a genuine attempt to exercise the power in accordance with the provisions in the . Specifically, in relation to a consideration of the construction contract, what is required is a genuine attempt to understand and apply that contract.
>
> [22] The decision of P Lyons J referred to by Applegarth J was the subject of an appeal in *Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq)* [2010] QCA 7. Holmes JA wrote the leading judgment, with which Fraser JA agreed (Fryberg J agreed to the orders but expressly declined to state a view on whether the narrow or wide approach to questions of good faith under BCIPA should be adopted). Her Honour said at [31] – [32]:
>
> > The learned primary judge took as his starting point for considering QBWSA's attack on the adjudication the condition identified as essential for validity in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*: a bona fide attempt by the adjudicator to exercise his power under the legislation. The parties were at odds as to the test by which the good faith requirement was to be assessed. The learned judge rejected MKG's contention that he should act on the test for good faith formulated in a number of Federal Court decisions, which focused attention on the actual state of mind of the decision-maker, requiring personal fault and a conscious intent to be "recreant to his duty". Those cases, his Honour noted, involved review of decisions under the , and could be regarded as a product of construction of that Act, which contained a privative clause requiring particular consideration of whether the decision in question was capable of challenge.
> >
> > The statutory context in which the minimum requirements for a valid decision under the Payments Act fell to be determined was different: the

> adjudicator's decision had an interim quality. His Honour preferred the broader approach advanced by QBWSA: what was required of the adjudicator was a genuine attempt to exercise his power in accordance with the Payments Act provisions, and in considering the construction contract, a genuine attempt to understand and apply it. But on either approach, the adjudicator's decision was not void on the ground that he had not acted in good faith. *[footnotes omitted]*

PD McMurdo J in *David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd* [2010] QSC 29 at [19]–[20] said:

> [19] In *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2009] QSC 165, P Lyons J rejected a submission that to be valid, an adjudicator's decision must also be reasonable [at [27]–[33]]. In his view, the statement of Giles JA in *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 at [87] that "a reasonable but erroneous decision by the adjudicator does not invalidate the decision" is not authority for the proposition that reasonableness is required. In the view of P Lyons J, it may be correct to say that a decision which displays "an extreme degree of unreasonableness" in a Wednesbury sense would not be a decision for the purposes of s 26 of the *Building and Construction Industry Security of Payment Act 1999* (NSW). In the present matter, counsel for the applicants did not argue that there was any requirement of reasonableness. At times during his oral argument, counsel referred to the unreasonable conclusions of the adjudicator. But he made it clear that this was submitted as a basis for inferring a lack of good faith, in the sense of the absence of a genuine attempt to decide the questions according to the Act and the contract.
>
> [20] In the same case, P Lyons J compared what was described as the broad test for good faith with the stricter approach argued there by the respondent. Under the broad test, what was required was a genuine attempt to exercise the power, and specifically in relation to a consideration of the contract, a genuine attempt to understand and apply that contract [at [33]]. Under the approach argued by that respondent, an absence of good faith would be established only by a conscious and wilful disregard of the adjudicator's statutory duty. Under this approach mere recklessness in the exercise of the power might not be sufficient [at [64]–[65]]. His Honour found it unnecessary to resolve that debate although he favoured the former approach [at [75]]. In dismissing an appeal against this judgment, Holmes JA preferred the latter approach [*Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq)* [2010] QCA 7 at [51]]. In the present matter, the same argument was not made for this respondent. It is common ground here that the applicants must establish no more than that the adjudicator did not make a genuine attempt to apply the Act and to understand and apply the contract. I go then to the alleged errors of the adjudicator, which are said to demonstrate the absence of good faith in that sense.

See however the discussion in [SOP22.290], where Sackar J in *State Water Corp v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879 seems to suggest at [65] that the absence of reasonableness in the adjudicator's determination may be a ground for curial intervention. In the light of the authorities above, it is submitted, with respect, that his Honour's observations in this regard are against the trend of authority.

In *Unifor Australia Pty Ltd v Katrd Pty Ltd* [2012] QSC 252, Daubney J referred at [21] to the decision of P Lyons J in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2009] QSC 165, where P Lyons J, after having surveyed the relevant authorities, concluded:

> [32] It may be correct to say that a decision which displays an extreme degree of unreasonableness akin to that described in *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223, is not a decision for the purposes of s 26 of the *Payments Act*. Otherwise, I do not consider an adjudicator's decision purporting to be made under the *Payments Act* will be invalid if it is not "reasonable". The *Payments Act* seeks to provide a mechanism for obtaining a decision which will be quick, but in a sense, provisional. It does not seem to me, consistent with the general object and tenor of the Act, to impose a requirement of "reasonableness".

In *HM Hire Pty Ltd v National Plan and Equipment Pty Ltd* [2013] QSC 274, Applegarth J at [22] et seq addressed the category of abuse of process "...when the use of the court's procedures is unjustifiably oppressive to one of the parties."

At [23], his Honour said:

> ... An abuse of process may occur if a party seeks to litigate in a later proceeding an issue that was determined in the earlier proceeding: *Haines v Australian Broadcasting Corporation* (1995) 43 NSWLR 404; [1995] NSWSC 136 at 414. As French CJ noted in Aon: "Abuse of process principles may be invoked to prevent attempts to litigate that which should have been litigated in earlier proceedings as well as attempts to re-litigate that which has already been determined." The passage earlier quoted from the speech of Lord Bingham in J*ohnson v Gore Wood & Co* emphasises that it would be wrong to hold that because a matter could have been raised in earlier proceedings that it should have been, so as to render the raising of it in later proceedings necessarily abusive. The existence of some improper purpose in advancing the later proceeding or an intention to oppress may be decisive. However, the absence of an improper purpose does not preclude a finding that the later proceeding involves an unjust harassment of a party and constitutes an abuse of process.

See further *State Bank of New South Wales Pty Ltd v Stenhouse Ltd* [1997] Aust Torts Reports 81-423, in which Giles J, in a passage cited with approval by Applegarth J in *HM Hire* above, said:

> The guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the system of administration of justice, and amongst the matters to which regard may be had are:
>
> (a) the importance of the issue in and to the earlier proceedings, including whether it is an evidentiary issue or ultimate issue;
>
> (b) the opportunity available and taken to fully litigate the issue;
>
> (c) the terms and finality of the finding as to the issue;
>
> (d) the identity between the relevant issues in the two proceedings;
>
> (e) any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceedings; all part of –
>
> (f) the extent of the oppression and unfairness to the other party if the issue was re-litigated and the impact of relitigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and
>
> (g) an overall balancing of justice to the alleged abuser against the matters supported for abuse of process: [1997] Aust Torts Rep. 81-423 at 64-089; cited with approval in *Clout v Klein* (supra) at [56] and in numerous other authorities.

In *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, Mitchell J said:

> [111] The term "jurisdictional fact" is well established by authority. However, in light of the above issues, I find it more useful to approach the task by an inquiry into the conditions for the valid exercise of the relevant power, identifying whether they are objective facts or the existence of a state of mind in the adjudicator. That different use of language does not reflect any substantive difference to the approach taken using the terminology "jurisdictional fact".
>
> *Reasonableness*
>
> [112] The grounds for judicial review also challenge the adjudicator's decision on the ground of unreasonableness.
>
> [113] In *Minister for Immigration v Eshetu* [1999] HCA 21 [40]; (1999) 197 CLR 611 [130] Gleeson CJ and McHugh J observed:
>
> > Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as "illogical" or "unreasonable", or even "so unreasonable that no reasonable person could adopt it". If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.
>
> [114] To give an allegation of unreasonableness the consequence of invalidating an exercise of statutory power, it is necessary to identify a requirement of reasonableness as a condition for the valid exercise of the power. This may occur in a number of ways. It may be that the statute confers a discretionary power with an implied requirement of reasonableness as a condition for the valid exercise of the power. If the valid exercise of the power is conditioned by the decision-maker forming an opinion, it may be that the there is an implied condition that the opinion be reasonably formed: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1944) 69 CLR 407, 432; *A v Corruption and Crime Commission* [120] [122].
>
> [115] A decision which is regarded as unreasonable may also give rise to an inference that some other kind of jurisdictional error has been made. This process of inferring error is well known to the law. [59] The concept was illustrated by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360, in the following terms:
>
> > If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.
>
> [116] That illustration was given in a context where the relevant Commissioner lacked jurisdiction to decide questions of law, unlike the present case. However, in the present case it remains open to infer error by reference to the result reached, on the basis that the result could not have been arrived at if no jurisdictional error was made, so long as the result is not explicable by a non-jurisdictional error of law. An inference of jurisdictional error may also be supported by comments made in the adjudicator's reasons, either alone or in combination with the result at which the adjudicator arrived. As will become apparent, I have found the impugned determinations to be unreasonable in this last sense.

The question arises as to whether or not in the West Coast security of payment legislation grounds for judicial review includes a failure by the adjudicator to act reasonably. In the light of the *Brodyn* principles, and which still remain intact despite the decision in *Kirk's* case above, it is doubtful whether the answer to this question will be in the affirmative.

(uu) Fraud in adjudication process, ground for curial review

At [60] of *Brodyn*, Hodgson JA was persuaded that a decision of an adjudicator which was obtained by fraud, without there being any fraud on the part of the adjudicator, was voidable and was liable to be set aside by proceedings of the kind appropriate to judgments obtained by fraud. In *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting* [2011] QSC 327, McMurdo J said:

> [134] The impact of *Kirk* upon the review of an adjudication under the Act has now been considered by the Court of Appeal in this State in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd2* and by the Court of Appeal in *New South Wales in Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*. To the extent that the JR Act would purport to remove this Court's power to grant relief for jurisdictional error on the part of an adjudicator, it is invalid as beyond State legislative power. *Certiorari* may be granted where a relevant decision has been obtained through fraud, including where the fraud is that of a party which is subject to the decision: *SZFDE v Minister for Immigration and Citizenship* at 197. In *Kirk v Industrial Court of New South Wales* at 580 [97], the joint judgment quoted this passage from *Colonial Bank of Australasia v Willan* where the Privy Council said:
>
> > It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.
>
> [135] So whilst *certiorari* could be granted for the "manifest fraud in the party procuring [the decision]", that was a distinct ground from jurisdictional error. The same distinction was made in *Kirk*, where in the joint judgment, fraud as a ground for *certiorari* was expressly put aside from consideration: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 at 567 [56]. Neither *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* nor *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* involved the fraud ground. Therefore, on the present authorities, the expressed exclusion of judicial review of an adjudicator's decision, according to s 18 of the JR Act (and its Schedule 1, Part 2), may still be in place so far as the fraud ground is concerned.

(vv) An excess of jurisdiction – an award of a quantum meruit - as ground for curial review

At [35] of *Unifor Australia Pty Ltd v Katrd Pty Ltd* [2012] QSC 252, Daubney J concluded that the adjudicator fell into jurisdictional error by making an assessment on a *quantum meruit* basis as his power to assess the amount of the payment claim was prescribed by s 26 (of the BCIPA) and regulated by s 14 of that Act. His Honour concluded that the adjudicator's decision was unlawful and therefore void.

(ww) Anshun principles – as applicable to an adjudicator's earlier determination – as ground for curial review

Applegarth J, in *HM Hire Pty Ltd v National Plan and Equipment Pty Ltd* [2013] QSC 274, considered the Anshun principles within the context of a challenge to an adjudication determination.

After an exhaustive analysis of the relevant Anshun principles, his Honour at [21] said:

> In determining whether there is an Anshun estoppel in a case such as this, the issue is whether it was unreasonable to not bring forward the claims which are now sought to be litigated, if only to permit the court to decide whether one claim should be heard and determined in advance of the others. The issue is not whether it would have been reasonable to bring forward all of the claims. The party seeking to establish the Anshun estoppel must prove that it was unreasonable to not do so and instead to litigate in the first proceeding only one of a number of claims. Bringing forward and litigating all possible claims at one hearing "can be a recipe for complex and unwieldy litigation": *Aldi Stores Limited and WSP Group plc, WSP London Limited and Aspinwall & Company Limited* [2007] EWCA Civ 1260 at [39]. The successive litigation of claims at different hearings, with its potential for multiple appeals, also may be a recipe for complex and unwieldy litigation. The principle that was applied in Anshun "is designed to foster public and private interests by encouraging parties to advance all their related claims or defences at the one time, thereby diminishing unnecessary duplication of curial and other effort": Gibbs v Kinna (supra) at 29 [33] It advances the underlying public interest in finality in litigation and that a party should not be twice vexed in the same matter. A finding of Anshun estoppel terminates what would otherwise be a party's right to obtain a judicial determination upon the merits of a claim. A conclusion of unreasonableness should not be lightly reached. It should not be reached simply on the basis of a predisposition that the interests of justice in the efficient and fair conduct of litigation requires all claims to be litigated in the one proceeding so as to avoid multiplicity of proceedings, and that all claims should be finally determined at the same hearing. The conclusion that an Anshun estoppel exists depends upon proof of unreasonableness, taking account of all of the facts of a case.

[SOP25.448] Adjudicator's failure to consider all elements of the payment claim and all aspects of the reasoning for withholding payments advanced by the payment schedule

An adjudicator fails to perform his statutory function unless he/she considers all elements of the payment claim and all aspects of the reasons for withholding payments advanced by the payment schedule: see the judgment of McDougall J in *Illawarra Retirement Trust v Denham Constructions Pty Ltd* [2015] NSWSC 1173 at [74].

[SOP25.455] Setting aside a statutory demand under the Bankruptcy Act in the face of a judgment based on an adjudication determination

In the case of *Re J Group Constructions Pty Ltd* [2015] NSWSC 1607, Robb J extracted the following principles on the issue of whether a company that is a judgment debtor on a judgment issued upon the filing of an adjudication certificate under the Act can claim that there is a genuine dispute about the existence of an underlying debt, and so obtain relief in the face of a statutory demand. These principles may be summarised as follows:

(a) His Honour accepted that he should follow the decision of Brereton J in *Re Douglas Aerospace Pty Ltd* (2015) 294 FLR 186; [2015] NSWSC 167 on this issue: see [85] of *J Group*.

(b) However, his Honour was satisfied that there were additional considerations that might arise in other cases where an application is made to set aside a statutory demand: see [86] of *J Group*.

(c) As Young J (as his Honour then was) held in *John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250, where the contemporaneous correspondence between the parties evidences a dispute or an offsetting claim, a court will ordinarily be accept that there is such a genuine

dispute or offsetting claim without the need to examine in detail the figures, the alleged construction defects and the evidence that supports them: see [87] of *J Group*.

(d) The principle stated in subparagraph (c) above has the support of the Court of Appeal in *W & P Reedy Pty Ltd v Macadams Banking Systems (Pty) Ltd* [2007] NSWCA 146 at [5] and many other decisions: see [88] of *J Group*.

(e) The threshold for establishing either a genuine dispute or a genuine offsetting claim is a relatively low one. It is sufficient that there is a serious question to be tried based on a cause of action advanced in good faith for an amount claimed in good faith such as not to be frivolous or vexatious: see [88] of *J Group*.

(f) The principles stated by Barrett J (as his Honour then was) in *Elm Financial Services Pty Ltd v McDougall* [2004] NSWSC 560 was cited by Robb J in J Group. Barrett J at [18] of Elm Financial said:

> There is then, however, the question of quantification. It is necessary, in view of the definition of "offsetting total" in s 459H(2) and its reference to "the amount of that claim", that the party alleging the existence of an offsetting claim, as a basis for an order setting aside a statutory demand, takes steps to quantify it. The matter is dealt with in *Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No 2)* (1994) 12 ACLC 490. In *No. 96 Factory Bargains Pty Ltd v Kershel Pty Ltd* [2003] NSWSC 146, I referred to that necessity in these terms:
>
> > The first thing to be said about the way the plaintiff puts its case is that, while the definition of "offsetting claim" in s.459H(5) refers, in general terms, to a claim "by way of counterclaim, set-off or cross-demand", it is clearly contemplated by the section as a whole that the claim must be one capable of being quantified in money terms. It need not be a liquidated claim but it must be one to which a monetary liability can be attached. This is because of the directive in s.459H(2) that the court determine, among other things, "the amount of that claim" or, where there are several claims, "the total of the amounts of those claims". It follows that only claims sounding in debt or damages or other monetary consequences (such as may be available under the Trade Practices Act) may be taken into account for the purposes of s.459H.
>
> See [90] of *J Group*.

(g) The following statement by Brereton J at [40] of *Douglas Aerospace* above was cited with approval by Robb J in *J Group*:

> [40] However, the quantification of that offsetting claim is another matter. While the full amount of an offsetting claim is to be deducted from the admitted total to ascertain the substantiated amount [*Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 13 ACSR 263], that applies only to the extent that the offsetting claim is genuine. Thus a company relying on an offsetting claim must adduce evidence that enables the court to ascertain the amount of the genuine claim to the extent necessary to apply the formula in s 459H. If the offsetting claim must plainly exceed the amount of the demand, it is unnecessary that it be precisely quantified. But where that is not clear, the court must be able to quantify an offsetting claim, and if the evidence does not permit it to do so, will attribute to it only a nominal value [*Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd* (1994) 13 ACSR 455].
>
> See [91] of *J Group*.

(h) As held by Brereton J at [100] of *Douglas Aerospace*, after following the decision of the Court of Appeal in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91, the following decisions were plainly wrong: *Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 559; *Ettamogah Pub (Rouse Hill) Pty Ltd v Consolidated Constructions Pty Ltd (in liq)* [2006] NSWSC 1450; *Prime City Investments Pty Ltd v Paul Jones & Associates Pty Ltd* [2013] NSWSC 2: see [94] of *J Group*.

(i) There is no doubt that the addressee of a statutory demand may, in appropriate circumstances, successfully apply to set it aside where the demand is based on an adjudicator's determination or consequent judgment, if offsetting claims arise from transactions separate from those that gave rise to the judgment debt in the adjudication application.

In this regard, *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553 per Campbell J above was to be followed: see [68] of *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 per Pullin JA with Newnes and Murphy JJA concurring and [97] of *J Group*.

In the end result, Robb J varied the statutory demand by reducing it by an amount that could not be justified on the papers before his Honour.

It is a completely different situation where a respondent in an adjudication who is faced with a statutory demand after an adjudication goes against it, seeks to set off certain amounts. Campbell J addressed this question in *M & D Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553 (11 June 2004), where his Honour, at [15]–[20], said:

> [15] A question arises of how the BACISOP Act interacts with the provisions of the *Corporations Act 2001* (Cth) concerning setting aside of statutory demands by reason of offsetting claims. I accept that the law has been correctly stated by Master Macready in *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* (2003) 180 FLR 318; 47 ACSR 696; [2003] NSWSC 929, in deciding that s 25(4) of the BACISOP Act only applies to proceedings actually brought to set aside a judgment debt and not, as is the case here, where a plaintiff, in separate proceedings, seeks to set aside a statutory demand made in respect of the debt.
>
> [16] It was submitted, for the defendant, that I should construe the definition of "offsetting claim" in 459H(5) of the *Corporations Act 2001* (Cth) so that it did not relate to a claim alleged to offset a judgment debt arising from the BACISOP Act. I do not accept that submission.
>
> [17] The fact that there is a judgment debt is no reason to deny a claim the status of being an *"offsetting claim"*. The definition of *"offsetting claim"* is perfectly general, and it frequently happens that a company is a judgment debtor, but has an offsetting claim arising by reason of transactions separate to those which gave rise to the judgment debt.
>
> [18] It was submitted that, if it were possible to set aside a statutory demand founded on a judgment debt arising from a notice of determination under the BACISOP Act, then that Act would be rendered toothless.
>
> [19] As a first step in the submission, I was reminded that the purpose of parliament in introducing that legislation was to ensure that, once a quick, and possibly rough, adjudication by a neutral person had taken place, a progress payment in the amount found by the adjudicator should be made to a builder, and that the ultimate correctness of the progress payment being made should be argued afterwards. I was reminded that the BACISOP Act was concerned with maintaining a builder's cashflow, not determining its ultimate rights. I accept, in broad terms, that first step.
>
> [20] Next, it was submitted that, if it were possible to rely upon an offsetting claim to set aside a statutory demand, the object of the BACISOP Act would not be achieved. I do not accept that this is so. There are means of enforcement, short of a winding up action, which are open to a judgment creditor. When a judgment has been obtained

> pursuant to the BACISOP Act, if the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of a Commonwealth Act, the *Corporations Act 2001* (Cth), to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Div 3 of Pt 5.4 of the *Corporations Act 2001* (Cth) set out a regime whereby a statutory demand is set aside *whenever* there is an offsetting claim, as defined.

It will be noted that one of the considerations impacting on Campbell J's (as his Honour then was) mind was that a New South Wales Act could not derogate from rights afforded under a Commonwealth Act.

The position is an anomalous one, in that set off may not be possible had the successful application invoked another remedy other than that of a statutory demand.

Campbell J's (as his Honour then was) judgment at [20] of *Demir* was referred to by Martin J at [36] of *Reed Construction (Qld) Pty Ltd v Dellsun Pty Ltd* [2010] 2 Qd R 481; [2009] QSC 263.

At [40] of *Reed Construction*, Martin J, referred to the judgment of Hammerschlag J in *Ozy Homewares v Wesgordon* [2007] NSWSC 982, where Hammerschlag J referred to the decision in *Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 559, and said:

> [26] Having regard to the provisions for restitution in the Act, it seems to me doubtful that a judgment[,] which comes about because of the statutory regime in the Act in circumstances where a defendant cannot raise a defence or any cross-claim which might nullify it is a final judgment[,] creat[es] a res judicata between the parties so as to preclude a genuine dispute in relation to the judgment debt for the purposes of s 459H (as opposed to not precluding the raising of an offsetting claim).

At [46] of *Reed Construction*, Martin J continued thus:

> It would be a curious, indeed unsatisfactory and inconsistent, construction of BCIPA which would result in a contractor being estopped from raising a dispute or an offsetting claim in an application under s 459G of the Corporations Act in circumstances where it is specifically allowed to do so in an action contemplated by the provisions of s 100. The reasoning advanced by Macready As. J in *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* has been adopted and refined by the authorities which have followed it. The terms of BCIPA cannot be used to constrain the operation of a Commonwealth statute such as the Corporations Act. It is sufficient, for the purposes of this decision, to hold that s 100(1)(c), by providing that nothing in part 3 of BCIPA affects any right that a party to a construction contract may have apart from the Act in relation to anything done or omitted to be done under the contract, is sufficient to allow (if it is otherwise needed) a party to raise a genuine dispute or an offsetting claim under s 459G of the Corporations Act.

Demir was referred to and followed by Barrett J (as his Honour then was) in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186 (10 December 2004) and by Palmer J in *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005] NSWSC 284 (1 April 2005). In *Greenaways*, Barrett J went on to discuss what must be shown to make out an "offsetting claim" for the purpose of s 459H(1)(b) of the *Corporations Act 2001* (Cth) and, after having done so, held that the statutory demand based on a judgment resulting from the filing of an adjudicator's certificate under the Act, was to be set aside.

Demir has been cited with approval by Young CJ in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* (2005) 21 BCL 443; [2004] NSWSC 1230.

This question was discussed in *Diploma Constructions (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91, where Pullin JA (with whom the other Judges of the Court of Appeal of Western Australia agreed) said:

> There is no doubt that the recipient of a statutory notice may successfully apply to set aside a statutory demand based on an adjudicator's determination or a consequent judgment if it has offsetting claims arising from transactions separate from those that gave rise to a judgment debt based upon an adjudication under the Act: *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 533 (at [17]) (per Campbell J).

These authorities have been referred to further by Daly AsJ at [9] of *Scrohn Pty Ltd v Newearth Constructions Pty Ltd* [2015] VSC 254.

In *Dasein* it was held that the provisions of the Commonwealth Act, allowing a set off under s 553C thereof, supersede and take preference over s 25 of the NSW Act, by reason of s 109 of the Australian Constitution.

In *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, the Victorian Court of Appeal, per Warren CJ, Tate and McLeish JJA, addressed the constitutionality of ss 16(2)(a)(i), 16(4)(b)(i) and 16(4)(b)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic). For a discussion on this aspect, see [SOP3.130] *(b)* above.

In *Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 559, White J said at [11]–[12]:

> [11] Part 3 of the *Building and Construction Industry Security of Payment Act* provides a summary procedure for determining what payments should be made on an interim basis, but it does not preclude the right of the parties to a building contract to have their rights and liabilities under that contract determined in accordance with the usual civil procedures. Thus, sub-sections 32(2) and (3) of that Act provide, *inter alia*, for restitution to be ordered by a court or tribunal hearing the matter arising under a construction contract, of any amount paid in accordance with Pt 3 of that Act.
>
> [12] It follows that whilst a party against whom a certificate requiring it to pay money has been issued, and against whom a judgment is entered in accordance with Pt 3 of that Act, is undoubtedly indebted to the other party to the contract who has obtained the certificate, nonetheless, if such a person has a genuine claim that it is not, in truth, indebted for the amount certified, it can maintain that claim as an offsetting claim under s 459H(1)(b) of the *Corporations Act*: see *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* (2003) 180 FLR 318; 47 ACSR 696; [2003] NSWSC 929; *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553; *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186; and *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005] NSWSC 284.

This principle was applied by the Supreme Court of Western Australia Court of Appeal in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91.

On p 5 of Mr Justice Ashley Black's paper *Commercial Equity Seminar 26 April 2016*, his Honour addressed the question as to whether or not a genuine dispute can be relied on to set aside a statutory demand arising from the registration of an adjudication order under the New South Wales Act (the same principles, it is submitted would apply to similar provisions in the statutes of the other States and Territories).

His Honour said:

> The balance of recent cases indicate that a genuine dispute cannot be relied on as a basis to set aside a statutory demand arising from registration of an adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("SOPA"), and a challenge to the correctness of the adjudication itself does not establish an offsetting claim: *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91; *Re Douglas Aerospace Pty Ltd* (2015) 294 FLR 186; [2015] NSWSC 167; *J Group Constructions Pty Ltd* [2015] NSWSC 1607. The circumstances in which a discrete offsetting claim, for example for loss arising from deficiencies in the work undertaken, may be relied on to resist a statutory demand based on an adjudication under the SOPA were left open by Brereton J in *Re Douglas Aerospace*

Pty Ltd [2015] NSWSC 162 and considered in detail by Robb J in *J Group Constructions Pty* Ltd [2015] NSWSC 1607 (for commentary, see S Zarnucki, "Testing the boundaries of the statutory demand procedure" (2015) Insolvency Law Bulletin 115.

See the further discussion at [SOP15.80](b) above.

[SOP25.457] The ordering of security upon setting aside a statutory demand based on an adjudication determination

In *13 Manning Street P/L v Charlie Woodward Builder P/L* [2010] QSC 151, Fryberg J was required to consider an application under s 459H of the to set aside the demand based on a District Court judgment following an adjudication determination. His Honour, in the unreported judgment, noted that:

> The evident intent of the is to provide some sort of security for contractors. The respondent would evade the whole operation of the Act were I simply to set aside the statutory demand unconditionally. I do not think the applicant should be able to thumb its nose at the legislation in that way. There have been, moreover, substantial delays in this matter and while I do not wish to attribute blame to either party for them, at the end of the matter there will be substantial amounts of interest to be accounted for. In my judgment there should therefore be a condition on the order setting aside the statutory demand that the applicant pay into the District Court in the file of the judgment debt the amount of that debt to lie in Court to abide the outcome of the applicant's proposed proceedings.

This principle was applied by the Supreme Court of Western Australia Court of Appeal in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91.

[SOP25.460] *"... not to raise any defence ..."*

It was emphasised by Einstein J in *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico* (2005) 21 BCL 266; [2004] NSWSC 344 (27 April 2004) at [27] that "payments made pursuant to adjudication determinations are *interim* payments". The basic philosophy behind the Act is that the adjudication determination does not preclude a subsequent challenge to the amount claimed in the appropriate court, or by the agreed dispute resolution mechanism.

It seems to be clear from McDougall J's judgment in *Musico*, his Honour was of the view that the prohibitions in s 25(4) in regard to matters that are capable of being raised by a respondent in proceedings to set aside the enforcement of an adjudication certificate as a judgment, require a narrow construction, and do not exclude all forms of judicial review. Gzell J, in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* [2004] NSWSC 254, did not go so far as saying that relief could not lie where a certificate had been filed and judgment obtained, but he refused to entertain an application for *certiorari*, stating that there would be no utility in granting such relief, and accordingly, the application should be dismissed on discretionary grounds.

Gzell J's reasons from his judgment appear below:

> [19] The scheme of the Act was to ensure that contractors obtained expeditious payment of progress claims. If there was a dispute as to the amount, a fast adjudication system was provided. The adjudicator's decision had to be obeyed and judgment could be entered for the adjudicated amount without the opportunity of challenge by way of defence or cross claim.
>
> [20] The structure is an interim regime only. The plaintiff is not debarred from claiming any relief to which it is entitled in other proceedings. Section 32 of the Act was specific. Nothing in the interim regime affected any rights that a party to a construction contract may have had under the contract or apart from the Act in respect of anything done or omitted to be done under the contract. The plaintiff had commenced separate proceedings in the District Court claiming damages.

> [21] Integral to the protection of the interim regime was s 25 of the Act. If the plaintiff sought to set aside the District Court judgment constituted by the filing of the adjudication certificate, it could not challenge the adjudicator's determination. The only utility of an order in the nature of *certiorari* is to ground an application to set aside the judgment but in such proceedings the plaintiff is debarred from challenging the adjudicator's determination.

Campbell J (as his Honour then was), in *Rail Infrastructure Corp v Veqhelyi* [2004] NSWSC 427 (11 May 2004) at [3], observed that it was "arguable" that "there is a difference of view between [McDougall J and Gzell J] …" on this issue.

McDougall J, in *ACA Developments Pty Ltd v Sullivan* (2004) 21 BCL 71; [2004] NSWSC 304, noted at [6]–[7], that his Honour's decision in *Musico* had apparently not been cited to Gzell J in *Brodyn*.

Notwithstanding the difference of opinion, and subject to questions of discretion, there are acknowledged grounds for moving to set aside an adjudicator's determination.

In *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* [2003] NSWSC 1019 (6 November 2003) at [14], it was stressed that because of the tight framework within which the adjudicator has to work, the process "must necessarily give rise to many adjudication determinations which will simply be incorrect". The adjudication result is sacrificed on the altar of ensuring that the contractor has its cash flow intact, or alternatively, remains fully secured for any eventual award.

For a discussion as to whether or not a defence based upon conduct that falls within s 52 of the *Trade Practices Act 1974* (Cth), as it then was (see now s 18 of the Australian Consumer Law, contained in Sch 2 to the CCA) is permitted, see the discussion at [SOP15.80](d) and [SOP25.70].

[SOP25.462] Not entitled *"… to bring any cross-claim against the claimant …"*

Under s 25(4)(a)(i) of the New South Wales Act, the respondent, who brings proceedings to set aside a judgment obtained under this section, is precluded from bringing any cross-claim. The immediate question arises as to whether or not the provisions of this subsection preclude the raising of set-off. In *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, the Victorian Court of Appeal, per Warren CJ, Tate and McLeish JJA, addressed the constitutionality of ss 16(2)(a)(i), 16(4)(b)(i) and 16(4)(b)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic). For a discussion on this aspect, see [SOP3.130] *(b)* above.

Before dealing with that aspect, it must be noted that the prohibition against bringing a cross-claim raising any defence in relation to the matters arising out of the construction contract or challenging the adjudicator's determination, arise only after the issuing of the certificate by the nominating authority pursuant to s 24(1). These prohibitions do not apply in an application for an injunction to restrain the issuing of a certificate, obviously, before the certificate sees the light of day, but after the determination.

There have been a number of decisions on the question of set-off in England in construing the comparative sections of the HGCR Act. It is pointed out that under s 110(2)(b), as read with s 111 of that Act, no set off or abatement is permitted by reference to any sum claimed under one or more other contracts. The courts have held that the relevant sections of the English Act precluded the defences or cross-claims that were not raised in the notice of intention to withhold payment (under the English Act cf the payment schedules referred to in s 14 above), and dealt with by the adjudicator, *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] BLR 158; [2000] EWHC 176 (24 January 2000); *VHE Construction plc v RBSTB Trust Co Ltd* [2000] BLR 187; [2000] EWHC Technology 181 (13 January 2000).

Where applicable, the similar or mirror provisions are to be found in the Acts of the other States and Territories listed below:

Australian Capital Territory – s 27(4)(a)(i)

Queensland – s 31(4)(a)(i)

South Australia – s 25(4)(a)(i)

Tasmania – s 27(5)(a)(i)

Victoria – s 28R(5)(a)(i)

[SOP25.463] *"Victoria… is not, in those proceedings entitled – (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or (ii) to raise any defence in relation to matters arising under the construction contract; or (iii) to challenge an adjudication determination or a review determination …"* – s 28R(5)(a)(iii) of the Victorian Act

In *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233, the question was raised as to whether or not s 28R(5)(a)(i) – (iii) was in conflict with s 85 of the *Constitution Act 1975* (Victorian Constitution), and therefore invalid. For the sake of ease of reference, s 28R(5)(a)(i) – (iii) is set out below:

> (5) If a person commences proceedings to have the judgment set aside, that person–
>
> (a) subject to subsection (6), is not, in those proceedings, entitled–
>
> (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or
>
> (ii) to raise any defence in relation to matters arising under the construction contract; or
>
> (iii) to challenge an adjudication determination or a review determination;
>
> …

Section 85 of the Victorian Constitution provides for the powers and jurisdiction of the Victorian Supreme Court. Pursuant to sub-section (1), it is stated:

> Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

Vickery J at [40]-[45] of *Amaysa* came to the conclusion that s 28R(5)(a)(i)-(iii) of the Victorian Act was valid for the following reasons. His Honour said:

> [40] These considerations referred to in the Second Reading Speech find support in the Explanatory Memorandum which accompanied the passage of the amending Bill through the Legislature, where it said:
>
> New section 28R sets out procedures for the bringing of proceedings for the recovery of an unpaid adjudicated amount for which an adjudication certificate has been issued. This clause also places restrictions on a person seeking to set aside a judgement under those proceedings. The person cannot bring across-claim, raise a defence under the construction contract or challenge the adjudication determination or review determination. This is to ensure that the proceedings under section 28R can be dealt with in a timely and streamlined way.
>
> This provision does not prevent a person bringing separate proceedings under the construction contract to recover any amount allegedly overpaid or underpaid under the progress payment process. Section 46 of the Act expressly preserves this right.
>
> …
>
> Clause 40 amends section 51 of the Principal Act to insert a new provision stating that it is the intention of section 28R to alter or vary section 85 of the *Constitution Act 1975*. This provision is inserted because of the inclusion in section 28R of the

restriction on a person bringing proceedings to set aside a judgment to enforce an adjudicated amount preventing that person from challenging the adjudication determination or review determination. The notes on proposed new section 28R set out the purpose of this restriction.

[41] Accordingly, the statutory statement provided for in s 51(2) of the Act, when read in the light of these extrinsic materials, provides an unequivocal acknowledgment that the intention of s 28R(5)(a)(iii) was to import a valid restriction on the power of the Supreme Court, which would apply to a person bringing proceedings to set aside a judgment to enforce an adjudicated amount, preventing that person from challenging the adjudication determination or review determination.

[42] Secondly, the Victorian Act provides for an independent exercise of judicial power in entering a judgment pursuant to s 28R of the Act.

[43] Under s 28R(1) of the Act, an adjudication certificate is issued by a respondent to the claimant, who is thereafter owed the certified amount. It is not the adjudication determination itself that is enforced, nor the adjudication certificate that is deemed as a judgment debt. It is the operation of sections 28M or 28N of the Act which creates the obligation to pay. It is that debt (which is created only by the issue of the certificate under s 28Q) that is to be enforced in a court of competent jurisdiction. The process of obtaining the court's judgment may then be undertaken ex parte.

[44] Under the Act, an applicant applies to the Court for a judgment recognising the debt owed, and, once judgment is entered, the procedures for enforcement of judgment debts may be enlivened.

[45] The entry of judgment under the Victorian Act is an exercise of judicial power, it is not merely an administrative act. The Court must bring an independent mind to the application for a judgment debt. Provided that the Act applies, there are two matters required by s 28R which the Court must be satisfied of before entering judgment:

(a) Is there an adjudication certificate filed with the application? and

(b) Is there an affidavit to prove that all or some of the amount provided for in the certificate has not been paid?

(footnotes omitted)

[SOP25.465] Discretionary considerations in regard to the grant or refusal of curial review

(a) Discretionary considerations and remedies

Applegarth J noted at [8]–[10] of *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No 2)* [2013] QSC 67, the following:

[8] Prerogative remedies and similar statutory remedies for jurisdictional error are discretionary, and the discretion is to be exercised judicially. In a clear case of want or excess of jurisdiction a prerogative writ will issue "almost as of right, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course": *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ; followed in *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558; [2004] NSWCA 200, which was in turn followed in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at 446 - 449 [267] - [284].] In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*, McDougall J observed that even in a case of clear jurisdictional error there is a residual discretion to not make an order in the nature of *certiorari* and that, in the ordinary case, such an order would be made "almost as of right". One discretionary ground to decline to order *certiorari* is where there are "alternative and adequate remedies for the wrong of which complaint is made".

[9] The High Court in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389; [1949] HCA 33, in

referring to the jurisdiction under s 75 of the Commonwealth Constitution to issue a writ of mandamus against an officer of the Commonwealth referred to "well recognized grounds upon which the court may, in its discretion, withhold the remedy" and continued:

> For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.

This passage has been cited with approval in more recent times: *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 at [28]. In the same case Kirby J at [77] referred to "the need to conserve relief to cases where it is appropriate and required to do practical justice". I am not concerned with the grant of a constitutional writ, however, similar principles governing the exercise of the discretion to withhold a remedy in the exercise of the Court's supervisory jurisdiction apply. Where relief is sought in the form of an order quashing or setting aside an adjudication decision, or an order is sought declaring the decision to be void, an aggrieved applicant who has established a jurisdictional error ordinarily will be entitled to such a remedy, but the remedy may be withheld as a matter of discretion if the circumstances make it just to do so. One example is if a more convenient and satisfactory remedy exists.

[10] As to declaratory relief, although it has been said that it is neither possible nor desirable to fetter the discretion to grant declaratory relief by laying down rules as to the manner of its exercise [*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582], the discretion to grant or to refuse declaratory relief is exercised according to principle. As with prerogative relief, relief is granted or withheld "according to principle rather than an unstructured judicial discretion": Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (4th ed, Thomson Reuters, NSW, 2009) at [10.100]. Whether it will be appropriate to grant such relief depends upon the requirements of justice in the particular case: *John Fairfax & Sons v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 470.

At [11] of *BM Alliance*, Applegarth J went on to hold:

[11] Relief in the nature of prerogative relief may be refused if, in all the circumstances, that seems the proper course: *Allianz Australia Insurance Ltd v Crazzi* (2006) 68 NSWLR 266 at 303 [224]. In referring to the general discretion to grant or withhold prerogative relief, or relief in the nature of prerogative relief, McDougall J stated the following in a case in which an adjudicator had no power to hear and determine an application brought in the absence of an essential statutory requirement:

> [9] For the reasons that I gave in the Court of Appeal at [268] to [284], I think there is a general discretion to grant or withhold prerogative relief, or relief in the nature of prerogative relief, and that the discretion is relatively uncontrolled or, in other words, is wide. However, I think, the exercise of the discretion must take into account both the policy underlying prerogative relief (as to which see my reasons at [279] to [281]) and the statutory context in which the application (in this case, under s 69) arises.
>
> [10] The general proposition, in relation to prerogative relief or its statutory equivalent, is that it was developed to prevent excess of jurisdiction.

> Thus, it exists to prevent a tribunal or inferior court from assuming a jurisdiction that it does not have, or from acting in excess of the jurisdiction that it does have. (This is not intended to be an exhaustive statement of the reasons for and limits of prerogative relief or its statutory equivalents.)
>
> [11] "In those circumstances, it seems to me, the fact that there may be an alternative right to sue for a debt is not a relevant discretionary consideration where a case is made out otherwise for the grant of relief. The sorts of things that might justify the exercise of the discretion include those referred to in the Court of Appeal's reasons: for example, where the claimant has exercised its right to suspend work, relying on the determination and on s 24(1) of the Act. It does not seem to me that the fact that the claimant has in effect chosen to go down the path of adjudication, but has failed to do so in accordance with a relevant jurisdictional requirement is of itself something that should enliven any discretion; even where, as I think is the case, there may well be an alternative course still open under s 15(2)(a)(i)": *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWSC 1167 at [9] – [11].
>
> The relevant jurisdictional requirement in that case under comparable New South Wales legislation related to a claimant notifying the respondent within a specified period of the claimant's intention to apply for adjudication of the payment claim. Satisfaction of that requirement was essential to the validity of an adjudication application and to the existence of the power to adjudicate. It involved an essential element at the application stage of the decision-making process. It did not "involve consideration of matters which can arise during the course of the decision-making process itself": *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (supra) at 405 [43] per Spigelman CJ.

At [27] of *BM Alliance*, Applegarth J, relying on *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11; *Leung v Minister for Immigration and Multicultural Affairs* [1997] 79 FCR 400 at 413 noted further that no doubt existed that an invalid administrative decision could nevertheless have operational effect. In this regard, his Honour observed that it may be necessary to treat an invalid administrative decision as valid as there was no move to set it aside. His Honour stated that the same consequence may obtain where a court has refused to declare an administrative decision to be invalid for discretionary reasons.

In BM Alliance, in an adjudication determination to the order of $24M, the jurisdiction excess touched merely, what his Honour considered to be, a relatively small portion of that determination.

His Honour considered whether to remit the matter so that jurisdictional error could be corrected and in this regard, at [40], of his decision, held:

> BMA advances substantial arguments against an order for remitter, including an argument based upon the New South Wales Court of Appeal decision in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399 that because the period referred to in s 25(3) has expired, any further determination would be invalid. BMA advances other reasons against making an order remitting the matter. In response, BGC advances substantial submissions that the Court has power to, and should, make an order remitting the matter to the second respondent for consideration. It is unnecessary for me to determine these issues. Remitting the matter for a further determination by the second respondent may give rise to complex issues including whether the determination is to be based upon existing evidence and submissions or include matters which have come to light since the decision dated 7 May 2012. Such a further

> determination will generate additional costs. If, however, I was to conclude that I should not exercise the power to remit in the circumstances, BGC might be deprived of the interim payment of approximately $24M for the value of construction work for claims which were either not challenged or unsuccessfully challenged.

Ultimately, his Honour was persuaded that the course which he should adopt in the exercise of his discretion was that set out at [43], in which his Honour said:

> The course of exercising my discretion to decline to declare the decision void, subject to BGC's undertaking to repay BMA the part of the award that was affected by jurisdictional error and certain other amounts, is a more convenient and satisfactory remedy than declaring the decision void and making various consequential orders. It avoids the risk of further litigation, cost and complexity in relation to the conduct of a further adjudication and the validity of a further adjudication decision made outside the time period set by s 25 of the Act if I was to make a remittal order. It avoids BGC being deprived of approximately $24M if I declined to make a remittal order and ordered repayment of all of the monies paid pursuant to a decision declared to be void.

Applegarth J's decision, although his Honour did not say so in terms, is relevant to a broader issue, and that is whether or not an adjudication determination which is bad in part can nevertheless be enforced in part. See the discussion in [SOP25.510].

(b) Where the point was not taken before the adjudicator

In *Kembla Coal & Coke Pty Ltd v Select Civil Pty Ltd* [2004] NSWSC 628 (23 July 2004), McDougall J, at [110] said:

> Even if I were wrong in this conclusion, I would not grant relief by reason of the matters raised under the third challenge. That is because the relevant challenge was not taken before the adjudicator. As a matter of discretion, and consistent with what I said in *Transgrid v Walter Construction Group* [2004] NSWSC 21 at [67], I think that the parties should be held, in substance, to the case that they sought to make out before the adjudicator. Any other approach could permit a party with a good point to take its chances on other points before the adjudicator, whilst holding back the particular point, and raise it in a challenge in this court if the outcome of the adjudication were not to its liking. Of course, this cannot be a universal rule. There may be cases where it is appropriate to permit a party to rely on a ground that was not taken before the adjudicator. But in the present case, there is no evidence to suggest why this is so.

McDougall J's judgment in *Kembla Coal* was affirmed by the New South Wales Court of Appeal in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288. The High Court has given leave to appeal in this matter. As at the date of the publication of this book, judgment is still reserved.

In *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53, McDougall J, in the exercise of his Honour's discretion, and where the point was not taken before the adjudicator, refused to set aside a determination. His Honour said:

> [43] In those circumstances, it is not necessary to deal in detail with the second issue: the question of discretion. It was submitted for Mr Oppedisano that, where excess of jurisdiction is shown, *certiorari* is granted almost as of right. I agree. But it is nonetheless a discretionary remedy, for the reasons that I pointed out in *Chase Oyster Bar v Hamo Industries* [2010] NSWSC 1167. In this case, the adjudication went through to finality in circumstances where Mr Oppedisano had provided a payment schedule dealing with the claim on its merits, and did not raise the question under s 7(2)(b) of jurisdiction; and had taken a similar course in his adjudication response. As I have indicated before, to the extent that he did raise any jurisdictional question, it was one as to the compliance with the requirements of s 13(2)(a).

(c) Some reviewable error — where the adjudication determination is valid

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004] NSWSC 823 (13 September 2004) McDougall J said the following:

> [68] Mr Corsaro submitted that, even if I found that the Minister's complaints were made out, I should withhold relief on discretionary grounds. He relied on what Einstein J said in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* [2003] NSWSC 1019 at [18], when his Honour referred to the "wholesale undermining [sic] of the mischief sought to be dealt with by the Act" that would follow if the court were to grant relief in the nature of prerogative relief each time an adjudication application was shown to be affected by some reviewable error.
>
> [69] In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, Palmer J at [95] and [96] referred to some of the circumstances that the court should take into account in deciding whether to exercise its discretion to grant relief under s 69. At the latter paragraph, he said that "a weighty circumstance in the exercise of the discretion … is the fact that the scheme of the Act requires that a respondent '*pay now argue later*': s 25. In some cases adherence to this scheme by refusal of prerogative relief on discretionary grounds may produce no great hardship to the respondent; in other cases, it may."
>
> [70] At [98], his Honour said that, prima facie, jurisdictional error in the adjudication process leading to an obligation on the part of one party to make a substantial payment should be corrected by the grant of relief under s 69 if there were no equally effective and convenient remedy.
>
> [71] It is not necessary that I should express a concluded view in the present case as to whether or not (assuming that the grounds for relief had been made out) relief should nonetheless be withheld on discretionary grounds. However, recognising as I do the public interest considerations to which Mr Corsaro pointed in his submissions, I find it difficult to see how the discretion could properly be exercised in favour of withholding relief where the amount at issue is substantial and where (as Palmer J showed in *Multiplex* at [101] and following) the consequence of quashing the determination would be to permit the claimant to make another adjudication application.

The above decision went on appeal to the Court of Appeal, New South Wales *sub nom Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 (6 May 2005). The appeal against McDougall J's decision was dismissed with no reference to McDougall J's holdings on the issue of discretion.

The issue of whether or not the court has a discretion was dealt with by Master Macready at length at [91]–[106] in *Transgrid v Siemens Ltd* [2004] NSWSC 87 (25 February 2004).

At [103], Master Macready, significantly, held:

> The public interest is also an important consideration. The plaintiff referred to the following matters under this head.
>
> *First*, there is the public interest reflected in a fundamental policy of the Act to provide an inexpensive means for determining *interim* payments.
>
> *Secondly*, the parties to the contract have agreed to a contractual regime which provides for interim progress payments based on contractual progress certificates. The interim payments are "on account only" (cl 42.2). The parties' expectations are that any error in the contractual progress certificate cannot be the subject of an appeal, and that any disagreement about under-payment or over-payment can be resolved in the final certificate. (See clauses 42.7 and 42.8), or in subsequent arbitration or litigation.
>
> *Thirdly*, the adjudication determination required an enormous effort by the adjudicator. It involved submissions and documents filling over 20 lever-arched folders. The adjudicator required two extensions of time. (The first was to 13 October and the second was to 20 October). The adjudicator's fees, reflecting the huge task undertaken by him and reflected in a lengthy and comprehensive determination, were $113,030.72 (McArdle at [14]). The plaintiff contends that he committed a jurisdictional error by not embarking on the Herculean task of independently valuing each contentious item, irrespective of the parties' submissions. In these circumstances, the court should be reluctant to make an order in the nature of *certiorari*, where the alternative enquiry

> which the adjudicator should have embarked upon (according to the plaintiff) was an impossibility, or one which required even more money (ie fees) and time. An even lengthier and more costly enquiry would have been at odds with the basic aim of the Act – to provide *cheap* and *quick* adjudication of interim payments.
>
> *Fourthly*, the present case concerns a large engineering project, and a contract which will upon completion have involved about 30 progress claims. The public interest is not served by expensive litigation involving, potentially, multiple proceedings. There is a public policy against a multiplicity of proceedings: *Dow Jones and Co Inc v Gutnick* (2002) 77 ALJR 255 at 262 [36]. This is reflected in the Act. See also ***R v Monopolies Commission; Ex parte Argyll plc*** [1986] 2 All ER 257; [1986] 1 WLR 763 at 774–775 per Sir John Donaldson MR, where the Court of Appeal exercised its discretion by refraining from making an order in the nature of *certiorari*, notwithstanding that the preconditions for such order had been satisfied. In the context of financial regulation (with which the latter cases was concerned), Bingham LJ has stated (extrajudicially) that "it would seem to me wise for the courts to venture into this unchartered minefield with considerable circumspection lest the cure be more damaging than the disease": "Should Public Law Remedies be Discretionary?" [1991] *Public Law* 64 at 75. These comments carry force when the court considers whether to exercise its discretion to refrain from making an order in the nature of *certiorari* in relation to an adjudication determination.

In *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395 (3 November 2004), Hodgson J, and with whom Mason P and Giles JA agreed, said the following at [37]:

> However, I would comment that the legislature has treated the question of whether progress payments should be made as an important question, and this suggests that the fact that the payments are provisional only and the rights of the parties will be determined otherwise would not normally be a ground for withholding relief. Particularly this is so on the approach I have taken, where relief is available only if the determination is found to be void.

Under the circumstances, the debate in regard to discretionary considerations would appear to be irrelevant, see further [38]–[43] of *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 (3 November 2004).

McDougall J, at pp 30–31, of his unpublished paper, *The Building & Construction Industry Security of Payment Act 1999* (September 2004), has, with respect, made the following very useful observations:

> While in brief reasons on an application for an interlocutory injunction in *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 935 at [33], Gzell J mentioned, without deciding the matter and as an apparent statement of general principle, "that *certiorari* lies to quash a decision for error of law on the face of the record", it nonetheless appears relatively settled at first instance that (as held in *Musico*) relief will not lie against mere (non-jurisdictional) errors of law on the face of the record. As stated by Einstein J in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* [2003] NSWSC 1019 (at [18]), to permit respondents to "invoke a general review of those determinations by way of orders in the nature of prerogative writs" would allow for "a wholesale undermining of the mischief sought to be dealt with by the Act", see also *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027 at [32], per McDougall J. Accordingly, while no decision has yet attempted to exhaustively set out *all* possible grounds of review, the following conspectus provided by Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (at [34]) is instructive. His Honour said that relief will lie in principle against a determination when it:
>
> - was given in bad faith or was procured by fraud;
> - was one which the adjudicator had no power under the Act to make;

- was made without complying with the limited requirements of natural justice provided by s 17(5), s 20(1), (2) and (3), s 21(1), s 21(4)(a) and s 18(4) of the Act; and see [15] above;
- did not deal with the question remitted for adjudication;
- determined a question not remitted for adjudication;
- did not take into account something which the Act required to be taken into account; or
- was based upon something which the Act prohibited from being taken into account.

As Palmer J emphasised in *Multiplex*, the court in the exercise of its discretion to grant relief should always be mindful of the objects and provisions of the Act, see also McDougall J in *Musico v Davenport* [2003] NSWSC 977 at [56]–[57]. Specifically, given that the savings clause in s 32 renders adjudications of only temporary effect, in appropriate instances "[i]t might be said … that errors made in the adjudication process should await correction and restitution by the process envisaged by s 32, and not by invocation of the judicial review process under s 69 of the *Supreme Court Act 1970*" (at [94]). His Honour expressed this in a different way (at [96]):

> When an application under the Act is shown to have resulted from jurisdictional error, a weighty circumstance in the exercise of the discretion whether to grant relief under s 69(1) *Supreme Court Act* is the fact that the scheme of the Act requires that a respondent "pay now, argue later".
>
> Given that the availability of prerogative relief was only positively recognised in October of last year, it remains to be seen how, and to what extent, this "weighty circumstance" will bear upon the development of the law in this area.

Multiplex v Luikens was referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v Luikens* was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

In *Austruc Constructions Ltd v ACA Developments Pty Ltd* (2005) 21 BCL 191; [2004] NSWSC 131, McDougall J, at [96]–[105], turned to general discretionary considerations from which it appears as if his Honour was persuaded that such general discretionary considerations applied.

However, at [75] of *Smith v Coastivity Pty Ltd* [2008] NSWSC 313, McDougall J pointed out that his decision in *Austruc* did not support Coastivity's submissions that the application before him should be dismissed on discretionary grounds. His Honour explained that:

> (1) [W]as a case decided before the Court of Appeal gave its decision in *Brodyn*, and thus the relevant issues were whether there had been jurisdiction or error of law on the face of the record, or denial of natural justice (see *Austruc* at [57], and the cases there cited).
>
> (2) [W]as a decision on an application for an interlocutory injunction. Thus, there was a general question of discretion, of the kind common to all such applications (see *Austruc* at [96] and following). The two specific discretionary issues that I raised in *Austruc* at [56] and [71], although relating to the failure of the respondent to put certain matters to the adjudicator, nonetheless were appropriate to be considered in relation to the general discretionary point."

In *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152, Barrett J (as his Honour then was) applied discretionary considerations in rejecting the motion before him. His Honour said at [36]–[39]:

> [36] For the reasons I have stated, the plaintiff has not made out a case for the making of a declaration that the adjudicator's determination is void. But in view of the lengths

to which the plaintiff has gone in this court in an attempt to obtain declaratory relief in a matter involving $14,025, I desire to say a few words generally about the statutory context.

[37] Matters of the present kind seem often to be approached on the footing that the s 25 result (filing of an adjudication certificate as a judgment for debt) must be resisted virtually at all costs. The limits imposed by s 25(4) upon attempts to have such a judgment set aside are referred to in that connection. But it seems sometimes to be not sufficiently appreciated that, although a judgment in debt may result from the adjudication process, there is no curtailing of contractual and other rights arising in relation to the performance of the relevant work. This is made clear by s 32. Thus, if the principal has a claim for defective work or can show that work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator. The principal might, if thought fit, institute proceedings seeking not only to advance the claim in question but also, perhaps, to obtain, by reference to a right of set-off, a stay of the judgment that s 25 has had the effect of creating. The s 25(4) limitations do not apply to an application for a stay, as distinct from an application to have a judgment set aside.

[38] It was pointed out in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385 by Handley JA (with whom Santow JA and Pearlman AJA agreed) that a judgment entered under s 25 is, by reason of s 32(3)(b), effectively a provisional judgment, both in what it grants and what it refuses. His Honour added (at [21]):

> A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid.

As Handley JA observed, the specific statutory context is one in which inconsistent judgments are contemplated and allowed.

[39] These points should be borne in mind by principals or proprietors who consider themselves to have good claims in contract or on other grounds outside the Act and, at a first stage, suffer an adverse determination by an adjudicator involving a modest sum. The consequences the Act produces go, in commercial terms, to matters of cash flow and credit risk without definitive and final creation of legal rights. Where the amount involved in a determination is small, the availability to a disappointed principal or proprietor of the avenues referred to by Handley JA and a perception that they are more appropriate avenues might be factors that influence the discretion that this court exercises upon an application for declaratory relief of the present kind."

At [76] of *Smith*, McDougall pointed out that (as his Honour then was) J's judgment in *Shellbridge* could not be distinguished in the same way that his Honour distinguished his own judgment in *Austruc* as that decision was post *Brodyn* and further, it was at a final hearing.

At [79] of *Smith*, McDougall J pointed out that a determination that is void has no legal effect, in that it created neither rights nor liabilities. The claimant was not entitled to be paid the sum that had been adjudicated and the respondent was not liable to pay it.

His Honour then, at [81]–[91] debated in detail, with reference to substantial authority, the question as to whether or not there was a discretion in the event to refuse to set aside an adjudication which was void.

Rather than confronting this difficult problem by finally determining it, his Honour held at [91] that in the case before him, there were no discretionary circumstances sufficient to warrant the withholding of the grant of injunctive relief sought in the summons.

It is respectfully submitted that his Honour could quite comfortably and on sound legal grounds could have concluded that in the event of a void determination, no matter how

much money was involved in it, that determination could not stand and should be set aside. Of course, it must be recalled that his Honour was dealing with an injunction, in which there is always a discretion.

(d) Other grounds for refusing injunctive relief

In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1, Palmer J, in the exercise of his Honour's discretion refused an injunction where it was conceded that the s 24 certificate had been prematurely obtained, on the simple basis that a new certificate could be obtained, and to compel the successful party in the adjudication process to obtain such a new certificate and reapply for a judgment in the District Court, would be an exercise in futility.

Brookhollow Pty Ltd v R & R Consultants Pty Ltd [2006] NSWSC 1 has been referred to by White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 with approval.

[SOP25.510] New South Wales – "*severance*", separating the good from the bad – in whole or in part

The courts in England will generally refuse to dissect an adjudicator's decision to remove parts where a successful challenge has been made, see *Farebrother Building Services Ltd v Frogmore Investments Ltd* (unreported, High Court of Justice, QBD, Technology and Construction Court, Gilliland J, 20 April 2001).

If the adjudicator's determination is bad in part, must the court declare that the whole of it cannot be enforced, and at the same time grant an injunction restraining the successful party from enforcing it in its entirety.

At [90]–[92] of *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, Palmer J said:

> [90] For the above reasons, I am not satisfied that Multiplex has made out any ground for the quashing of the determination under s 69(1) of the *Supreme Court Act 1970* save in respect of Item 9. As I have found in [79]–[81], the error into which Mr Luikens fell led him to exclude from his consideration Multiplex's evidence and submissions in respect of Item 9, which was matter which he was required to take into account by s 22(2)(d) of the Act. The difference between the parties as to what Multiplex owes in respect of Item 9 is $99,609. That is not a trivial sum in the context of a total of $529,034.59 (excluding GST) which Mr Luikens determined was the adjudicated amount for the purpose of s 22(1)(a) of the Act. It seems to me, therefore, that the determination is flawed by reason of a jurisdictional error. Remedies by way of judicial review are discretionary. The question now arises whether, in the exercise of the court's discretion, the determination should be quashed.
>
> [91] The first point to note is that although the jurisdictional error in this case has affected only one disputed claim amongst the sixteen which Mr Luikens considered in his adjudication, the court cannot quash just the decision which affects Item 9, leaving the rest of the determination intact. That is because the adjudication process is required by s 22(1) of the Act to produce only three findings: the adjudicated amount (if any), the date upon which that amount becomes payable and the rate of interest payable. Only these findings are reflected in the adjudication certificate which is issued under s 24(3) of the Act and filed as a judgment under s 25(1). The adjudicator has no power to correct the adjudication amount where it is shown to have been produced by error of law, whether or not jurisdictional. There is power to correct a determination under s 22(5) only in accordance with what might loosely be called the "slip rule". None of the circumstances provided in s 22(5) is applicable in the present case.
>
> [92] It seems to me that because the Act requires a determination to produce only one amount for payment pursuant to a payment claim served under s 13(1), despite the fact that the payment claim might have comprised numerous claims for separate and distinct items of work, and because the Act does not provide for variation of the

> adjudicated amount, or the judgment debt, if the adjudicator's decision as to any component part of the adjudicated amount is shown to be liable to be set aside on judicial review, the consequence is that, subject to other discretionary considerations, the whole of the determination must be quashed if jurisdictional error infects any part of the process whereby the adjudication amount has been produced. This is, no doubt, a highly inconvenient result. However, I do not see any means of avoiding it, as the Act presently stands.

But of course that case was decided when the law on this issue in New South Wales was held to be whether or not a *certiorari* type remedy should be granted.

The question which now arises is whether the all or nothing approach is proper, in the light of *Brodyn*, in which it was held that the correct remedy against a determination that failed to comply with the provisions of the Act in a material aspect, was one of a declaration and an injunction.

One strong argument in favour of the proposition that the decision on this point in *Multiplex* above should no longer represent the law, is the fact that when considering injunctive relief, a court will fashion a minimum remedy to do justice between the parties.

This question arose in *Lanskey Constructions Pty Ltd v Noxequin Pty Ltd (in liq)* [2005] NSWSC 963 (3 November 2005) where the "bad" part of the adjudication determination amounted to $12,435.39 of a total of $145,849.90.

Associate Justice Macready said:

> [21] Although *Multiplex* was not followed by the Court of Appeal in *Brodyn*, nothing was said to cast doubt upon the correctness of Palmer J's remarks in [90] to [92] of the judgment. Indeed, Palmer J specifically recognised that a remedy in the nature of *certiorari* was discretionary. The first defendant submitted that the remedies of injunction and declaration are more flexible than that of *certiorari* and ordinarily cannot be used to enforce a remedy that is excessive or disproportionate to the wrong involved. As Palmer J points out the statutory framework does not admit any correction in these circumstances to the findings that are to be made by the Adjudicator. Either the finding can stand or it should fall.
>
> [22] For these reasons the court cannot declare some part of the adjudication determination as void. No other discretionary considerations for refusing relief have been advanced in this case except the small proportion that the error $12,435.39 bears on the total claim, namely, $145,849.90. Although small I would not, in the exercise of my discretion, on this occasion refuse relief.

McDougall J in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 347, without referring to any of the authorities above concluded that the Court would not be in a position to rewrite a determination where part was bad. His Honour said:

> [27] Mr Kidd referred also to the decision of the Court of Appeal in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2007) 23 BCL 205; [2007] NSWCA 19. The particular significance of that decision is that it supports the proposition that there is no concept, in relation to determinations, of partial invalidity. Hodgson JA (with whom Beazley JA agreed) said this at 219 [55]. If it seems to me to follow from this that if a determination lacks some essential condition, either in the terms discussed by Hodgson JA in Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394*Brodyn* at 441 [52], [53], or in the nature of denial of natural justice, then the consequences of invalidity follow.
>
> [28] I acknowledge that what was said in John Holland Pty Ltd v Roads & Traffic Authority (NSW) (2007) 23 BCL 205; [2007] NSWCA 19*John Holland* at 219 [55] dealt with a hypothetical failure to consider one of many submissions - a hypothetical breach of s 22(2)(d) of the Act. But since both failure to follow an essential statutory precondition of validity, and a substantial denial of natural justice result in invalidity of the determination, what Hodgson JA said must be applicable in either circumstance. In

particular, it must be applicable even though the invalidity arises from denial of natural justice, rather than from the absence or failure of an essential statutory precondition. On either basis, there is lacking something essential to validity. On either basis, the resulting determination must be void. And what is void is the determination, not the particular part affected by the relevant invalidating circumstance.

[29] To put it another way: if the Court were to strike down part only of the determination, it would be, in effect, rewriting it. That would usurp the function entrusted by the Act to adjudicators. In addition, it may not always be obvious to see how a denial of natural justice has affected the outcome: for example, where the omitted or irrelevant matter had the capacity to assess an adjudicator's overall view of the "credibility" or substance of a party's case. Brereton J made a similar point, although in a completely different context, in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [65], [118]. An appeal from his Honour's decision was dismissed ([2007] NSWCA 32). I do not regard the observations made by Giles JA at [29] as reflecting on the substance of what Brereton J had said in the paragraphs to which I have referred.

Beech J dealt with the question of severance in *Samsung C&T Corporation v Loots* [2016] WASC 330 at [413] et seq. At [426], his Honour concluded that:

> For these reasons, I would reject Duro's submission that any parts of the adjudicators' reasoning that reveal jurisdictional error only affect the component of the adjudicated amount that is based on that reasoning. The jurisdictional error of the adjudicator in each of the second and third determinations renders both of them wholly invalid. I would quash each of them accordingly.

It is to be noted that at [420] his Honour recognised that the special provision dealing with severance in the Victorian Act, as discussed below, did not apply in Western Australia.

[SOP25.510.1] The task of the adjudicator is to determine the matters raised in the payment claim

Where an adjudicator determined matters that were not raised in a payment claim, he exceeded his jurisdiction and the determination was void. This aspect was dealt with by Beech J at [217]-[218] of *Samsung C & T Corporation v Loots* [2016] WASC 330, where his Honour said:

> [217] I repeat what I said in *Alliance Contracting Pty Ltd v James* [2014] WASC 212:
>
> > In my view, the determination by an adjudicator of whether any party to a payment dispute is liable to make a payment involves, and is limited to, determining whether the recipient of the payment claim (the non-payment or rejection of which constitutes the payment dispute) is liable to make a payment in respect of that payment claim. So, on my construction, the adjudicator's power is confined to accepting, wholly or in part, or rejecting that the recipient of that payment claim must pay that claim to the party which made the claim. The function of the adjudicator is to determine the merits of the payment claim the disputing of which constitutes the payment dispute, and to determine whether any party to that payment dispute is liable to make a payment in respect of that payment claim.
>
> [218] As a result, once it was found, as in my view was inevitable, that Duro had not made a payment claim in relation to the $32.4 million in its December 2015 progress claim, it followed that the adjudicator had no power to determine that Samsung was obliged to pay that sum to Duro. In so determining, the adjudicator exceeded his statutory authority.

[SOP25.511] Victoria – *"severance"*

In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, Vickery J considered whether the common law doctrine of severance applied to a payment claim. At [115]–[116] of his judgment, Vickery J said:

> [115] I do not accept this submission. The question should be whether the Act, either expressly or impliedly, operates to exclude the common law doctrine of severance. I find that it does not. Indeed, the purposes and objects of the Act earlier described are best served by processes which, so far as possible, ought to accommodate reasonable flexibility and avoid unnecessary technicality.
>
> [116] Severance in this case would operate to achieve the purpose and objects of the Act and would not operate to diminish the attainment of these goals. A respondent to a payment claim and an adjudicator, if appointed, should be able to assess the valid part of this progress claim which sufficiently describes the work for which payment is claimed, and provide a rational response or adjudication determination in respect of that part of the claim, and exclude from consideration that part of the claim which does not comply.

Contrary to his Honour's holding, Vickery J at [67] of *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 said:

> Non-compliance with an essential precondition for the existence of a valid adjudication determination renders the determination void: see: *Transgrid v Siemens Ltd* [2004] NSWCA 395; (2004) 61 NSWLR 521 per Hodgson JA at 539. For example, affording natural justice, to the extent that the Act requires it to be given, is one of the essential conditions for the existence of a valid determination. In this area there can be little room for the concept of partial invalidity in relation to determinations arrived at in breach of its requirements. Indeed, it would be rarely safe to introduce such a concept. As McDougall J said in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 357 at [29]:
>
> > … it may not always be obvious to see how a denial of natural justice has affected the outcome: for example, where the omitted or irrelevant matter had the capacity to assess an adjudicator's overall view of the "credibility" or substance of a party's case.

In the written paper recording the Speech by The Honourable Justice Peter Vickery, *Security of Payment Legislation in Australia, Differences between the States – Vive la Différence?*, Building Dispute Practitioners Society, 12 October 2011, his Honour addressed this issue, with reference *inter alia* to his own judgments above, in a detailed analysis commencing at paragraph 28. At paragraphs 43 – 48 his Honour explained thus:

> 43 The regime established under the Victorian Act in relation to "excluded amounts" is unique to this State. Section 10B provides:
>
> 10B. Excluded amounts
>
> (1) This section sets out the classes of amounts (excluded amounts) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.
>
> (2) The excluded amounts are-
>
> (a) any amount that relates to a variation of the construction contract that is not a claimable variation;
>
> (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to-
>
> (i) latent conditions; and
>
> (ii) time-related costs; and
>
> (iii) changes in regulatory requirements;
>
> (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;
>
> (d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

44 Section 10B is supported by subsections 23(2A)(a) and (2B)(b) of the Victorian Act. The subsections read:

(2A) In determining an adjudication application, the adjudicator must not take into account-

(a) any part of the claimed amount that is an excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

(2B) An adjudicator's determination is void-

(a) to the extent that it has been made in contravention of subsection (2);

(b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

45 By use of the words emphasised "to the extent that", these subsections provide statutory recognition of the principle of severance in relation to both "excluded amounts" which may be included in a payment claim, but also "any other matter that is prohibited by this Act from being taken into account". A question arises as to precisely what may be swept up in the latter phrase, however, it would appear to support, rather than detract from, the general applicability of the common law of severance to the machinery of the Act in Victoria.

46 Accordingly, the principle of severance was applied in Seabay to the "excluded amount" included in the relevant Payment Claim. However, the principle was not applied without qualification. It was observed (*Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 [67]):

> Non-compliance with an essential precondition for the existence of a valid adjudication determination renders the determination void. For example, affording natural justice, to the extent that the Act requires it to be given, is one of the essential conditions for the existence of a valid determination. In this area there can be little room for the concept of partial invalidity in relation to determinations arrived at in breach of its requirements. Indeed, it would be rarely safe to introduce such a concept. As McDougall J said in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 347 at [29]:
>
> > … it may not always be obvious to see how a denial of natural justice has affected the outcome: for example, where the omitted or irrelevant matter had the capacity to assess an adjudicator's overall view of the "credibility" or substance of a party's case.
>
> [footnote omitted]

47 On the other hand, in New South Wales and Queensland, a different approach has prevailed in relation to invalid parts of Payment Claims submitted by a claimant. In the recent Queensland case, *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145, Atkinson J determined that an invalidity as to part results in an invalidity as to the whole. Noting that "[t]his [was] not necessarily an attractive result" (at [55]) his Honour nevertheless reasoned that he was compelled to adopt the approach of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [92] where it was observed:

> It seems to me that because the Act requires a determination to produce only one amount for payment pursuant to a payment claim served under s 13(1), despite the fact that the payment claim might have comprised numerous claims for separate and distinct items of work, and because the Act does not provide for variation of the adjudicated amount, or the judgment debt, if the adjudicator's decision as to any component part of the adjudicated amount is shown to be liable to be set aside on judicial review, the consequence is that, subject to other discretionary considerations,

> the whole of the determination must be quashed if jurisdictional error infects any part of the process whereby the adjudication amount has been produced. This is, no doubt, a highly inconvenient result. However, I do not see any means of avoiding it, as the Act presently stands.

48 Noting that a different regime was provided for in Victoria by s 10B, s 23(2A) and (2B) and was therefore distinguishable, Atkinson J in *James Trowse* (at [56]) found that, in the absence of any such provision, it was not possible to sever the adjudication decision. Following the reasoning of Palmer J in *Multiplex*, the Court said (*James Trowse* [57]–[59]):

> The statutory scheme in Queensland provides for an adjudication decision for one amount only. Pursuant to s 26 of BCIPA, an adjudicator is to decide the amount of the progress payment, if any, to be paid by the respondent to the claimant (the adjudicated amount), the date on which any amount became or becomes payable, and the rate of interest payable on any amount.
>
> The adjudicated amount is a statutorily created sum that once determined is final and binding upon the parties. Once determined, an adjudicated amount can be the subject of an Adjudication Certificate and thereafter a judgment registered with the Court and capable of enforcement against the respondent. The adjudicated amount founds the sum claimed in the judgment along with other sums for costs and interest.

Save a slip rule, there is no mechanism available to sever any unlawful finding from an adjudicated amount, in particular a part of the adjudicated amount that is infected by jurisdictional error as found in this case.

[SOP25.512] Victoria – the remedy of remission where adjudication determination part good and part bad

At [72] of *Maxstra Constructions Pty Ltd v Gilbert* [2013] VSC 243, Vickery J found support for remitting an adjudication determination found in breach of the rules of natural justice. At [73], his Honour added:

> Although some elements of timing found in the provisions of the Act would tend to suggest that the remedy of remitting a matter back to the original tribunal for determination would not be open as a matter of implication, in my opinion, no such implication can arise.

[SOP25.513] Queensland – "*severance*"

Under s 37 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld) (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s 100(4) has been inserted into the *Building and Construction Industry Payments Act 2004* (Qld), as follows:

> If, in any proceedings before a court in relation to any matter arising under a construction contract, the court finds that only a part of an adjudicator's decision under Part 3 is affected by jurisdictional error, the court must —
>
> (a) identify the part affected by the error; and
>
> (b) allow the part of the decision not affected by the error to remain binding on the parties to the proceeding.

Note: In a paragraph under the heading "Notes on provisions" in the Explanatory Notes for Amendments moved during consideration in detail, the Minister said:

> Amendment 18 amends clause 37 of the Bill so that new section 100(4) provides that if a court finds that only part of an adjudicator's decision under part 3 of the Act is affected by jurisdictional error then the court may, rather than must, identify the part affected by the error and allow the part of the decision not affected by the error to

> remain binding on the parties to the proceeding. This amendment will allow the court discretion to enforce a part of a payment, rather than a direction to do so as is currently provided by the Bill.

This amendment put to bed in Queensland, the debate as to whether a determination which is in part bad must fail altogether, or whether the good part of the determination can remain enforceable.

See the commentary on s 100(4) of the Queensland Act at [69] of *Sunshine Coast Regional Council v Earthpro Pty Ltd* [2015] QSC 168.

It is to be noted that Under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

At [56] of *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145, Atkinson J, in regard to the Victorian equivalent, said:

> The Victorian equivalent of BCIPA includes provisions not found in its interstate equivalents: *Building and Construction Industry Security of Payment Act 1999* (NSW); *Construction Contracts Act 2004* (WA); *Building and Construction Industry Security of Payment Act 2009* (Tas); *Construction Contracts (Security of Payments) Act 2004* (NT) which may render the adjudicator's decision partially void: see *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "Victorian Act") s 10B, s 23(2A) and (2B). In the absence of any such provision, it is not possible to sever the adjudication decision: an amendment to BCIPA to conform with amendments made to the Victorian Act may be considered worthy of attention by those responsible for this legislation in Queensland.

At [58], her Honour added:

> The adjudicated amount is a statutorily created sum that once determined is final and binding upon the parties. Once determined, an adjudicated amount can be the subject of an Adjudication Certificate and thereafter a judgment registered with the Court and capable of enforcement against the respondent. The adjudicated amount founds the sum claimed in the judgment along with other sums for costs and interest.

The judgments above are to be contrasted with the result arrived at in *Hansen Yuncken Pty Ltd v Ericson* [2011] QSC 327, where McMurdo J found fraud, but instead of setting aside the entire adjudication, determination was able to and did determine the impact of the fraud on the sum adjudicated and adjusted that accordingly. McMurdo J did this without reference to any of the authorities above.

In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No 2)* [2013] QSC 67, Applegarth J, after considering the impact of jurisdictional error, more particularly the judgment of Finkelstein J in *Leung v Minister for Immigration and Multicultural Affairs* [1997] 79 FCR 400 in relation to decisions that were invalid *inter alia* on the ground of jurisdictional error, where Finkelstein J said at 413:

> There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside.

After referring the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 and the decision of the Federal Court in *Jadwan Pty Ltd v Department of Health and Aged Care* (2003) 145 FCR 1, Applegarth J

was of the opinion that a decision infected with jurisdictional error still had operational effect where no person sought to have it set aside or ignored. Further, that the consequence may be the same where a Court, in the exercise of its discretion, has refused to declare an administrative decision to be invalid.

At [33] of *BM Alliance*, Applegarth J decided, in the exercise of his Honour's discretion, to:

> … have regard to the purpose of the Court's supervisory jurisdiction to prevent excess of jurisdiction and the nature and consequences of the jurisdictional error in this case. The second respondent correctly assumed a jurisdiction to decide the adjudication application. He exceeded his jurisdiction by including termination costs in the amount of the progress payment to be paid by BMA to BGC. The consequences of his jurisdictional error are readily ascertainable. The error affected his decision in that the statute requires him to make a single determination, not many. However, unlike a denial of natural justice or some other jurisdictional error which might have tainted the whole of the decision-making process, the jurisdictional error in this case did not affect the determination and quantification of other parts of BMA's claim. Absent the jurisdictional error, BGC would have obtained an adjudication decision for an ascertainable amount in the order of $24M.

In the end result, his Honour declined to declare the entire adjudication invalid and dismissed the application for such a declaration on the ground that within a certain period the respondent give an undertaking that it would pay the applicant that part of the adjudicated sum infected by the excess of jurisdiction.

[SOP25.514] Queensland – court's discretion to save the "good part" of an adjudication without setting aside and/or quashing the entire award

Ann Lyons J said at [11] of *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2013] QSC 141, citing *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No 2)* [2013] QSC 67:

> [11] His Honour then considered the consequences of declining to declare the decision void and making a conditional order as sought by BGC and held:
>
> > [35] In enacting and amending the Act, Parliament has not purported to regulate the Court's exercise of its supervisory jurisdiction, including the circumstances in which the Court will decline to declare an adjudication decision void. To decline to exercise the discretion to declare void an adjudication decision on condition that the claimant repays the amount found to have been erroneously included in an adjudication decision is not to legislate a remedy in the form of a declaration of partial invalidity. Instead, it is to exercise the discretion to decline declaratory relief, or relief in the nature of prerogative relief, on a well-recognised basis, namely the availability of a more satisfactory remedy.
> >
> > [36] To do so deprives BGC of the easily-identified amount that was paid to it as a result of the jurisdictional error, and no more. Account is taken of the nature of the jurisdictional error and the statutory context in which the jurisdictional error challenge arose. Requiring BGC to pay the amount in question and other amounts necessary to remedy the effect of the jurisdictional error is apt to remedy the excess of jurisdiction in the circumstances of the case.
> >
> > [37] In many other cases, jurisdictional error is of a fundamental kind and ordinarily an adjudication decision will be quashed or set aside or a declaration made that the decision is void. The fact the jurisdictional error resulted in an identifiable and relatively small

part of the adjudicated amount is a relevant consideration. This is not an "ordinary case" of jurisdictional error in which an order in the nature of *certiorari* would be made almost as of right.

Filing of adjudication

[SOP25.520] Victoria — *"... filing of adjudication certificate as judgment debt ..."*

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

The provisions below resulted from the repeal of s 27 of the previous Act, which was amended by Act 42 of 2006, the first amendment of which came into operation on 26 July 2006, see the history of the Victorian legislation.

Sections 28O–28R of the amendment Act provide for the consequences of the respondent not paying the adjudicated amount. These sections provide for prompt enforcement of an adjudicator's determination by adopting a certification by the authorised nominating authority, a process similar to that which obtains in New South Wales, so as to obtain a judgment of the court.

The new s 28R(5) and (6) provide the following:

> (5) If a person commences proceedings to have the judgment set aside, that person –
>
> (a) subject to sub-section (6), is not, in those proceedings, entitled –
>
> (i) to bring any cross-claim against the person who brought the proceedings under sub-section (1); or
>
> (ii) to raise any defence in relation to matters arising under the construction contract; or
>
> (iii) to challenge an adjudication determination or a review determination; and
>
> (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.
>
> (6) Sub-section (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.

Vickery J, at [35] of *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd* [2009] VSC 425 (25 September 2009), explained the thrust of the statutory provisions above as follows:

> Section 25 of the New South Wales Act, being the Building and Construction Industry Security of Payment Act 1999 (NSW), is the Act referred to by the Attorney General upon which the amended enforcement provisions, which include s 28R, were modelled. Section 25 of the New South Wales Act provides expressly for the filing of an adjudication certificate as a judgement for the debt in question. The adjudication certificate is to be accompanied by an affidavit by the claimant, stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed. It is plain that the judgment entered is pursuant to an ex parte process, but with a facility provided to a respondent to set aside the judgment on limited grounds. Section 25 of the New South Wales Act provides:
>
> **Filing of adjudication certificate as judgment debt**

(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

[SOP25.530] Western Australia — *"... filing of adjudication certificate as judgment debt ..."* - principles concerning leave to enforce an adjudication determination

Section 43 of the Western Australian Act provides that a determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of court. Under s 43(3), it is provided that a determination signed by an adjudicator and certified by the Registrar as having been made by a registered adjudicator is to be taken as having been made under Pt 3 of the Act.

Nothing in the Act spells out the relevant criteria that a court must or should take into account in granting leave to enforce an adjudication determination as a judgment.

At [116] of *Hamersley Iron Pty Ltd v James* [2015] WASC 10, Beech J listed the legal principles involved in obtaining leave to enforce an adjudication determination. His Honour said:

Leave to enforce: Legal principles

[116] The following principles relevant to s 43 have been established by the cases:

(1) Given that the Act does not expressly identify the matters to which regard should be had on the question of leave, consideration must be given to the context, objects, purpose and policy of the Act [*O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58; (2008) 36 WAR 479 [13], [41]; *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80 [24] [25]; *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304 [49]]. The object of the Act is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.

(2) It is for a party resisting enforcement to demonstrate a reason why enforcement should not occur. There is a predisposition in favour of the grant of leave [*O'Donnell Griffin* [41]; *Thiess* [27]; *Cape Range* [49]].

(3) Generally speaking, the fact that a party resisting enforcement alleges that it has other pending claims which could be set off against the determination amount will not justify the refusal of leave *O'Donnell Griffin* [70] [74]; *Cape Range* [155].

(4) There are no closed categories of circumstances that may be relevant to the question of whether leave should be granted *Thiess* [27], [29]; *Cape Range* [49]. All the circumstances must be considered.

In *Hamersley HMS Pty Ltd v Davis* [2015] WASC 14, Beech J, at [104], was satisfied that Hamersley had an arguable case, which gave rise to a serious question to be tried in relation to each of the components of its counterclaim, which exceeded the amount of the adjudicated sum. His Honour continued as follows:

> **The exercise of discretion under s 43 of the Act**
> [105] In my view, in those circumstances, for the reasons given in *Hamersley Iron Pty Ltd v James* [2015] WASC 10 at [134] [144] and [170] [173], s 553C is engaged in this case, with the result that leave should not be given to enforce the adjudication determination. Rather, the application for leave to enforce the adjudication determination should be stayed pending resolution, by legal proceedings or by agreement, of Hamersley's counterclaim.

Reference may however be made to the judgment of Pritchard J in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, where her Honour said:

> The principles applicable to the grant of leave to enforce a determination were considered by Corboy J in *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80 [24] - [29], and I respectfully adopt his Honour's analysis. For the reasons set out by his Honour, I agree that the scheme of the CC Act reinforces the proposition that prima facie, a party who has the benefit of a determination is entitled to enforce it. The existence of an arguable case that a determination is invalid and liable to be declared to be so, or to be set aside in the exercise of prerogative relief, would be a reason for refusing the grant of leave to enforce a determination. However, that is not necessarily the only reason why leave might be refused. What will be a sufficient reason for refusing leave to enforce a determination will depend on a consideration of all of the relevant circumstances, and must be assessed bearing in mind the scheme and policy of the CC Act (see also *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* (2008) 36 WAR 479; [2008] WASC 58 [13] (Beech J). In this case, an additional reason (apart from the invalidity of the determination) was advanced by Austral, namely that the determination sum had been 'paid' for the purposes of s 39(a) of the CC Act by virtue of Austral's setoff claim. I deal with this submission in [152] [157] below.

It is pointed out by Master Sanderson in *RNR Contracting Pty Ltd v Highway Constructions Pty Ltd* [2013] WASC 423 at [21] that:

[h]er Honour's decision was made after the decision of the Court of Appeal in *Perrinepod*, but that case does not figure in her consideration of whether or not the judgment ought be registered. It is also worthy of note her Honour was dealing with two applications. First, an application by the party in whose favour the adjudication had been made to register a judgment, and second, an application by the contractor to quash the adjudication. Her Honour dealt with both matters together. She determined there was no grounds for quashing the adjudicator's decision. Consequently, it is not difficult to see why the *Perrinepod* decision was not considered in the context of the application to register the adjudication as a judgment.

Master Sanderson at [22] of *RNR Contracting* summed the matter up thus:

> In the end, its seems to me the discretion found in s 43 ought be exercised in favour of the plaintiff. While I would accept it is arguable the adjudicator made a jurisdictional error, I am not satisfied that fact alone warrants my exercising the discretion to refuse to register the judgment. In *Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35; [2011] WASC 172, Kenneth Martin J was dealing with an application for an order nisi for a writ of *certiorari* over matters in dispute under the Construction Contracts Act. His Honour had this to say about an exercise of discretion:
>
> > I would, in any event, on the basis of an exercise of discretion, refuse an order nisi for *certiorari*, bearing in mind the future opportunities Mount Gibson clearly holds

> under the more traditional paths of arbitration or litigation to pursue any issue over this disputed payment of adjudicated funds to Downer. The importance of the *Construction Contracts Act* as a swift circuit-breaking mechanism in a construction contract dispute is the fundamental governing criteria in the analysis. The need to swiftly break a construction contract payment deadlock, to enable a contractor to receive payment on an interim basis to relieve that contractor from possibly suffering terminal economic harm in a situation of limited bargaining power, would be undermined if the scope for challenges by judicial review allowed a nitpicking dissection of mere aspects of an adjudicator's reasons. Arguments over minor alleged errors, on analysis, present as second order technical arguments, well capable of being ventilated elsewhere and later, pursuant to a preserved right to arbitrate or to litigate [107].

[SOP25.540] Queensland — *"... filing of adjudication certificate as judgment debt ..."*

Section 30 of the Queensland Act provides for the consequences of not paying a claimant the adjudicated amount. Section 31 provides for the filing of an adjudication certificate as a judgment debt. Both these sections substantially follow the relevant provisions in the New South Wales Act. Under s 31(2), it is provided that an adjudication certificate cannot be filed under the section unless it is accompanied by an affidavit by the claimant stating that the whole or part of the adjudicated amount has not been paid at the time the certificate is filed. Under s 31(3), it is provided that if the affidavit states that part of the adjudicated amount has been paid, the judgment is for the unpaid part of the amount only. Section 31(4) states what happens if the respondent commences proceedings to have the judgment set aside. That provision follows the New South Wales model.

Of relevance here is the decision of Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No 2)* [2013] QSC 67, where in the exercise of his Honour's discretion he found that a relatively minor part of the adjudicator's determination was void, he made orders, the effect of which were that the sum reflected by the excessive jurisdiction be repaid within 14 days and subject to an undertaking by the successful applicant in the adjudication process, the application to declare the whole of the adjudication determination void, be dismissed.

[SOP25.550] Northern Territory — *"... filing of adjudication certificate as judgment debt ..."*

Under s 45 of the Act, a determination may be enforced as a judgment for a debt in a court of competent jurisdiction.

Although the Northern Territory Act and the Western Australian Act have much in common, there is no provision in the Northern Territory Act, as there is in s 43(2) of the Western Australian Act, that the determination may be enforced "with the leave of a court …".

Section 45(2) provides that a determination signed by an adjudicator and certified by the Registrar as having been made by a registered adjudicator is taken to have been made under Pt 3 of the Act.

[SOP25.560] South Australia — *"... filing of adjudication certificate as judgment debt ..."*

Section 24 of the Act provides for the consequences of not paying the claimant the adjudicated amount. Section 25 of that Act provides for the filing of an adjudication certificate or costs certificate as a judgment debt. These two sections follow substantially s 22(4) of the Act.

[SOP25.570] Tasmania — *"... filing of adjudication certificate as judgment debt ..."*

Section 27(1) of the Act provides that an adjudication certificate may be filed as a judgment for debt in a court of competent jurisdiction. Under s 27(2), it is provided that an adjudication certificate that is filed as a judgment for a debt in a court of competent jurisdiction is enforceable as a judgment for a debt. Under s 27(3), an affidavit by the claimant is required stating that a part of the adjudicated amount has not been paid at the time the certificate is filed. Section 27(5) provides that if the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled –
  (i) to bring a cross-claim against the claimant; or
  (ii) to raise a defence in relation to matters arising under, or relating to the subject matter of, the building or construction contract; or
  (iii) to challenge the adjudicator's determination; and
(b) must pay into the court as security the unpaid part of the adjudicated amount, pending the final determination of those proceedings.

Under s 25(7) of the Act, an adjudicator may determine that a party to an adjudication is required to pay to another party to the adjudication some or all of the costs that have been incurred by the other party because of frivolous or vexatious conduct, or the making of unfounded submissions, by the first-mentioned party. There is no similar provision in any of the other States and Territories. The Act is silent as to what factors will constitute frivolous or vexatious conduct, nor is there any definition of "unfounded submissions". If submissions are not upheld, are they necessarily unfounded? One would hardly think that any conduct other than delinquent conduct was intended to be caught by the provisions of this section.

Section 37 provides for payment of the adjudicator's fees. This section follows the provision of s 29 of the New South Wales Act, except that under s 37(2), the Tasmanian Act provides for payment to the adjudicator of his fees for dealing with an unsuccessful challenge to his or her appointment. Section 37(2) states:

(a) to uphold a decision by an adjudicator under section 36 not to take the action specified in section 35(2), the adjudicator may charge the person who applied for the review the costs incurred by the adjudicator in relation to the review, unless the court has, under that Act, ordered those costs to be paid by a person other than the adjudicator; or
(b) not to uphold a decision by an adjudicator under section 36 not to take the action specified in section 35(2), the adjudicator may not pass on to the parties to the adjudication application any costs incurred by the adjudicator.

[SOP25.580] Australian Capital Territory — *"... filing of adjudication certificate as judgment debt ..."*

Sections 26 and 27 of the Act follow ss 24 and 25 of the Act.

Under s 36 of the Act there is provision for the costs and expenses of an adjudicator. This section follows the provisions of s 29 of the Act.

Master Mossop in *Denham Constructions Project Company 810 Pty Ltd v Smithies and Stowe Australia Pty Ltd; Denham Constructions Project Company 810 Pty Ltd v Risgalla and Stowe Australia Pty Ltd* [2014] ACTSC 169 held at [39] that the filing of an adjudication certificate under the ACT Act does not carry with it the consequences of a court judgment in terms of issue estoppel. His Honour said:

> … The adjudication certificate is required to contain, *inter alia*, the adjudicated amount: s 26(3)(c). That is the central issue determined by an adjudication decision. Yet the Act clearly contemplates that on this issue there is no conclusiveness or finality because the existence of an adjudication decision or adjudication certificate or a

judgment based on the adjudication certificate does not affect any civil proceedings arising under the underlying construction contract: s 38(2). The interim nature of the adjudication decision and a consequential judgment indicates that no issue estoppel in any ordinary sense arises but rather that the filing of the adjudication certificate is targeted at enforcement of the interim payment arrangement.

The three issues before Master Mossop in *Denham Constructions Project Company 810 Pty Ltd v Smithies and Stowe Australia Pty Ltd; Denham Constructions Project Company 810 Pty Ltd v Risgalla and Stowe Australia Pty Ltd* [2014] ACTSC 169 were summarised in [5]-[7] of his Honour's judgment, the first of which was:

> [5]…. Does s 27(1) have the effect of simply permitting an adjudication certificate to be enforced as if it were a judgment of the Court, or does it also have the consequence that there is an issue estoppel that arises as to the validity of that certificate which can only be effectively avoided by an application to set aside the judgment under s 25 or as a consequence of an appeal under s 43.

The submission made by the Plaintiff in respect of the first issue above was as set out in [21] of his Honour's judgment, and read as follows:

> The estoppel as against Denham 810 was said to arise as a consequence of the following chain of reasoning:
>
> (a) the Supreme Court of the Australian Capital Territory is a superior court of record: *Supreme Court Act 1933* (ACT) s 3;
>
> (b) "*orders of a superior court of record are valid until set aside, even if the orders are made in excess of jurisdiction*": *New South Wales v Kable* [2013] HCA 26; (2013) 298 ALR 144 at [32];
>
> (c) As a consequence of (a) and (b) above, the s 27 Judgment is valid until set aside even if the adjudication certificate or adjudication decision on which it was based was void for jurisdictional error: see *Brodyn v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421 at [61];
>
> (d) "[a] judgment in favour of the plaintiff, by default or otherwise, establishes that he had a cause of action and each essential element of it": Spencer Bower and Handley, *Res Judicata* (4th ed, 2009) at [8.15];
>
> (e) an "essential element" of the s 27 Judgment was that the document filed by Stowe in this Court was a (valid) adjudication certificate for the purposes of the Act (if it wasn't it could not have been "filed as judgment for a debt" under s 27 of the Act);
>
> (f) as a consequence, for so long as the s 27 Judgment remains on foot, Denham 810 is estopped from denying that the adjudication certificate on which the s 27Judgment was based was a valid adjudication certificate;
>
> (g) that being so, any assertion that the March Payment Claim Decision is invalid must inevitably fail as, if the certificate is valid (as Denham 810 is bound by an issue estoppel to accept), it necessarily follows that the March Payment Claim Decision is also valid (as a valid adjudication certificate can only be issued where a valid adjudication decision under the Act has been made and not complied with: see SOP Act s 26(1)).

The submissions to the contrary appear from [22] of his Honour's judgment, and to which reference may be made.

At [24], Master Mossop, referring to the words "filed as a judgment for a debt" in s 27(1) noted that that phrase gave the certificate an effect which would it would not otherwise have.

His Honour, after referring to *Birdon v Houben Marine* (2011) 197 FCR 25; [2011] FCAFC 126 and *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1; [1996] HCA 24 in [25] of his judgment, noted at [34] that:

> It is consistent with the approach taken by the majority judges in *Birdon* to characterise the rights created by the SOP Act as novel statutory rights which, notwithstanding the reference to "enforced as a judgment for debt", do not necessarily pick up all of the incidents of an ordinary court judgment that has been entered.

At [39], Master Mossop held that the filing of an adjudication certificate under the SOP Act did not carry with it the ordinary consequences of a judgment in terms of issue estoppel.

At [41] of *Denham*, his Honour did not accept the contention that the proceedings had to be dismissed because an issue estoppel precluded the plaintiff from contending that the adjudication determination in issue was affected by jurisdictional error.

[SOP25.590] Instituting separate proceedings seeking a declaration that no moneys are owing – multiplicity of proceedings

In *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 (3 December 2003), the contractor commenced proceedings seeking summary judgment. The principal commenced separate proceedings and sought a declaration that he did not owe any amount to the contractor in respect of a specific progress claim in excess of the amount specified in a progress certificate issued by the superintendent, and also that the principal paid to the contractor such sum as it might recover against the principal in the first set of proceedings. At [108]–[111], Einstein J held:

> [108] Section 63 of the *Supreme Court Act* expresses a fundamental principle of the Act which is the avoidance of multiplicity of proceedings. The second set of proceedings flies in the face of that principle.
>
> [109] These reasons are sufficient to justify the summary dismissal of the second proceedings. There are disparate other reasons to the same end. Declarations of right are final and not interlocutory orders having the effect of creating a res judicata or an issue estoppel: *Marra Developments Ltd v B W Rofe Pty Ltd* [1977] 2 NSWLR 616 per Hutley JA at 626. The subject declaration sought in the second proceedings fails to comply with this criterion.
>
> [110] Further as a general rule the power to make a declaration will not be exercised when the court is called upon to answer a question that is purely hypothetical. In its submission in relation to this principle, the club contended that "[t]here would appear to be a genuine dispute between Leighton and the club as to the amount which was owing under the contract at the time progress claim No 18 was served". The purpose of the Act is to permit a contractor to sidestep curial proceedings concerning resolution of that form of genuine dispute by utilising the payment claim and other provisions of the Act with the expressed aim that in so doing, the contractor may have the benefit of the peremptory interim determination of such issue. That purpose would be turned on its head if proceedings in the nature of the second proceedings were permitted to go forward.
>
> [111] During the hearing, reference was made to the entitlement of the Club to commence substantive proceedings for relief concerning the parties' rights under the contract, which relief would be final in character and would upon final determination have the effect of creating a res judicata or an issue estoppel. The entitlement of parties to commence proceedings of this type at an appropriate time is recognised in s 32 of the Act.

There can be no quarrel with his Honour's judgment insofar as he held that declaratory relief was not appropriate on an interim basis. But in the light of the provisions of s 32, it is submitted that his Honour was incorrect in dismissing the cross-claim.

Summary judgment could have been given for the plaintiff in regard to its claim to enforce the adjudicated amount, and directions could then have issued for the cross-claim. There can be no reason in logic or law for a cross-claim to have to wait, for proceedings to enforce an adjudicated amount first to be completed.

In fact if there is an arbitration clause available to be invoked, there can be no reason for arbitration proceedings not to be commenced until other remedies such as an attempt to resist enforcement of the adjudicated sum, first be exhausted.

In *Over Fifty Mutual Friendly Society Ltd v Smithies* [2007] NSWSC 291, the plaintiffs, in a challenge to the adjudicator's determination, sought to advance the proposition that although they did not have a serious case for interlocutory remedies under the Act, they did have a serious case at general law and sought a declaration to that effect. Einstein J held that it was inappropriate to endeavour to circumvent the scheme of the Act by seeking a declaration.

In *Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd* [2008] NSWSC 1405 it was held that the adjudicator should be joined as a party where, not only was it alleged that his adjudication determination was void, but that the applicant had no liability to him to pay for his costs and that he should refund any amount that had been paid to him. See also *Karimbla Construction Services Pty Ltd v Bettaplex (Queensland) Pty Ltd* (unreported, Supreme Court of Queensland, 17 July 2007) where Douglas J said: "In that context, Mr Kerr submitted that it was significant and problematical that neither the nominating authority under the Act nor the Adjudicators have been made parties to these proceedings because they have statutory obligations on them to pursue the applications. That also seems to me to be an issue of concern and one that should dissuade me from staying my hand when there is at least a prima facie argument or a triable issue as to whether or not the jurisdiction under the Act can be invoked".

[SOP25.600] Injunctions in the context of the *Building and Construction Industry Security of Payment Act 1999* (NSW) — the overriding consideration

In considering whether or not injunctive remedies are available, the intent and purpose of this legislation, which is to provide effective speedy and interim measures of relief to builders who have been kept out of their progress payments, is an overriding consideration.

[SOP25.610] The stages at which and the purposes of which the grant of injunctive remedies may be considered

The stages at which and the purposes for which injunctive remedies may be considered are in the main:

(a) prior to the appointment of an adjudicator, to prevent such appointment;

(b) after the appointment of the adjudicator, to stop the adjudication process;

(c) once a determination has been made, to prevent the appointing body from issuing a certificate under s 24 of the New South Wales Act (there are similar provisions in all similar Acts in the other States and Territories), to found the basis of a judgment under s 25;

(d) after a judgment is entered under s 25, to stay that judgment and/or to preclude any execution thereon; and

(e) after a stay is granted, and monies are paid into court as security – an injunction to restrain payment out of such monies.

[SOP25.620] The limitations in obtaining any such injunctive remedies

In weighing up whether to grant any such remedies, the overriding purpose of the legislation above is a paramount consideration.

[SOP25.630] The granting of an injunction to restrain the adjudication process

In *Digital City Pty Ltd v QX Australia Pty Ltd* [2004] NSWSC 933 (7 October 2004) Campbell J (as his Honour then was) granted an interlocutory injunction precluding the

advancing of the adjudication process, pending the determination by the court of whether the adjudicator had jurisdiction on terms requiring payment into court of the amount claimed.

Whether or not Campbell J (as his Honour then was) was correct in ordering the amount of the adjudication determination to be paid into Court is questionable.

In *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, it was held by the Victorian Court of Appeal consisting of Warren CJ, Tate and McLeish JJA, that the Victorian Act did not apply to a company in liquidation. For a discussion on this aspect, see [SOP3.130] *(b)* above. The remedy provided by their Honours was a declaration of nullity. In holding that the Act did not apply to a company in liquidation, their Honours reasoned *inter alia* that ss 553C of the Corporations Act provided for set-offs, whereas this remedy was not available by way of a cross-claim in the adjudication process, nor was it available to oppose the enforcement of an adjudication determination.

What their Honours did not consider was whether the same danger obtains where a company is clearly insolvent whether or not it is placed in liquidation. It is submitted that this will require further consideration in an appropriate case in due course.

[SOP25.640] Grant of injunction to preclude issuing of adjudication certificate

(a) New South Wales – injunction to preclude issuing of adjudication certificate

In *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 935 (20 October 2003) Gzell J granted an injunction restraining a contractor from seeking an enforcement of an adjudication determination or obtaining an adjudication certificate, pending an application for an order in the nature of *certiorari* quashing the adjudicator's determination for alleged errors of law on the face of the determination. The injunction was conditional upon the plaintiff paying the adjudication amount, less the amount in contention, together with interest to the contractor and paying the amount in contention into court within five business days.

In *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 715 at [11] Campbell J, after holding that there were certain serious questions to be tried, granted an injunction restraining Earth Tech from obtaining a s 25(1) certificate from the Authorised Nominating Authority on condition that Australian Remediation Services, which was a company without any substantial asset backing, provided a suitable bank guarantee to the satisfaction of the registrar for payment of the full amount determined by the adjudicator, together with an amount as security for the undertaking to pay damages.

In *Emergency Services Superannuation Board v Sundercombe* [2004] NSWSC 405 (9 September 2004) McDougall J said at [73] that the price for granting interlocutory relief was that ESSB pay the contractor the unaffected amount of the determination plus interest.

In *Coordinated Construction Co Pty Ltd v JM Hargreaves Pty Ltd* [2004] NSWSC 1206 (30 November 2004) Palmer J emphasised the necessity of seeking injunctive relief properly and issued a stern warning to the profession generally that injunctive relief in the future to restrain the implementation of an adjudication would, in the exercise of the court's discretion, be refused if it was sought at the last moment.

In *Glen Eight Pty Ltd v Home Building Pty Ltd (in liq)* [2005] NSWSC 907 Campbell J, after holding that this was a proper matter for an interim injunction, said at [31]:

> In my view, the appropriate amount which ought be paid into court, or secured, is the total amount of the adjudication determination, together with a further sum, to provide what amounts to a cover for interest, in the event that the defendants succeed at the trial: *Australian Remediation Services v Earth Tech Engineering* [2005] NSWSC 715 at [11].

In *Energy Australia v Downer Construction (Australia) Pty Ltd* [2005] NSWSC 1042 (14 October 2005) Barrett J (as his Honour then was) considered whether an interlocutory injunction should issue, pending the hearing of claim for a declaration that the purported adjudication was void and of no effect.

The case before him was, in essence, that the defendant's supposed adjudication application was not, in truth, an adjudication application at all, for the reason that the adjudication application was put forward on a basis different from that set out in the progress claim. Notwithstanding his Honour's holding that there was a serious question to be tried, and for which see [35] of his judgment, he nevertheless rejected the application for an interlocutory injunction having regard to the balance of convenience.

At [41]–[47] his Honour focused on the question as to whether s 25(4) operates in such a way as to cut off the plaintiff's ability to obtain proper redress on the issues which his Honour had identified as serious questions to be tried.

In his analysis, his Honour referred to [61] of Hodgson JA's judgment in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394. For the sake of ease of reference and the importance of the matter, what his Honour said on this issue is set out in full below:

> [42] I return to the substantive relief claimed by the plaintiff in these proceedings. The basic proposition for which it contends is that the purported adjudication determination is not an adjudication determination at all; and that it is void so that it is, in the eyes of the law, non-existent. This brings to the fore paragraph 61 of the judgment of Hodgson JA in *Brodyn*:
>
> > Where the adjudicator's determination is void for one of the reasons discussed above, then until it is filed as a judgment, proceedings can appropriately be brought in a court with jurisdiction to grant declarations and injunctions to establish that it is void and to prevent it being filed. However, once it has been filed, the resulting judgment is not void. An application can be made to set aside the judgment; and as noted above at [41] and [42], it is not contrary to s 25(4)(a)(iii) to do so on the basis that there is in truth no adjudicator's determination.
>
> [43] His Honour refers there to [41] and [42] of the judgment which I also set out:
>
> > Further, in my opinion an order of the Supreme Court quashing the determination or declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator's adjudication within s 25(4): this wording assumes that there is a determination which is challenged.
> >
> > Indeed, even in the absence of such an order quashing the determination or declaring it void, the respondent could in my opinion seek to have the judgment set aside on the ground that there never was a determination. If for example a respondent could show that the document that was filed as being an adjudicator's determination was a forgery, that would not be challenging the adjudicator's determination. Similarly, in my opinion, if the respondent could show that for some other reason recognised in law a purported adjudicator's determination did not amount to an adjudicator's determination within the meaning of the Act, that would not be challenging an adjudicator's determination: this, as indicated above, assumes that there is such a determination to be challenged. Conceivably, the availability of that remedy could itself be a ground for refusing relief in the Supreme Court, on the basis that the same matter could more conveniently be relied on in an application to set aside the judgment; but that was not a matter relied on by the primary judge.
>
> [44] In these proceedings, the relief sought is of the very kind referred to in the second sentence of Hodgson JA's [41]. It is there made clear that s 25(4)(a)(iii) would not operate to the plaintiff's detriment. If there is, in truth, no existing adjudicator's determination, the assertion to that effect by the plaintiff does not involve challenging

> any such determination. This is because the determination is non-existent. The situation can thus be seen to be one in which, although having to pay money into court, the plaintiff is able to have fully and properly argued and determined the matters about which it is aggrieved, without being pre-empted by the statutory scheme.
>
> [45] I should say that in several cases the court has recognised the summary nature of that statutory scheme and has seen it as inappropriate to seek to temper it in ways that the statute does not contemplate. I too approach the matter in that way.
>
> [46] In the result, I am not satisfied that the plaintiff has shown that refusal of the interlocutory relief will entail relevant hardship for it. In my opinion, the plaintiff will not be, in any material sense, worse off if the proceedings move towards trial in the absence of the interlocutory relief sought, than it would be if the relief were granted. In this particular case where the plaintiff maintains that there is no adjudicator's determination, the status quo does not, as I see it, stand in need of safeguarding by the interlocutory order the plaintiff seeks. This view is based squarely on s 25(4)(c)(iii).
>
> [47] The application for relief by way of interlocutory injunction is therefore dismissed.

The question as to whether or not an aggrieved party who is faced with the prospect of having to find a substantial amount of money, must wait until after judgment is granted against that party and have the limited remedy of seeking to set aside that judgment, with the additional onus which that procedure places on its shoulders, is indeed one that should, with respect, attract the attention and interest of the Court of Appeal.

(b) Queensland – injunction to preclude issuing of adjudication certificate

At [39] of *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390; [2008] QCA 397, where Keane JA (with Fraser JA and Fryberg J concurring) said the following:

> It is evidently the intention of the BCIP Act, and, in particular, s 31 and s 100 to which reference has been made, that the process of adjudication established under that Act should provide a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract, where those parties operate in a commercial, as opposed to a domestic, context. This intention reflects an appreciation on the part of the legislature that an assured cash flow is essential to the commercial survival of builders, and that if a payment the subject of an adjudication is withheld pending the final resolution of the builder's entitlement to the payment, the builder may be ruined.

Keane JA continued at [40] as follows:

> The BCIP Act proceeds on the assumption that the interruption of a builder's cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.

As observed by Bond J in *BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QSC 222, *Neller* was examined by Daubney J at [32] and [34] of *Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd* [2014] QSC 170, where Daubney J said the following:

> [32] In short, even before Kirk's case, a party disappointed by an adjudication decision could pursue relief based on contentions that the adjudicator's decision was void. That was the situation when the Court of Appeal decided *R.J. Neller*. The fact that, since 2010, it has been clarified that jurisdictional error can found a contention that an

> adjudicator's decision is void, in my view, does not detract from the strength and applicability of the observations made by Keane JA in *R.J. Neller* concerning the relevant legislative policy underlying BCIPA. If an adjudicator's decision, pursuant to which money has been paid by a contractor to a builder, is subsequently adjudged to be void (on whatever basis), the risk that the builder might not be able to refund those monies after a successful action by the contractor to have the decision declared void is the risk which, as Keane JA said, the legislature has prima facie assigned to the contractor.
>
> ....
>
> [34] When one otherwise considers the arguments advanced in the present case concerning the balance of convenience, the arguments come down to this. Sun has a prima facie entitlement to be paid the money. WICET has the right to challenge the validity of the adjudicator's decision, and may well be regarded, for present purposes, as having strong grounds for contending that the adjudicator's decision is void. But, as a matter of policy, WICET carries the risk that monies paid over pursuant to the adjudicator's decision may not ultimately be refunded by Sun if the adjudicator's decision is ultimately adjudged to be void.

Daubney J's approach was followed Peter Lyons J in *Sunshine Coast Regional Council v Earthpro Pty Ltd* [2014] QSC 271 at [15].

However, Bond J in *BRB Modular* was constrained to disagree with the approach taken by Daubney J in *Wiggins*. His Honour explained that it seemed to him:

> …that the appropriate analytical significance of the Act's policy in cases such as the present is that the policy characterises the nature of the right that is in question in the interlocutory injunction application. So if, on an interlocutory injunction application of this nature, the applicant has established a prima facie case that the adjudication decision is void for jurisdictional error, in considering the question which arises on the balance of convenience, in considering where the lower risk lies, it is appropriate to consider the fact that granting an injunction would deny to someone a right, the nature of which is that described by Keane JA in *R.J. Neller*. The way in which this plays out in the exercise of the discretion is in the balancing process described by Hansen J in *Kellogg Brown & Root Pty Ltd*.

Bond J then went on to deal with the question of whether or not the amount in dispute should be paid into Court. His Honour cited [11] of McDougall J's judgment in *Filadelfia Projects Pty Ltd v EntirITy Business Services Pty Ltd* [2010] NSWSC 473 and [42] of the judgment of Hammerschlag J in *Nazero Group Pty Ltd v Top Quality Construction Pty Ltd* [2015] NSWSC 232, where Hammerschlag J said:

> The policy of the Act, as reflected in s 25(4)(b), is that a claimant is to be given protection of payment into Court when a respondent seeks, whether by injunction or otherwise, to inhibit the claimant's enforcement of an adjudication in its favour. Pendente lite, Top Quality is being held out of payment, with the risk attendant on delay, notwithstanding the statutory obligation on Nazero to pay. It is open to Top Quality to file the adjudication certificate, in which event Nazero would have little option but to seek to have the judgment set aside to protect its position, in which event, s 25(4)(b) of the Act would mandate payment into Court. Here, by happenstance, the section does not apply because the further step has not yet occurred. Top Quality would have to take that step to enforce its statutory right to payment. The only difference is that these proceedings have intervened. The policy of the Act is not served by removing Top Quality's protection pending determination of Nazero's challenge even though s 25(4)(b) of the Act does not apply in terms.

Bond J was prepared to grant an injunction in the terms sought by the applicant. Part of these terms appear from the order in the headnote of *BRB Modular*, and that is that

security for the amount in dispute, by way of a bank guarantee in payment of an amount into Court, be provided/paid by BRB Modular.

(c) Tasmania – injunction to preclude issuing of adjudication certificate

See also [34] of *R v Pettersson; ex parte Fenshaw Pty Ltd* [2015] TASSC 33 per Porter J.

[SOP25.650] Grant of injunction pending proceedings to set aside determination

Here it is emphasised that careful attention must be paid to the statutory limitations imposed by s 25(4)(a) and (b) of the NSW Act referred to above.

[SOP25.660] Grant of injunction to preclude execution on s 25 judgment

The appropriate remedy to avoid execution on a s 25 judgment appears from the judgment of Hodgson JA in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 below.

At [84]–[88] of *Brodyn*, the Court of Appeal said:

> [84] It follows that the appeal should be dismissed with costs. However, this will not necessarily mean that *Brodyn* is without any remedy
>
> [85] A court in which judgment for recovery of money has been given can stay execution of that judgment. A party against whom there was a substantial judgment could apply for a stay of execution on the grounds that it had greater claim against the judgment creditor, for which it would shortly obtain judgment, and that, if the judgment money was paid, it would be irrecoverable; and the court could in its discretion grant a stay, on terms if it thought appropriate. I see no reason why a judgment under s 25 of the Act could not be stayed on that kind of basis, although the policy of the Act that progress payments be made would be a discretionary factor weighing against such relief.
>
> [86] In the present case, there could be discretionary factors in favour of a stay of execution in favour of Brodyn. Windeyer J, in his judgment of 23 August 2004, said that the execution of a deed of company arrangement had the effect of bringing into being a statutory set off of the claims between Brodyn and Dasein. We had no submissions about this, but conceivably that could be one basis for a stay of the District Court judgment. The circumstances that the adjudicator has, by force of the Act, disregarded a claim for damages for delay of over $116,000, and (apparently in error) has disregarded a claim for deficiencies and defects amounting to about $90,000, and also that money paid over may well be irrecoverable, could be further grounds for granting a stay. There is a further point that the adjudicator could not take into account Brodyn's objections to Dasein's claim for over $50,000 for items left on the site, because these objections were not raised in the payment schedule: s 20(2B) of the Act. In my opinion, the circumstance that significant objections of a respondent have not been taken into account because they were not raised in the payment schedule could not of itself be a ground for resisting reliance on an adjudicator's determination or enforcement of a resulting judgment; but just possibly it could in this case add to the discretionary considerations in favour of Brodyn.
>
> [87] However, as noted above, the intention of the legislature that progress payments be made with a minimum of delay and court involvement, and the possibility that Dasein's financial difficulties have been caused by failure to make this progress payment, could militate strongly against the granting of such a stay.
>
> [88] It would of course be desirable if issues concerning possible staying of a s 25 judgment could be dealt with as part of case management of proceedings brought (as permitted by s 32 of the Act) to obtain a final resolution of the rights of the parties. This should be possible if the judgment is in the same court as those proceedings. If it is not, because for example thes 25 judgment is in the District Court and the s 32

> proceedings are in the Supreme Court, then it may be that the Supreme Court could remove the judgment into the Supreme Court pursuant to s 145 of the District Court Act, or possibly grant a conditional "common injunction"' against the judgment creditor restraining enforcement of the judgment.

In *Harwood Constructions Ltd v Lantrode Ltd* (unreported, High Court of Justice, Technology and Construction Court, 24 November 2000) the court entered judgment for the adjudicated sum, but stayed the judgment pending a winding up application of the respondent company.

At [61] of *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238 (28 August 2006), Basten JA said

> [61] In relation to the second circumstance, where no payment schedule is provided, it may again be noted that the Building Payment Act envisages that a liability may arise even where the failure to provide a payment schedule was due to no fault on the part of the person allegedly liable to make the payment. A similar situation was referred to in Brodyn at [85]–[88] in relation to a judgment obtained pursuant to s 25, following an adjudication determination. Hodgson JA noted (in a judgment with which Mason P and Giles JA agreed) that where a judgment under the Act might be shown to create injustice, there may be grounds for a stay either of the enforcement of the judgment or of the proceedings in which the judgment is sought. Similar circumstances could arise in relation to a judgment sought under s 15 of the Act.

Stay applications were made in *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico* (2005) 21 BCL 266; [2004] NSWSC 344 (27 April 2004) and *Herscho v Expile Pty Ltd* [2004] NSWCA 468 (13 December 2004).

In *Grosvenor*, Einstein J held at [31]–[32] that having regard to the policy of the Act, there was sound reason for making stays less readily available and perhaps there must be more than a "real risk of prejudice" if a stay is not granted. Hodgson JA, in Herscho, echoed the same sentiments.

At [107] of *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2009] QSC 165, P Lyons J said:

> In Grosvenor Constructions, Einstein J considered that the policy of the Act, which is that successful claimants be paid, was a factor that should be taken into account in deciding whether to grant a stay. However, he also considered that where there is certainty that a party's right to challenge the outcome recorded in the certificate would otherwise be rendered nugatory, and that that party would suffer irreparable prejudice, the proper and principled exercise of the discretion would be to grant a stay. In that case, those consequences followed from the fact that the party who had the benefit of the judgment was insolvent.

At [27] of *Vadasz v Bloomer Constructions (Qld) Pty Ltd* [2009] QSC 261, Douglas J referred to the decision of the Queensland Court of Appeal in *RJ Neller Building Pty Ltd v Ainsworth* [2008] QCA 397, where Keane JA addressed the policy considerations affecting the statues of payments order to be made by an adjudicator under the Act. At [39] of *RJ Neller*, Keane JA said:

> … This intention reflects an appreciation on the part of the legislature that an assured cash flow is essential to the commercial survival of builders, and that if a payment the subject of an adjudication is withheld pending the final resolution of the builder's entitlement to the payment, the builder may be ruined. …

At [7] of *Burrell v JGE Machinery* [2014] NSWSC 19, McDougall J referred to Keane JA's judgment in *RJ Neller* with approval.

At [62] of *Bittania*, his Honour graphically spelt out how injustice might arise from a failure through no fault of the respondent to serve a payment schedule. His Honour said:

> [62] It is not difficult to envisage circumstances, close to the present, in which the rigid requirements of the Act could result in at least potential injustice. Such a case may

> arise where a builder twice files a payment claim which is resisted with a payment schedule in each case giving the same reason, the reason in each case being accepted by the builder in the sense that no adjudication was sought, and the builder, having taken no further steps to overcome the reason set out in consecutive schedules, then serves a third payment claim. Putting aside possible allegations of fault on the part of the claimant, the proprietor may intend to file a payment schedule on the final business day (only 10 are permitted) but fail to do so through illness, accident or other unforeseeable and unavoidable circumstances. In accordance with the right created by s 15, the builder may then commence proceedings for payment of the claim. On the appellants' argument, the proprietor could resist a judgment on the basis that the builder can have had no bona fide belief in its entitlement to the money and hence should not be treated as a person making a valid claim for the purposes of s 13(1). On the other hand, in accordance with the dicta in *Brodyn*, it is arguable that the court would have the power to stay the proceedings, or stay the enforcement of the judgment in such circumstances.

But can these judgments be correct? The Act has draconian consequences as argued elsewhere in this book. What more than a "real risk of prejudice" can possibly be shown in order to obtain a stay? It is respectfully submitted that both of these judgments are wrong and should not be followed. See the article by Kouris S, "When can one enjoin or stay the security of payment process?" (2005) 21 BCL 184 and the further authorities there cited.

In *Timwin Construction Pty Ltd v Facade Innovations Pty Ltd* (2005) 21 BCL 383; [2005] NSWSC 548 (1 June 2005) McDougall J ordered, *inter alia*, that the balance of the money paid into court by Timwin as the price of obtaining interlocutory relief be paid out to it, but that that order be stayed for a short while.

Facade appealed, the appeal being heard on 8 June 2005 *sub nom Facade Innovations Pty Ltd v Timwin Constructions Pty Ltd* [2005] NSWCA 197 (8 June 2005). Hodgson JA set aside the stay.

At [13]–[16] Hodgson JA said:

> [13] Mr Christie for Timwin submitted that stays in relation to appeals in matters under this Act should not be granted merely because of anticipated difficulty in recovering money paid, much less in enforcing judgments. He referred to the decisions in *Herscho v Expile Pty Ltd* [2004] NSWCA 468 and *McLaughlin's Family Restaurant v Cordukes Ltd* [2004] NSWCA 447.
>
> [14] Mr Christie submitted that it was only in exceptional circumstances that security would be ordered for a judgment, and that the circumstances of this case fell far short of the grant of a Mareva injunction. He submitted that the evidence showed that Timwin was a company with substantial assets able to meet the judgment if its basis was re-established.
>
> [15] My impression is that the appeal is a reasonable appeal, but that its success is far from assured. Apart from considerations associated with the policy of the Act in general and s 25 in particular, I do not think a case is made out for a stay simply on the basis that there is a reasonable appeal and there might be problems in enforcing the judgment if the money is not retained in court. I am not inclined to the view that considerations associated with the policy of the Act in general and s 25 in particular would justify a stay by reason of the existence of a reasonable appeal but, in saying that, I do not wish to preclude that matter being further considered on the application to set aside the judgment.
>
> [16] The orders I make are these:
>
> 1. I order that order three made by McDougall J on 1 June 2005 in proceedings 55035/05 for payment out to Timwin of money paid into court be stayed until the judgment entered in favour of Facade in 11729/05 is set aside.
> 2. I order that the costs of this motion be costs in the appeal.

3. I order that the appeal be expedited, but not so as to displace matters already fixed for hearing.

In *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152, Barrett J at [37], held that the s 25(4) limitations do not apply to an application for a stay, as distinct from an application to have a judgment set aside.

Shellbridge at [37] reads as follows:

> [37] Matters of the present kind seem often to be approached on the footing that the s 25 result (filing of an adjudication certificate as a judgment for debt) must be resisted virtually at all costs. The limits imposed by s 25(4) upon attempts to have such a judgment set aside are referred to in that connection. But it seems sometimes to be not sufficiently appreciated that, although a judgment in debt may result from the adjudication process, there is no curtailing of contractual and other rights arising in relation to the performance of the relevant work. This is made clear by s 32. Thus, if the principal has a claim for defective work or can show that work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator. The principal might, if thought fit, institute proceedings seeking not only to advance the claim in question but also, perhaps, to obtain, by reference to a right of set-off, a stay of the judgment that s 25 has had the effect of creating. The s 25(4) limitations do not apply to an application for a stay, as distinct from an application to have a judgment set aside.

At [45]–[48] of *Over Fifty Mutual Friendly Society Ltd v Smithies* [2007] NSWSC 291 Einstein J relevantly said:

> [45] In *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 571 reference was made (at [52]) to the principle to be derived from *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico* (2005) 21 BCL 266; [2004] NSWSC 344, namely that where there is certainty that the defendants' rights will be otherwise rendered nugatory and that it will suffer irreparable prejudice, because moneys paid [under the Act] would be irrecoverable as a result of the claimant's insolvency or liquidation, then the proper and principled exercise of the court's discretion was to grant a stay which was "to prevent injustice".
>
> [46] In the same decision the court (at [54]) observed that stays in relation to debts under the Act would be less readily available than stays in relation to appeals from curial proceedings. Reference was made to the decision of Hodgson JA in *Herscho v Expile Pty Ltd* [2004] NSWCA 468 who had suggested the risk of prejudice must be a very high risk and certainly more than merely a real risk to justify a stay (at [3] and [9]).
>
> [47] In *Taylor Projects* at [59], the court observed that:
>
> > [t]he principle in Grosvenor is only applicable where the claimant is either actually, or very close to, insolvent. Were it otherwise then*the stay itself may drive the claimant into the very insolvency which the interim payment regime of the Act is designed to prevent* … (emphasis added)
>
> [48] The plaintiffs' submission on the current application has been to eschew any need to call evidence as to the financial position of the second and third defendants and thereby to completely disregard the onus lying upon them, if seeking to pray in aid the defendants' financial positions in terms of the balance of convenience. The simple submission from the plaintiffs was that it was a matter for the second and third defendants to place before the court any evidence which might suggest that its financial standing [in terms of being in a position to repay the funds paid into court should it ultimately prove unsuccessful in the final litigation] could not be gainsaid. The submission is woefully misconceived.

However, notwithstanding Basten JA's earlier statements in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238 (28 August 2006), which appear to support the principle that where injustice could be shown, it would be appropriate for a respondent to an adverse adjudication application to apply for and be given a stay of a s 15 judgment (the judgment following a s 25 certificate), his Honour sharply narrowed the focus of any such stay application by saying at [118]:

> [118] However, the suggestion that an injured party could bring separate proceedings in relation to misleading or deceptive conduct is to disregard an important practical consequence of the State law. The loss which the appellants seek to prevent is one which will occur, in a summary way, in the s 15 proceedings. The institution of separate proceedings will not avail them in that respect, unless they can obtain a stay of the s 15 proceedings to allow the separate *Trade Practices Act* proceedings to be completed. At best that involves a claim for a stay, on discretionary grounds, of the s 15 proceedings. Although dicta in *Brodyn* suggests that such a stay may be appropriate in some circumstances, there must be real doubt as to whether a stay would be appropriate if its purpose were to allow the respondent to the proceedings to raise a matter (albeit elsewhere) which could not, on the present hypothesis, be raised directly in the s 15 proceedings by way of cross-claim or defence. The very purpose of the prohibition is to prevent a right to judgment on a payment claim being delayed by a cross-claim. It is quite likely that a court would refuse a discretionary stay in those circumstances, on the basis that the Respondent was trying to achieve indirectly the very result which the Parliament had prohibited it from obtaining directly. That could be seen as an abuse of process, rather than a legitimate basis for a stay.

In *Katherine Pty Ltd v The CCD Group Pty Ltd* [2008] NSWSC 131, the plaintiffs sought an order staying the enforcement of a judgment that the defendant had recovered in the District Court pursuant to adjudication certificates reflecting the determinations.

The basis upon which the plaintiffs proceeded to seek the remedies was that the enforcement of the judgment would include the enforcement of a penalty and that the defendant's conduct in proposing and insisting upon the penalty and utilising the mechanism given by the Act to enforce that penalty was unconscionable within the meaning of ss 20 and 22 of the Australian Consumer Law (former ss 51AA and 51AC of the *Trade Practices Act 1974* (Cth)).

At [47], McDougall J held that it would be an injustice to permit the defendant to have the full benefit of a bargain that, because of its incorporation of a penalty, was unconscionable. The order which his Honour gave was to preclude the enforcement of the judgment insofar as it included the penalty.

Allsop P (as his Honour then was), with whom Giles JA and Hodgson JA concurred, said in *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [49]:

> [49] If, in all the circumstances, the respondent, by the adjudication process, has been provided with a windfall which, in law, should not be retained, the appropriate vehicle for the vindication of the appellant's rights in that regard is the kind of proceeding contemplated by s 32(3). The appellant chose to attack the validity of the adjudication. For the reasons given by the primary judge and for the above reasons, that adjudication was not invalid and led to rights recognised by the Act. The remedy for any injustice to the appellant also lay in the Act, in s 32.

Hodgson JA added at [59]:

> [59] The result of this case may seem unsatisfactory, because it leaves the respondent with the benefit of a determination (and consequent judgment) arrived at through an error of law, and which includes about $500,000 claimed on the basis of the respondent's liability to Merrmac which has been satisfied by the appellant. As pointed out by Allsop P (as his Honour then was), any remedy for the appellant would have to be sought in proceedings brought pursuant to s 32 of the Act. If such proceedings are brought, and if in an interlocutory application it can be shown that a judgment has been

> obtained under the Act which is unmeritorious (and particularly if it can also been shown that payment made of the judgment is likely to be irrecoverable), the judgment debtor may be able to obtain a stay of the judgment or an injunction against enforcement of it: see *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [85]–[88].

In *Paul Michael Pty Ltd v Urban Traders Pty Ltd* [2010] NSWSC 1246, White J addressed the discretionary factors involved in the grant or refusal of an injunction to restrain the execution of two judgments and consequential orders following a successful adjudication determination, where there was a deed of company arrangement in place, and the builder was no longer trading. At [4], his Honour said:

> [4] The defendants submit that the legislative purpose of the *Security of Payment Act* is to protect builders' cash flow by providing a fast track procedure for interim determinations of builders' rights to progress payments which may provide rough and ready justice. Where the builder is insolvent and has gone into voluntary administration or liquidation, the same considerations do not apply as apply to a builder which is a going concern. In the latter case a builder who has obtained an adjudication in its favour has a real interest in enforcing the judgment so as to preserve cash flow, even though the parties' position might be later adjusted. Where the builder is no longer carrying on business, but is subject to a deed of company arrangement, the legislative purpose underlying the Security of Payment Act has a diminished operation and this should be reflected in the court's preparedness to stay execution of the judgment. In *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* (2005) 21 BCL 443; [2004] NSWSC 1230, Young CJ in Eq (as his Honour then was) said that the *Security of Payment Act* is only intended to operate when the head contractor and subcontractor are going concerns. Where the builder no longer needs cash flow the mischief to be covered by the Act is not present (at [87]).

Vickery J had occasion to refer to and comment on *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico* (2005) 21 BCL 266; [2004] NSWSC 344 above in *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrications Pty Ltd (No 2)* [2010] VSC 340, which his Honour distinguished on the basis that no judgment had been entered in Asia Pacific. His Honour said:

> [27] In Victoria, r 66.16 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) provides that the Court may stay execution of a judgment. As a separate rule, r 64.25, deals with a stay of execution of proceedings pending an appeal. However, these rules are not applicable to the case at hand. There is no Court process by way of an executory judgment or other proceeding which is sought to be stayed.
>
> [28] Accordingly, it is not open to apply the approach of *Grosvenor Constructions* to the present matter in conferring jurisdiction upon the Court to entertain the present application of the Plaintiff.

At [36], Vickery J noted that the question that then arose was whether any order could or should be made. His Honour noted at [42]–[43] that Aircon was in a precarious financial position and he was not satisfied that Aircon would be in a position to repay Asia Pacific the sum of $121,132.45, should it be ordered to make such a payment consequent upon a hearing and determination of the principal proceedings which should occur some time in the latter part of the following year. Accordingly, as will appear from [50] of his Honour's judgment, Vickery J made the following orders:

> 1. From the fund held in the National Australia Bank, Level 4, 330 Collins Street, Melbourne in Account No. 083 004 16-695-1260 on term deposit
>
> (a) the First Defendant be paid the sum of $121,132.45; and
>
> (b) the Plaintiff be paid the balance

2. The Plaintiff to be paid the whole of the amount held on term deposit in the National Australia Bank, Level 4, 330 Collins Street, Melbourne in Account No. 083 004 16-646-7903.
3. The First Defendant pay the Plaintiff's costs, including reserved costs, of the application insofar as those costs relate to the judicial review of the Olsen Adjudication Determination and the Plaintiff pay the First Defendant's costs, including reserved costs, of the application insofar as those costs relate to the judicial review of the Blackman Adjudication Determination.

At [23] of *Adelaide Interior Linings Pty Ltd v Romaldi Constructions Pty Ltd* [2013] SASC 110, Anderson J quoted the following extract from the judgment of the District Court below:

> [46] I conclude from the above authorities that despite an interpretation that might be placed on the words of Einstein J in*Grosvenor* and *Taylor* above there would have to be demonstrated a near certainty of a defendant's insolvency before an injunction would be granted, that test might more accurately be described as there being a *real risk* of a defendant's inability to repay. I reach that conclusion having considered the detailed analysis by McDougall J in *Veolia* and *RSA* and also the remarks of Ball J in *Grindley*.

At [48] – [52], Anderson J concluded that the approach of the judge in the District Court was misdirected. At [50], Anderson J said:

> In my view the judge, by allowing the respondent the luxury of delaying payment by instituting an action in court under the guise of bringing all matters between the parties into a dispute in court, has permitted the respondent to circumvent the Act.

In an appeal to the Full Court of the South Australian Supreme Court in the matter of *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2)* [2013] SASFC 124, the Full Court, at [62]-[73], made a detailed analysis of the principles relating to the power to grant injunctions, but nevertheless decided not to disturb the decision of Anderson J.

[SOP25.670] Paying money into court in an application to have an adjudication declared void

(a) New South Wales authorities – paying money into court in an application to have an adjudication declared void

In *Tombleson v Dancorell Constructions Pty Ltd* [2007] NSWSC 1169 there was an application to declare a determination void. There was no application to set aside the judgment. The respondent to the application, the successful party in the adjudication, moved for a stay of the application to declare the determination void pending payment of security.

At [9], Bergin J (as her Honour then was) repeated what has been said on a number of occasions, viz that in an application to set aside a judgment obtained under s 25, the applicant is required to pay the unpaid amount of the judgment into court as security. Her Honour said:

> [9] As has been said on a number of occasions, this is a section that is relevant to proceedings to set aside a judgment. An applicant commencing proceedings to have a judgment set aside "is required" to pay into the court as security the unpaid portion of any adjudicated amount; *Jem Developments Pty Ltd v Hansen Yuncken Pty Ltd* (2006) 68 NSWLR 100; [2006] NSWSC 1087; *Siemens Ltd v Tolco Pty Ltd* (unreported) 11 December 2006, p 6.

At [20], her Honour referred to s 67 of the *Civil Procedure Act 2005* (NSW) which provides that, subject to the rules, the court may at any time, or from time to time, by order stay any proceedings before it, either permanently or until a specified date.

At [22], her Honour concluded thus:

> [22] The amount in dispute is approximately $360,000, well within the jurisdictional limit of the District Court. The costs to be incurred in this litigation must be proportionate to the importance of the subject matter in dispute. It seems to me that the only real issue in this case is: did the plaintiff propose to live in the house? If she did, at what point of time was the intention present? Assuming the plaintiff intended to live in the house, thus making the adjudicator's role superfluous, there is still no explanation why this builder has not been paid.

But, of course, one must bear in mind the fact that her Honour's observations in regard to payment of money into court were arbiter within the context of the judgment, in that, she made it clear at [17] that she was satisfied that the provisons of s 25(4) were not applicable, because the proceedings before her were not proceedings to set aside the judgment.

The approach taken by Martin J in *Surfabear Pty Ltd v GJ Drainage & Concrete Construction Pty Ltd* [2009] QSC 308 was not taken by Einstein J in *Lanmac (NSW-ACT) Pty Ltd v Wallace* [2010] NSWSC 976. Apparently, from the judgment, Martin J's judgment was not referred to his Honour. However, at [12] of *Lanmac*, Einstein J cited Bergin J's (as her Honour then was) judgment in *Tombleson v Dancorell Constructions Pty Ltd* [2007] NSWSC 1169 above. At [13] of *Lanmac* his Honour said:

> Each of the matters the subject of the above observations of Bergin J is accepted as of substance. Indeed in *Jem Developments Pty Ltd v Hansen Yuncken Pty Ltd* [2006] NSWSC 1087 I alluded to the same factors where the proprietor had made no secret of the fact that its purpose was to outflank section (4) of the Act so as to avoid the requirement [were it to seek to have the judgment set aside] to pay into Court as security, the unpaid portion of the adjudicated amount pending a final determination of proceedings in that regard.

But what his Honour did not say in *Lanmac* was that Bergin J's (as her Honour then was) comments were merely obiter: see the comments above. It is respectfully submitted that *Lanmac* should not be followed and that the better view is that expressed by Martin J in Queensland above.

Hammerschlag J's addressed the necessity to pay the adjudicated amount and other sums into Court as a condition before an applicant can advance an application to preclude a s 25(4) certificate (New South Wales) from being issued in the following paragraphs of *Nazero Group Pty Ltd v Top Quality Construction Pty Ltd* [2015] NSWSC 232:

> [21] Earlier, in *Tombleson v Dancorell Constructions Pty Ltd* [2007] NSWSC 1169 (Tombleson v Dancorell Constructions Pty Ltd [2007] NSWSC 1169*Tombleson*), a plaintiff brought proceedings seeking orders in the nature of a writ of *certiorari* (*certiorari*) quashing an adjudication based on which the defendant had judgment entered in the District Court. It sought declarations that the determination was void as well as injunctions restraining the first defendant from taking any action in order to enforce the adjudication determination or any judgment based on any adjudication certificate issued pursuant to the determination. The relief claimed did not extend to an order that the judgment be set aside. The defendant sought an order that the proceedings be stayed until the plaintiff paid the adjudicated amount into Court as security. Section 25(4) of the Act did not apply. However, Bergin J found that the plaintiff was seeking to avoid triggering the section, but nevertheless prevent the defendant from enforcing the judgment by injunction. Her Honour considered that just resolution of the proceedings (including that the legislation under which the proceedings were brought was not circumvented) warranted the proceedings being stayed until the plaintiff provided a bank guarantee or paid money into Court, slightly reduced from the adjudicated amount because of a concession by the defendant that there was an issue about possible defects in the work done; see too *Lanmac (NSW – ACT) Pty Ltd v Wallace* [2010] NSWSC 976.
>
> …

[31] Additionally, s 67 of the CPA provides that "Subject to rules of court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day". The court possesses inherent power to stay proceedings and an incidental power to control and to ensure the proper and fair use of its jurisdiction: *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 227 ALR 425.

…

[33] A principled approach as to whether a plaintiff should be required to pay money into Court (and if so, how much) where it challenges an adjudication determination, but there is no judgment, requires, because it involves the exercise of discretion, that regard be had to the particular circumstances of the case. For this reason, such orders should not be made by rote, and it is not correct to say that they are required whenever a person brings proceedings to challenge an adjudication and s 25(4)(b) of the Act is not in play; c.f. *Surfabear Pty Ltd v GJ Drainage & Concrete Construction Pty Ltd* [2009] QSC 308 at [38] – [42].

…

[40] The starting point in the exercise of the discretion to make the orders sought here is the general policy aims of the Act, and specific aims of particular pertinent sections. A general policy aim of the Act is to give enforceable rights to progress payments. Another is to ensure the speedy and effective determination of disputes about them. Specific provisions of the Act aim to put a claimant who has the benefit of an adjudication in its favour in a strong position, so much so that it is entitled to automatic judgment. Section 23(2) of the Act imposes a statutory obligation to pay an adjudicated amount before the relevant date. Coupled with this is the burden placed by s 25(4)(b) of the Act on a respondent who commences proceedings to have a judgment set aside to pay into Court, with the corresponding benefit of the security such payment gives the claimant. Where the claimant has not yet obtained judgment, the respondent remains under the statutory obligation to pay. McDougall J's reference in Filadelfia Projects Pty Ltd v EntirITy Business Services Pty Ltd [2009] NSWSC 1468*Filadelfia* to "analogy with s 25(4)", is recognition of the fact that from a policy point of view, such a respondent has no less an obligation to pay than one against who judgment has been obtained.

(b) Queensland authorities – paying money into court in an application to have an adjudication declared void

The requirement to pay moneys into court as a condition for obtaining a stay of a judgment based on adjudication determination was before Martin J of the Supreme Court of Queensland in *Surfabear Pty Ltd v GJ Drainage & Concrete Construction Pty Ltd* [2009] QSC 308. At [38]–[42], Martin J, in dealing with this issue before him, said:

[38] On this point, Surfabear attempts to draw a distinction between its application for the adjudicator's determination to be declared void and the kind of action mentioned in s 31(4)(b) – that is, an application to have a judgment entered pursuant to such determination set aside.

[39] The respondent does not acknowledge this distinction. Rather, it relies on the objectives of BCIPA, as explained in the second reading speech and referred to by Gzell J in *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 935, [17]–[18] and confirmed in *Cooper v Veghelyi* [2005] NSWSC 602. Abacus Funds, however, contemplated the situation where an applicant sought injunctive relief to restrain the respondent from taking steps to enforce an adjudicator's determination by seeking to obtain an adjudication certificate or filing such certificate as a judgment debt. As such, while it did refer to the objectives of the New South Wales legislation, it did not consider any provision similar to that contained in s 31(4)(b) of BCIPA (Qld).

[40] Veghelyi is equally unpersuasive of the plaintiff's cause. That case, while dealing with a judgment for debt based on an adjudicator's decision, and considering the NSW

equivalent to s 31(4)(b), is not authority for the rule that an application for a declaration of invalidity should be stayed until unpaid judgment monies are paid into court. The applicant in *Veghelyi* expressly sought an order that the relevant judgment be set aside. As such, s 25(4) of the NSW Act was directly applicable. As noted by Patten AJ: *Cooper v Veghelyi* [2005] NSWSC 602.

Whether or not it is appropriate for Ms Cooper to seek that relief in this court is, I think, beside the point as it is in fact the relief which she seeks. It might well be otherwise if she merely contented herself with seeking a declaration that the adjudication was void (emphasis added).

[41] Earlier in his judgment, Patten AJ refers to the reasons of Hodgson JA (with whom Mason P and Giles JA agreed) in *Brodyn Pty Ltd v Davenport*, which states (2004) 61 NSWLR 421; [2004] NSWCA 394:

> Further, in my opinion an order of the Supreme Court quashing the determination or declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator's adjudication within s 25(4): this wording assumes that there is a determination which is challenged.

[42] While the objective of BCIPA in ensuring that a person entitled to progress payments under a construction contract is able to receive such payments promptly is well established, those objectives do not override the plain and ordinary meaning of its provisions. Section 31(4)(b) makes express reference to "proceedings to have the judgment set aside" when requiring unpaid adjudicated amounts to be paid into court. Other types of proceeding, such as the application made in this case, do not fall within the ambit of that section. No payment into court is required in the present case and the present application need not be stayed.

Should the adjudicator's determination be declared void?

In *57 Moss Rd Pty Ltd v T & M Buckley Pty Ltd t/a Shailer Constructions* [2010] QSC 278, an extempore and unreported judgment of 7 April 2010, Daubney J made short shrift of the respondent's submission that pending an application to have an adjudication determination declared void, the applicant was required to pay any amount into court.

[SOP25.680] New South Wales – a motion to have an adjudication declared void – discretionary factors

Bell JA (as her Honour then was) at [23] and [24] of *J & Q Investments Pty Ltd v ZS Constructions (NSW) Pty Ltd* [2008] NSWCA 203 (20 August 2008) summarises the relevant principles as follows:

[23] In Brodyn Hodgson JA (at 449 [85]) albeit, in a somewhat different context, commented on the policy of the Act, which he had earlier identified as that progress payments be made, as a discretionary factor weighing against the grant of a stay. In *Herscho v Expile Pty Ltd* [2004] NSWCA 468 his Honour commented with approval on the remarks of Einstein J in *Grosvenor Constructions NSW Pty Ltd v Musico* (2005) 21 BCL 266; [2004] NSWSC 344 at [31]–[32] that, having regard to the policy of the Act, there is sound reason for making stays less readily available in these cases and looking for more than "a real risk of prejudice" if a stay is not granted (at [3]).

[24] Hodgson JA's remarks were echoed by Giles JA in *McLaughlin's Family Restaurant v Cordukes Ltd* [2004] NSWCA 447, a case involving an application for a stay of enforcement of a judgment given in the District Court in respect of a payment claim under the Act. In that case counsel for the claimant did not contend that the opponent would be unlikely to repay in the event the claimant were successful on appeal. However his Honour went on to observe (at [10]):

The second is that the Act is part of a scheme intended to provide for prompt payment of money pursuant to payment claims made in accordance with its provisions, with the

parties to the relevant construction contract being left to sort out the final result between them in other proceedings. There is evidence that the claimant proposes to bring proceedings in this Court against the opponent claiming substantial amounts for breach of the relevant contract. In conformity with the policy of the Act, in *Herscho v Expile Pty Ltd* Hodgson JA saw merit in earlier observations that there was sound reason for making stays less readily available in cases such as the present and perhaps for looking for more than a real risk of prejudice if a stay was not granted. In my opinion also, there is merit in an approach by which in circumstances such as the present the Court should be reluctant to grant a stay where there is no case of hardship and the final position between the parties can be worked out in the larger proceedings which the claimant is to bring.

[SOP25.683] Victoria – a motion to have an adjudication declared void – discretionary factors

At [17] et seq of *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 144, the Victorian Court of Appeal considered the principles governing a stay. The Court referred to r 66.16 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), which simply stated that "[t]he Court may stay execution of a judgment."

At [18], the Court noted that the Court had a wide discretion as to whether or not a stay would be appropriate. It was noted at [19] that the onus lay on the applicant to demonstrate "special" or exceptional circumstances justifying a stay, for example, to prevent the appeal, if successful, from being rendered nugatory.

At [21] of Saville, the Court of Appeal noted further that in *Narain v Euroasia (Pacific) Pty Ltd* [2008] VSCA 195, Ashley JA said at [21]:

> … [T]he foreshadowed making of a bankruptcy order, by its effect upon the ability of an appellant to prosecute an appeal, and by its reputational impact, may have the effect of rendering the appeal nugatory and so constitute special circumstances justifying a stay on execution. …

Further Victorian authority was referred to at [23] of *Saville: Li v The Herald & Weekly Times Pty Ltd*; *Cellante v Kallis Industries Pty Ltd* [1991] VicRp 99; [1991] 2 VR 653, 657.

[SOP25.685] Western Australia – a motion to have an adjudication declared void – discretionary factors

At [27] of *Hire Access Pty Ltd v Ebbott* [2012] WASC 108, Hall J noted that an appeal of the type referred to in the matter before him had to involve a question of law, and that avenues for review from an adjudicator's decision are necessarily limited by s 46 of the *Construction Contracts Act 2004* (WA).

In rejecting the application for a stay, his Honour noted that under s 43 of the *Construction Contracts Act 2004*, a successful party to an adjudication is to apply to a competent court for the entry of judgment and for leave to enforce the determination.

In those circumstances, the appellant would have had an opportunity to seek a delay or deferral of enforcement from the court to which such an application is made, and consequently it was not for his Honour to entertain any such application, but for the court which had before it an application for the entry of judgment and for leave to enforce the determination.

[SOP25.690] Injunction to restrain payment out of moneys paid into court by the unsuccessful party in adjudication determination challenge

In *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 358, there had been a payment into court by the unsuccessful party in a challenge to an adjudication determination. That party sought to restrain payment out of those moneys to

the other party who contended that, in that event, the moneys might be lost because of a probable inability to repay them if the ultimate decision as to liability were to be overturned. Einstein J, in his Honour's judgment, discussed the various discretionary factors and held that the moneys should remain where they were pending a final determination.

At [81]–[84] of *Brodyn*, Hodgson JA said:

> [81] It was submitted for Brodyn that, because Dasein did not have a licence under the HBA, the subcontract was illegal (s 4) and unenforceable (s 10). Accordingly, Dasein was not entitled to any progress payment.
>
> [82] In my opinion, the civil consequences for an unlicensed contractor for its breach of s 4 are those set out in s 10, and not any wider deprivation of remedies. In my opinion this is confirmed by the different provisions of s 94, which explicitly precludes, in the event of breach of the insurance provisions, the obtaining of a quantum meruit unless a court considers it just and equitable. In my opinion, the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s 10 of the HBA (*Home Building Act 1989* (NSW)).
>
> [83] Accordingly, in my opinion Dasein's failure to have a licence could not be a ground on which the adjudicator's determination could be considered void, or for otherwise giving relief in respect of the determination.

In *On Hing Pty Ltd v Phoenix Project Development Pty Ltd* [2006] QDC 159, District Court Judge Alan Wilson SC followed *Brodyn* on this point. It is interesting to note that *Brodyn* is making its way through the courts of Queensland.

At [4] of *Paul Michael Pty Ltd v Urban Traders Pty Ltd* [2010] NSWSC 1246, White J addressed the discretionary factors involved in the grant or refusal of an injunction to restrain the execution of two judgments and consequential orders following a successful adjudication determination, where there was a deed of company arrangement in place, and the builder was no longer trading, his Honour said:

> The defendants submit that the legislative purpose of the *Security of Payment Act* is to protect builders' cash flow by providing a fast track procedure for interim determinations of builders' rights to progress payments which may provide rough and ready justice. Where the builder is insolvent and has gone into voluntary administration or liquidation, the same considerations do not apply as apply to a builder which is a going concern. In the latter case a builder who has obtained an adjudication in its favour has a real interest in enforcing the judgment so as to preserve cash flow, even though the parties' position might be later adjusted. Where the builder is no longer carrying on business, but is subject to a deed of company arrangement, the legislative purpose underlying the Security of Payment Act has a diminished operation and this should be reflected in the court's preparedness to stay execution of the judgment. In *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* (2005) 21 BCL 443; [2004] NSWSC 1230, Young CJ in Eq (as his Honour then was) said that the *Security of Payment Act* is only intended to operate when the head contractor and subcontractor are going concerns. Where the builder no longer needs cash flow the mischief to be covered by the Act is not present (at [87]).

[SOP25.710] Concurrent appeal proceedings against a declaration of nullity

In *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd (No 2)* [2006] NSWCA 147 (13 June 2006), there was a second application to the Court of Appeal for a stay. in which Hodgson JA granted a stay on certain conditions which were not satisfied, and the stay came to an end. pursuant to the judgment of Einstein J in *Procorp Civil Pty*

Ltd v Napoli Excavations & Contracting Pty Ltd [2006] NSWCA 118, the sum of $202,254 was paid into Court and paid out to Napoli.

Napoli sought an order for security for the costs of the appeal.

At [10], Hodgson JA said:

> [10] The clear intention of the *Building and Construction Industry Security of Payment Act 1999* (NSW) is that progress claims made under the Act be dealt with quickly and without court proceedings, in circumstances where payments made pursuant to such claims are only provisional and the ultimate rights of the parties can be determined in ordinary court proceedings as contemplated by s 32 of that Act. In those circumstances, in my opinion, a party instituting court proceedings to challenge an adjudicator's determination or a judgment pursuant thereto is fairly regarded as being in substance a plaintiff, rather than merely defending a claim made against it. In that respect, it is unlike a company challenging a statutory demand, which is itself a document directed towards the institution of court proceedings against the company.

[SOP25.720] Abuse of process in the adjudication proceedings

In *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; 21 BCL 437; [2005] NSWCA 49 at [26] and [28], Handley JA, with whom Santow JA and Pearlman AJA agreed, said that it was open to a claimant, on a proper construction of the Act, to pursue concurrently its rights under the statute and at law. In doing so, the Court held there was no abuse of process. However, there was a limiting factor. Handley JA, said at [24], "[where] proceedings being commenced shortly before a trial is due to start", with the result that "the statutory procedures would interfere with the orderly preparation and presentation of the parties' cases in the Court", an abuse of process may require the adjudication application to be halted. In *Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd* [2008] NSWSC 1405 there were parallel proceedings, but a hearing date had not been obtained in regard to the District Court proceedings. The parties were still working through the directions made by that Court. In the premises, there was no abuse of process.

In *Katherine Pty Ltd v The CCD Group Pty Ltd* [2008] NSWSC 131, McDougall J, at [15]–[17] observed:

> [15] In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; 232 FLR 1; [2006] NSWCA 238, the Court of Appeal held that a judgment founded on a determination under the NSW Act could be stayed if the determination had been procured by misleading or deceptive conduct in breach of s 52 of the *Trade Practices Act*. That stay could be granted pursuant to s 87 of the *Trade Practices Act* on the application of the party alleging the use of misleading or deceptive conduct. Alternatively, the judgement creditor could be restrained pursuant to s 80 (if there were a "proceeding" in which that relief was sought) or s 87 (on application for that relief) from enforcing the judgment.
>
> [16] The same principles would enable the Court to fashion relief under s 87 (or, in a proceeding, under s 80) based on s 51AA or s 51AC. The defendant did not submit otherwise. Nor did it submit that the question should be dealt with in the District Court rather than in this Court (something that I had raised in the course of argument on 15 February 2008).
>
> [17] It is unnecessary to consider many of the matters debated in *Bitannia*, in particular the difference between a proceeding and an application, given that on any view the summons in these proceedings, and the amended summons on which the plaintiffs moved, is a proceeding invoking federal jurisdiction under the relevant provisions of the Trade Practices Act and claiming relief under it.

In *CC No 1 Pty Ltd v Reed Constructions Australia Pty Ltd* [2010] NSWSC 294, Macready AsJ held that it was not an abuse of process to reagitate matters, the subject of earlier claims and which had not been adjudicated on. He held, in the circumstances, that there was no abuse.

Applegarth J dealt with the same issue in *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135. His Honour dealt with the abuse of process argument at [48]–[50] of *AE & E*, where his Honour said:

> [48] If it had been necessary to do so, I would have found that the service of an adjudication application in respect of the claims described in paragraph 1 of the originating application ("the re-agitated claims") would an abuse of process in the circumstances. The first of these circumstances is that there is an issue estoppel, so that an adjudication application was "foredoomed to fail" in respect of the re-agitated claims. The second circumstance is that Stowe seems to be doing no more than seeking from another adjudication a better result than it got from Mr Smithies. For the reasons given in *Dualcorp* and authorities that have followed it, re-agitation of the same issue before another adjudicator in an attempt to obtain a different determination of the same issue is precluded by the Act. Such a re-agitation would constitute an abuse of the processes created by the Act for the speedy determination of claimed entitlements to progress payments. Respondents to payment claims must deal with them within the time allowed in the Act. They should not be vexed by repetitious claims for items that an adjudicator has determined were not made out. Such a course is precluded by the Act.
>
> [49] The Act does not permit Stowe to seek a further adjudication of items that Mr Smithies adjudicated and found were not established. To seek such a benefit is to seek an advantage that the law does not provide, and to apply for a further adjudication of the same items would be an abuse of process. AE should not have to devote time and costs to responding to those repetitious claims.
>
> **Conclusion**
>
> [50] Claims for the same items in the same amount have been resubmitted in circumstances in which there has been no ongoing work or change in the value of the work. The claims have been the subject of a previous adjudication in which the claims were not accepted for reasons that included a want of evidence. AE has established an entitlement to relief on the basis of issue estoppel.

Obviously, it is to be noted that his Honour's remarks were obiter within the context of his Honour's judgment.

See however a fuller discussion on this aspect at [SOP25.570].

Curial review

[SOP25.730] Victoria — curial review of adjudicator's determination

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Under s 26 of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic) which relates to construction contracts entered into from 30 March 2007, ss 25–27 of the principal Act are repealed.

The same Act introduces new Divs 2A and 2B, inserted in Pt 3 after s 28 of the Principal Act.

Under Div 2A, s 28A provided a threshold for review, ie in an amount of $100,000 or the amount prescribed for the purposes of this section.

Under s 28B, it is provided that a respondent may apply for a review of an adjudication determination provided it had submitted a payment schedule within the time specified in s 15(4) or 18(2) on the ground that the adjudicated amount included an excluded amount and provided that excluded amount was identified in the payment schedule. Under s 28B(5) it is provided that an application under the section may only be made if the respondent has paid the claimant the adjudicated amount, other than amounts alleged to be excluded amounts, into a designated trust account.

Under s 28C, a claimant may apply for review of an adjudicated determination only if the adjudicator failed to take into account a relevant amount in making the determination because it was wrongly determined to be an excluded amount.

Subsections 28D(1)–(5) detail the procedure for making a review application.

Under s 28E, a party to an adjudication review may make a submission to the authorised nominating authority in response to an application for review within three business days after being given a copy of the adjudication review application.

Under s 28G, a provision is made for the appointment of a review adjudicator.

Section 28H details the review procedures.

The further subsections of s 28 provide details of the review procedures.

The major question which arises under the Victorian Act is whether or not there can be a curial review of an adjudicator's determination outside the provisions of s 28 above and, if so, on what grounds?

The Victorian Act is silent on the application of the *Brodyn* and *Transgrid* principles.

The opportunity was there for the Victorian legislature to have done so. It is a pity that this aspect was left open.

Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 (24 April 2009) in a seminal judgment accepted the application of *Brodyn* in Victoria in part, but significantly rejected its application (and it follows the application of many New South Wales decisions which followed it) in Victoria.

In summary, and for the reasons below, his Honour rejected one of the main holdings in *Brodyn* that *certiorari* was not available as a remedy in an appropriate case to challenge an adjudicator's determination.

His Honour began his reasoning by outlining the intent and purpose of the *Building and Construction Industry Security of Payment Act 2002* (Vic) and which came into operation in Victoria on 31 January 2003 and which has since been amended on two occasions, first the amendments which came into operation on 26 July 2006 (Act No 42 of 2006) and the second group of amendments on 30 March 2007 (Act No 15 of 2002).

His Honour noted at [37] that the Victorian Act was modelled on the provisions and processes of the New South Wales Act. At [40], his Honour referred to [122] of *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 where Beech J described the purpose of the like Western Australian legislation in the following terms:

> In construing the Act it is to be borne in mind that the object of the scheme created by the Act is, as described in the explanatory memorandum and the Second Reading Speech, to "keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes."

At [41], Vickery J also referred to the judgment in *Amflo Constructions Pty Ltd v Jefferies* (2004) 20 BCL 452; [2003] NSWSC 856 at [25], where Campbell J (as his Honour then was) made observations to similar effect in about the NSW Act, regarding provisions which are mirrored in the Victorian Act:

> A fundamental feature of the legislation is that, apart from the fact that parties to a construction contract cannot contract out of the rights given by the legislation … nothing … affects any of the rights that parties to a construction contract have … The

> concern of the Act is with maintaining the cash flow of claimants, by enabling them to recover quickly amounts which the adjudication process says they are entitled to. It is possible for the person who pays the amount of money which an adjudication has found due to seek to reclaim that money, in court proceedings which decide what the ultimate legal rights of the parties are. An evident purpose of the Act is that, if there is to be such litigation, it will start from a position where the claimant has been paid the amount which the adjudication process has decided should be paid. [Specific references to the sections of the NSW Act omitted].

His Honour concluded on this point at [45] of *Hickory* that "[f]rom this analysis, I readily accept the observation made in a number of recent authorities that the Act places the claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights: *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 (19 August 2008) and *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42; [2002] NSWSC 395 at 50".

Protectavale was cited with approval by Blow J in the *Supreme Court of Tasmania in Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd* [2013] TASSC 3.

Having adopted the purpose and intent of the Australia wide security of payment legislation, his Honour at [69] of *Hickory* pointed to the observations of Basten JA in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228, where Basten JA was of the view that some aspects of the reasoning of Hodgson JA in *Brodyn* may require reconsideration ([71]–[77]). Vickery J said:

> … Rather than approaching the matter by asking whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination, Basten JA approached the matter by asking whether the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. On this analysis, if the pre-condition is a matter for the objective determination of the court, a court may declare the determination to be void and order injunctive relief if the pre-condition is not satisfied. On the other hand, if the power to resolve questions said to be pre-conditions to the valid exercise of power by the adjudicator are, on a proper analysis, questions for the adjudicator, a subsequently made determination may still remain a valid determination.

Although at [72] of his Honour's judgment, Vickery J accepted that the statements of law enunciated in *Brodyn*, as applied to the NSW Act are in substance persuasive, his Honour at [73]–[75] said that after having undertaken a closer examination of the Victorian Act, and by the application of the relevant provisions of the *Constitution Act 1975* (Vic), the construction given to the New South Wales legislation in *Brodyn* was not open under the Victorian Act.

His Honour's first reason was the limited privative clause in s 28R(5) of the Victorian Act.

That section provides:

> (5) If a person commences proceedings to have the judgment set aside, that Person –
>
> (a) to subsection (6), is not, in those proceedings, entitled –
>
> (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or
>
> (ii) to raise any defence in relation to matters arising under the construction contract; or
>
> (iii) to challenge an adjudication determination or a review determination; and
>
> (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.

At [77]–[79], Vickery J referred to the principles of statutory construction in regard to privative clauses: see *R v Hickman; Ex parte Fox* (1945) 70 CLR 598; [1945] HCA 53 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; [1995] HCA 23; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2; *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; [1949] HCA 10 at 399 (CLR).

His Honour concluded his first reason thus:

> [80] The majority in *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, summarised a contemporary approach to Hickman in the following terms:
>
> > It follows from Hickman, and it is made clear by subsequent cases, that the so-called "Hickman principle" is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions. Once this is accepted, as it must be, it follows that there can be no general rule as to the meaning or effect of privative clauses. Rather, the meaning of a privative clause must be ascertained from its terms; and if that meaning appears to conflict with the provision pursuant to which some action has been taken or some decision made, its effect will depend entirely on the outcome of its reconciliation with that other provision (footnotes omitted).
>
> [81] The privative clause, such as it is expressed in s 28R(5)(a) of the Victorian Act, when construed with the aid of the Hickman principle, provides scope for relief in the nature of *certiorari* in the appropriate case. The subsection would only operate, in the circumstances of this case, if an adjudication determination is under challenge: s 28R (5)(a) also operates in the other circumstances defined in this paragraph of the subsection. A determination of an adjudicator which is not a bona fide attempt to exercise the power conferred by the Act; or which does not relate to the subject matter of the adjudication; or is not reasonably referable to the powers conferred on an adjudicator by the Act, could not in truth be described as an "adjudication determination" within the meaning of the Act at all. In this regard, the majority in *Plaintiff S157/2002* at [48] said:
>
> > This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all". Thus, if there has been jurisdictional error because, for example, of a failure to discharge "imperative duties" or to observe "inviolable limitations or restraints", the decision in question cannot properly be described in the terms used in [the privative clause under consideration] as "a decision … made under this Act" and is, thus, not a "privative clause decision" as defined in [the relevant parts of the Act under consideration] (footnotes omitted).
>
> [82] Accordingly, to the extent that there is any conflict between the Act in its application to the facts of this case and the privative clause, it may be resolved in the manner I have described.
>
> [83] On the construction of the Act, as I have found it to be, *certiorari* would lie, and the privative clause contained in s 28R(5)(a) of the Act would not thwart its operation.

Vickery J's second reason for not adopting the holding in *Brodyn* that *certiorari* was not available as a remedy challenging an adjudication award is provided at [84] of his Honour's judgment, where he said:

> Further, there is some room for the operation of *certiorari* outside the narrow ambit of s 28R(5)(a), and this is so even without resort to the Hickman principle of construction. The provision only comes into operation once a judgment has been entered under the Act. The procedure which precedes this step involves passing through a number of gateways: first, the making of the adjudicator's determination which makes a finding that money is payable under the construction contract in respect of the progress claim: s 23(4) ands 23; second, on any failure on the part of a respondent to pay, within the

time limits specified by s 28M and s 28N, the sum determined by the adjudicator, the claimant may request the nominating authority to provide an adjudication certificate: s 28O(1)(a); third, following the issue of an adjudication certificate, an application may be made to a court of competent jurisdiction for the entry of judgment founded on the certificate and founded on evidence that the whole or part of the sum specified in the certificate remains unpaid: s 28R(1)–(4); then, Judgment may then be entered by the relevant court. It is only at this point that proceedings may be commenced to have the judgment set aside. It is also only at this point that the privative clause s 28R(5)(a) comes into operation. At any time prior to the entry of judgment, s 28R(5)(a) has no application, and cannot for example, work to prevent a challenge to an adjudication determination. Accordingly, during the albeit limited period before the entry of judgment, the provision has no application to proceedings in the nature of *certiorari* to quash an adjudicator's determination.

The third reason for his Honour rejecting the relevant *Brodyn* holding is stated at [85]–[88] as follows:

[85] A further and fundamental issue of construction which arises under the Victorian Act is the application of the *Constitution Act 1975* (Vic), insofar as it makes provision for the powers and jurisdiction of the Supreme Court. Section 85 of the Constitution Act relevantly provides by subsections (1), (5) and (6):

…

(1) Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

…

(5) A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless –

(a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and

(b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section; and

(c) the statement is so made –

(i) during the member's second reading speech; or

(ii) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or

(iii) with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.

(6) A provision of a Bill which excludes or restricts, or purports to exclude or restrict, judicial review by the Court of a decision of another court, tribunal, body or person is to be taken to repeal, alter or vary this section and to be of no effect unless the requirements of subsection (5) are satisfied.

[86] The Victorian Act expressly refers to s 85 of the Constitution Act in relation to two of its provisions. Section 51 of the Act provides for the constitutional 85(5)(a) references as follows:

> (1) It is the intention of section 46 [relating to immunity afforded to an adjudicator] to alter or vary s 85 of the *Constitution Act 1975*.
> (2) It is the intention of section 28R [which includes the privation clause in s 28(5)] to alter or vary section 85 of the *Constitution Act 1975*.
>
> [87] Critically, there is no reference in the Act to altering or varying s 85 of the Constitution Act in relation to any other matter, including the grant of relief by way of *certiorari*. It follows, in my opinion, that no implication can arise in construing the Act which has this effect. Indeed it could be said that the implication operates in the opposite direction. Having specifically turned its mind to the matter of which provisions in the Act should operate to limit the jurisdiction of the Supreme Court under the Constitution Act, it appears to have been the intention of the Legislature not to limit the Court's jurisdiction by excluding or restricting judicial review by the Court of a determination of an adjudicator under the Act.
>
> [88] In my opinion, an adjudication determination is susceptible to the writ of *certiorari* because it affects rights in the relevant sense. Although an adjudication determination cannot finally resolve all of the rights of the parties under the applicable construction contract, which are left to be determined by later proceedings in the event of dispute, nevertheless, an adjudication determination does have the effect of finally determining the right of a claimant to immediate payment of its progress claim. This has a discernable or apparent legal effect upon rights, sufficient to found *certiorari*: *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149; 70 ALJR 286 at 159 (CLR) per Brennan CJ, and Gaudron and Gummow JJ. In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, Beech J pointed to a number of features of the equivalent statutory scheme which operates in Western Australia: *Construction Contracts Act 2004* (WA), in arriving at a similar conclusion: *O'Donnell Griffin* at [100].

Vickery J, in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426 (25 September 2009), was asked to reconsider his judgment on the availability of a *certiorari* remedy in the context of a security of payment adjudication determination. His Honour declined to do so.

The judgment concludes that although an adjudicator is not an inferior court, the powers which an adjudicator exercises is amenable to *certiorari*, in that, an adjudication determination, not only satisfies the "legal rights test", see [48] of the judgment, but despite the fact that adjudication proceedings under the Act are markedly circumscribed does not detract from their "judicial" character.

His Honour again distinguished *Brodyn* because of the provisions of the *Constitution Act 1975* (Vic). At [97] of *Grocon*, Vickery J said:

> Critically, there is no reference in the Act to altering or varying s 85 of the Constitution Act in relation to any other matter, including the grant of relief by way of *certiorari*. It follows, in my opinion, that no implication can arise in construing the Act which has this effect. Indeed it could be said that the implication operates in the opposite direction. Having specifically turned its mind to the matter of which provisions in the Act should operate to limit the jurisdiction of the Supreme Court under the Constitution Act, it appears to have been the intention of the Legislature not to limit the Court's jurisdiction by excluding or restricting judicial review by the Court of a determination of an adjudicator under the Act.

At [102], his Honour concluded, thus:

> For the reasons which I have expressed, in my opinion, relief in the nature of *certiorari*, on all of the grounds available under the writ, including any error on the fact of the record, is not excluded either expressly or by implication under the Act in Victoria. The prerogative writ may be invoked in relation to the determination of an adjudicator under the Victorian Act where it is open to do so. In this respect, I am unable to follow *Brodyn*.

In *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd (No 2)* [2009] VSC 459 (8 October 2009), Vickery J, at [18], emphasised that under s 27 of the earlier Victorian Act the Court retained a discretion as to whether or not to enter judgment. His Honour stated that that discretion was not excluded by the terms of that Act, and stressed that "no step has been taken by the Legislature pursuant to s 85 of the *Constitution Act 1975*, to limit the inherent jurisdiction of the Supreme Court in this respect". At [21], his Honour held that in cases where there was an application to enter judgment under s 27 of the Old Act, it was appropriate, in his Honour's view, to approach the matter by applying the closely analogous procedure for the entry of a summary judgment pursuant to O 22 of the *Victorian Rules of Court*.

In Note 11, appended to his Honour's judgment, his Honour compared the position under the Old Act and that of s 28R of the New Act, and said:

> Cf. the position pursuant to s 28R of the New Act which provides *inter alia* for a facility to challenge an adjudication determination or a review determination in the course of seeking to set aside a judgment entered under the section: s 28R(5)(b). Pursuant to s 28R(5)(a)(iii) no challenge to an adjudication determination or a review determination is permitted. Further, pursuant to s 28R(5)(b) the party bringing the challenge must pay into the court as security the unpaid portion of the amount payable pursuant to adjudication determination or a review determination the pending the final determination of those proceedings: s 28R(5)(b). Further, unlike s 25 of the Old Act, s 28R of the New Act has been passed by the Legislature in compliance with s 85 of the : s 51 of the New Act. The restrictions imposed on the jurisdiction of the Supreme Court by s 28R are thereby rendered valid. By way of contrast, there is no equivalent expression of intention contained in the Old Act in relation to s 25: s 51 of the Old Act.

In *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 680, one of the issues which Vickery J was called upon to determine, after his Honour quashed certain aspects of the adjudicator's determination, was whether or not those parts of the adjudication determination, which were the subject of his Honour's holding that they should be quashed, should be remitted and, if so, whether to the same or a different adjudicator. His Honour said:

> [22] During argument I was directed to a decision of this Court in *Vegco Pty Ltd v Gibbons* [2008] VSC 363; (2008) 30 VAR 1. That proceeding involved an application for judicial review under O 56 of the *Supreme Court (General Civil Procedure Rules) 2005* (Vic) in relation to an opinion of a medical panel which answered two medical questions and provided an assessment on the degree of a compensation claimant's impairment arising from a work injury. The application was upheld and the opinion quashed on the grounds that the panel both committed jurisdictional error in taking into account an irrelevant consideration and breached the rules of natural justice. Addressing a submission that the medical questions ought to be remitted to a differently constituted panel, Kyrou J (as his Honour then was) observed:
>
> > Successful applicants in judicial review and appeal proceedings to the trial division of this Court frequently seek remittal to a differently constituted primary decision-maker when the primary decision is set aside and the matter is remitted. If orders are made by this Court as a matter of course requiring decisions to be remade by a differently constituted primary decision-maker, this may have serious resourcing implications for primary decision-makers and add to the costs and delays of the decision-making process.
>
> [23] His Honour went on:
>
> > For the Court to be persuaded to order remittal to a differently constituted primary decision-maker, good reason for doing so, based on established principles, must be shown by the party seeking such an order. The guiding principle is that remittal will be to a differently constituted primary decision-maker where there is some feature of the conduct or reasons for decision of the primary decision-maker which would

render it unfair to the successful party or give the appearance of unfairness to that party (whether arising from strongly expressed views on key issues, adverse findings on the credit of witnesses, apprehended bias or otherwise) if the matter were remitted to the same decision-maker or where it would be impracticable for the same primary decision-maker to re-determine the matter.

[SOP25.740] Western Australia — curial review of an adjudicator's determination

There is no provision in the Western Australian Act containing provisions similar to those set out in s 25(4) at [SOP25.760]. The enforcement of an adjudication determination in Western Australia takes place under s 43.

Section 43(2) provides that a determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect. Nothing is stated as to the grounds upon which such leave may be opposed. Presumably, as cross-claims are not excluded, they may be raised in opposition to an application to have the determination enforced.

In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* (2008) 36 WAR 479; [2008] WASC 58, Beech J was confronted with similar questions. His Honour correctly, with respect, held that as the relevant section of the Western Australian Act does not expressly identify the matters relevant to the question as to whether leave should be granted under s 43(2), the Court consequently, in exercising the power to grant leave, must have regard to the context, objects, purpose and policy of the legislation, so far as they may be discerned from the legislation and relevant secondary material. His Honour drew a parallel at [44] of his judgment between the provisions of s 43 on the one hand and s 33 of the *Commercial Arbitration Act 1984* (NSW) on the other, and referred to the decision of Rolfe J in *Cockatoo Dockyard Pty Ltd v Commonwealth of Australia* (1994) 35 NSWLR 689, where the following was stated:

> In my opinion s 33 of the Act does not provide another method whereby a party may call in question the award of an arbitrator and, although perhaps under another guise, provide the court with the power to reverse what the arbitrator has done …
>
> In my opinion, s 33 is not a dispute resolving provision referring a matter the subject of arbitral proceedings to the court. It provides a summary procedure whereby awards may be enforced "in the same manner as a judgment or order of the court to the same effect", and allows judgment to be entered in terms of the award. In the context of the Act that cannot, in my opinion, mean the court is given power under s 33 to reconsider whether the award should have been made and, if for some reason it concludes that it should not, to refuse to enforce the award.
>
> Prima facie, and so much was conceded by Mr Bennett, a party with the benefit of an award can seek to enforce it by resort to s 33. It is necessary for a party resisting an order under s 33 to establish a reason why the award should not be enforced. A reason may be that the court considers the award is arguably vitiated by appealable error, or by other circumstances making it susceptible of being set aside in accordance with the provision of the Act. In other words it may well be an appropriate exercise of the court's discretion not to grant leave if an application for leave to appeal is on foot or if an application has been made to set aside [the] award, for example, on the ground of misconduct. However unless an attempt is being made to have the award set aside I have difficulty envisaging other circumstances in which the discretion can be exercised. Certainly I do not regard s 33 as a "back door" method of appealing against an award insofar as it constitutes a decision by the arbitrator how he should exercise his discretion. The discretion given does not include, in my opinion, an ability to re-visit the way in which the arbitrator exercised his discretion where, otherwise, his discretion is not subject to attack in accordance with the Act. A contrary conclusion would, I believe, be totally at odds with the obvious intention and philosophy of the Act.

At [45], his Honour noted that the following decisions followed Rolfe J's construction of s 33 in *Cockatoo*: *Diploma Construction Pty Ltd v Windslow Corporation Ltd* [2005] WASC 74 at [7]–[9], [17]; *Doric Building Pty Ltd v Marine & Civil Construction Co Pty Ltd* [2005] WASC 155 at [64]–[65]; *Premium Grain Handlers Pty Ltd v Elite Grains Pty Ltd* [2005] WASC 103 at [8]–[9]; *Devaugh Pty Ltd v Lamac Developments Pty Ltd* [2000] WASC 314 at [14], [16]; *Miles v Palm Bridge Pty Ltd* [2001] WASC 113 at [7].

At [47], his Honour concluded that the same criteria should apply in determining the discretionary grounds under s 43 for the grant or refusal of leave.

Under s 31(2)(iv) of the Western Australian Act, an adjudicator must dismiss an adjudication application if he/she is satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time, or an extension of it, is not sufficient for any other reason.

This is a most sensible and useful provision which should be found in every other State and the Northern Territory Acts. The provision caters for the problem that arose in the *CIB Properties Ltd v Birse Construction Ltd* [2005] 1 WLR 2252; [2005] BLR 173; [2004] EWHC 2365. If the matter is very complex or if any of the other criteria set out in this subsection apply, and the adjudicator does not dismiss the adjudication, the question that then arises is whether or not his/her failure to do so, is a ground for administrative review as provided for in s 46(2) of the Western Australian Act and, if so, whether the issue of complexity is to be determined subjectively or objectively. That is, obviously, a matter that will have to be worked out in due course by the Western Australian Courts.

The Western Australian Act, in s 46(1)–(3) provides as follows:

Review, limited right of

(1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.

(2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

(3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

Consequently, *Brodyn* and *Transgrid* can have no application in Western Australia. An applicant for review of an adjudication must bring its case within the provisions of the *State Administrative Tribunal Act 2004*, the relevant sections of which are:

(a) s 27(1)–(3) – under which the review of a reviewable decision before the Tribunal, and hence the review of an adjudication determination, is to be by way of a hearing *de novo*, and is not confined to matters that were before the decision-maker (the adjudicator) but may involve the consideration of new material whether or not it existed at the time the decision was made;

(b) s 31 – under which the tribunal may invite the decision-maker, and in this case, the adjudicator, to reconsider his/her decision;

(c) s 52 – under which compulsory conferences to identify and clarify the issues in the proceedings and promote the resolution of the matters, and in this case, the adjudication determination, by settlement between the parties;

(d) s 54 – which provides for the mediation of a dispute, and hence the mediation of a dispute concerning an adjudication;

(e) s 90 – under which the tribunal can issue an injunction;

(f) s 105 – which provides for an appeal from a tribunal's decision, and hence from its review of an adjudication determination, to the Court of Appeal of Western Australia "on a question of law" but with leave from the Court of Appeal; and

(g) s 106 – which provides for a stay pending the determination of an application for leave to appeal.

One must also have regard to s 6 of the Western Australian Act, which section provides:

> For the purposes of this Act, a payment dispute arises if –
>
> (a) by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed;
>
> (b) by the time when any money retained by a party under the contract is due to be paid under the contract, the money has not been paid; or
>
> (c) by the time when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

In *MRCN Pty Ltd t/as Westforce Construction and ABB Australian Pty Ltd* [2014 WASAT 135, it was held that ongoing commercial discussions about an invoice did not constitute a payment dispute. A payment dispute had to be clear and unequivocal.

In *MCIC Nominees Trust (t/as Capital Projects & Developments) v Red Ink Homes* [2013] WASAT 177, the State Administrative Tribunal of Western Australia considered a number of questions which arise in the reckoning of time permitted by s 26(1) of the Western Australian Act.

The Tribunal noted at [44] that under cl 7(3) of Sch 1 Div 5 of the *Construction Contracts Act 2004* (WA), it is provided that:

> Within 28 days after a party receives a payment claim, the party must do one of the following, unless the claim has been rejected or wholly disputed in accordance with subclause (1) –
>
> (a) pay the part of the amount of the claim that is not disputed;
>
> (b) pay the whole of the amount of the claim.

At [49], the Tribunal said:

> The common law rule however provides that the word "within" signifies the time by which a requirement, act or event must occur. The common law rule applies to specified events and specified dates. In calculating the period where an event is specified, the date of the event is excluded, as are fractions of a day (Prowse v McIntyre (1961) 111 CLR 264; [1961] HCA 79; per Windeyer J).

Although some defined form of curial review of an adjudicator's decision is called for, one is left to wonder whether a *de novo* hearing of all of the issues determined by the adjudicator with a possibility of the introduction of fresh evidence is destructive of the main purpose of the legislation. One can well imagine that the proceedings before the tribunal may take some time and may be followed by an application for a stay pending an application for leave to appeal on a point of law to the Court of Appeal of Western Australia. If in the meantime, arbitration proceedings take place, and the entire construction dispute is determined by arbitration, what appears to be left open in the legislation is the fate of the proceedings before the tribunal and the Court of Appeal.

One of the earliest decisions in Western Australia on the legislative provisions above, is in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [2005] WASAT 269 (4 October 2005).

The major matters decided in that case are as follows:

(a) The determination as to whether or not a payment claim under the Western Australian Act was made is a matter for the adjudicator without there being any right to review that issue in the State Administrative Tribunal. Accordingly, under s 46(2) of the *Construction Contracts Act 2004* (WA) (the CC Act), the tribunal reversed the adjudicator's decision and referred the matter back to the adjudicator to make a determination under s 31(2)(b) of the CC Act within 14 days.

(b) The proceedings before the tribunal, in accordance with the principle of open administration of justice, should be held in public.

(c) The whole scheme of the CC Act was inconsistent with the concept of a hearing *de novo* within the ordinary meaning of s 27(1) of the SAT Act. It was accordingly necessary to read s 27(1) down to the extent necessary to remove that inconsistency. Accordingly, any material provided to the tribunal that was not before the adjudicator would be disregarded, see [69]–[71].

In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [102], Beech J, bearing in mind the fact that an adjudication determination did not determine the parties' substantive rights, and taking into account the scheme of the Act as a whole, stated that an adjudicator had authority to determine questions of law authoritatively and wrongly, and therefore, the test for jurisdictional error (if *certiorari* does lie) is the same as that which would apply to an inferior court.

At [103], Beech J referred to *Re Carey; Ex parte Exclude Holdings Pty Ltd* [2006] WASCA 219; (2006) 32 WAR 501, where McLure JA summarised the five categories of jurisdictional error, in respect of inferior courts and analogous bodies, identified in *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58. McClure JA said:

> [181] The scope of jurisdictional error depends upon whether or not the decision-maker has authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law: Craig at 179. If it does not have authority to do either, there can be judicial review in the broad sense where the distinction between jurisdictional error and error within jurisdiction is of no practical significance. If the decision-maker has that authority, the Court's judicial review powers are confined to errors of jurisdiction in the narrow sense. The High Court in Craig identified five types or categories of such errors. It did not suggest the list was exhaustive. However, the appellants did not contend it should be expanded in any particular way to accommodate the errors in this case. The five categories are as follows. First, if an inferior court or an anomalous tribunal mistakenly asserts or denies the existence of jurisdiction. Second, if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Third, if it is an essential condition of the exercise of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied (which I understand to be a reference to a jurisdictional "fact") there will be jurisdictional error if the court or a tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the Court has jurisdiction to entertain. Fourth, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a precondition of the existence of any authority to make an order or decision in the circumstances of the case. Fifth, it will exceed its authority and fall into jurisdictional error if it misconstrues the statute establishing it and conferring jurisdiction and thereby misconceives the nature or the function which it is performing or the extent of its powers in the circumstances of the case.

Beech J pointed out that the summary above was adopted at [16] of *Re State Administrative Tribunal; Ex parte McCourt* (2007) 34 WAR 342; [2007] WASCA 125.

At [129] of his Honour's judgment in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, Beech J noted that in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46 at [32]–[50],

Mildren J, in the Northern Territory, dealing with a similarly worded section to s 46(1) of the Western Australia Act, came to the same conclusion.

At [122] of *O'Donnell Griffin*, Beech J held that the object of the Western Australian Act is advanced by a construction of s 46 of that Act, which:

(a) permits a right of review under s 46(1) in relation to questions arising under s 31(2)(a); and

(b) excludes the availability of prerogative relief in relation to jurisdictional error said to be constituted by failure to dismiss under s 31(2)(a).

At [121], his Honour pointed out:

> … an appeal to this court on a question of law would lie, with leave, from the decision of the *State Administrative Tribunal: State Administrative Tribunal Act 2004* (WA), s 105.

At [128] of *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, Beech J held that *certiorari* was not available in respect of any error regarding compliance with s 26 of the Western Australian Act (WA). For the sake of ease of reference, s 26 states:

1. To apply to have a payment dispute adjudicated, a party to the contract, within 28 days after the dispute arises or, if applicable, within the period provided for by section 37(2)(b), must –
    (a) prepare a written application for adjudication;
    (b) serve it on each other party to the contract;
    (c) serve it –
        (i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on the adjudicator;
        (ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;
        (iii) otherwise, on a prescribed appointor chosen by the party; and
    (d) provide any deposit or security for the costs of the adjudication that the adjudicator or the prescribed appointor requires under section 44(8) or (9).
2. The application –
    (a) must be prepared in accordance with, and contain the information prescribed by, the regulations;
    (b) must set out the details of, or have attached to it –
        (i) the construction contract involved or relevant extracts of it; and
        (ii) any payment claim that has given rise to the payment dispute; and
    (c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.
3. A prescribed appointor that is served with an application for adjudication made under subsection (1) must comply with section 28.

In *Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35; [2011] WASC 172, Kenneth Martin J noted at [30] that s 46(3) of the Western Australian Act (WA), enacted in 2004, was six years before the decision in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1.

His Honour noted at [31] that s 41(3) may be read as a privative clause showing a legislative intent to totally exclude rights of review by prerogative writ of *certiorari*. His Honour noted in the same paragraph that Kirk clearly inhibited the achievement of such a wide exclusionary objective.

Kenneth Martin J proceeded thus:

> [32] The state of the law, post Kirk regarding jurisdictional error challenges now being understood as preserved for State courts by reason of Ch III of the Constitution was uncontroversial between the parties. In *Thiess Pty Ltd v MCC*, Corboy J summarised the effect of Kirk as regards s 46(3) at between [78] - [82]. His Honour said [80]:
>
> > So construed, I consider that s 46(3) does not prevent an aggrieved respondent from seeking prerogative relief in respect of a decision by an adjudicator to refuse to dismiss an adjudication application under s 31(2)(a).
>
> [33] His Honour then continued [81]:
>
> > In any event, State legislation may preclude judicial review by a State Supreme Court for error of law on the face of the record but not for jurisdictional error: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1.
>
> [34] I agree. Corboy J was referring to Kirk at [100], where the plurality had said:
>
> > This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.
>
> [35] The present application is different to those dealt with by Beech J in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 and by Corboy J, in Thiess. I am not dealing with scenarios of an adjudicator's summary dismissal, or refusal to summarily dismiss, an application under s 31(2)(a). The underlying facts presenting in the present case saw this adjudicator, Mr Anstee-Brook, reach his determination on the merits.

Kenneth Martin J at [67] of *Graham Anstee-Brook* noted that in some cases, the failure to give reasons may constitute the failure to exercise jurisdiction. His Honour referred to cases such as *Donges v Ratcliffe* [1975] 1 NSWLR 501 at 511 and *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 277.

In *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217, the issue was whether State Administrative Tribunal of Western Australia had jurisdiction under s 46(1) to review a decision "not to dismiss an application" under s 31(2)(a) of the Western Australian Act. At [18], McLure P noted that under s 31(2)(a) of the Western Australian Act, the adjudicator does not decide an interlocutory application made by a party, but acts on his own motion, and it followed therefore that a failure or omission to dismiss is not a decision under s 31(2)(a)Western Australian Act.

The Tribunal had dismissed the application for review, following its earlier decision in *Match Projects Pty Ltd and Arccon (WA) Pty Ltd* [2009] WASAT 134, in which it was decided that such decisions are not open to review under s 46(1).

At [79], of *Perrinepod* above, Murphy JA came to the conclusion that the reference in s 46(1) to "a 'decision made under s 31(2)(a)' can only be a decision to dismiss an adjudication application without making a determination on the merits." The grounds upon which his Honour came to this decision, in which McLure P and Martin CJ concurred, are set out in [80]–[93].

At [94], Murphy JA, with McLure P and Martin CJ concurring, said the following:

> The above analysis would lead me, respectfully, to disagree with Beech J's construction of s 46(1) in O'Donnell, and toward the view that the conclusion reached by the Tribunal in *Match Projects* was correct. …

At [118] of *Perrinepod*, Murphy JA noted his agreement with Beech J at [102] of O'Donnell, and with whom Corboy J, in *Thiess v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80 at [59], also expressed agreement, that an adjudicator's determination under s 31(2)(b) is not amenable to judicial review for a non-jurisdictional error of law.

This paragraph from *Perrinepod* was referred to at [18] of *Re David Scott Ellis; Ex Parte Triple M Mechanical Services Pty Ltd (No 2)* [2013] WASC 161, where E M Heenan J said:

> [18] The limited rights of review permitted under the Act are described in s 46. They include a right to apply to the State Administrative Tribunal (SAT) but only respect of a decision made under s 32(2)(a) to dismiss an application without making a determination of its merits. This means that if an adjudicator wrongly dismisses an application without proceeding to an adjudication a way is open for the adjudication to take place under s 31(2)(b) within 14 days of the decision of SAT. Otherwise by s 46(3) a decision or a determination of an adjudicator cannot be appealed or reviewed. This is not regarded as an exclusion of judicial review - *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217 but, as shall be seen, it is an indication that the structure of the Act regards reviews as limited and restricted. It will be necessary to consider this further.

Kenneth Martin J at [16] of *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 summed up his Honour's view as to the limited grounds for challenging an adjudicator's determination under the Western Australian Act. His Honour said:

> … I refer generally to my earlier reasons in *Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* [29] - [41] and *Red Ink Homes Pty Ltd v Court* [2014] WASC 52 [66] - [92] as regards the policy of the *CC Act*. I also accept that no unduly technical or legalistic approach should be taken towards picking apart the reasons of an adjudicator, who frequently is a person without legal training and acting under a pressing time deadline. Nevertheless, where a clear jurisdictional error is shown in an adjudicator's decision, this court cannot turn a blind eye. Also see: *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217; (2011) 43 WAR 319 [7] - [8] (McLure P) and [120] [126] (Murphy JA, Martin CJ agreeing); *Re Scott Johnson; Ex parte Decmil Australia Pty Ltd* [2014] WASC 348 [52] (Beech J); *WQube Port of Dampier v Philip Loots of Kahlia Nominees Ltd* [2014] WASC 331 [8] (Chaney J); *Hamersley Iron Pty Ltd v James* [2015] WASC 10 [47] - [61] (Beech J); and *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd* [2015] WASC 60 [23] - [24] (Mitchell J).

In regard to s 46(3) and its relationship with s 46(1) of the Western Australian Act, Murphy JA concluded:

> [122] Section 46(3) is expressed in general language and does not resemble the typical form of privative clause directed to the supervisory jurisdiction of the court. It does not refer, in terms, to judicial review by a court, nor does it refer to the forms of prerogative relief: cf *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; [1990] HCA 44; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1. In

my view, the text of Section 46(3) does not even purport to exclude judicial review of adjudication determinations.

[123] Moreover, viewed in the context of Section 46, and the Act as a whole, and bearing in mind the principles set out in [121] above, s 46(3) is to be read as applying to review by the Tribunal only. The word "review" is a commonly used term and must take its meaning from its context: *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 26. The subject of s 46 is review by the Tribunal. That is expressly the case in subs 1 and subs 2. Although the prohibition in subs (3) is not in terms limited to Tribunal review, it is made subject to subs 1. It is consistent with that structure that subs 3 also be read as applying to Tribunal review. The word "review" in s 46(3) is, accordingly, in my view, intended to refer to the right of review to the Tribunal contemplated by s 46(1).

[124] Section 46(3) also provides that a determination by an adjudicator cannot be "appealed", except as provided by s 46(1). The Act does not, in s 46(1) or elsewhere, grant any right of "appeal" as such. Rights of appeal (or review, leaving aside judicial review) of decisions of this nature are purely creatures of statute: *Fleming v The Queen* [1998] HCA 68; (1998) 197 CLR 250 [17]; *Dwyer v Calco Timbers Pty Ltd* [2008] HCA 13; (2008) 234 CLR 124 [2].

[125] It is significant that in s 45(3), the word "appeal" is used when, evidently, the intention is to refer to a "review" under s 46(1). The prohibition forbidding an "appeal" in s 46(3) appears to serve no purpose other than to emphasise the absence of any other statutory right of review of any kind.

[126] The conclusion that s 46(3) does not preclude judicial review on the ground of jurisdictional error is reinforced by the observation that the words "a decision or determination of an adjudicator" in s 46(3) are to be construed consistently with the approach taken in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2, as only extending to decisions or determinations made in the valid exercise of jurisdiction conferred by the Act. As in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2, if s 46(3) were construed as excluding judicial review for jurisdictional error, those provisions of the Act which limit the jurisdiction conferred upon, relevantly, an adjudicator (such as s 31(2)(a)) would be deprived of any meaning or effect.

[127] Finally, in this context, I should note that Beech J in *O'Donnell* [122] considered that the primary object, described in the Second Reading Speech to "keep the money flowing", was advanced by a construction of s 46 which, in effect:

(1) permitted a right of review to the Tribunal under s 46(1) in relation to, relevantly, a "decision" "not to dismiss" under s 31(2)(a); and

(2) excluded the availability of prerogative relief in relation to jurisdictional error.

In *Perrinepod*, it was decided per Martin CJ, McLure P and Murphy JA in the Western Australian Court of Appeal that the failure or refusal to dismiss an adjudication application was not amenable to a judicial review for non-jurisdictional error of law. At [118] it was held as follows:

> Finally, although it is unnecessary to resolve in this appeal the scope of judicial review in respect of determinations under s 32(1)(b), I agree with Beech J in *O'Donnell* [102], with whom Corboy J has also expressed agreement in *Thiess v MCC* [59], that an appointed adjudicator's determination under s 31(2)(b) is not amenable to judicial review for non-jurisdictional error of law. I agree that the scheme and purpose of the Act, which, as the long title indicates, is "to provide a means for adjudicating payment disputes arising under construction contracts", is more consistent with an appointed

adjudicator being akin to an inferior court rather than an administrative tribunal for *certiorari* purposes, when exercising the power to make a determination under s 31(2)(b).

Further relevant comments on this issue are to be found at [6] of the judgment of the State Administrative Tribunal of Western Australia in *BGC Contracting Pty Ltd and Ralmana Pty Ltd t/a RJ Vincent & Co* [2015] WASAT 128, where the Tribunal said:

> Section 46(1) of the CC Act confers on the Tribunal the jurisdiction to review 'a decision made under section 31(2)(a)' of the CC Act. The application falls within the Tribunal's review jurisdiction conferred by the CC Act (s 17 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act)). The review may only be made by a person "aggrieved" by such a decision. A decision made under s 31(2)(a) of the CC Act is a decision to "dismiss" the application for adjudication brought by the applicant, without making a determination on the merits, if the application falls into one of the categories identified in s 31(2)(a)(i)¬(iv) of the CC Act (*Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217 (*Perrinepod*) per Murphy JA at [79] (with whom Martin CJ agreed) and McLure P at [15]. Although it is possible that a respondent to an application for adjudication may be aggrieved for the purposes of s 46(2) of the CC Act (Perrinepod per Murphy JA at [82]), in this case it is the applicant who is aggrieved, as it is the applicant's application for adjudication of its disputed payment claim that was dismissed rather than determined on the merits.

The Tribunal's conclusion on this issue is to be found at [9], where it is relevantly stated:

> The CC Act does not confer on the Tribunal the jurisdiction to review an adjudicator's decision not to dismiss (*Perrinepod* per Murphy JA at [79]; *Tormaz Pty Ltd and High Rise Painting Contractors Pty Ltd* [2012] WASAT 166).

The Tribunal addressed the question as to whether, in the circumstances of that case, the Tribunal was correct in summarily dismissing the claim. The Tribunal concluded that the adjudicator should not have summarily dismissed the claims. The Tribunal reasoned as follows:

> [37] The adjudicator recognised that an order may be an interlocutory or "interim" order or a final order. The applicant relied upon authority that final relief by a court may be granted by "order" rather than "judgment" and the distinction is based upon historical distinction between the nature of the proceeding (see: *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669). However, s 31(2)(a)(iii) of the CC Act describes what the "order" must be about for s 31(2)(a)(iii) of the CC Act to apply. The "order, judgment or other finding" referred to in s 31(2)(a)(iii) of the CC Act must be "about the dispute that is the subject of the application" for adjudication, not merely about the procedure by which the dispute will be advanced to a hearing before the court, after which a final dispositive judgment or other order will be made, depending on the nature of the claim. This is a fundamental distinction between substantive decisions, orders and laws and procedural decisions, orders and laws. Procedural laws and orders are those which "make the machinery of the forum court run smoothly" as opposed to substantive laws and orders which are "determinative of the rights of both parties" (*Tolofson v Jensen* [1994] 3 SCR 1022 at 1071 ¬ 1072; relied upon in *John Pfeiffer Pty Ltd v Rogerson* (2000) CLR 503; [2000] HCA 36 at [131] – [134]). Whilst it is acknowledged that there is no "bright line" between "substantive" and "procedural" decisions, orders and laws in the spectrum where one commences and the other ends, the Order is not substantive in the sense of being determinative of the rights and liabilities of the parties in relation to the matter comprised in CIV 1156. The Order simply directs the parties in the manner in which they must proceed so as to have the matter heard and determined by the Supreme Court. The Tribunal

> concludes that the Order in CIV 1156 is entirely about how the matter will proceed through to a final hearing and not 'about' the substantive matter of CIV 1156.
>
> [38] Therefore, even if there had been evidence before the adjudicator that the applicant as defendant/counterclaimant had filed a defence and counterclaim in CIV 1156 concerning the payment dispute (the subject of the application for adjudication) the Order in CIV 1156 was not "about" that payment dispute and the Order is not one that compelled the adjudicator to dismiss the application for adjudication. For this reason also, the Tribunal concludes that the adjudicator should not have dismissed the application for adjudication pursuant to s 31(2)(a)(iii) of the CC Act.

In so deciding, the Court appears to have differed from the judgments of Corboy J in *Thiess v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80 and the judgment of Kenneth Martin J in *Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35; [2011] WASC 172.

As held in *Perrinepod*, and for which see also [27] of *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, s 46(3) of the *Construction Contracts Act 2004* of Western Australia is not a privative clause which excludes the supervisory jurisdiction of the Court in respect of jurisdictional error. At [28] of *Cape Range*, Pritchard J noted that the use of the word "review" in s 46(3) of the Act refers only to a review by the State Administration Tribunal of the kind referred to s 46(1) of the Act.

Perrinepod Pty Ltd v Georgiou Building Pty Ltd (2011) 43 WAR 319; [2011] WASCA 217 was the subject of further discussion in *Modular Forms Pty Ltd v Cecich* [2015] WASAT 76, where the State Administrative Tribunal of Western Australia noted:

> [29] The respondents maintain that the decision of the Court of Appeal in *Perrinepod* at [81] (reproduced at [23] above) requires that a dismissal pursuant to s 31(2)(a) of the CC Act be "express" and not "by implication". The respondents contended at the hearing that this view is supported by Mitchell J in *Field Deployment Solutions Pty Ltd -v- SC Projects Australia Pty Ltd* [2015] WASC 60 (*Field Deployment*) at [65] and [66]:
>
> The second question of law identified by the appellant is:
>
> Does the Tribunal have jurisdiction to determine whether the adjudicator was right not to dismiss the application under section 31(2)(a)(i)?
>
> Behind this question lies an assumption that the adjudicator in this case did decide not to dismiss the appellant's adjudication contract under s 31(2)(a)(i) of the Act. *I am not satisfied that the adjudicator did make such a decision in this case. He did not do so expressly*. The appellant postulates that the adjudicator must have implicitly not been satisfied that the Agreement was not a construction contract. However, there is nothing to exclude the possibility that the adjudicator did not consider the issue because he did not have to do so in order to determine that the appellant's adjudication application must be dismissed. (emphasis added)

At [30] of *Cape Range*, his Honour went on to say:

> Clearly, an application to this court for a declaration as to the invalidity of a determination made by an adjudicator is not a review of the kind contemplated by s 46(1) of the Act. Accordingly, s 46(3) does not preclude Austral's application for declaratory relief in respect of the Determination on the ground that the determination is invalid. Counsel for Cape Range ultimately accepted, albeit reluctantly, that this was so.

Pritchard J in *Cape Range* above at [83] and EM Heenan J in *Ellis [No 2]* below at [75], [79] followed Murphy JA in *Perrinepod* where his Honour equated a jurisdictional error in an adjudication to an inferior court rather than from a tribunal.

That approach was taken as well by Kenneth Martin J at [85] of *Red Ink Homes Pty Ltd v Court* [2014] WASC 52.

At [91] of *Red Ink*, Kenneth Martin J adopted and applied Prichard J's observation in *Cape Range* as to the informal nature of the adjudication process. His Honour said:

> [I]n assessing whether an adjudicator has made errors of a kind which would render a determination invalid, it would be entirely inapt to engage in a "line by line" scrutiny of a determination. To do so would be to risk descending into a merits review of an adjudicator's determination. Further, an approach of that kind would have the potential to undermine the objectives of the CC Act to facilitate an informal and speedy means for resolving payment disputes between parties to construction contracts, while preserving a right to litigate or arbitrate about any substantive areas of dispute underlying those payment disputes [58].

See further *WQUBE Port of Dampier v Philip Loots of Kahlia Nominees Ltd* [2014] WASC 331 per Chaney J.

In *Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd* [2014] WASC 206, Acting Master Gething noted that had Doric sought leave to enforce the adjudication determination, Kellogg could have raised the concerns set out in its judicial review application and the court would have had regard to them in considering whether or not to grant leave to enforce the adjudicator's determination.

At [40] et seq of *Kellogg*, Acting Master Gething undertook a comprehensive review of the legal principles involved in setting aside a statutory demand. It is beyond the scope of this book to embark upon that subject.

A further examination of the limited rights permitted under the Western Australian Act for a curial review of an adjudicator's determination, as set out in s 46, was undertaken by E M Heenan J in *Re David Scott Ellis; Ex Parte Triple M Mechanical Services Pty Ltd (No 2)* [2013] WASC 161, where, for example, his Honour said at [18]:

> The limited rights of review permitted under the Act are described in s 46. They include a right to apply to the State Administrative Tribunal (SAT) but only respect of a decision made under s 32(2)(a) to dismiss an application without making a determination of its merits. This means that if an adjudicator wrongly dismisses an application without proceeding to an adjudication a way is open for the adjudication to take place under s 31(2)(b) within 14 days of the decision of SAT. Otherwise by s 46(3) a decision or a determination of an adjudicator cannot be appealed or reviewed. This is not regarded as an exclusion of judicial review - *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217 but, as shall be seen, it is an indication that the structure of the Act regards reviews as limited and restricted. It will be necessary to consider this further.

See further *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 40.

It is to be noted that in *Perrinepod* above, McLure P, in dealing with s 31(2)(a), held that there was some support for the view that timetables in the adjudication process cannot be ignored without immutable adverse consequences. In *Triple M Mechanical Services Pty Ltd v Ellis* [2013] WASC 67 at [16], E M Heenan J noted that this tentative view differs from that expressed by Le Miere J in *Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd* (2012) WASC 129 in which, without determining the question, his Honour plainly contemplated the possibility that there was at least a discretion vested in the adjudicator to continue to consider a response or annexures received after the expiration of the agreed time limit.

At [17] of *Triple M*, E M Heenan J referred to the view which was, in his opinion preferable, expressed by Gething C in the District Court in *Witham v Raminea Pty Ltd* [2012] WADC 1, where the time limits were considered to be mandatory. The issue was not finally decided in *Triple M*.

[SOP25.745] Western Australia – leave to appeal a decision of the State Administrative Tribunal of Western Australia concerning the review of an adjudication determination before it

Under s 105 of the *State Administrative Tribunal Act 2004* (WA), it is provided that an appeal from a decision of the Tribunal may be brought, on a point of law, with leave of the court to which the appeal lies.

The question as to whether or not leave to appeal under the aforesaid section should be entertained was considered by and determined by Mitchell J at [42] of *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd* [2015] WASC 60. His Honour said:

> In considering the merits of the appellant's arguments it is necessary to bear in mind the nature and limits of the appeal provided for by s 105 of the SAT Act. As Buss JA, with whom other members of the Court agreed, noted in *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 [53]:
>
> > An appeal "on a question of law" is narrower than an appeal that merely "involves a question of law". Where an appeal lies "on a question of law" the subject matter of the appeal is the question or questions of law. If a question raised by a litigant, properly analysed, is not a question of law, linguistic gymnastics in the formulation of the grounds of appeal cannot convert it into a question of law. A question of mixed law and fact is not a question of law within s 105(2).

Mitchell J, at [96] of *Field Deployment*, quoted the following passage of *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409, 419 per Moffitt P:

> It is not sufficient to show that some error of law appears in the judgment or during the course of the trial. The error has to be one upon which the decision depends, so the decision is vitiated by the error … It will not suffice to establish that one or some only of a number of alternative findings upon which the decision was given involved errors of law, if one alternative involved no error of law.

[SOP25.750] Queensland — curial review of an adjudicator's determination

However, in Queensland, the position is certainly different. McMurdo J in *Walton Construction (Qld) Pty Ltd v Salce* [2008] QSC 235 said at [6]:

> … this Court has jurisdiction to declare void an adjudicator's decision which was given without jurisdiction, quite apart from the operation of the Judicial Review Act: see, in particular, upon s 128 of the *Supreme Court Act 1995* (Qld). Under the equivalent statute in New South Wales, it is well established that where some necessary precondition of an adjudicator's power has not been satisfied, and an adjudicator has erroneously decided that it has been satisfied, such an error results in the adjudicator's decision being void, and not merely voidable, and it may be declared to be so. In *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, Hodgson JA (with whom Mason P and Giles JA agreed) said that:
>
> > [a] court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order [in] the nature of *certiorari*: see also *TransGrid v Seimens Ltd* [2004] NSWCA 395; (2004) 61 NSWLR 521 at 539 per Hodgson JA; *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd* [2007] NSWSC 1340 at [31] to [33]; *Hitachi Ltd v O'Donnell Griffin Pty Ltd* [2008] QSC 135 at [49]; *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205 at [29] to [30].

This judgment was cited by Margaret Wilson J at [7] of *Skinner v Timms* [2009] QSC 46.

The jurisdictional grounds relied on by Margaret Wilson J in *Skinner* are set out at [19] of her Honour's judgment as follows:

> I am satisfied that the adjudicator did not have jurisdiction to make the adjudication decision and that the adjudication decision is void because –

(a) Mr Timms was not entitled to a progress payment when he purported to make a progress claim;
(b) even if the progress claim was valid, Mr Skinner did not serve a payment schedule;
(c) in the absence of a payment schedule, Mr Timms was not entitled to make an adjudication application without giving Mr Skinner a second chance to serve a payment schedule in accordance with s 21(2);
(d) Mr Timms did not give Mr Skinner such a second chance;
(e) there was no valid adjudication application upon which the adjudicator could make an adjudication decision.

Chesterman J, at [46] of *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205, concluded that as the adjudicator had no jurisdiction to embark upon the adjudication, as he had determined a payment claim which was the subject of an earlier payment claim, and had given rise to a determination which had resulted in a judgment being entered, the applicant was entitled to a prerogative order quashing the adjudication, and a declaration that it was void.

Whilst *certiorari* remedies are not available to set aside an adjudication determination in any of the other States and Territories, the principle giving rise to the Hutchinson judgment is obviously valid and applicable in an action to have the adjudication determination declared void.

The Queensland Act makes no specific provision for the curial or other review of an adjudicator's determination.

In appropriate circumstances, the determination of an adjudication application by an adjudicator in Queensland was able, prior to the amending legislation below, to be reviewed under the *Judicial Review Act 1991* (Qld).

The grounds of the review under that Act are set out in ss 20 and 23 of the *Judicial Review Act 1991*.

Those provisions have been repealed by the *Justice and Other Legislation Amendment Act 2007* (Qld), but the provisions of the amending Act are apparently not retroactive.

In *JJ McDonald & Sons Engineering Pty Ltd v Gall* [2005] QSC 305, Duttony J held that the question as to whether or not the reference in an adjudication response to the payment schedule, without attaching it, was not a proper matter to be agitated under the aforesaid Act, as it was a question of fact against which there could be no curial challenge.

In *CBQ Pty Ltd v Welsh* [2006] QSC 235, Cullinane J (as his Honour then was), revisited the question as to when the construction contract was concluded in determining the adjudicator's jurisdiction.

At [34] of *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205, Applegarth J applied McDougall J's judgment in *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798.

The question remains as to whether or not following the amendments made to the *Judicial Review Act 1991* (Qld) by the *Justice and Other Legislation Amendment Act 2007* (Qld), decisions made under Pt 4, Div 2 of the *Building and Construction Industry Payments Act 2004* (Qld) are excluded from the ambit of the *Judicial Review Act 1991*.

At [40] of *Uniting Church in Australia Property Trust (Qld) v Davenport* [2009] QSC 134 (2 June 2009), Daubney J summarised the question thus:

> The second respondent says, however, that such relief is not available in the present case because, as a consequent of amendments made to the *Judicial Review Act 1991* (JRA) by the *Justice and Other Legislation Amendment Act 2007*, decisions made under Part 3 Division 2 of the BCIPA are excluded from the ambit of the JRA. By reason of that amending legislation, Part 2 of Schedule 1 of the JRA specifies Part 3 Division 2 of the BCIPA for the purposes of s 18(2)(b) of the JRA, with the

consequence that the JRA does not apply to "decisions made, proposed to be made, or required to be made" under 2 of the BCIPA. At it highest in respect of this argument, however, the present application is one for injunctive relief pursuant to s 43(2) of the JRA, which falls within Part 5 of the JRA, being the part dealing with prerogative orders and injunctions: see, for comparison, *Vis Constructions Ltd v Cockburn* [2006] QSC 416. It is far from clear that the inclusion of the BCIPA in Part 2 of Sch 1 of the JRA has the consequence of excluding an entitlement on the part of a contracting party to make application for injunctive relief under Part 5 of the JRA. On the one hand, Fraser JA in *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] QCA 213 expressed an inclination to the view that adjudications are no longer reviewable under any part of the *Judicial Review Act 1991*: see [78] and footnote 25.On the other hand, however, in *Intero Hospitality Projects Pty Ltd v Empire Interior (Aust) Pty Ltd* [2008] QCA 83, Chesterman J (as he then was) said at [60]–[64]:

> [60] The application for judicial review was brought pursuant to Part 5 of the *Judicial Review Act 1991* (Qld) (JR Act): see *Queensland v Epoca Constructions Pty Ltd & Anor* [2006] QSC 324 at [16]–[35]; *ACN 060 559 971 v O'Brien & Anor* [2007] QSC 91; *JJ McDonald & Sons Engineering Pty Ltd v Rics Dispute Resolution Service Qld & Anor* [2005] QSC 305; *Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Anor* [2007] QSC 333 at [39]–[43]. With the enactment of the *Justice and Other Legislation Amendment Act 2007* judicial review of adjudications made pursuant to the *Building and Construction Industry Payments Act 2004* (the Act) will no longer be reviewable pursuant to Part 3 of the JR Act.
>
> [61] Adjudications will, however, continue to be reviewable pursuant to Part 5 of the JR Act which regulates the jurisdiction the Court formerly had to control proceedings of inferior courts and domestic tribunals. The grounds on which review might be sought are those established by the well known principles of administrative law. They are of course more circumscribed than the grounds for review given by s 20, s 23 and 24 of the JR Act.
>
> [62] Mr Bond SC who appeared with Mr Hindman for the applicant held out the prospect that builders dissatisfied with adjudications will continue to seek judicial review of them, utilising the provisions of Part 5 and seeking guidance, no doubt, from the New South Wales jurisprudence in which there have been numerous attempts to review adjudications pursuant to the general principles of an administrative law *dehors* a *Judicial Review Act 1991*.
>
> [63] Section 48 of the JR Act (unlike s 13) applies to applications for judicial review brought under both Part 3 and 5. The observations of Muir JA that: "Judicial review of adjudicators' decisions sits uncomfortably with the Act's purpose of providing an expeditious, interim determination" and the remarks I made in Minimax that: "The salutary protection afforded to subcontractors by the Act will be sadly reduced if applications are routinely reviewed on any of the grounds appearing in s 20 of the JR Act"are as apposite to applications brought under 5 as to those formerly brought under Part 3.
>
> [64] Section 48 will continue to offer an appropriate means of protecting the efficacy of the *Building and Construction Industry Payments Act 2004* by discouraging applications for review, subject, of course, to the individual merits of particular cases.

At [41] of *Uniting Church in Australia Property Trust (Qld)* above, Daubney J stated that his preference was to adopt the approach of Chesterman J.

Uniting Church was cited to the Queensland Court of Appeal in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22 where the question arose as to the appropriate way to proceed to obtain a judicial review of an adjudicator's decision in Queensland.

At [9] of *Northbuild*, Margaret McMurdo P said:

> This Court did not hear detailed submissions as to the appropriate procedure to be followed in seeking relief from the Supreme Court in cases of jurisdictional error by decision-makers under legislation listed in sch 1 to the Judicial Review Act. The appellant's application to the Trial Division of the Supreme Court for a declaration was brought "Pursuant to section 128 of the *Supreme Court Act 1995* or alternatively the inherent jurisdiction of the Supreme Court, [for] a declaration". My preliminary view is that this was an appropriate way to proceed in view of s 58 *Constitution of Queensland*, s 56(2) *Supreme Court of Queensland Act 1991*, s 128 *Supreme Court Act 1995* and pt 5 Judicial Review Act.

Chesterman JA, who decided *Intero Hospitality Projects* above, after a detailed analysis at [23]–[31] of *Northbuild*, said importantly at [32] and part of [33]:

> [32] The result, it seems to me, is that *Brodyn* remains authority for its first proposition: that adjudications which do not comply with the essential statutory requirements are void and the court may, when non-compliance has been demonstrated, make declarations and/or grant injunctions to prevent a void adjudication being acted on. The second proposition reversed by *Chase Oyster Bar*, which in turn decided that the court has jurisdiction to grant prerogative relief with respect to adjudications affected by error on the face of the record or jurisdictional error cannot be applied in Queensland, at least without additional analysis, because of the complication, not present in New South Wales, afforded by s 18(2) and the inclusion of the Payments Act in the Schedule. What does s 18(2) of the JR Act mean for the Payments Act, and is its meaning affected by *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1?
>
> [33] The conclusion, which I think now should be accepted, that adjudication decisions under the Payments Act are not reviewable under the JR Act does not mean that the court's supervisory jurisdiction over adjudicators has been removed. That opinion is dictated by Kirk. If the effect of s 18(2) of the JR Act were to prohibit the exercise by the Supreme Court of its jurisdiction to grant prerogative relief the section would be unconstitutional and of no effect …

At [34], his Honour noted that s 18(2) is not in terms privative.

White JA also addressed this question in a detailed analysis commencing at [48] of his Honour's judgment in *Northbuild* tentatively held:

> By originating application filed 29 October 2009 Northbuild sought a declaration that the adjudication was void or liable to be set aside on the grounds that the adjudicator failed:
>
> - to consider or make a bona fide attempt to consider the issues raised by Northbuild in its payment schedule;
> - to make a bona fide attempt to consider Northbuild's submissions and/or supporting evidence contained in its adjudication response;
> - to consider issues raised by Northbuild in its payment schedule and adjudication response;
> - to take into account matters he was required to consider pursuant to sections 26(2)(a), 26(2)(b) and 26(2)(d) of the Payments Act.
>
> Northbuild sought orders setting aside or, alternatively, permanently staying the adjudication decision; an injunction to restrain CIL from requesting an adjudication certificate; an injunction restraining CIL from seeking to rely upon or enforce the adjudication decision; and an injunction directed to the adjudicator to restrain him from issuing an adjudication certificate to CIL.

At [51], White JA tentatively held:

> Accordingly, the relationship between the Judicial Review Act, particularly relief pursuant to Pt 5, the Payments Act and the survival of pre Judicial Review Act

> remedies in the nature of the prerogative writs does not squarely arise. However, these issues have been fully argued by counsel and the regular reliance on statements in *Brodyn* in Queensland courts which the New South Wales Court of Appeal has said recently are incorrect insofar as they might exclude review for jurisdictional error (*Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190) suggest that the appeal should be considered in that broader context. Before doing so, it is appropriate to look at the scheme of the Payments Act.

At [73], White JA asked what the effect of the 2007 amendments to the Judicial Review Act had on the availability of curial review, and pointed out that the Judicial Review Act, after 2007 insofar as it may impact on the BCIPA (the Queensland Act). Her Honour's analysis continued up to [80]. At [80], her Honour said:

> Accepting the criticisms which have been levelled at *Brodyn* on the question of the availability of prerogative review for jurisdictional error, Hodgson JA's observation that an adjudicator's purported decision would be void if it did not meet the statutory conditions essential for a valid decision are unexceptional. So, too, where the necessary level of procedural fairness had not been accorded to a party: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57. By quoting extensively from and relying on passages in *Brodyn* the primary Judge did not fall into error, since he considered whether the adjudicator had performed the task assigned to him by s 26 which did not require, in this case, any articulation of the distinction between adherence to "basic requirements" and jurisdictional error.

Northbuild was cited with approval in *John Holland Pty Ltd v Walz Marine Services Pty Ltd* [2011] QSC 39

In *Bloomer Constructions (Qld) Pty Ltd v O'Sullivan* [2009] QSC 220, White J embarked upon a detailed analysis of the authority and the legislation referred to above.

At [14], his Honour was of the opinion that the observations of Chesterman J above were obiter, since the Court was concerned with an application under Pt 3 and the relationship between s 13 of the Judicial Review Act and s 100 of the BCIP Act.

At [21] of Bloomer, White J concluded that the 2007 amendments to the Judicial Review Act apply to exclude the whole of that Act from the provisions of the BCIP Act relating to adjudicator's decisions. Nevertheless, at [23] of Bloomer, White J said:

> If an adjudicator enters into an adjudication in respect of which he had no jurisdiction or, conversely, declines to carry out an adjudication which comes within the purview of the Act, he has fallen into jurisdictional error and the court has power under s 128 Supreme Court Act to declare the adjudication void for want of jurisdiction or, as the case might be. It is unnecessary, on this application, to go further and consider whether this court's inherent power to control error in subordinate or inferior courts and tribunals extends to the decision of an adjudicator under the BCIP Act: *Musico v Davenport* [2003] NSWSC 977 at [55], or whether that power extends to other examples of error such as failure to accord natural justice beyond what the BCIP Act requires. The legislature clearly does not want the process of speedy cash flow for contractors frustrated by access to the courts "obtained from the rear": *Musico* at [28]–[41].

In *ACN 060 559 971 v O'Brien* [2008] 2 Qd R 396; (2007) 23 BCL 421; [2007] QSC 91 (19 April 2007), Mullins J, at [16], said:

> [16] The applicant submits that the decision of the first respondent is reviewable under the *Judicial Review Act 1991* ("JRA") as it satisfies the tests set out at (a) of the definition of "decision to which this Act applies" in s 4 of the JRA. The applicant submits that is consistent with the conclusion reached in other judgments in the Trial Division of this Court including *Queensland v Epoca Constructions Pty Ltd* [2006] QSC 324 (*Epoca*) at [16] to [35] and *JJ McDonald & Sons Engineering Pty Ltd v Gall* [2005] QSC 305 (cf *Vis Constructions Ltd v Cockburn* [2006] QSC 416 at [42]).

> Although SSM argued the application on the assumption that the first respondent's decision was reviewable under the JRA as a decision of an administrative character made under an enactment, it expressly preserved its position to argue otherwise on an appeal. For the reasons given in *Epoca*, I consider that the first respondent's decision is one to which Pt 3 of the JRA applies.

It seems to be that on the balance of authorities in Queensland, the amendment to the Judicial Review Act above, exclude curial review of an adjudicator's determination. However, the Queensland Supreme Court has jurisdiction to declare void an adjudicator's decision which was given without jurisdiction, quite apart from the operation of the Judicial Review Act . What the appropriate circumstances are is a matter that will still have to be decided in the Queensland courts.

At [10] of *Phoenix Project Development Pty Ltd v On Hing Pty Ltd* (2007) 27 Qld Lawyer Reps 213; [2006] QDC 75, a case decided on the assumption that the Judicial Review Act still applied and provided curial remedies against an incorrect adjudication determination, District Court Judge Alan Wilson SC referred to *Brodyn*. His Honour observed that the legislature intended certain matters to be determined finally by the adjudicator, and to preclude the parties from raising separate or new triable issues subsequently.

In *Cant Contracting Pty Ltd v Casella* [2006] QSC 242, a case also decided on the assumption that the Judicial Review Act still applied and provided curial remedies against an incorrect adjudication determination, de Jersey CJ cited, with approval, a passage from Hodgson JA's judgment at [82] in *Brodyn*.

In *Queensland v Epoca Constructions Pty Ltd* [2006] QSC 324 per Philippides J, held at [22] that Brodyn was not of assistance to the distinct issue of whether the Queensland Act was excluded from the ambit of the Judicial Review Act. Her Honour stated at [26] that the Judicial Review Act was not excluded by necessary implication.

Brodyn and New South Wales authorities following that were applied by McMurdo J in *Nebmas Pty Ltd v Sub Divide Pty Ltd* [2009] 2 Qd R 241; [2009] QSC 92.

It was noted by Applegarth J at [19] of *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205, what was said by Hodgson JA at [52]–[54] of Brodyn in regard to the basic and essential requirements for an adjudicator's determination to have the strong legal effect provided by the Act.

At [20] of *John Holland*, Applegarth J said that Hodgson JA's approach in *Brodyn* has been adopted in Queensland in *Hitachi Ltd v O'Donnell Griffin Pty Ltd* [2008] QSC 135; *Walton Construction (Qld) Pty Ltd v Salce* [2008] QSC 235; *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205.

In *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2009] QSC 165, P Lyons J surveyed the authorities to the effect that a condition of validity of the exercise of an adjudicator's power is that the adjudicator has acted in good faith. His Honour said:

> [32] It may be correct to say that a decision which displays an extreme degree of unreasonableness akin to that described in *Associated Provincial Picture House Ltd v Wednesbury Corporation* is not a decision for the purposes of s 26 of the Payments Act. Otherwise, I do not consider an adjudicator's decision purporting to be made under the *Payments Act* will be invalid if it is not "reasonable". The *Payments Act* seeks to provide a mechanism for obtaining a decision which will be quick, but in a sense, provisional. It does not seem to me, consistent with the general object and tenor of the Act, to impose a requirement of "reasonableness".
>
> [33] I am therefore of the opinion that the test advanced on behalf of *QBWSA* is too widely formulated. If the broad test for good faith is to be adopted, then what is required is a genuine attempt to exercise the power in accordance with the provisions in the Payments Act. Specifically, in relation to a consideration of the construction contract, what is required is a genuine attempt to understand and apply that contract.

Intero Hospitality Projects Pty Ltd v Empire Interior (Aust) Pty Ltd [2008] QCA 83 was referred to by Applegarth J in *John Holland* at [30].

At [33] of *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205, Applegarth J cited with approval Einstein J's summary in *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205 of the requirements of natural justice for the validity of an adjudication determination.

At [38] of *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; [2009] QSC 205, Applegarth J applied McDougall J's judgment in *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399.

Holmes JA, with the concurrence of Fraser JA and Fryberg J, at [39] of *Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq)* [2010] QCA 7, rejected the argument that the availability of review under the Act, and its subsequent removal by amending legislation, created a different statutory matrix justifying a departure from the *Brodyn* principles. His Honour said:

> … If anything, it seems to me that the amendment to the JJudicial Review Act brought the availability of challenge to judgments based on adjudicators' decisions squarely into line with the position as it exists in New South Wales, reinforcing the appropriateness of following Brodyn on this point. From that follows an acceptance that s 31(4) [Qld Act] does not preclude a declaration that the adjudicator's determination is void, or the setting aside of a judgment obtained by the filing of the adjudication certificate, where there is no valid determination.

In *Hansen Yuncken Pty Ltd v Ericson* [2010] QSC 156, McMurdo J recently sunmarised the respective sides of that controversy, and at [10]–[12], observed the following:

> [10] Firstly, thus far there does not appear to have been a consideration of the impact of *Brodyn* on this question. If *Brodyn* is to be followed in Queensland, it is by force of the Payments Act that relief in the nature of prerogative remedies for jurisdictional error is unavailable, quite apart from the 2007 amendment to the JR Act. *Brodyn* has been applied in a number of judgments in the trial division (although not on this question): *Hitachi Limited v O'Donnell Griffin Pty Ltd*; *Walton Construction (Qld) Pty Ltd v Salce*; *J Hutchinson Pty Ltd v Galform Pty Ltd*; *John Holland Pty Ltd v TAC Pacific Pty Ltd*; *Nebmas Pty Ltd v Sub Divide Pty Ltd*; *Spankie v James Trowse Constructions Pty Ltd* and *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*. And it appears to have been followed by the Court of Appeal in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd (in liq)*.
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> [11] Secondly, there appears to have been no discussion of whether s 18 of the JR Act, by providing that the JR Act does not apply, might have the effect of thereby qualifying the operation of s 41(1), so that the embargo upon the issue of the prerogative writs would not apply in relation to decisions under the Payments Act. Section 18 is not in terms that certain decisions cannot be judicially reviewed under that Act; it is in terms that the Act as a whole does not apply to them.
>
> [12] Thirdly, the availability of relief in the nature of the prerogative remedies would have to be considered now by reference to the recent judgment of the High Court in *Kirk v Industrial Court of New South Wales*, where in the joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, it was held that the supervisory jurisdiction exercised by State Supreme Courts to enforce the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Courts cannot be removed by legislation and that a statute affecting the availability of such remedies is effective only in the exclusion of the remedies in cases of non-jurisdictional error. In a thorough analysis undertaken by Vickery J in respect of the Victorian equivalent of the Payments Act in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* it was held that an adjudicator is amenable to *certiorari* as a public body exercising "governmental powers" as that concept was used in *Craig v South Australia*. If that is accepted, then the exclusion of relief in the nature of the

prerogative remedies, either by the Payments Act or by s 18(2) of the JR Act, in cases of jurisdictional error would seem to be invalid.

In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No 2)* [2013] QSC 67, Applegarth J considered the discretionary options open to a court where jurisdictional error was determined. His Honour held that jurisdictional error did not necessarily lead to a declaration of invalidity. The adjudication determination still had operational validity until set aside. For a more detailed discussion of his Honour's findings in regard to the options open to the court, see [SOP25.465].

At [31] of *Richard Kirk Architect Pty Ltd v Australian Broadcasting Corporation* [2012] QSC 177, Daubney J said the following:

> [31] RKA, therefore, sought to invoke the supervisory jurisdiction of this Court, contending, in effect, that the third respondent's decision did not meet the statutory conditions essential for a valid decision. It is convenient, in that regard, to repeat the following observations I made in *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd* [2011] QSC 293:
>
> > [18] The making of payment claims and the adjudication of disputed payment claims are governed by Part 3 of *BCIPA*. In *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22, White JA comprehensively explained the legislative background to and effect of the relevant provisions in Part 3. I respectfully adopt all that was said by her Honour without repeating it here at length. It is convenient, however, to quote the following:
> >
> > > [59] Part 3 Div 2, which is now excluded from the purview of the *Judicial Review Act*, deals with the adjudication of disputes about a payment claim by an adjudicator. A claimant may apply for adjudication of a payment claim if the respondent serves a payment schedule and the amount is less than the claimed amount or the respondent fails to pay the whole or any part of the amount identified for payment in the payment schedule, or, if the respondent fails to serve a payment schedule or fails to pay the whole or any part of the claimed amount by the due date. An adjudication application must be made to an authorised nominating authority chosen by the claimant and within quite limited time frames, for example, where a payment schedule has been received, within 10 business days. Apart from administrative matters, the adjudication application may contain the submissions relevant to the application which the claimant chooses to include. A copy must be served on the respondent. The authorised nominating authority must refer the application as soon as practicable to a person eligible to be an adjudicator under the provisions in the *Payments Act*. If the respondent has given a payment schedule, the respondent may give to the adjudicator a response to the claimant's adjudication application within either five business days after receiving a copy of the application or two business days after receiving notice of an adjudicator's acceptance of the application. A respondent cannot include in the response any reasons for withholding payment unless those reasons had already been included in the payment schedule served on the claimant. (citations omitted)

> [19] The Court of Appeal in *Northbuild Construction* also applied to decisions made under *BCIPA* the proposition drawn from *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1 that the legislature cannot exclude the power of a State Supreme Court to exercise its supervisory jurisdiction as to jurisdictional error in executive and judicial decision making. McMurdo P further observed that:
>
> > There is no doubt that an adjudicator's decision under the *Payments Act* is an administrative decision over which the Supreme Court of Queensland has a supervisory jurisdiction, despite s 18(2) *Judicial Review Act* ...

However, in Queensland, the position is certainly different. McMurdo J in *Walton Construction (Qld) Pty Ltd v Salce* [2008] QSC 235 said at [6]:

> … this Court has jurisdiction to declare void an adjudicator's decision which was given without jurisdiction, quite apart from the operation of the Judicial Review Act: see, in particular, upon s 128 of the *Supreme Court Act 1995* (Qld). Under the equivalent statute in New South Wales, it is well established that where some necessary precondition of an adjudicator's power has not been satisfied, and an adjudicator has erroneously decided that it has been satisfied, such an error results in the adjudicator's decision being void, and not merely voidable, and it may be declared to be so. In *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, Hodgson JA (with whom Mason P and Giles JA agreed) said that:
>
> > [a] court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order [in] the nature of *certiorari*: see also *TransGrid v Seimens Ltd* [2004] NSWCA 395; (2004) 61 NSWLR 521 at 539 per Hodgson JA; *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd* [2007] NSWSC 1340 at [31] to [33]; *Hitachi Ltd v O'Donnell Griffin Pty Ltd* [2008] QSC 135 at [49]; *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205 at [29] to [30].

This judgment was cited by Margaret Wilson J at [7] of *Skinner v Timms* [2009] QSC 46.

The jurisdictional grounds relied on by Margaret Wilson J in *Skinner* are set out at [19] of her Honour's judgment as follows:

> I am satisfied that the adjudicator did not have jurisdiction to make the adjudication decision and that the adjudication decision is void because –
>
> (a) Mr Timms was not entitled to a progress payment when he purported to make a progress claim;
>
> (b) even if the progress claim was valid, Mr Skinner did not serve a payment schedule;
>
> (c) in the absence of a payment schedule, Mr Timms was not entitled to make an adjudication application without giving Mr Skinner a second chance to serve a payment schedule in accordance with s 21(2);
>
> (d) Mr Timms did not give Mr Skinner such a second chance;
>
> (e) there was no valid adjudication application upon which the adjudicator could make an adjudication decision.

Chesterman J, at [46] of *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205, concluded that as the adjudicator had no jurisdiction to embark upon the adjudication, as he had determined a payment claim which was the subject of an earlier payment claim, and had given rise to a determination which had resulted in a judgment being entered, the applicant was entitled to a prerogative order quashing the adjudication, and a declaration that it was void.

Whilst *certiorari* remedies are not available to set aside an adjudication determination in any of the other States and Territories, the principle giving rise to the Hutchinson judgment is obviously valid and applicable in an action to have the adjudication determination declared void.

[SOP25.760] Northern Territory — curial review of an adjudicator's determination

Under s 33(1)(a), the adjudicator has power to dismiss an application without making a determination of its merits, if:

> (i) the contract concerned is not a construction contract;
>
> (ii) the application has not been prepared and served in accordance with section 28;
>
> (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or
>
> (iv) satisfied it is not possible to fairly make a determination –
>
> (A) because of the complexity of the matter; or
>
> (B) because the prescribed time or any extension of it is not sufficient for another reason; …

Under s 33(1)(b), the adjudicator must otherwise determine what amount is to be paid, or security to be returned, and any interest payable under s 35, on the balance of probabilities. Under s 48(1), it is provided that a person who is aggrieved by a decision made under s 33(1)(a), ie a dismissal of the adjudication application, may apply to a local court for review of that decision. Under s 48(3), it is provided that, except for a local court review of a s 33(1)(a) decision, a decision or determination of an adjudicator on an adjudication, cannot be appealed or reviewed.

In *Total Development Supplies Pty Ltd v GRD Building Pty Ltd* [2007] FCA 2032 (17 December 2007), Reeves J, in the Federal Court, considered an application for an anti-suit injunction to prevent GRD pursuing the local court appeal. At [10], his Honour held:

> [T]he Local Court appeal proceedings could only have the effect of being vexatious or oppressive if complete relief may be had in the proceedings in this court in the sense that there is nothing to be gained by the Local Court appeal proceedings over and above what may be gained in the proceedings in this court: see *CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33; 189 CLR 345. Under the express provisions of s 48 of the *Construction Contracts (Security of Payments) Act*, GRD can only obtain a review of the adjudicator's decision in the Local Court. It cannot seek that review in this court. Thus GRD has something to gain by its Local Court appeal proceedings that it cannot gain in these proceedings. The situation is somewhat akin to the statutory treble damages that CSR was able to claim against *Cigna* in the US proceedings under the Sherman Act that led the High Court to set aside the anti-suit injunction in that case: see *CSR* at 399. It follows that the Local Court appeal proceedings do not have the effect of being vexatious or oppressive and TDS's application for an anti-suit injunction to prevent them continuing must be dismissed. Furthermore, because TDS's alternative application to stay the Local Court proceedings essentially relies upon the same ground, viz vexation or oppression, it too should be dismissed.

Under s 45, an application can be made to a court of competent jurisdiction to have the adjudication determination enforced in the same way as a judgment or order of the court to the same effect and, if leave is granted, judgment may be entered in terms of the determination. Presumably, under the Northern Territory Act, as well, as there is no prohibition against a cross-claim, an appropriate cross-claim may be invoked in opposition to a leave to enforce application.

There is a reasonable argument that obtains, that if the adjudication is void, for one or more of the *Brodyn* and/or *Transgrid* reasons, then notwithstanding the provisions of

s 48(3), which for the sake of ease of reference is repeated below:

> (3) Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

such grounds may be raised in opposition to an application to enforce the adjudication determination.

Hiley J at [31] of *Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd* [2014] NTSC 22 agreed with Mildren J's in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14; [2009] NTSC 4 at [13], where Mildren J said:

> Section 48(3)of the Act contains a privative clause. Except as provided by s48(1) (which applies only where the adjudicator dismisses the application under s33(1)(a)), a decision of an adjudicator cannot be appealed or reviewed. However, given the nature of the tribunal which the Act provides for, this provision does not prevent the Court from declaring that a determination is void for jurisdictional error of a kind where the tribunal wrongly construes the Act. I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction. ... In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits.

At [32] – [39] of *Axis*, Hiley explained:

> [32] The other two judges in AJ Lucas, Riley J (at [16]) and Southwood J (at [51]), agreed with Mildren J that Section 48(3) of the Act does not prevent the Supreme Court from declaring that a determination of an adjudicator is void for jurisdictional error where the adjudicator wrongly construed the Act.
>
> [33] Section 33(1)(a) was discussed by Southwood J in AJ Lucas, Riley J agreeing. At [32] – [34] his Honour said:
>
> > [32] The structure of Section 33(1) of the Act is such that the jurisdiction of an adjudicator to embark upon the adjudication for an application on the merits depends upon the adjudicator in fact reaching a state of satisfaction that certain prescribed criteria are met: R v Federal Court of Australia; *Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113; [1978] HCA 60 at 125. The prescribed criteria being those set out in s33(1)(a)(i) to (iv) of the Act. If the criteria are not satisfied, the adjudicator must dismiss the application without making a determination on the merits. The existence of such a state of satisfaction is a condition precedent to an adjudicator embarking upon a consideration of an application on the merits.
> >
> > [33] The statutory criteria set out in s33(1)(a)(i) to (iv) are of such a nature that the satisfaction of the adjudicator as to whether they have been fulfilled or not must be both reasonable and founded upon a correct understanding of the law. A reasonable and legally correct state of satisfaction is a necessary jurisdictional fact. If such a jurisdictional fact does not exist, an adjudicator would be acting in excess of jurisdiction if he made a determination of an application on the merits. The adjudicator cannot give himself jurisdiction by erroneously deciding that the fact or event exists: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; [1999] HCA 21 at [127] per Gummow J.
> >
> > [34] Such a construction of Section 33(1) of the Act is based in the first instance upon the text of the section.Section 33(1)(a) expressly provides that the adjudicator must dismiss the application without making a determination of its merits if the criteria set out in s33(1)(a)(i) to (iv) are not fulfilled. The criteria themselves are aimed at ensuring the application to be adjudicated is about a payment dispute in respect of a payment claim made under a construction contract, the application has been commenced reasonably promptly and the subject matter of the application is not too complex and its resolution will not take too long. The express purpose of the Act is confined

> to promoting the security of payments under construction contracts. The object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts; providing for the rapid resolution of payment disputes arising under construction contracts; and providing mechanisms for the rapid recovery of payments under construction contracts. The object of the adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.

[34] In K & J Burns, after quoting what Mildren J had said in *AJ Lucas* at [13] and what Southwood J had said in *AJ Lucas* at [32], Kelly J said, at [104]:

> *AJ Lucas* is therefore authority for the proposition that a decision of an adjudicator is not reviewable merely because he wrongly decides that the prescribed criteria in s33(1) (and by extension s28) are met, but that that if an adjudicator wrongly construes the Act on a matter going to his jurisdiction, then his purported determination is not a determination and is amenable to judicial review.

[35] And, at [107]:

> That is to say, a purported determination by an adjudicator is reviewable by the court if, by reason of misconstruing the provisions of the Act which confer power upon him, or (possibly) for some other reason, the adjudicator has failed to observe an essential precondition for the exercise of that power, and hence for the existence of a valid adjudicator's decision or determination. That will not include errors in determining whether or not the provisions of s28 of the Act have in fact been complied with, provided the adjudicator acts reasonably and in good faith because, as Mildren J said in the passage of *Independent Fire Sprinklers* quoted above, deciding these matters is a core function conferred on the adjudicator by the Act. (I have one caveat to add. It is not necessary to decide in this case, but I would leave open the question of whether it is a necessary precondition of the exercise of power by an adjudicator that the contract concerned is in fact a construction contract, given the scope and purpose of the legislation.)

[36] In K & J Burns Southwood J qualified what he had previously said in *AJ Lucas* about the ability of the Court to review the adjudicator's consideration of the criteria contained in s33(1)(a)(i) - (iii) of the Act. At [30] he said:

> ... the text of each of the criteria contained in s33(1)(a)(i) - (iii) of the Act suggests that those criteria are quite discrete. The existence of each of those criteria is an essential condition of an adjudicator's jurisdiction to adjudicate a payment dispute on the merits.

[37] However, Southwood J was in the minority in that matter and no other judge expressed agreement with His Honour's qualification of what he had previously said in *AJ Lucas*. Rather (from [125]) Kelly J discussed the qualification in some detail and provided persuasive reasons why she disagreed with it and why she considered that "the approach in *AJ Lucas* was correct": see particularly [135], [139], [140], [142], [143] and [145]. At [144] her Honour affirmed that in her view the correct construction of s33(1) is that set out by Southwood J at [32] of *AJ Lucas*. The other judge, Olsson A-J, did not express a view on this point. I consider that the approach espoused by Southwood J in *AJ Lucas*, with the agreement of Riley J, is binding on this court.

[38] Needless to say I agree with the submission made on behalf of the first defendant that it is for the adjudicator to determine if the matters in s33(1)(a) exist and that judicial review is only available in respect of those matters where he made an error of law in reaching his state of satisfaction or where his satisfaction was unreasonable. A mere error of fact would not invalidate a determination unless it is demonstrated that the adjudicator's state of satisfaction in relation to that fact was unreasonable.

[39] I also note and agree with both counsel that nothing turns on the possible distinctions between an "essential precondition" and "jurisdictional error" for the purposes of this deciding matter.

At [50] of *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; (2009) 25 BCL 409; [2008] NTSC 46 (14 November 2008), Mildren J concluded that relief in the nature of *certiorari* does not lie against a decision of an adjudicator under the Northern Territory Act.

The extent to which the Northern Territory courts will follow the rest of the *Brodyn* principles will still have to be worked out.

The decision of Mildren J in *Independent Fire Sprinklers* was referred to with approval by Beech J in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, where the Western Australian legislation was in the same terms on this issue as the Northern Territory legislation.

At [132] of *O'Donnell Griffin*, Beech J said:

> Moreover, I note that in *Independent Fire Sprinklers* Mildren J reached substantially the same conclusion as I have, but without adopting my construction of s 46(1). His Honour's conclusions were, as I have said, based on his construction of the Act as a whole that whether the application was prepared and served in time is a matter for the adjudicator. That is substantially the approach adopted by Basten JA in the New South Wales cases. Thus if I am wrong in my construction of s 46(1), there would be a question whether the same conclusion should be reached for the reasons given by Mildren J.

[SOP25.770] South Australia — curial review of an adjudicator's determination

There is no provision for any curial review of an adjudicator's determination in the South Australian Act. The South Australian courts have not as yet spoken on whether they will follow any aspect of *Brodyn*.

[SOP25.780] Tasmania — curial review of an adjudicator's determination

There is no provision for any curial review of an adjudicator's determination in the Tasmanian Act. The Tasmanian courts have not as yet spoken on whether they will follow any aspect of *Brodyn*.

[SOP25.790] Australian Capital Territory — curial review of an adjudicator's determination

Section 43 of the Act provides for a judicial review of an adjudicator's decision.

This provision is unique to the Australian Capital Territory Security of Payment legislation. It is stressed that it is not found in the Security of Payment legislation of any of the other States or Territories.

For the sake of ease of reference, s 43(1), which is also to be found herein at Part 6 – Miscellaneous, reads as follows:

> Except as provided for in this part, a court does not have jurisdiction to set aside or remit an adjudication decision on the ground of error of fact or law on the face of the decision.

At [31] of *Pines Living Pty Ltd v O'Brien* [2013] ACTSC 156, Master Mossop commented on the section, and said:

> That subsection purports to limit the jurisdiction of the Supreme Court to grant an order to the effect of a writ of ***certiorari*** in so far as the order is based upon an error of law on the face of the decision. An error of law on the face of the record is one of the established grounds for the grant of a writ of *certiorari*: see *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; [1995] HCA 58 at 175-176. Whilst, in the Territory, there is no statutory provision which defines or expands the scope of what constitutes "the record" for the purposes of the writ of ***certiorari*** (cf. Supreme Court Act 1970 (NSW) s 69(4); Administrative Law Act 1978 (Vic) s 10), the fact that the decision of an adjudicator "must... include the reasons for the decision" means that it is

> at least arguable that the reasons form part of the record for the purposes of *certiorari*. If that is correct, then the scope to review, by way of ***certiorari***, a decision of an adjudicator under the SOP Act is quite broad. Whats 43(1) purports to do would be to remove from the jurisdiction of the Court one of the recognised bases upon which a decision may be quashed. It was recognised in Kirk (at [100]) that legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond the power of State legislators. In New South Wales it has been held that the legislative scheme of the NSW SOP Act was inconsistent with the availability of review for non-jurisdictional error of law: *Musico and Ors v Davenport* [2003] NSWSC 977 at [54]; *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [42]; *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421 at [51]; *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 at [39]. However, neither Kirk nor the New South Wales authorities address the issue which is relevant in the Territory, namely, whether such a restriction is consistent with the jurisdiction granted by s 48A of the Australian Capital Territory (Self-Government) Act 1988 (Cth). In other words, does section 48A prevent the Territory legislature from excluding from the jurisdiction of the Supreme Court the power to quash a decision of a statutory decision-maker on the ground of error of law on the face of the record? Having regard to my conclusions as to the third and fourth errors of law addressed below, which might be characterised as non-jurisdictional errors of law, I do not need to resolve this issue in order to decide this case.

Under s 43(1) of the Act, a court does not have jurisdiction to set aside or remit an adjudication decision on the ground of error of fact or law on the face of the decision, otherwise than in accordance with the provisions of Pt 6 of the Act.

It would appear as if this section is aimed at excluding any *certiorari* remedy.

It is not clear whether or not any jurisdictional challenge that may be made to an adjudication determination is intended to be excluded as well.

In the Explanatory Statement to the ACT Act, the Minister said at cl 43:

> This clause provides for appeals on questions of law by parties to an adjudication decision to the Supreme Court. The provision is modelled closely on the appeal provision under section 38, part 5 of the *Commercial Arbitration Act 1986*, save for one respect, in that the period in which an adjudicator must make a new decision has been reduced to 10 business days after the decision has been remitted. This reduction is consistent with the subject matter of the Bill.

Under s 43(2) of the Act, an appeal may be made to the Supreme Court on any question of law arising out of an adjudication decision.

In an earlier update, concerning s 43(2) of the ACT legislation, it was submitted that it would appear as if the phrase "… any question of law …" is to be given the same meaning as that phrase is generally accepted within an arbitration context, and for which see the discussion in the Chapter "Right of Appeal" of Jacobs, *Commercial Arbitration Law and Practice* (Thomson Reuters, subscription service).

At [30] of *Steel Contracts Pty Ltd v Simons* [2014] ACTSC 146, Refshauge J said:

> The significant restrictions to an appeal set out in s 43(4)are relevantly identical to the restrictions to an appeal against of an award made under s 38(5) of the Commercial Arbitration Act 1986 (ACT). I see no reason why the approach to the latter provision should not be applied to this legislation, which is similar in nature.

Under s 43(3), any such appeal needs the consent of the parties to the decision or the leave of the Supreme Court.

Under s 43(4), the same criteria in regard to the grant of leave as one finds with regard to s 38(5)(b)(i)–(ii) of the *Commercial Arbitration Act 1986* (ACT), which, prior to the 2010 Commercial Arbitration legislation, was current in all of the States and Territories.

The relevant phrases employed in s 43 are discussed at considerable length in the Chapters "Right of Appeal" and "Application for Leave to Appeal" of Jacobs, **Commercial Arbitration Law and Practice** (Thomson Reuters, subscription service).

It would be a task of supererogation to repeat what has been said therein.

A point of significance between s 43(4) of this Act and s 38(5)(b)(i)–(ii) of the Commercial Arbitration Act is the contents of s 43(4)(a)–(b) of this Act, which states:

> (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more parties to the adjudication decision; and
>
> (b) there is—
>
> (i) a manifest error of law on the face of the adjudication decision; or
>
> (ii) strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law.

In regard to the provisions of s 43(4)(a) above, see the discussion at [41]-[44] of *Fulton Hogan Construction Pty Ltd v Brady Marine and Civil Pty Ltd* [2015] ACTSC 384.

Under s 43(5), the Supreme Court may, in granting leave, set appropriate conditions.

Under s 43(6), the Supreme Court, on the determination of an appeal under s 43(2), may make the following orders:

> (a) confirm, amend or set aside the adjudication decision; or
>
> (b) remit the adjudication decision, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to—
>
> (i) the adjudicator for reconsideration; or
>
> (ii) if a new adjudicator is appointed by the Supreme Court—to that adjudicator for consideration.

The Act does not state whether or not, if leave is granted in respect of one or more law points, the Court of Appeal will be at large to decide another or other law points.

A similar question within the context of the New South Wales legislation was dealt with by the Court of Appeal in *HIA Insurance Service Pty Ltd v Kostas* [2009] NSWCA 292 (16 September 2009).

For the principles relating to the requirement of "special circumstances" for an extension of time to be granted for an application for leave to appeal: see *Steel Contracts Pty Ltd v Simons* [2014] ACTSC 146.

Under s 43(7), the adjudicator must make a new adjudication decision within 10 business days after the date that the matter has been remitted or within such time as directed by the Supreme Court.

Under s 44, the Supreme Court has jurisdiction to determine any question of law arising in an application to the court made by any of the parties to an adjudication decision, either with the consent of the adjudicator who made the decision or with the consent of the parties to the decision. This section seems to follow s 39 of the Commercial Arbitration Act. The section is discussed at length in the Chapter "Determination of preliminary point of law", under "Powers of the Court" in Jacobs M, *Commercial Arbitration Law and Practice* (Thomson Reuters, subscription service), and to which reference may be made.

The curial review provisions of the ACT Act are unique, and only time will tell whether or not these provisions provide an answer to the otherwise draconian legislation.

These provisions bring into very sharp focus the necessity for the adjudication process in the Australian Capital Territory to identify and make submissions in regard to all relevant law points, probably with reference to authority, so as to ensure that there is no error of law on the part of the adjudicator.

A comprehensive decision on the right of appeal accorded by the *Building and Construction (Security of Payment) Act 2009* is contained in the judgment of Refshauge J in *Steel Contracts Pty Ltd v Simons* [2014] ACTSC 146. His Honour held that the relevant provisions of the Act referred to above sets a high bar for leave applications.

In *Steel Contracts* above, Refshauge J has the following to say about the principles concerning extensions of the time limits for leave to appeal:

> [42] To extend time in these circumstances will, as Brennan CJ and McHugh J observed in *Jackamarra v Krakouer (1998) 195 CLR 516* at 521; [7], "put at risk the substantive rights of the respondent". This is particularly relevant in a case such as under the Security of Payment Act where speedy resolution of claims is a specific objective of the Act.
>
> [43] The matters which are said to be relevant were summarised by the Full Court of the Federal Court of Australia in *Parker v The Queen* [2002] FCAFC 133 at [6] which, after considering the well-known decisions of *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344; [1984] FCA 176 and Jess v Scott (1986) 12 FCR 187, set them out as follows:
>
> 1. Applications for an extension of time are not to be granted unless it is proper to do so; the legislated time limits are not to be ignored. The applicant must show an "acceptable explanation for the delay"; it must be "fair and equitable in the circumstances" to extend time;
> 2. Action taken by the applicant, other than by way of making an application for review, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished;
> 3. Any prejudice to the respondent in defending the proceedings that is caused by the delay is a material factor militating against the grant of an extension;
> 4. However, the mere absence of prejudice is not enough to justify the grant of an extension; and
> 5. The merits of the substantial application are to be taken into account in considering whether an extension of time should be granted.
>
> [44] See, also, *R v Meyboom* [2012] ACTCA 2; (2012) 256 FLR 450. There is no reason why these principles should not apply to this application.

26 Claimant may make new application in certain circumstances

(1) This section applies if:

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21(3).

(2) In either of those circumstances, the claimant:

(a) may withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made, and

(b) may make a new adjudication application under section 17.

(3) Despite section 17(3)(c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

[Subs (3) am Act 133 of 2002, s 3 and Sch 1[39]]

(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17.

[S 26 am Act 133 of 2002]

SECTION 26 COMMENTARY

[SOP26.50] *"… fails to determine …"*

Bergin J (as her Honour then was), in *Emergency Services Superannuation Board v Sundercombe* [2004] NSWSC 405 (9 September 2004), considered the meaning of the phrase *fails to determine* in the above subsection at [102]. Her Honour quoted from Palmer J's judgment in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140:

> [102] An adjudicator may fail to determine an adjudication application for the purposes of s 26(1)(b) for a number of reasons. The adjudicator may become incapable of making the determination within the time required or may for some reason refuse to do so or become disqualified from doing so. But, in my opinion, an adjudicator may also fail to determine an adjudication within time for the purposes of the subsection if the determination is purportedly delivered within time but is not given according to law. For example, where the adjudicator has given a determination within time but it has been procured by fraud, it could hardly be said that the adjudicator has performed the task which the Act requires of him or her within the time stipulated in s 21(3). The same may be said of a case in which the adjudicator delivers a determination within the time stipulated but the determination has been given without jurisdiction. In such cases, it may be said that the determination is of no effect: it is as if the adjudicator had made no decision at all.

The above cases show that the verb "fails" has a wide meaning. In [32] of *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374 (28 April 2008), Nicholas J was of the opinion that "fails" means "does not".

At [28] *CC No 1 Pty Ltd v Reed Constructions Australia Pty Ltd* [2010] NSWSC 294, Macready AsJ referred to two recent decisions on this point. The first was a decision of McDougall J in *Urban Traders v Michael* [2009] NSWSC 1072 [88]–[96]:

> [88] Without intending to state comprehensively the circumstances in which a determination of a dispute will give rise to an issue estoppel, there must be, among other things, a decision on that dispute, by a court or other tribunal authorised to decide it, which has the requisite degree of finality.
>
> [89] By contrast, a liability arising under s 14(4) of the Act involves no reference to, or determination by, any decision-making body. Thus, one element associated with issue estoppel – a decision – is missing.
>
> [90] Further, I think, a liability arising under s 14(4) does not have the requisite degree of finality. If the liability is to be enforced, it must be through one of the two alternative mechanisms set out in s 15(2) of the Act. If the claimant proceeds down the first path – suing in a court of competent jurisdiction – judgment is not automatic. First, the claimant must establish the circumstances set out in s 15(1) of the Act (see s 15(4)(a)). Secondly, the respondent may defend the suit, although on limited grounds not including "any defence in relation to matters arising under the construction contract" (see s 15(4)(b)).
>
> [91] If the claimant proceeds down the second path – adjudication – then it must notify the respondent of its intention to do so, and give the respondent an opportunity to provide a payment schedule (see s 17(2)). If the respondent avails itself of that opportunity, then whatever dispute is raised by that payment schedule may be resolved in adjudication in the usual way (see s 22(2), noting in particular para (d)).
>
> [92] By contrast, enforcement of a determination is simpler: an adjudication certificate is filed as a judgment for a debt in a court of competent jurisdiction, and is enforceable

> accordingly (s 25(1)). True it is that the judgment may be set aside in certain circumstances (see s 25(4)). But in proceedings to set the judgment aside, the respondent may not, among other things, challenge the adjudicator's determination (see s 25(4)(a)(iii)).
>
> [93] Thus, in my view, there are significant differences between a liability arising under s 14(4) on the one hand, and a liability arising under an adjudicator's determination on the other. The essential qualities of determinations that give rise to issue estoppel are lacking from a statutory liability arising under s 14(4). It is no answer to this to say that s 14(4) has the effect of, or should be deemed to be, an adjudicator's determination. The existence of issue estoppel is something determined by analysis of what it is that is said to give rise to the estoppel, not by the application of verbal formulae.
>
> [94] In the present case, there has been no adjudication of the claim raised by payment claim 19. It is not a case where the builder is seeking to have another adjudicator do what a previous adjudicator failed to do to its satisfaction. It is not a case where the builder is seeking to use the processes of the Act repetitiously, in an attempt to get a better outcome. On the contrary, if the builder's contention – that no payment schedule was provided in response to payment claim 19 – is correct, it has obtained the best outcome that it can get, in respect of the particular payment claim. That is because, by operation of s 14(4), the proprietors are liable for the amount claimed. The builder cannot do better than that in any adjudication. By repeating the claim in a subsequent payment claim, the builder gave the proprietors another opportunity to provide a payment schedule. In that payment schedule, the proprietors were entitled to answer not only the fresh aspects of the claim, but also those aspects that (as permitted by s 13(6)) had been included in the earlier payment claim.
>
> [95] What has happened in this case is far removed from the concept of abuse of process, in relation to the Act, that emerges from the authorities to which I have referred.
>
> [96] I conclude that the builder is not barred, by issue estoppel or some analogous form of estoppel or by the concept of abuse of process, from claiming, under payment claim 21, entitlements that were claimed under payment claim 19; and that this is so whether or not a payment schedule was provided in time in response to payment claim 19.

The second case that Macready AsJ referred to in *CC No 1*, at [29], was the decision of McDougall J in *Allpro Building Services v C & V Engineering Services* [2009] NSWSC 1247.

At [31]–[33] of *CC No 1*, Macready AsJ concluded as follows:

> [31] The proper construction of the Act must accommodate the purpose of s 13(5) and s 13(6). The February payment claim had a new reference date even though the construction work was completed towards the end of 2009. This is permitted under the Act: see s 13(4)(b). As has been frequently said it is not simply a repetition by itself which leads to an abuse. There must be something in all the circumstances for the abuse to arise. Here it is plain that the additional amounts now sought to be recovered in respect of variations which were the subject of the earlier claims is for a different amount. The amount is a distinct item of cost which was not claimed in the earlier claims. Although in an expansive use of the word there is some "reagitation" of the factual background there has been no "reagitation" of the entitlement to the earlier claimed amount.
>
> [32] It is plain that in the ordinary case where a claim is made to a completed piece of work the owner might justifiably feel entitled to regard the claim as the totality of the claim. In the present circumstance it is clear that there was an accidental omission of the claim for preliminaries. There is no suggestion of misleading or deceptive conduct in respect of the omission and what it is sought to rectify is said to be a clear entitlement to some payment of an additional amount by the contractor in respect of the same item of work. It obviously would have been more expedient if the claim had been

made earlier so that the owner could have considered it at the time of the earlier claim. Although there will be more work because of the contractor's default in this regard I do not think that this is a sufficient reason to conclude that there is an abuse of process.

[33] In these circumstances on the proper construction of the Act I do not think it can be said that an abuse has arisen. In the event that I had not reached this conclusion there are other reasons why an order restraining the whole of the adjudication process should not be made. That is the existence of claims for variations V226, V228, V229 and NV 1 - 5 that are fresh claims in the February claim. The amounts of the positive variations total $2,100,288 and the amount of the negative variations total $1,032,000. The total claim for preliminaries is $1,299,015. The new claims are a substantial part of the February claim. Given the nature of the new claims it would be hard to suggest that the preliminaries claim is a substantial and unseverable part of the February claim which should lead to the restraint of the whole adjudication process as occurred in the *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635.

[SOP26.60] *"… may make a new adjudication application …"*

At [30] of *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374 (28 April 2008), Nicholas J said, *inter alia*:

[30] Section 26 is the only provision which authorises a claimant to withdraw an adjudication application and to make a new one. The terms of s 26(1), s 26(2) and s 26(3) taken together make plain that entitlement to withdraw is confined to the happening of either of the circumstances specified in s 26(1)(a) or s 26(1)(b). In my opinion the effect of these provisions is to preclude the withdrawal of an application by a claimant in any other circumstances, including prior to expiry of the specified period. If it were otherwise, the enactment of s 26(2)(a) would be otiose.

In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003) Palmer J at [104] held that when an adjudication is quashed the claimant may within 5 days, make a new application. He said:

[102] An adjudicator may fail to determine an adjudication application for the purposes of s 26(1)(b) for a number of reasons. The adjudicator may become incapable of making the determination within the time required or may for some reason refuse to do so or become disqualified from doing so. But, in my opinion, an adjudicator may also fail to determine an adjudication within time for the purposes of the subsection if the determination is purportedly delivered within time but is not given according to law. For example, where the adjudicator has given a determination within time but it has been procured by fraud, it could hardly be said that the adjudicator has performed the task which the Act requires of him or her within the time stipulated in s 21(3). The same may be said of a case in which the adjudicator delivers a determination within the time stipulated but the determination has been given without jurisdiction. In such cases, it may be said that the determination is of no effect: it is as if the adjudicator had made no decision at all.

[103] When an adjudication under the Act is quashed pursuant to judicial review, in my opinion the claimant becomes entitled to withdraw its adjudication application under s 26(2) upon and from the date upon which the quashing order is made because on that date it has been ascertained that the adjudicator did not determine the adjudication according to law within the time allowed by the Act, for the purposes of s 26(1)(b). The claimant may then, within five business days of the quashing order, make a new adjudication application under s 26(3). That subsection, in conjunction with s 17(3)(c), (d) and (e), makes it clear that the adjudication process does not start all over again from the beginning. Rather, there is an adjudication pursuant to a fresh adjudication application, of the dispute as defined by the original payment claim and the original payment schedule. The respondent may not, therefore, make any submissions to the new adjudicator in reliance upon reasons for withholding payment of the original payment claim which were not indicated in its original payment schedule, as provided

> in s 14(3) and s 20(2B). The new adjudicator appointed by the nominating authority under s 19 may, or may not, be the adjudicator who conducted the original adjudication, as considerations of convenience, saving of expense and perceptions of pre-judgment may require. In conducting the new adjudication, the adjudicator would, doubtless, have regard to the reasons of the Supreme Court for quashing the original determination. By this procedure, the saving in time and expense envisaged by the adjudication machinery of the Act may not be totally lost.

Multiplex v Luikens was referred to by Nicholson J with approval in *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203 at [42]. *Multiplex v Luikens* was also cited with approval by Ball J in *Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd* [2015] NSWSC 127 at [21].

Barrett J in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* (2004) 20 BCL 276; [2004] NSWSC 116 referred to *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 with approval, as has Bergin J (as her Honour then was) in *Emergency Services Superannuation Board v Sundercombe* [2004] NSWSC 405 (9 September 2004) and White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376.

At [19] of *Emergency Services Superannuation Board v Davenport* [2004] NSWSC 697, Bergin J (as her Honour then was) quoted from Palmer J's judgment in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140:

> If a payment claim which originates an adjudication comprises the whole of the claims made by that claimant under the contract, the consequence of quashing a determination may be relatively straightforward: the whole of the dispute, instead of being determined on an interim basis by the adjudicator under the Act, may simply await final determination by litigation or other dispute resolution procedures. If, on the other hand, a payment claim is in respect of many progress claims made under a contract and considerable construction work remains to be carried out under the contract, the matter will probably not be so straightforward. The claimant will no doubt want the payment claim determined before completing construction work. Can the claimant re-submit the dispute constituted by the payment claim and the payment schedule to the same adjudicator to be determined according to the reasons given by the court in quashing the original determination? Or is the adjudicator, having made a determination under s 22(1), functus officio?

See [32] of *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374 (28 April 2008).

McDougall J, in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2010] NSWSC 1367, relying on what Hodgson JA said in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [41], [52] and [57]–[60], which passages McDougall J held were not adversely impacted on by the decision of the Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWSC 1167, held that when a determination is declared void, there was in fact no determination. His Honour at [24] of *Cardinal* said:

> … In my view, it follows in those circumstances that the adjudicator did not "determine the application" for the purposes of s 26(1)(b) of the Act. I agree with the view of Nicholas J in John Holland at [32] that the expression "fails to determine" in s 26(1)(b) means, in effect, "does not determine". In circumstances where a declaration is declared to be void, there is thus no determination of the matters set out in s 22(1) of the Act.

At [26], his Honour made it clear that he was concerned only with the consequences of a declaration that a determination is void, and left open the question whether the same consequences would follow if a determination were quashed under s 69 of the *Supreme*

Court Act 1970 (NSW). His Honour noted that it was that situation which Palmer J, Barrett J and Bergin J (as her Honour then was) dealt with in the cases referred to above.

At [29], McDougall J queried the decision of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, where Palmer J concluded that the time for making a fresh application ran from the date of the quashing order, because that was when it was first ascertained that s 26(1)(b) had been triggered.

At [30] of Cardinal, his Honour said:

> There are some problems in that analysis. The principal problem flows from the language of the section. Section 26(3) starts the clock running "after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2)". As the introductory words of s 26(2) state, the claimant becomes entitled to withdraw "[i]n either of [the] circumstances" set out in section 26(1). Those circumstances are, respectively, failure to receive notice of acceptance within four business days, and failure to determine within the time allowed by s 21(3).

The question which none of the cases above address is whether the withdrawal of an application under s 26(2) also brings with it the termination of the legal effect of an earlier payment claim and payment schedule, or if the entire process must begin from the start.

At [37]–[42] however, his Honour added:

> [37] Of course, that does not mean that the claimant is entirely without remedy. Except where the outer time limit fixed by s 13(4)(b) of the Act has expired, the claimant retains the right to serve a fresh payment claim. That claim may include amounts that were the subject of previous claims (s 13(6)). In the circumstances under consideration, there could be no estoppel or abuse of process, on the principles discussed in cases such as *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69 and *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168.
>
> [38] It is correct to say that, if a fresh payment claim were served, the respondent would have a fresh, and unqualified, opportunity to raise further "defences" in its payment schedule. That, no doubt, is an inconvenience from the claimant's perspective. But the Act's object, to secure cash flow, does not to my mind require that plain words should be given a strained construction so as to enable the claimant to retain some perceived tactical advantage.
>
> [39] Further, and as Mr McVay submitted, inconvenient consequences may follow if, in the circumstances under consideration, a fresh application could be lodged under s 26(2)(b). In many cases, a significant period of time – usually several months at least – would elapse before a determination is declared to be void. By then, the parties may well know more that is relevant to the assessment of the payment claim. For example (as Mr McVay submitted was so in this case), a respondent may have become aware in the intervening time of the extent of defects as at the date of the payment claim (or the relevant reference date) and of the cost of rectification. It would be artificial, and in a sense unjust, to preclude it from relying on those matters. But it follows from Mr Neal's preferred construction, bearing in mind s 20(2B) of the Act, that this would follow; that "known knowns" as at the later date must be put out of mind. That artificiality speaks against acceptance of Mr Neal's preferred construction.
>
> [40] Of course, if the s 13(4)(b) time limit has expired, no further payment claim can be served. That means that the statutory right has in effect been lost, in circumstances where as I have pointed out there is usually no fault on the part of the claimant. That is a substantial inconvenience. But even then, the claimant is not without remedy. It may pursue its legal rights under the construction contract (s 32).
>
> [41] The reality, I think, is that the legislature did not contemplate that s 26 might be engaged because a purported determination was (and was declared to be) void, or a nullity. There is much to be said for the proposition that, in those circumstances, it is

> for the legislature to indicate its intention as to what should follow when the section is so engaged, not for the courts first to guess what the intention is (or might have been), and secondly to give effect to that presumed intention by a forced construction of the words actually used.
>
> [42] I acknowledge, as I have said, that there is an element of absurdity in giving the right to withdraw an application, but not giving a right that is, in all relevant respects, concomitant with the right to withdraw: to make a fresh application. But it seems to me that, where the right to make a fresh application has not been linked to the timing of the withdrawal of the previous application, and where the fresh application can only be made within a statutorily specified window which has got nothing to do with the withdrawal of the previous application, then the language of the statute compels no other conclusion.

At [30] of *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374, Nicholas J held that the business day period set out in s 26(1)(a) had to have lapsed before an applicant was entitled to withdraw an application under s 26(2)(a).

That part of his Honour's judgment was obiter and what it did not address in any event was whether the 4 business day time period in s 26(1)(a) was a jurisdictional fact, the failure of which rendered the withdrawal a nullity or whether or not substantial compliance with the 4 day period was sufficient. Assuming therefore that a claimant were to withdraw an adjudication application, 3 business days and 23 hours after the application was initially made, would that render the withdrawal a nullity?

The issue is a difficult one, and all that can be done here is to raise the issue.

It is however appropriate to quote from *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting* [2011] QSC 327, where McMurdo J said:

> [142] In *Spankie v James Trowse Constructions Pty Ltd [2010] QCA 355* at [29], these cases (with the exception of *Cardinal Project Services* which was decided after this case was heard), were said to support the view that the respondent there was entitled to make a new application under s 32 of the Act where the decision upon the previous application was declared to be void for a denial of natural justice. The remarks there were obiter dictum and, as I have mentioned, the *Cardinal Project Services* conflict in the New South Wales cases as a result was not considered.
>
> [143] Each of these cases was one where the adjudicator's determination was affected by the adjudicator's failure to decide the application according to the rules of natural justice or otherwise according to law. In that way, the adjudicator could be regarded as not having decided the application. In the present case, I have held that relief should be refused upon the natural justice ground. The question then is whether the adjudicator here could be said to have not decided the application, because unknown to him, the application was affected by the applicant's fraud. The fraud provides a basis for setting aside the decision. But it is straining the language of s 32(1)(b) to say that the adjudicator has not decided this application, because there has been no act or omission by the adjudicator by which he has failed to discharge his duty in any respect. I am not persuaded that s 32(1)(b) would be engaged if this decision were set aside.

At [19] of *Draybi One Pty Ltd v Norms Carpentry Joinery Pty Ltd* [2013] NSWSC 1676, Stevenson J held that on a proper construction of the Act, the phrase "reference date" has the meaning wherever it is referred to in the Act. His Honour relied on *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571 at [15].

[SOP26.70] Queensland – claimant may make new application in certain circumstances

Section 17 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld) (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), amends s 32(1)(b) of the *Building and Construction Industry Payments Act 2004* (Qld) by omitting the words "s 25(3)" and replacing them with the words "section 25A or 25B".

It is to be noted that under s 44 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld), s 115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

DIVISION 2A – CLAIMANT'S RIGHTS AGAINST PRINCIPAL CONTRACTOR

[Div 2A insrt Act 103 of 2010, Sch 1[1]]

26A Principal contractor can be required to retain money owed to respondent

(1) A claimant who has made an adjudication application for a payment claim can require a principal contractor for the claim to retain sufficient money to cover the claim out of money that is or becomes payable by the principal contractor to the respondent.

(2) Such a requirement is made by serving on the principal contractor a request (a ***payment withholding request***) in the form approved by the Director-General of the Department of Finance and Services.

[Subs (2) am Act 93 of 2013, Sch 1[8]]

(3) A payment withholding request must include a statement in writing by the claimant in the form of a statutory declaration declaring that the claimant genuinely believes that the amount of money claimed is owed by the respondent to the claimant.

(4) A ***principal contractor*** for a claim is a person by whom money is or becomes payable to the respondent for work carried out or materials supplied by the respondent to the person as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply.

(5) A person who is served with a payment withholding request must, within 10 business days after receiving the request, notify the claimant concerned if the person is not (or is no longer) a principal contractor for the claim.
Maximum penalty: 5 penalty units.

Note: A person may no longer be a principal contractor as a result of money owed to the respondent having been paid by the person before the payment withholding request was served.

[S 26A am Act 93 of 2013; insrt Act 103 of 2010, Sch 1[1]]

26B Obligation of principal contractor to retain money owed to respondent

(1) A principal contractor who has been served with a payment withholding request must retain, out of money owed to the respondent, the amount of money to which the payment claim relates (or the amount owed by the principal contractor to the respondent if that amount is less than the amount to which the payment claim relates).

(2) The amount is only required to be retained out of money that is or becomes payable by the principal contractor to the respondent for work carried out or materials supplied by the respondent to the principal contractor as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply.

(3) The obligation to retain money under this section remains in force only until whichever of the following happens first:

(a) the adjudication application for the payment claim is withdrawn,

(b) the respondent pays to the claimant the amount claimed to be due under the payment claim,

(c) the claimant serves a notice of claim on the principal contractor for the purposes of section 6 of the *Contractors Debts Act 1997* in respect of the payment claim,

(d) a period of 20 business days elapses after a copy of the adjudicator's determination of the adjudication application is served on the principal contractor.

(4) A part payment of the amount claimed to be due under the payment claim removes the obligation under this section to retain money to the extent of the payment.

(5) When the claimant's adjudication application is determined, the claimant must serve a copy of the adjudicator's determination on the principal contractor within 5 business days after the adjudicator's determination is served on the claimant.
Maximum penalty: 5 penalty units.

[S 26B insrt Act 103 of 2010, Sch 1[1]]

26C Contravention of requirement by principal contractor

(1) If a principal contractor discharges the principal contractor's obligation to pay money owed under a contract to the respondent in contravention of a requirement under this Division to retain the money, the principal contractor becomes jointly and severally liable with the respondent in respect of the debt owed by the respondent to the claimant (but only to the extent of the amount of money to which the contravention relates).

(2) The principal contractor can recover as a debt from the respondent any amount that the claimant recovers from the principal contractor pursuant to a right of action conferred by this section.

[S 26C insrt Act 103 of 2010, Sch 1[1]]

SECTION 26 COMMENTARY

[SOP26.100] *"… in contravention of a requirement under this Division to retain the money …"*

Hammerschlag J in *Hanave Pty Ltd v Nahas Construction (NSW) Pty Ltd* [2012] NSWSC 888 held at [22] that a contravention of s 26C of the Act(NSW) required a voluntary act or omission on the part of the discharger, after receipt of the payment withholding request, and for that act or omission, in a practical sense, to be the causative factor of the discharge. On the facts of the case, the payment out of Court was pursuant to an order of the Court.

26D Protections for principal contractor

(1) An obligation under this Division to retain money owed by a principal contractor to the respondent operates (while the obligation continues) as a defence against recovery of the money by the respondent from the principal contractor.

(2) Any period for which a principal contractor retains money pursuant to an obligation under this Division is not to be taken into account for the purposes of reckoning any period for which money owed by the principal contractor to the respondent has been unpaid.

(3) A claimant who has served a payment withholding request on a principal contractor in connection with an adjudication application must, if the adjudication application is withdrawn, give the principal contractor written notice of the withdrawal of the application within 5 business days after it is withdrawn.
Maximum penalty: 10 penalty units.

(4) The principal contractor is entitled to rely in good faith on a statement in writing by the respondent in the form of a statutory declaration that:

(a) a specified amount claimed to be due under an adjudication application has been paid, or

(b) an adjudication application has been withdrawn.

[S 26D insrt Act 103 of 2010, Sch 1[1]]

26E Respondent to provide information about principal contractor

(1) An adjudicator may, in connection with an adjudication application and at the request of the claimant, direct the respondent to provide information to the claimant as to the identity and contact details of any person who is a principal contractor in relation to the claim.

(2) A respondent must comply with a direction of an adjudicator under this section.
Maximum penalty: 10 penalty units.

(3) A respondent must not, in purported compliance with a direction of an adjudicator under this section, provide information that the respondent knows is false or misleading in a material particular.
Maximum penalty: 10 penalty units.

[S 26E insrt Act 103 of 2010, Sch 1[1]]

26F Other rights of claimant not affected

This Division (including any action taken by a claimant under this Division) does not limit or otherwise affect the taking of any other action by a claimant to enforce a payment claim or adjudication determination.

[S 26F insrt Act 103 of 2010, Sch 1[1]]

SECTION 26A – 26F COMMENTARY

[SOP26.150] Commentary on ss 26A – 26F of the New South Wales Act

(a) Generally

Sections 26A–26F were introduced into the New South Wales Act by the *Building and Construction Industry Security of Payment Amendment Act 2010*. The Amendment Act was assented to on 29 November 2010, and commenced on 28 Feb 2011. This amendment applies retroactively and thus may be of importance in regard to adjudication applications that have been served before the commencement of the amendment.

Stephen Carcano, in "Recent amendment to Building and Construction Industry Security of Payment Act 1999 places greater power in sub-contractor's hands", *Construction Legal Update* (Dec 10), has commented on the effects of the s 26A New South Wales Act.

As the comments, with respect, are appropriate and correct, they have, with the author's consent, been reproduced below.

> … Now, as a result of the Amendment Act, a Subcontractor may, as part of an adjudication against a Contractor, require a Principal Contractor to withhold money owed by it to the Contractor. The new section 26A of the Act provides that where a Subcontractor has served an adjudication application on a Contractor under the Act, the Subcontractor may also serve a "payment withholding request" on the Principal Contractor, requiring it to withhold payment from the Contractor sufficient to cover the

Subcontractor's claim. If the Principal Contractor fails to comply with this request, he will become jointly and severally liable with the Contractor for the amount owed to the Subcontractor.

The purpose of this new mechanism is to enable Subcontractors to secure payments owed to them by a defaulting Contractor. However, the obvious concern for Contractors is that Subcontractors may use this new entitlement as a means of imposing greater commercial pressure on Contractors with respect to forcing settlement of claims. Under the "old" regime, where a Subcontractor included spurious claims in an adjudication application, a Contractor might choose to contest those claims as part of the adjudication process. Now however, the Contractor faces a scenario where potentially large amounts of its cash-flow are frozen throughout the adjudication process, irrespective of whether the amounts relate to bona fide Subcontractor claims or are purely spurious. Even where the Contractor is ultimately successful in the adjudication process, it appears the money may remain frozen for 20 or more business days following the adjudicator's determination (refer to section 26B(3) of the Act as amended). Needless to say, this is a significant period of time to do without payment for a Contractor that may not have substantial cash reserves to cover the shortfall.

The amendments are also of concern from a Principal Contractor point of view. As mentioned above, a Principal Contractor may become jointly and severally liable, with the Contractor, to the Subcontractor for the amount claimed. Clearly, Principal Contractors must ensure their administrative and accounts functions are operating efficiently in order to avoid this situation. More importantly however, Principal Contractors must be concerned that Subcontractors will now have the ability to potentially impose severe cashflow pressure on important Contractors, perhaps to the detriment of the project …

(b) These sections do not constitute a charge

In *NSW Land and Housing Corporation v DJ's Home and Property Maintenance Pty Ltd (in liq)* [2013] NSWSC 1167, Hammerschlag J held that the provisions of ss 26A – 26F do not constitute a charge. His Honour held:

> [63] The two essential features of a charge which are missing after service of a payment withholding request, and which Div 2A of the SoP Act (ss 26A - 26F) does not supply, are a right in the claimant serving the payment withholding request to resort to the money withheld, and an obligation on the principal contractor to pay it to the creditor who obtains the charge.
>
> [64] The obligation imposed on the principal contractor under the SoP Act is to retain the money. This is not surprising because Div 2A of the SoP Act is intended to work before an adjudication determination is made and therefore before liability between the claimant and the respondent is determined.

DIVISION 3 – CLAIMANT'S RIGHT TO SUSPEND CONSTRUCTION WORK

27 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 24.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[40]]

(2) The right conferred by subsection (1) exists until the end of the period of 3

business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15(1), 16(1) or 23(2).

[Subs (2) subst Act 133 of 2002, s 3 and Sch 1[41]]

(2A) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.

[Subs (2A) insrt Act 133 of 2002, s 3 and Sch 1[41]]

(3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension.

[S 27 am Act 133 of 2002]

SECTION 27 COMMENTARY

[SOP27.50] New South Wales – *"…may suspend…"* – the right to

Spigelman CJ in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 at [53]–[55] considered, without deciding, the meaning of the phrase "may suspend" within the context of s 27 of the New South Wales Act. His Honour said:

> [53] The statute itself also creates another risk which may lead to irreversible contractual consequences. A claimant is given the option, at several stages of the process which I have set out at [46] above, to give notice of an intention to suspend the carrying out work or supplying services. (Section 15(2)(b), s 16(2)(b), s 24(1)(b).) S/he is given statutory protection in the event of such a suspension by s 27 of the Act. In Brodyn, Hodgson JA said at [51] that s 27 "could operate as a trap", if the processes under the Act were subsequently set aside as void. Nevertheless, Hodgson JA went on to observe that the Court may be able to avoid injustice by the terms of any relief which it gives.
>
> [54] It may be arguable that s 27(1) applies so long as a bona fide notice of intention to suspend was given, whether or not, as a result of a subsequent court order, the fact or circumstance which authorises the notice to be given has been set aside. This issue was not the subject of submissions and need not be decided.
>
> [55] The possibility that s 27 may "operate as a trap" is a material consideration. However, it is not, in my opinion, sufficient to overcome the force of the text and structure of the legislative scheme to which I have referred. As Hodgson JA recognised in *Brodyn*, the purpose of the legislative scheme is best served by restricting the scope of intervention by the Courts. I do not believe that there will be frequent occasion for such interference – perhaps after a transitional period – once it is realised in the

building industry that punctilious compliance with each specific time limit is required if a builder is to have the benefit of the scheme established by the Act.

Under the *Building and Construction Industry Security of Payment Amendment Act 2010*, Div 2A has been inserted after Div 2 of Pt 3.

The amending legislation further requires Pt 4 to be inserted at the end of Sch 2. Under Pt 4, the amending legislation is retroactive whether or not an application for determination is pending.

[SOP27.60] New South Wales – *"… any loss or expense …"*

Ordinarily, claims for damages do not fall within the scope of the legislation. But s 13(3)(a) of the New South Wales Act specifically authorises s 27(2A) claims.

In *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61 (19th February 2009), Brereton J said at [17]:

> None of those observations was directed to the inclusion in a payment claim, pursuant to s 13(3)(a), of the amount of an asserted liability under s27(2A). Section 13(3)(a) expressly authorises the inclusion in a payment claim of such an amount, in addition to a claim for a progress payment for construction work. It is beside the point that claims for damages do not fall within the concept of progress payments for work done, where the statute specifically authorises the inclusion of claims for loss arising from the removal of work from the scope of the contract. It is equally beside the point that such claims might be characterised as claims for damages for repudiation, where the statute specifically authorises their inclusion.

[SOP27.70] Victoria — *"… the right to suspend …"*

Section 14(3)(a) of the Act specifically authorises s 29(4) of the claims. Under s 29 of the Victorian legislation, there is provision for the right to suspend. This section was substantially amended by s 29 of the *Building and Construction Industry Security of Payment (Amendment) Act 2006*.

[SOP27.80] Western Australia — *"… the right to suspend …"*

Section 42 of the Act provides that the non-compliance by the principal of the principal's obligations under a determination may result in the contractor suspending its obligations. s 42(2) sets out the detail which must be contained in a notice of suspension. Section 42(5) relieves the contractor, who has suspended the performance of its obligations in accordance with this section, from liability for any loss or damage suffered by the principal, or any person claiming through the principal, and further that the contractor retains its rights under the contract, including any right to terminate it.

[SOP27.90] Northern Territory — *"… the right to suspend …"*

Under s 44(1) of the Northern Territory Act, a contractor may suspend its obligations by reason of the principal's non compliance with the adjudicator's determination. Under s 44(2), the requisite notice by the contractor to the principal must:

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations;

(b) state the date on which the contractor intends to suspend the performance of its obligations; and

(c) be given to the principal at least 3 working days before that date.

Under s 44(3), it is provided that if on the date stated in the notice, the principal has not paid the contractor the amount in accordance with the determination, the contractor may suspend the performance of it obligations until no longer than 3 working days after the date on which the amount is paid.

Under s 44(5), a contractor that suspends the performance of its obligations in accordance with s 44 is not liable for any loss or damage suffered by the principal or any other person claiming through the principal, and further retains its rights under the contract, including any right to terminate it.

[SOP27.100] Queensland — *"… the right to suspend …"*

Section 33(1) of the Act provides that a claimant who has not been paid the adjudicated amount has the right to suspend the construction work or the supply of related goods and services, provided that 2 business days have passed since the claimant has given notice of the intention to do so. Under s 33(2), it is provided that the right conferred by s 33(1) exists until the end of a period of 3 business days immediately following the date on which the claimant receives payment from the respondent of the balance of the adjudicated amount.

Queensland – Claimant may suspend work

Section 18 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld)(assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)) amends s 33(2) of the *Building and Construction Industry Payments Act 2004* (Qld) by omitting the words "s 19(1)" and replacing them with the words "section 19(2)".

[SOP27.110] South Australia — *"… the right to suspend …"*

Section 28 of the South Australian Act follows the suspension provision in s 27 of the New South Wales Act.

[SOP27.120] Tasmania — *"… the right to suspend …"*

Section 29 of the Act provides that a claimant may suspend the building work or construction work, or the supply of building or construction-related goods and services on non payment of the adjudicated amount. This section, but for the numbering of the subsections, accords with s 27 of the Act.

[SOP27.130] Australian Capital Territory — *"… the right to suspend …"*

Section 29 of the Act provides for the suspension of the work by a claimant where an adjudication determination has not been paid in full or in part. There is a similar right in regard to related goods and services.

DIVISION 4 – GENERAL

28 Nominating authorities

(1) Subject to the regulations, the Minister:

(a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act, and

(b) may withdraw any authority so given.

(1A) The Minister may:

(a) limit the number of persons who may, for the time being, be authorised under this section, and

(b) refuse an application under subsection (1) if authorising the applicant would result in any such number being exceeded.

[Subs (1A) insrt Act 133 of 2002, s 3 and Sch 1[42]]

(2) A person:

(a) whose application for authority to nominate adjudicators for the purposes of this Act is refused (otherwise than on the ground referred to in subsection (1A)(b)), or

(b) whose authority to nominate adjudicators is withdrawn,

may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of the Minister's decision to take that action.

[Subs (2) am Act 95 of 2013, Sch 2.15; Act 133 of 2002, s 3 and Sch 1[43]]

(3) An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application made to the authority. The amount that may be charged for any such service must not exceed the amount (if any) determined by the Minister.

[Subs (3) insrt Act 133 of 2002, s 3 and Sch 1[44]]

(4) The claimant and respondent are:

(a) jointly and severally liable to pay any such fee, and

(b) each liable to contribute to the payment of any such fee in equal proportions or in such proportions as the adjudicator to whom the adjudication application is referred may determine.

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[44]]

(5) An authorised nominating authority must provide the Minister with such information as may be requested by the Minister in relation to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[44]]

[S 28 am Act 95 of 2013; Act 133 of 2002]

SECTION 28 COMMENTARY

[SOP28.50] New South Wales — "… nominating authorities …"

The current Minister in New South Wales administering the Act, is the minister for Commerce. Applications for authorisation can be made to the NSW Department of Commerce at http://www.dpws.nsw.gov.au, at which site there is a list of NSW nominating authorities and their addresses. The list is set out below. The Department of Commerce provides a comprehensive kit containing guidelines and precedents at that web site.

Adjudicate Today

Business Address:	Suite 2, Mona Vale Business, 90 Mona Vale Road Mona Vale, NSW, 2103
Postal Address:	Suite 2, Mona Vale Business, 90 Mona Vale Road Mona Vale, NSW, 2103
Telephone:	1300 760 297
Fax:	1300 760 220
Email:	nsw@adjudicate.com.au
Internet:	http://www.adjudicate.com.au

Air Conditioning & Mechanical Contractors Association of NSW Limited

Business Address:	30 Cromwell Street, Burwood, Victoria 3125
Postal Address:	PO Box 550, Burwood VIC 3125
Telephone:	(03) 8831 2800
Email:	nargent@amcansw.com.au
Internet:	http://www.amca.com.au/about/office-locations/

Australian Solutions Centre Pty Ltd

Business Address:	23/1 Pitt Street, Loftus NSW 2233
Telephone:	1300 722 624
Fax:	1300 722 924
Email:	solutions.centre@bigpond.com
Internet:	http://www.solutionscentre.com.au/contact-us.html

The Resolution Institute (formerly LEADR & IAMA)

Business Address:	Level 1 13-15 Bridge Street Sydney NSW 2000
Telephone:	02 9251 3366 or 1800 651 650 (freecall)
Fax:	02 9251-3733
Email:	infoaus@resolution.institute
Internet:	https://www.resolution.institute/

Master Builders Association of New South Wales Pty Ltd

Business Address:	Level 2, 52 Parramatta Road, Forest Lodge, NSW 2037
Postal Address:	Private Bag 9, Broadway, NSW 2007
Telephone:	02 8586-3517
Fax:	02 9660-3700
Email:	legal@mbansw.asn.au
Internet:	http://www.mbansw.asn.au/Services/Legal/Legal-Department/

Master Plumbers Association of NSW

Business Address:	2 Percy St Auburn 2144 NSW
Telephone:	1800 424 181
Email:	http://www.masterplumbers.com.au/contact-us
Internet:	http://www.masterplumbers.com.au

National Electrical and Communications Association

Business Address:	Level 3, 28 Burwood Road,

	Burwood, NSW, 2134
Postal Address:	Level 3, 28 Burwood Road,
	Burwood, NSW, 2134
Telephone:	02 9744-1099
Fax:	02 9744-1830
Email:	necansw@neca.asn.au
Internet:	http://www.neca.asn.au

Newcastle Master Builders Association

Business Address:	Level 1, 165 Lambton Road,
	Broadmeadow NSW 2292
Postal Address:	Box 266,
	Hunter Region Mail Centre NSW 2310
Telephone:	02 4953-9400/ Toll Free: 1300 780 095
Fax:	02 4953-9433
Email:	enquiries@newcastle-mba.com.au
Internet:	newcastle@mbansw.asn.au

[SOP28.60] Victoria — "… nominating authority …"

Under s 4 of the Victorian Act, the authorised nominating authority is defined as a person authorised by the Building Commission under s 42 to nominate adjudicators. The nominating person must under s 42(2) refer to the Minister's guidelines as provided for in s 44. The current list is set out below.

Adjudicate Today Pty Ltd

Business Address: Level 23, HWT Tower, 40 City Road, Southbank, Victoria 3006

Postal Address: As above
Telephone: 1300 760 297
Fax: 1300 760 220
Email: vic@adjudicate.com.au
Website: http://www.adjudicate.com.au

Australian Solutions Centre Pty Ltd

Business Address: Asian Pacific Business Centre, Level 1, 1 Queens Road, Melbourne, VIC 3004

Postal Address: PO Box 764, Sutherland, NSW 1499
Telephone: 1300 722 624
Fax: 1300 722 924
Email: solutions.centre@bigpond.com.au
Website: http://www.solutionscentre.com.au

Building Adjudication Victoria Inc

Business Address: Hobson's Bay Business Centre, Level 1, 92 Railway Street South, Altona VIC 3018

Postal Address: As above
Telephone: 03 8398 0817
Fax: 03 8398 0899
Email: bav@rodlaw.com.au
Website: http://www.bav.org.au

Building Adjudication Victoria Inc

Business Address: Suite 316, 189 Queen Street, Melbourne, VIC 3000

Postal Address: As above
Telephone: 03 9225 7326
Fax: 03 9600 2199
Email: bav@bav.org.au
Website: http://www.bav.org.au

The Resolution Institute (formerly LEADR & IAMA)
Business Address: Level 1

13-15 Bridge Street

Sydney NSW 2000
Telephone: 02 9251 3366 or 1800 651 650 (freecall)
Fax: 02 9251-3733
Email: infoaus@resolution.institute
Internet: https://www.resolution.institute/

Rialto Adjudications Pty Ltd
Business Address: Level 2, 613 St Kilda Road, Melbourne, VIC 3004

Postal Address: As above
Telephone: 03 9516 6440
Fax: 03 9510 6081
Email: ten.nallumcm@yecart
Website http://rialtoadjudications.com/contact-us.php

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Section 33 of the amendment Act inserts ss 43A, 43B and 43C in the principal Act. These sections provide for the functions of the authorised nominating authority, for the authorised nominating authority to provide information and for the fees of the authorised nominating authority.

[SOP28.70] Queensland — "… nominating authority …"

In Pt 4 of the *Building and Construction Industry Payments Act 2004* (Qld) there are elaborate provisions for the appointment of a formal registrar and staff of a registry to *inter alia* keep a register of authorised nominating authorities and adjudicators, and detailed provisions for applications as nominating authority, and adjudicators, and for the cancellation of authority and the removal of authorised adjudicators. The current list of bodies that may issue a certificate in adjudication is set out in the *Building and Construction Industry Payments Regulation 2004*, Sch 1, Pt 1 and is reproduced below.

One wonders if all these detailed provisions are necessary, and whether they will provide a more fertile ground for litigation.

Sections 22 – 36 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld) contain new and elaborate provisions dealing *inter alia* with the registrar's functions and powers (s 22), delegation by registrar (s 23), registrar's annual report (s 25) and other similar and related matters.

[SOP28.75] Queensland — "… nominating authority …" – fees of authorised

Section 19 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld) (Amendment Act), (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), omits s 34 of the *Building and Construction Industry Payments Act 2004* (Qld) (Queensland Act).

Under s 20 of the Act, s 35(4) of the Queensland Act has been amended by the deletion of "(other than because ... 25(3)".

Section 35(5) of the Act has been deleted and replaced with a new subsection (5); additional subsections (6) – (8) have also been inserted. Please see s 20 of the Amendment Act.

[SOP28.80] Northern Territory — "… nominating authority …"

In the Northern Territory, under s 30, an adjudicator is appointed by the "prescribed appointer".

The phrase "prescribed appointer" under the definition section, s 4, is defined as a person prescribed as such by the Regulations.

The list of prescribed appointers is set out in reg 5 of the *Construction Contracts (Security of Payments) Regulations 2005* and is set out below.

The Royal Australian Institute of Architects
Housing Industry Association Limited
Contractor Accreditation Limited
The Institution of Engineers, Australia
Law Society Northern Territory
The Institute of Arbitrators & Mediators of Australia
Australian Institute of Quantity Surveyors
Territory Construction Association Incorporated

[SOP28.90] Western Australia – "… nominating authority …"

The list of prescribed appointers is set out in reg 11 of the *Construction Contracts Regulations 2004* and is reproduced below.

The Australian Institute of Building
Australian Institute of Project Management
The Australian Institute of Quantity Surveyors
Electrical and Communications Association of Western Australia (Union of Employers)
The Institute of Arbitrators and Mediators Australia
Master Builders Association of Western Australia (Union of Employers)
RICS Australasia Pty Ltd
The Royal Australian Institute of Architects

29 Adjudicator's fees

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application:

(a) such amount, by way of fees and expenses, as is agreed between the adjudicator and the parties to the adjudication, or

(b) if no such amount is agreed, such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator.

(2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.

[Subs (3) subst Act 133 of 2002, s 3 and Sch 1[45]]

(4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21(3).

(5) Subsection (4) does not apply:

s 27-Sch 2

(a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid, or

(b) in such other circumstances as may be prescribed by the regulations for the purposes of this section.

[S 29 am Act 133 of 2002]

SECTION 29 COMMENTARY

[SOP29.50] *"… is entitled …"* – adjudicator's fees, principles concerning

In *Faithful & Gould Ltd v Arcal Ltd* (unreported, High Court of Justice, QBD, Technology and Construction Court, 31 May 2001) it was held that an adjudicator was entitled to claim fees in the name of a nominee company.

In *Prentice Island Ltd v Castle Contracting Ltd* [2003] ScotSC 61 (15 December 2003), it was held an adjudicator acting in good faith was still entitled to fees despite the fact that an adjudication determination was quashed. At [15] the court said:

> [15] If an adjudicator in good faith falls into error on this question and continues to act in circumstances in which he ought to resign, nevertheless in my view he remains in post as a validly appointed adjudicator, unless and until he either resigns or is stopped from acting by the court. While I reach this view upon a consideration of the terms of the Scheme as a whole, that view seems to accord with the approach of the court in *Naylor v Greenacres Curling Ltd* [2001] SLT 1092 and *Sim Group Ltd v Jack* [2002] SLT 847 at 850K.

In *Allpro v Micos* [2010] NSWSC 453, the adjudicator's determination was substantially late. McDougall J at [6] held that that did not invalidate the adjudication. However, his Honour said that it was entirely inappropriate for the adjudicator, who must know or must have known of the relevant provisions of the Act, to insist on payment of his fees where, if the provisions of s 29(4) of the Act had operated, there would have been no such entitlement.

[SOP29.60] *"… such amount …"* - of adjudicator's fees

In *Stubbs Rich Architects v W H Tolley & Son Ltd* (unreported, Commercial Court [Eng], 8 August 2001), it was held that the fees charged by adjudicators may be challenged if, and only if, the adjudicators acted in bad faith. There are no decisions on this point in Australian courts, but the principles appear to be reasonable and should be adopted.

Davenport, in *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at p 207, says:

> Sometimes an adjudicator will be faced with the following problem. Assume that no fee has been agreed and the adjudicator demands an amount of $1,000. Assume that a reasonable amount is $800 and that the parties pay that amount but the adjudicator still refuses to deliver the decision until the remaining $200 is paid. In those circumstances, the adjudicator would lose the right to any fee whatsoever and the parties would be entitled to recover the $800 paid.

> That arises because, after receipt of the $800, the adjudicator is not refusing to communicate his or her decision until his or her fees are paid. The adjudicator is refusing to communicate the decision until paid an amount of $200 to which the adjudicator is not entitled. Section 29(4) bars any entitlement to fees or expenses unless the decision is made in time. The exemption from the bar only applies when the adjudicator is refusing to communicate the decision until his or her fees are paid.

But with respect that cannot be correct.

If under s 29(4), an adjudicator can withhold an award until his/her fees are paid, and there is a dispute about the quantum, it is difficult to see on what basis the adjudicator forfeits all fees.

[SOP29.70] *"… in such proportions as the adjudicator may determine …"*

In *Brambles Australia Ltd v Davenport* [2004] NSWSC 120 (12 March 2004), it was common ground that the adjudicator determined that the respondent was liable to pay 100% of the adjudication fees without affording the parties [Brambles in particular] an opportunity to make submissions on this issue. It was alleged that this offended the rules of natural justice and it was argued that the principles of natural justice required that each party be given an opportunity to present an informed set of submissions to the adjudicator to be considered. The submissions on behalf of Brambles are at [57] of his Honour's judgment, as follows:

> While it may be that an adjudicator has a discretion as to how to award the costs of any determination, there is a presumption inbuilt into ss 28(4)(b) and 29(3) that those fees will be split equally – albeit the parties will remain jointly and severally liable to the adjudicator therefor – unless that adjudicator determines to the contrary. In the present case no submissions were made by any party, nor were they sought by the adjudicator, to suggest a costs determination on any particular basis, let alone a 100% liability to Brambles.

His Honour stated that an adjudication was amenable to review on the ground of a denial of natural justice and then went on to consider whether the content of the obligation to afford natural justice was breached. At [58] and [59], his Honour said:

> [58] … The parties are aware as soon as an adjudication application is served that the adjudicator has the power to determine the proportions in which the claimant and respondent are to be liable to contribute to the payment of the adjudicator's fees and expenses. The legislation sets up a fast track tightly regulated set of procedures which, as earlier mentioned, have recently been the subject of extensive judicial consideration. The width of the discretion given to the adjudicator and the whole of the relevant legislative scheme, *importantly*, fixing a *time limit* within which the adjudication application is to be determined, appears to me to require that the parties, if they wish to put any particular matter to the adjudicator, do so in the course of and as part of their submission of the documents stipulated for by the Act: that is to say the payment claim, the payment schedule, the adjudication application and the adjudication response. In the absence of any submission of any type by either party in relation to the adjudicator's fees and expenses, the adjudicator may proceed to exercise, as here, his/her discretion to determine the issue. In that circumstance the adjudicator, in exercising that discretion, may take into account such matters as to the adjudicator appear relevant to the exercise. Whilst the discretion is not entirely at large, almost every matter which relates to the circumstances in which, and manner in which, the adjudication application has come forward and then been dealt with by the parties, may be taken into account.
>
> [59] There is no substance in the natural justice complaint.

[SOP29.73] Claiming a refund of fees where adjudication process has failed

In *Alucity Architectural Product Supply Pty Ltd v Australian Solutions Centre; Alucity Architectural Product Supply Pty Lte v Paul J Hick* [2016] NSWSC 608, the authorised nominating authority referred the matter to an adjudicator, who accepted the appointment, but then determined that the payment claim was invalid, and as a result he had no jurisdiction to determine it. An application was made to recover the fees paid to the nominating authority and adjudicator by the claimant on the basis that there was a total failure of consideration.

Hammerschlag J held that the doctrine of a failure of consideration had no application in the circumstances, and further that the authority and the adjudicator had not been enriched, and it was not unjust for them to retain the fees paid. It followed that no action for restitution lay.

[SOP29.75] Queensland – *"… matters to be considered in deciding fees …"*

Under s 21 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld). (The Act was assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), new ss 35A and 35Bof the *Building and Construction Industry Payments Act 2004* (Qld) (Queensland Act) have been inserted.

35A Matters to be considered in deciding fees

1. This section applies if an adjudicator is making a decision about the proportion of the adjudicator's fees and expenses to be paid by the claimant and respondent under section 35(3).
2. In making the decision, the adjudicator may consider the following matters —
    - (a) the relative success of the claimant or respondent in the adjudication
    - (b) whether the claimant or respondent commenced or participated in the adjudication for an improper purpose;
    - (c) whether the claimant or respondent commenced or participated in the adjudication without reasonable prospects of success;
    - (d) whether the claimant or respondent has acted unreasonably leading up to the adjudication;
    - (e) whether the claimant or respondent has acted unreasonably in the conduct of the adjudication;
    - (f) the reasons given by the respondent for not making the progress payment the subject of the adjudication application;
    - (g) whether the respondent included additional reasons for withholding payment in the adjudication response that were not included in the payment schedule served on the claimant;
    - (h) whether an adjudication application is withdrawn;
    - (i) the services provided by the adjudicator in adjudicating the adjudication application, including the amount of time taken to consider discrete aspects of the amount claimed;
    - (j) another matter the adjudicator considers relevant in making the decision.

35B Withdrawing from adjudication

An adjudication application is taken to have been withdrawn if —

(a) a claimant has served a notice of discontinuation on the adjudicator and respondent; or

(b) a respondent has paid the claimed amount the subject of the adjudication application to the claimant.

Despite the withdrawal of an adjudication application an adjudicator is still entitled to be paid fees for considering the application — see section 35.

[SOP29.80] Northern Territory — costs of adjudication determination

Under s 36(1) of the Northern Territory Act, it is provided that the parties to a payment dispute bear their own costs in relation to an adjudication of that dispute.

Under s 36(2), it is provided that if the adjudicator is satisfied a party to a payment dispute has incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, the other party. The adjudicator may decide that the other party must pay some or all of those costs. It will be noted that there is no such provision in the New South Wales, Queensland and/or Victorian Acts.

[SOP29.90] Adjudicator withholding adjudication until his fees are paid

It has been held in Scotland in *St Andrews Bay Developments Ltd v HBG Management Ltd* [2003] ScotCS 103 (4 April 2003) that adjudicators are not entitled to delay the delivery of an adjudication decision pending payment of fees. Having regard to the policy of the Act to bring about a speedy determination of the adjudication, it is submitted that this principle should obtain in Australia.

This section, of course, deals with payment of the adjudicator's fees, and does not deal with the validity of the adjudication determination if not made within the time frame set by s 21(3). The question that arises is whether an adjudication determination made beyond the 10 business days allowed in s 21(3) is void.

In *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* (2005) 22 BCL 426; [2005] NSWSC 545 (16 June 2005) (Technology and Construction List) per Master Macready (now Macready AJ), the point was left open as to whether or not s 21(3) was complied with, when the adjudicator made his decision, even before it was notified to the parties.

It is submitted that the word "notified" in s 21(3)(a) is clear, but in the light of *Brodyn* and *Transgrid* below, where there is substantial compliance with the provisions of the section, it is unlikely that a court would strike down a late adjudication determination, see further the discussion at [SOP25.70].

30 Protection from liability for adjudicators and authorised nominating authorities

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:

(a) in exercising the adjudicator's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.

(2) No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith:

(a) in exercising the nominating authority's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act.

[S 30 subst Act 133 of 2002, s 3 and Sch 1[46]]

SECTION 30 COMMENTARY

[SOP30.50] Victoria

The relevant section of the Victorian Act is slightly differently worded. But the differences are a mere matter of style, and not of substance.

31 Service of notices

(1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:

(a) by delivering it to the person personally, or

(b) by lodging it during normal office hours at the person's ordinary place of business, or

(c) by sending it by post or facsimile addressed to the person's ordinary place of business, or

(d) in such other manner as may be prescribed by the regulations for the purposes of this section, or

(e) in such other manner as may be provided under the construction contract concerned.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[47]]

(2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected when the notice is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.

[S 31 am Act 133 of 2002]

SECTION 31 COMMENTARY

[SOP31.50] *"... to the person's ordinary place of business ..."* – service of notices

In *Parsons Brinckerhoff Australia Pty Ltd v Downer EDI Works Pty Ltd* [2010] NSWSC 1295, Hammerschlag J held that:

> [8] Neither party drew the Court's attention to any pertinent authority on the meaning to be attributed to the phrase "ordinary place of business". However, senior counsel for the defendant accepted that the defendant could have more than one ordinary place of business.
>
> [9] It should be observed that under s 142(1) of the *Corporations Act 2001* (Cth) ("Corporations Act") the defendant must have a registered office. Under s 109X(1)(a) of that Act, for the purposes of any law, a document may be served on a company by leaving it at or posting it to the company's registered office.

[10] The Melbourne Office is the defendant's registered office. However, it was not suggested that s 109X(1)(a) of the Corporations Act applies in this case, no doubt because the Claim was neither left at nor posted there. It is well established that s 109X of the is facultative and that service at the registered office may take place by any means where the document has actually come to the attention of the addressee within time: see eg *Howship Holdings Pty Ltd v Leslie and Another* (1996) 41 NSWLR 542; [1996] NSWSC 314 at 544. The plaintiff did not seek to establish that the Claim came to the notice of anyone on behalf of the defendant as a consequence of delivery more than ten days before the payment schedule was served at the Melbourne Office. The plaintiff's submission was restricted to one that the Melbourne Office was also the defendant's ordinary place of business.

[11] The defendant's business operations are Australia wide. They can loosely be divided into road surfacing (including asphalt production), rail infrastructure maintenance and civil works (including drainage and curbing).

[12] It is often the case that a company's registered office is little more than an address maintained, as required by law, for the service of notices and where statutory registers are kept. That is not the case with respect to the Melbourne Office.

[13] The following business functions are performed from the Melbourne Office in relation to the defendant's operations nationally:

(a) business management and support services including the office of the defendant's Chief Executive Officer;

(b) finance support services including the office of the defendant's Chief Financial Officer;

(c) safety and environment management; and

(d) human resources.

[14] The defendant also has a number of regional divisional offices each of which is responsible for the conduct of normal business operations within its respective regional division. The divisions include Western Australia, Central Region (SA), New South Wales, Queensland, Northern Territory and Tasmania.

[15] The Broadmeadow Office is a site office maintained by the defendant for the purposes of administering and undertaking rail related projects, mainly track works in the Hunter Valley and Sydney, not related to the present project. The project itself was administered on a day-to-day basis from a site office maintained by the defendant at Glendale, NSW.

[16] To my mind the word "ordinary" in the phrase "ordinary place of business" connotes "usual"; see *Jones (as Trustee of the property of Heather MacNeil-Brown, A Bankrupt) v Southall & Bourke Pty Ltd* [2004] FCA 539 at [42]. I think that the ordinary place of a person's business includes any place at or from which the person usually engages in activities which form a not insignificant part of the person's business.

In *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903 (26 September 2003), Einstein J, at [25], pointed out that there was no provision in s 31 for service of the Adjudication Application on the respondent's solicitor. His Honour at [33]–[36] said:

[33] Save for [subs 32(1)] such provision for the purposes of the section as the regulations may prescribe or [subs 32(2)] particular provisions under the relevant construction contract or [subs 32(3)] the application of any other legislation with respect to the service of notices, it appears clear that in essence, service must be personal (s 31(1)(a)) or by being lodged during normal office hours at or sent by post or facsimile addressed to the ordinary place of business of the person to be served. There is no dispensation for service upon a solicitor: cf Pt 9 r 7, *Supreme Court Rules*.

[34] The words "the person's ordinary place of business" is not defined in s 4.

s 27-Sch 2

> [35] Plainly enough the whole of the rationale underpinning the procedures laid down by the Act is directed at providing a quick and efficient set of procedures permitting recovery of progress payments and the quick resolution of disputes in that regard. Time limits under the Act are strict. The consequences of not complying with the stipulated time limits can be significant. Counsel for the plaintiff has given an example in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 (9 April 2003), where a failure to comply with a time limitation under the Act resulted in successful $13 million summary judgment application.
>
> [36] An essential parameter forming part of Pt 3, Div 2 "Adjudication of disputes" is the requirement to be found in s 17(5) that "a copy of an adjudication application '*must*' be served on the respondent concerned". The following stepped procedure requires:
>
> - that the adjudicator accept the application by causing a notice of acceptance to be served on the claimant and the respondent [s 19];
> - that the respondent lodge with the adjudicator a response to the adjudication application within a specified time frame set out in s 20;
> - the adjudicator himself adhere to strict time frames. [Section 21 of the Act prevents the adjudicator from determining the adjudication until after the expiry of the period designated in s 20 for the lodgment by the respondent of its response in answer to the application];
> - in the event that the time frame for lodging an adjudication response has expired the adjudicator has no jurisdiction to extend the s 20 time frame.

At [59], his Honour said:

> In my view the character of the subject legislation is such that general principles of actual or ostensible authority in solicitors to receive service of copies of relevant notices must yield to the strictures of the strict requirement to prove service. The service provisions of the Act require to be complied with in terms. Prudence dictates that those responsible for complying with the service provisions take steps to be in a position to strictly prove service in the usual way. One only example of the difficulties which may arise is where a solicitor who may have been instructed to act in relation to an adjudication application has his/her instructions withdrawn. There are no provisions similar to those to be found in the *Supreme Court Rules 1970* for notices of ceasing to act and the like. The Act here under consideration simply proceeds by requiring particular steps to be taken by the parties and by the adjudicator and proof of strict compliance with the Act is necessary for the achievement of the quick and efficient recovery of progress payments and resolution of disputes in that regard.

It is to be noted that there is an important distinction between the contents of s 31(1)(b) and s 31(1)(c), in that, lodging a document under s 31(1)(b) is to take place "during normal office hours" and under s 31(1)(c), there is no such requirement.

In *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 at [21], Einstein J held that the distinction in language between s 31(1)(b) and s 31(1)(c) made it clear that the "normal office hours" restriction in the former did not apply to the latter. In *Zebicon Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 1408 at [31], McDougall J agreed.

The sufficiency of the service of an adjudication application was an issue before Brereton J in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388; [2006] NSWSC 13 (31 January 2006). At [58], his Honour said:

> [58] Moreover, provisions such as s 31, which authorise convenient methods of serving a company without having to consider rules of court (*Players Pty Ltd v Interior Projects* (1996) 133 FLR 265; (1996) 20 ACSR 189, 195; 14 ACLC 918, 922–3), are facultative and not exclusive or mandatory (*Howship Holdings Pty Ltd v Leslie (No 2)* (1996) 41 NSWLR 542; 133 FLR 307; 21 ACSR 440), and do not exclude any means

> of service proved to have brought a document to the actual attention of the company [*Ketrim Pty Ltd v AS & L Pty Ltd* (2004) 214 ALR 206; [2004] NSWSC 1046, [16]–[19]]. In this respect, delivery of a document to one director who is the directing mind and will of the company can bring the document to the attention of the company, as where the document is delivered to the only director of a sole-director company (*Emhill Pty Ltd v Bonsoc Pty Ltd* (2004) 50 ACSR 305; [2004] VSC 322). The evidence shows that the adjudication application actually came to the notice of Mr Dixon, Finmore's sole director and directing mind, and accordingly, there was effective service on Finmore on this basis also.

His Honour went on to hold, at [61], that no provision was made in the Act in respect of the service on a receiver. He said that this was not surprising since the appointment of a receiver "does not permeate the company's internal domestic structure".

At least, in New South Wales, it has been held in an obiter judgment by Hodgson JA, with whom Handley JA and Hunt AJA concurred, in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2007) 23 BCL 292; [2006] NSWCA 259 at [62]–[63] that it is not necessary that a document should come to the attention of any person at the addressee's ordinary place of business.

In *Zebicon Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 1408 at [24], McDougall J held that he did not consider himself to be at liberty to take a view different from that in the obiter judgment in *Falgat* above.

His Honour further referred to the judgment of Austin J in *Firedam Civil Engineering Pty Ltd v KJP Construction Pty Ltd* [2007] NSWSC 1162 at [65] in support of the obiter decision in *Falgat*. In *Zebicon* (at [25]), McDougall J went on to hold that it was sufficient for the document of which service was required to have been received into the memory of the addressee's fax machine on the relevant date. His Honour did not consider it necessary, in terms of the receipt, for the document to have been printed out. His Honour made the point that if it were, the addressee could avoid facsimile service of a document by keeping its fax machine perpetually empty of paper.

McDougall J in *The Owners Strata Plan 56587 v Consolidated Quality Projects* [2009] NSWSC 1476, said:

> [22] The question, although in narrow compass, is not an easy one. I accept the general proposition flowing both from the decision of Einstein J in *Emag* and from the decision of Hodgson JA in *Brodyn* that service of a payment claim is an essential matter if the processes of the Act are to be engaged. Although the decision of Einstein J in Emag was given before the Court of Appeal handed down its judgment in *Brodyn*, nothing seems to me to turn on that. On the contrary, I think, the reasoning of Einstein J is in substance (if not in detail) consistent with the view taken by Hodgson JA in the passage in *Brodyn* to which I have referred.
>
> [23] However, that does not answer the question. It simply focuses attention on the real question which is whether the payment claim in this case was served on the owners corporation. The answer to that question must take into account the requirements of s 31 of the Act. It follows from s 31(1)(e) that it must also take into account any relevant provision of the construction contract.
>
> [24] The starting point of the analysis is to observe that service, for the purposes of s 13 (read in conjunction with s 31) can only be valid if in some way RHM had been authorised to receive service of payment claims on behalf of the owners corporation. I do not think that it is correct to say that RHM should be regarded as the agent of the owners corporation. The owners corporation is required to ensure there is a superintendent to fulfil all aspects of the role of the superintendent to the contract "reasonably and in good faith". It follows from that that the superintendent should not be beholden to, or more specifically owe obligations to, one of the parties to the contract that could compromise the independence, or ability to act in good faith, of the superintendent. If the superintendent were the agent of the owners corporation for a

particular purpose, it would presumably owe fiduciary duty obligations to the owners corporation. It is not hard to see that, in an appropriate case, those fiduciary duty obligations might conflict with the ability of the superintendent to act reasonably and in good faith.

[25] However, it does not follow from this conclusion that the superintendent is not authorised to receive payment claims on behalf of the owners corporation. Whether or not that is so depends, in the first place, on an analysis of cl 23 of the contract read in conjunction with the Act.

[26] I start with the the proposition that the Act is concerned with ensuring, relevantly, that those who carry out construction work under a construction contract recover progress payments for the value of that work. That is why s 8 gives a statutory right to a progress payment and why s 13 and the following sections provide a mechanism for enforcing the statutory right given by s 8. However, the Act operates supplementary to, and not to the exclusion of, relevant provisions of the contract. If the contract gives a right to progress payments, and does so in a manner that cannot be seen to offend s 34 of the Act, the contractual regime has to be made to coexist with the statutory regime.

[27] Again, s 13 of the Act has as its general subject the provision of a mechanism, or the initiating point of a mechanism, for enforcing a right to a progress payment given (or confirmed) by s 8. The mechanism is, as I have said, the service of a payment claim. The phrase "payment claim" is defined, in a wholly circular and unhelpful fashion, to mean "a claim referred to in section 13".

[28] A progress claim under a contract, given in relation to a contractual right to receive a progress payment, may be a payment claim under the Act if it includes the statement required by s 13(2)(c). In those circumstances it will have a dual character. Relating that to the circumstances of this case, one aspect of the dual character is that it is a progress claim which initiates the progress of assessment and payment set out in cl 23. The other aspect of that dual character is that it is a payment claim that initiates the enforcement mechanism set out in Part 3 of the Act.

[29] The parties should not be taken to have contracted unaware of the provisions of the Act. Accordingly, it seems to me, if one looks at the matter objectively, the intention of cl 23 of the contract should be taken to be that it deals with claims to progress payments not only having regard to their contractual character but also having regard to their statutory character. Looking at the matter objectively, it seems to me that the parties could not have intended that there should be a dual track mechanism whereby contractual claims were provided and assessed in one way and statutory claims were provided and assessed in quite a different way. That would be a most unbusiness-like way to go about the administration of their contract.

[30] It is correct to say, as Mr Corsaro observed, that the superintendent has 14 days to assess a progress claim, whereas a respondent to a payment claim has 10 business days within which to provide a payment schedule (see s 14(4) of the Act). Although the difference may be noted, it is unlikely ever to be of real practical significance given that any period of 10 business days will, of necessity, include at least two weekend days. In any event, it is possible to comply with both regimes by ensuring that certification is effected within 10 business days if that is a lesser period of time than 14 days.

[31] However, it seems to me, the more helpful way of understanding the parties' objective intention is that they appear to have engaged in a regime whereby documents purporting to be both progress claims under the contract and payment claims under the Act were delivered, as one document, to the owners corporation in care of RHM. The parties appear to have treated that, in at least one case, as being capable of giving rise to a dispute that could be referred to adjudication. That would only be possible if the document that was served had been served on the owners corporation. Lest it be thought that the point was simply overlooked, I should observe that when the earlier

> adjudication took place, the owners corporation was represented by the same firm of solicitors that represented it in these proceedings.
>
> [32] For those reasons, it seems to me, as a matter of construction the regime set out in cl 23 of the contract should be taken to extend not only to progress claims strictly so called but also to the parallel track statutory mechanism for payment claims.

In *Steel v Beks* [2010] NSWSC 1404, Macready AsJ held that the payment claim and s 17(2) notices had not been served and, accordingly, referring both to *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190 and *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 84 ALJR 154; [2010] HCA 1, that the adjudication determination was void and had to be set aside.

In *Agusta Industries v Niclad Constructions* [2010] NSWSC 925, Gzell J noted at [35] that reference was made to an *obiter dictum* in *TQM Design & Construct Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1216 in which McDougall J was inclined to the view that there was a distinction between the concept of service and the concept of receipt, and that receipt in s 20(1)(a) of the New South Wales Act should be given its ordinary meaning.

At [36] of *Agusta Industries*, Gzell J said:

> But that decision predated *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* where Hodgson JA, having said at [51] that the onus was on Falgat to prove that a payment schedule was not provided, referred at [55] to the rebuttable presumption in the *Acts Interpretation Act 1901*, s 29 and said that detection by any person on behalf of the company was not necessary because of s 160 of the Evidence Act.

Accordingly, the decision in *TQM* above can no longer be regarded as an indication of what constitutes sufficient service of documents etc under the New South Wales Act.

Reed v Eire [2009] NSWSC 678 is authority for two important considerations of service. These appear from [58]–[59] of that judgement, which reads as follows:

> [58] Reliance on a representation is a commonly expressed way of enquiring into loss or damage by conduct contravening the proscription on engaging in misleading or deceptive conduct. In *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; [1992] HCA 55 at 525 Mason CJ and Dawson, Gaudron and McHugh JJ said that when concerned with contravention in the form of misleading or deceptive conduct constituted by misrepresentation -
>
> > in this situation, as at common law, acts done by the representee in reliance upon the misrepresentation constitute a sufficient connexion to satisfy the concept of causation.
>
> [59] As has been said, it should not be forgotten, in determining reliance, that the essential question is causation. Causation in law is not a scientific matter, but as was said in *March v E & M Stramare Pty Ltd [1991] HCA 12; (1991) 171 CLR 506* at 515, repeating from *Fitzgerald v Penn [1954] HCA 74; (1954) 91 CLR 268* at 277-8, it is "ultimately a matter of common sense".

In *Hill v Halo Architectural Design Services Pty Ltd* [2013] NSWSC 865, Stevenson J said that cl 15.3 of the agreement between the parties provided for a mandatory method of serving all notices and other communications. As will appear from [42] of his Honour's judgment, cl 15.3 reads as follows:

> All notices and other communications ... required or permitted to be given or made under this Agreement, shall be in writing and shall be addressed to a party at its address within Australia set forth in Item 10 of the Schedule hereto ... and shall be delivered personally, sent by telex, telegram or facsimile transmission ... and in the case of service in person, by telex, telegram or facsimile transmission shall be deemed to have

> been made or given and received on the next business day in the place of address following the day of delivery or transmission ...

It was submitted that under s 31(3) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) that notwithstanding the mandatory service clause above, there was nevertheless valid service where service had taken place in some other manner.

At [52]–[55] of his Honour's judgment in Hill, he held as follows in rejecting this submission:

> [52] In my opinion, s 31(3) of the Act, which states that the provisions of s 31 are in addition to, and do not limit or exclude any other law with respect to service of notices, takes the matter no further. That sub-section does not have the effect that the parties "may" (no matter what the relevant agreement provides) serve documents in a manner provided "by any other law". It simply says that the enabling provisions in s 31(1) do not limit, and are additional to any such "other" provision. Section 31(3) does not have the effect that the plaintiffs were, despite the terms of cl 5.3 of the Agreement, entitled to serve the Payment Schedule otherwise than in accordance with cl 5.3 of the Agreement (or s 31(1) of the Act.)
>
> [53] I see nothing in the observations in Giles JA in *Downer EDI Works Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2011] NSWCA 78 as being inconsistent with these propositions. In that case, Giles JA said at [29]:
>
> > Further again, the saving in s 31(3) permits service by leaving at or posting to a company's registered office: *Corporations Act 2001* (Cth), s 109X(1)(a). A registered office is often an address maintained for the purpose, not at the company's place of business. The legislature has seen as acceptable service by leaving a notice at or posting it to a registered office where no one may have knowledge of the relevant works, and which may be at a remote location.
>
> [54] In *Downer*, there was no suggestion that the construction contract contained a provision, such as cl 5.3 of the Agreement, requiring that service be affected at a nominated address.
>
> [55] In those circumstances, my opinion is that the Adjudicator was correct to conclude that the Payment Schedule had not been served on Halo and did not deny the plaintiffs natural justice by coming to that conclusion and by failing to take into account the contents of the Payment Schedule.

[SOP31.55] When time starts running?

Dealing with the question of when time begins to run, McDougall J, in *FAL Management Group v Denham Constructions* [2014] NSWSC 747, said the following at [7]:

> In support of the latter point, the plaintiff relied on some observations made by me, in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2005] NSWSC 378 at [25], ons 20 of the Act. I said, in substance, that receipt of the notice of acceptance was the fact that set the clock running and that provided the fact and the time of service, at least for the purposes of s 31(1)(c) of the Act.

[SOP31.57] *"… sending it …"*

Section 31(1)(c) refers to service of notices "… by post or facsimile …"

Section 31(3) is set out below for the sake of ease of reference:

> The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.

Each one of the States and Territories provides for service of such documents under an Electronic Transactions Act, as follows:

ACT: *Electronic Transactions Act 2001*

NSW: *Electronic Transactions Act 2000*

NT: *Electronic Transactions (Northern Territory) Act*

Qld: *Electronic Transactions (Queensland) Act 2001*
SA: *Electronic Transactions Act 2000*
Tas: *Electronic Transactions Act 2000*
Vic: *Electronic Transactions (Victoria) Act 2000*
WA: *Electronic Transactions Act 2011*

Of relevance are the comments of EM Heenan J, relying on an earlier version of the Western Australian Act, in *Triple M Mechanical Services Pty Ltd v Ellis* [2013] WASC 67 at [14]. His Honour stated as follows:

> This leads the applicant to submit that within the meaning of s (1)(a) and s 14 of the *Electronic Transactions Act 2003* (WA), these particular attachments were or were to be regarded as having been transmitted and received on the date of dispatch. I shall not go into the provisions of those sections at the moment, beyond saying that the submissions of the applicant seem to be tenable or arguable in this respect. If those submissions were to be accepted, then of course the annexures would have been received by the adjudicator within time. If they are not accepted, the annexures would have been received at the most a day late, because the evidence is that by a combination of factors, the adjudicator was able to have access to the annexures by the use of different software the following day.

[SOP31.60] Victoria — *"... service of notices ..."*

Section 50 of the Act which deals with the service of notices, differs from that of the other jurisdictions in stating that a facsimile received after 4.00pm on any day is deemed to have been received on the next day.

In *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141; [2010] VSC 199, it was contended that the payment claim had not been served as required by s 14(1) of the Victorian Act.

Vickery J noted:

> [84] As was pointed out by the Lord Chancellor in *Hope v Hope* (1854) 4 De GM & G 328; 43 ER 534 at 342 (De GM & G):
>
> > The object of all service is of course only to give notice to the party to whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done as required.
>
> [85] To like effect were the observations of Holroyd J in *Rudd v John Griffiths Cycle Co Ltd* (1897) 23 VLR 350 where his Honour, in the course of delivering a dissenting judgment of the Full Court, after referring to the common law history of personal service, went on to say (at 354):
>
> > Before the *Common Law Procedure Act 1852*, came into operation the Courts of England were in general very strict in their interpretation of what constituted personal service, but still on several occasions they declined to set aside the service where the copy of the writ had been delivered at the party's residence to a servant or relative of his and from the facts the Judge thought it fair to infer that it came into his hands or to his knowledge so that he did or could, if he pleased, become acquainted with its contents.
>
> [86] These passages were cited with approval by McInerney J in *Pino v Prosser* [1967] VR 835 at p 837, who observed that it would be:
>
> > ... remarkable to the point of seeming absurdity, in that the defendant who, on his own affidavit admits that he received the writ ... should be held not to have been served.

His Honour concluded at [114] that it was not a purpose of the Act that service of a premature payment claim should be invalid.

[SOP31.70] Queensland — *"... service of notices ..."*

Section 103(1) authorises service of notices in the manner provided for in the contract. Section 103(2) preserves the service of notice provisions in the *Acts Interpretation Act 1954* (Qld).

Philip McMurdo J, in *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30, considered and analysed the Queensland statutory provisions in regard to service, where his Honour said:

> [25] Section 39 makes no specific reference to the sending of a document by email. CGE's submissions appear to accept that, in general, a document required to be served under the BCIPA can be served by email. Irwin DCJ so held in *Penfolds Projects Pty Ltd v Securcorp Ltd* [2011] QDC 77 at [232], upon the basis that email is a "similar facility" within s 39(1) of the Acts Interpretation Act. With respect, that interpretation is open to doubt. The various means of service which are specified in s 39(1) are each described as a means of conveying a document to a particular place, such as a place of residence or business or a certain office of a body corporate. That is not a characteristic of an email transmission. As Austin J observed in *Austar Finance Group Pty Ltd v Campbell* (2007) 215 FLR 464; [2007] NSWSC 1493, when comparing an email with a facsimile transmission, "an email is transmitted to and electronically stored by a server which is normally not located in the receiver's premises, and positive action is needed on the part of the receiver to read the email (by accessing it through his or her computer) and to obtain a hard copy (by directing the computer to send the email to the receiver's printer)" [at 473].
>
> In many contexts, the provision of information by an electronic communication is facilitated by the ETA, s 11 of which is as follows:
>
> > 11 Requirement to give information in writing
> >
> > (1) If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).
> >
> > (2) The circumstances are that—
> >
> > (a) at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and
> >
> > (b) the person to whom the information is required to be given consents to the information being given by an electronic communication.
>
> Assuming that s 21(5) of the BCIPA is a State law by which a person (the party applying for an adjudication) is "required to give information in writing" (by serving a copy of the adjudication application), still the circumstances stated in s 11(2) would have to exist for that provision to authorise service by an email. One of those circumstances is the consent of the recipient to the information being given by an electronic communication. In some cases, that consent will have been given by a term of a construction contract, so that irrespective of the ETA, the document could be electronically served under s 103(1) of BCIPA. Where there is a consent by the adjudication respondent to service by email, which is not contained in the construction contract, s 11 of the ETA would appear to permit service to occur by what is defined for the ETA as an electronic communication.
>
> [27]Schedule 2 to the ETA defines "electronic communication" to mean:
>
> > (a) a communication of information in the form of data, text or images by guided or unguided electromagnetic energy; or

(b) a communication of information in the form of sound by guided or unguided electromagnetic energy, if the sound is processed at its destination by an automated voice recognition system.

His Honour then dealt with the position where the person to be served became aware of the contents of the documents, and in that regard, his Honour at [34] held:

> In *Capper v Thorpe [1998] HCA 24;* (1998) 194 CLR 342, it was said that a document will be served "if the efforts of the person who is required to serve the document have resulted in the person to be served becoming aware of the contents of the document" [at 352]. Similarly, in *Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542; [1996] NSWSC 314, Young J (as he then was) held that although service of an application for an order under s 459G was not effected by the deposit of the document in a document exchange box, the proof of actual receipt of the document from that box would suffice. Young J said [at 544, 545]:
>
> > The ordinary meaning of "service" is personal service, and personal service merely means that the document in question must come to the notice of the person for whom it is intended. The means by which that person obtains the document are usually immaterial. ...
> >
> > Accordingly, one gets back to the ordinary principle, has there been personal service, that is has the document come to the notice of the respondent? ...
> >
> > The ultimate issue is whether the document was received by the addressee ... If it is, then in my view no matter how it got to the addressee the addressee has been served. ...

At [37], his Honour noted that service does not require the recipient to read the document, but it does require something in the nature of the receipt thereof. His Honour added that a document could be served in that sense, although it was in electronic form, but however it was insufficient for the document and its whereabouts to be identified "absent something in the nature of its receipt".

32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

SECTION 32 COMMENTARY

[SOP32.50] ***"... any right that a party … may have under the contract ..."***

In *Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd* [2008] NSWSC 1423 at [44] (19 December 2008), Hammerschlag J said:

> There is, in my view, no policy which allows the machinery of the Act to facilitate the obtaining of payment of money to which the claimant is not under the parties' contract entitled to retain, with the effect that when the payer successfully recovers that money (also using the machinery of the Act) the usual costs consequences do not obtain.

His Honour delineated the principles applicable on the facts of that case to the granting of restitution of moneys overpaid pursuant to an adjudicator's determination and the calculation of interest thereon.

What is the position where a contract has an arbitration clause in it? Of course such a clause is separable.

It could not have been the intention of the legislature to have any provision of the Act impact on the right to invoke an arbitration clause.

At [SOP25.590] there is a discussion as to whether a cross-claim (and for that matter), an arbitration, can be instituted/commenced at the same time as a claim to enforce an adjudicated amount, or whether or not Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 (3 December 2003) was correct in holding that it was not proper to bring a cross-claim in an action to enforce an adjudicated amount.

In *Jem Developments Pty Ltd v Hansen Yuncken Pty Ltd* (2006) 68 NSWLR 100; [2006] NSWSC 1087, Einstein J noted, with approval, the observations of Barrett J in *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152 as underpinned by the terms of s 32 of the Act. At [37] and [38] of *Shellbridge*, Barrett J said:

> [37] Matters of the present kind seem often to be approached on the footing that the s 25 result (filing of an adjudication certificate as a judgment for debt) must be resisted virtually at all costs. The limits imposed by s 25(4) upon attempts to have such a judgment set aside are referred to in that connection. But it seems sometimes to be not sufficiently appreciated that, although a judgment in debt may result from the adjudication process, there is no curtailing of contractual and other rights arising in relation to the performance of the relevant work. This is made clear by s 32. Thus, if the principal has a claim for defective work or can show that work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator. The principal might, if thought fit, institute proceedings seeking not only to advance the claim in question but also, perhaps, to obtain, by reference to a right of set-off, a stay of the judgment that s 25 has had the effect of creating. The s 25(4) limitations do not apply to an application for a stay, as distinct from an application to have a judgment set aside.
>
> [38] It was pointed out in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; (2005) 21 BCL 437; [2005] NSWCA 49 by Handley JA (with whom Santow JA and Pearlman AJA agreed) that a judgment entered under s 25 is, by reason of s 32(3)(b), effectively a provisional judgment, both in what it grants and what it refuses. His Honour added at [21]:
>
> > A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid.
>
> As Handley JA observed, the specific statutory context is one in which inconsistent judgments are contemplated and allowed.

In *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2006) 66 NSWLR 624; [2006] NSWSC 874 (5 September 2006), the question arose as to the juristic nature of the right created by s 32. At [33] of McDougall J's judgment, he did not think it was correct to speak of s 32 as creating a restitutionary right. He said that the place of s 32 in the scheme of the Act was to reinforce the interim nature of an adjudication determination. His Honour at [34]–[38] said:

> [34] Thus, if it were necessary to do so, I would conclude that the nature of the claim to repayment is analogous to that described by Handley JA (speaking with the concurrence of Mahoney and Priestley JJA) in *Production Spray Painting and Panel Beating Pty Ltd v Newnham (No 2)* (1992) 27 NSWLR 659 at 661–662; 34 AILR 374.
>
> [35] In the event that any of the adjudications is found to have been erroneous (so that it is found that John Holland had no entitlement to be paid any disputed amount), there will have been demonstrated a total failure of consideration for the amount in question. It is clear that a common money count would lie in those circumstances: *Lee v Mallam* (1910) 10 SR (NSW) 876 at 885; 27 WN (NSW) 203 (Sly J, with whom Cohen and Gordon JJ agreed).
>
> [36] Kirby P applied that principle in *Government Insurance Office (NSW) v Healey (No 2)* (1991) 22 NSWLR 380 at 384, referring not just to "a common money count" but also to "its modern equivalent" (ie I think, a restitutionary claim).
>
> [37] The legislature intended the process of dealing with progress claims to be speedy. In many human activities, speed and error are natural companions. Section 32 is the legislative recognition of the potential application of that truism to the scheme of adjudication of disputes.
>
> [38] Regardless of the precise classification of the restitutionary right, there is another answer to this aspect of Mr Collins' submissions. Clause 42.7.2 requires the superintendent to determine, and state in the final payment schedule, the amount finally payable by the RTA to John Holland or vice versa "in connection with the work under the Contract". The amounts in question were paid pursuant to John Holland's assertions that they were due for work under the contract. I do not think that John Holland should be heard to argue that they are anything other than amounts "in connection with the work under the Contract". They are thus, if held to be repayable, amounts, or parts of amounts, payable under cl 42.7.4 by John Holland to the RTA. That is a sufficient connection to entitle the RTA to hold the security until they are paid (cl 42.7.4(b)).

At [32] of *Ceerose Pty Ltd v Building Products Australia Pty Ltd* [2015] NSWSC 1886, Beech-Jones J noted that the scope of s 32 was accepted and expanded upon by the Court of Appeal of *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWSC 140, where the Court of Appeal said:

> [45] The respondent cannot oppose a payment claim, or if there is a judgment upon filing an adjudication certificate cannot seek to impugn the judgment, in reliance on matters arising under the contract, so rights under the contract are preserved and can be otherwise asserted. The statutory liability established by an adjudicator's determination can be challenged only on limited grounds: *Brodyn Pty Ltd v Davenport* (2004). So it is open to the respondent (or the claimant – an adjudicator's determination may be adverse to a claimant) to contend in a final working out of the contractual mechanisms or in other proceedings for a result different from that determined by the adjudicator. Statutory liability otherwise than that established by an adjudicator's determination is also not final, and either party may in the course of a final determination contend for a different result, see s 32(1) and (2). Section 32(3)(a) then states the obvious, that there must be allowance in any other proceedings for an amount which has been paid. Section 32(3)(b) may be unnecessary, because an order in the other proceedings that the claimant pay money to the respondent will have the effect of restitution; however, it does enable an order for restitutionary interest and, if there has been a judgment upon

filing an adjudication certificate, an order contrary to the judgment: as was said by Handley JA in *Falgat Construction Pty Ltd v Equity Australia Corporation Pty Ltd* [2005] NSWCA 49; (2005) 62 NSWLR 385 at [21] –

> Finally, s 3(b) makes a judgment entered under s 25 on an adjudication certificate provisional only, both in what it grants and in what it refuses. A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid.

[46] Thus the RTA (and John Holland) remained entitled to assert and enforce their rights under the contract. That included, in the RTA's case, to contend as to the Spoil monies that John Holland was to be paid for the excavation work in Cut 4 under Pay Item R 42P15.1, or was not to be paid for it at all; as to the Latent Condition monies that there was not a latent condition; and as to the Detonator Dump monies that the Superintendent's certification of the claim had been correct. The contractual mechanisms for working out the parties' rights under the contract still operated, and had to be followed – the adjudicated claims were only part of the contractual tapestry. In giving effect to the contractual mechanisms there would have to be allowance for the amounts paid, quite apart from s 32(3)(a). If it came to proceedings (including arbitration under the "arbitration process" in the contract), the parties' rights under the contract would again be worked out with allowance as recognised in s 32(3)(a), and perhaps orders as contemplated by s 32(3)(b) although there could be an order that John Holland pay money to the RTA without the necessity to call it an order for restitution of money paid under or for the purposes of the Act.

In *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798, McDougall J held that a clause of a contract to the effect that where a builder wished to claim an amount over and above the contract amount, eg a variation or a delay or disruption cost, requiring as a precondition notice to the principal, that was not inconsistent with the rights given under the Act, and did not attract the operation of one or other of the alternative set out in s 34(2).

In *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd* [2009] NSWSC 320 at [34], Brereton J explained the purpose of s 34 thus:

> So far as the "final payment" component is concerned, while the 14 July Agreement provided for it to be secured by a bank guarantee, it did not affect Bellingham's entitlement to be paid on practical completion. In respect of the final payment under the contract, there is no reason why the agreement should be construed as excluding any right to make a progress claim under the Act in respect of it at the time when the Act authorised it. (Had it done so, it would have been void by reason of s 34 of the Act, discussed below). Likewise there is no reason why it should be construed (and Roseville does not suggest that it should be) as excluding any right to make a claim in respect of the demolition works; indeed Roseville accepts that Bellingham was entitled to make a claim under the Act in respect of the demolition works.

At [43] of *Roseville Bridge Marina*, Brereton J said:

> … The purpose of s 34 is to prohibit the exclusion or modification of the right to receive the contractual remuneration by progress payments; it does not prohibit the exclusion or modification of the contractual remuneration *simpliciter*. An agreement between the parties to a construction contract that some "extras" or "variations" will not entitle the builder to additional remuneration, or that a specified sum will be accepted for such works, forms part of the contractual regime according to which their rights under the Act as well as at law are regulated, and is not inconsistent with the rights given by the Act to claim a progress payment.

This paragraph was referred to with approval by Fraser and Morrison JJA and Boddice J in Queensland Court of Appeal in *Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd* [2015] QCA 288.

At [55] of *Roseville Bridge Marina*, Brereton J said:

> It is well established that there can be parallel proceedings under the Act and at law. Under the Act, the statutory rights are adjudicated only on an interim basis, and as such supplement the rights of the parties under the general law. Not only are consecutive proceedings under the Act and the general law permissible, but statutory proceedings need not be completed before curial proceedings are commenced, and a builder is entitled to pursue concurrently its statutory and common law remedies, subject to the limitation that the Act contemplates that a court will be free to undertake a final adjudication, so that a concurrent statutory claim may be vexatious and oppressive if commenced or carried on close to trial so that it will interfere with the curial proceedings [*Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; [2005] NSWCA 49]. It was not suggested that that was the case here.

In *Samadi Developments Pty Ltd v SX Projects Pty Ltd* [2015] NSWSC 1576, SX Projects obtained judgment against Samadi following an adjudication determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW). Samadi then, without paying the judgment debit, instituted proceedings under s 32(2) of the Act so as to determine its cross-claim against SX Projects. SX Projects then sought an injunction against Samadi to preclude it from proceeding with its cross-claim without first paying the judgment debt.

Ball J rejected that application and held:

> [6] It is SX's contention that, unless the proceeding is stayed until Samadi pays the amount the subject of SX's judgment, the policy of the Act will be undermined. The policy of the Act is to provide a quick and efficient means by which contractors are entitled to recover progress payments, without interfering with the parties' rights in relation to the relevant construction contract. If a stay is not granted, the practical effect is that SX will not enjoy the benefits the Act intended to provide because it will have to wait until the underlying contractual issues are determined by the court in this proceeding before it can enforce the judgment it obtained on the basis of the adjudication determination.
>
> [7] I do not accept SX's contention. It is contrary to the decision of Einstein J in *Grant Constructions Pty Ltd v Claron Constructions Pty Ltd* [2006] NSWSC 369, which, in my opinion, was correctly decided. There is nothing to prevent SX from enforcing the judgment it has obtained. It is true that SX may be prevented from bringing an application to wind up Samadi on the basis that its judgment has not been satisfied. However, if Samadi were wound up before the current proceeding is determined because the stay is granted and it is unable to pay the judgment debt against it, the result may be to deprive Samadi of the ability to pursue its contractual rights. However, those rights are expressly preserved by s 32(2) of the Act, which provides:
>
> > Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

At [31] of *Gambaro* above, their Honours added:

> BCIPA contemplates, however, that the statutory payment might differ from the contractual payment. For example, whilst both a superintendent and an adjudicator are obliged to apply the contractual criteria in assessing the amount of a progress payment, their assessments might differ and the adjudicator is not bound by a superintendent's assessment. In *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19, the New South Wales Court of Appeal held that the phrase "calculated in accordance with the terms of the contract" in the analogue of s 13(a) of BCIPA in BCIPA (NSW) means "calculated on the criteria established by the contract" rather than "reached according to mechanisms provided by the contract". Hodgson JA,

with whose reasons Beazley JA agreed, considered that this construction accorded with the use of the word "calculated" As Basten JA put it, "the statutory right to payment is unaffected by calculations undertaken by a superintendent or other authority appointed to value work under the contract" so that "the statutory regime is, partly, though not of course wholly, independent of the terms of the construction contract and is intended to operate according to its own statutory terms". That decision has been followed in the Trial Division, including in relation to the pricing of a variation in an amount which differs from a superintendent's assessment. (footnotes omitted)

Of significance, are the principles to be extracted from [39]-[43] of *Gambaro*. These, in essence, are:

(a) The operation of Parts 2 and 3 of the BCIPA were not exhausted upon payment of the adjudicated amount. Their Honours held that any proposition to the contrary was irreconcilable with the decision in *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* [2009] QCA 329 at [20].

(b) A progress certificate for payment of an amount assessed by the superintendent on account of a contractual entitlement to variations could not have any such effect.

(c) There is a distinction between contractual or adjudicated progress payments and the contractual remuneration on account of which such progress payments are made. The Queensland Court of Appeal referred, with approval, to a decision of Philip McMurdo J (as his Honour then was) in *Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd* [2014] QSC 223 at [51].

(d) Relying on the judgment of Macfarlan JA (with whom Handley AJ agreed) in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69 at [59], the Queensland Court of Appeal noted that s 32 of the New South Wales Act confined the inability of a claimant to reagitate issues determined by a previous adjudication in the context of a further claim for a progress payment.

At [45] of *Gambaro*, the Queensland Court of Appeal cited with approval the decision of Besenko J in *Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd* [2015] FCA 1371, where his Honour refused a subcontractor's application for an interlocutory injunction to restrain a contractor from exercising contractual rights to have recourse to a bank guarantee supplied by the subcontractor in satisfaction of an obligation to pay the adjudicated amount of a payment claim. The Queensland Court of Appeal noted that Besenko J concluded that the contractual right to recourse to a bank guarantee did not have any of the effects described by s 99(2)(b) of the BCIPA and did not have an effect on events after the contractor made the payments pursuant to the adjudicator's decision.

The commentary above on s 32(1)–(3) of the New South Wales Act must be considered in conjunction with the provisions of s 34 of the New South Wales Act, and for which see [SOP34.50] below.

Where applicable, similar or mirror provisions in regard to the other States and Territories are listed below. Each and every one of the provisions in regard to the other States and Territories must be looked at and considered so as to ascertain whether there are any differences. For example, the provisions on this issue in the Northern Territory and Western Australian Acts, differ the most from the other States and Territories:

Australian Capital Territory – s 38(1) – (3)

Northern Territory – *Construction Contracts (Security of Payments) Regulations 2005*s 47(1) – (4)

Queensland – s 100(1) – (4)

South Australia – s 32(1) – (3)

Tasmania – s 10(1) – (3)

Victoria – s 47(1) – (5)

Western Australia – s 45(1) – (4)

PART 4 – MISCELLANEOUS

33 Act binds Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

34 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void.

[S 34 subst Act 133 of 2002, s 3 and Sch 1[48]]

SECTION 34 COMMENTARY

[SOP34.50] New South Wales — *"… is purported to be, excluded, modified or restricting …"*

In *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay* [2004] NSWSC 716 (3 December 2004) McDougall J left open the issue as to where in the light of the provisions of s 34, there was any room for the operation of estoppel. His Honour said that this was an issue for a final and not an interim hearing.

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004] NSWSC 823 (13 September 2004), McDougall J held that the following clauses in a building contract were in conflict with s 34 and were therefore void:

> [47] It follows, in my judgment, that the following provisions of cl 42 are void under s 34:
>
> (1) In cl 42.1, the sentence "In aggregate payment claims shall not exceed the payment price" in the second unnumbered and unlettered sub paragraph.
>
> (2) In cl 42.2, the third unnumbered and unlettered sub paragraph, reading "In valuing work, regard shall not be had to the value of variations which value has not been included in the contract price".

The Minister took the decision of McDougall J on appeal to the New South Wales Court of Appeal. The decision on appeal is cited as *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 (6 May 2005).

Hodgson JA at [34]–[36] said:

> [34] In my opinion, this suggested anomaly loses force when one considers the true effect of s 22(2). It is true that para (d) of s 22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration under that paragraph, reasons included in the adjudication response that were not included in the payment schedule.
>
> [35] However, paras (a) and (b) of s 22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paras (a) and (b), even if they cannot be considered under para (d).
>
> [36] Similarly, in my opinion, an adjudicator could take into account a contention of an applicant that a term of the contract is void by reason of s 34, when considering matters under paras (a) and (b), even if that contention could not be taken into account under para (c).

At [38]–[44], his Honour summarised the submissions of senior counsel for the Minister on the meaning of s 34.

At [48], his Honour held that those submissions failed essentially for the reasons set out in [33] and [34] of *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; 21 BCL 273; [2004] NSWCA 395.

At [49]–[54], his Honour further said:

> [49] In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act. Section 22(2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s 22(2) as to what is to be considered, an error on these matters does not render the determination invalid.
>
> [50] Accordingly, even if s 34 does not invalidate the relevant parts of cl 42, the adjudicator's determination would not be invalid; and it is not necessary for me to express a final view as to whether s 34 has that effect in this case.
>
> [51] However, I am of the view that it is strongly arguable that s 34 does have that effect, on either or both of two grounds.
>
> [52] First, consistently with the view expressed in *Siemens* at [35], the procedure in cl 46 might be regarded as merely a procedure for identifying when and by whom a calculation is to be made. The basis for the expert's decision set out in cl 40.2 could then be regarded as the relevant express provision made by the contract with respect to the *calculation* of the amount of progress payments under cl 42.2, with which s 9(a) engages. If that view is correct, then the relevant sentences in cl 42 would preclude the payment of progress payments calculated in accordance with the terms of the contract, and thus fall foul of s 34.

> [53] Second, although "progress payment" is defined in s 4 of the Act to mean "a payment to which a person is entitled under s 8", and although s 4 does not contain a qualification by reference to context, nevertheless in my opinion it is plain that, in some places in the Act, the expression "progress payment" is used in a way that includes a more generalised meaning. For example, s 3(2) cannot mean that the means by which the Act ensures that a person is entitled to receive "a payment to which a person is entitled under s 8" is by granting a statutory entitlement to such a payment, regardless of whether the relevant construction contract makes provision for "payments to which a person is entitled under s 8". Plainly, in s 3(2), progress payment is meant in a more general sense; and the same must be true of its use in s 3(1). Similarly, where s 8(2)(a) refers to the date determined under the contract as the date on which a claim for a progress payment may be made, this provision was not meant to be ineffectual unless the contract provision relates to payments to which a person is entitled under s 8: again, in my opinion, plainly a more general sense of the phrase is intended to be included: cf *Quasar* at [21]. And in my opinion, the more general sense is also intended in s 8(1), because otherwise s 8(1) would be circular and vacuous.
>
> [54] On that basis, in my opinion a provision of a contract as to the determination of reference dates, or as to the calculation of the amount of progress payments, could be such as to restrict the operation of the Act within the meaning of s 34, even though the Act in s 8(2)(a) and s 9(a) expressly defers to such provisions. For example, if a contract provided for yearly reference dates, or provided that progress payments should be calculated on the basis of 1% of the value of work done, in my opinion such provisions could be so inimical to s 3(1), s 3(2) and s 8(1) as to be avoided by s 34. If, contrary to the first ground, cl 46 is a provision as to calculation, the relevant parts of cl 42 could still be seen as restricting the operation of the Act. In my opinion, it is preferable not to finally determine this question in a case where it is not necessary to do so.

Bryson JA's disagreed with Hodgson JA's observations in [51]–[54] to the effect that s 34 invalidated some parts of cl 42 of the construction contract.

At [58] of his judgment, Bryson JA said:

> [58] I respectfully say that I do not join in Hodgson JA's observations at [51] to [54] to the effect that s 34 invalidates some parts of cl 42 of the construction contract. The avoidance provisions should be applied according to their terms and no more widely. Rulings by McDougall J on the interaction of the construction contract with the Act and s 34 are open to question because his Honour's demonstration of the manner in which provisions of the contract excluded modified or restricted the operation of the Act, or otherwise fell within s 34(2), was not appropriately specific. As decision does not turn on this I do not pursue it further. If the application of the references in s 8(2) and s 9 to the terms of the contract and to whether or not the contract makes express provision with respect to specific matters with which ss 8 and 9 deal were fully considered, it may be that the parts of cl 42 which McDougall J considered would fall outside them and the relation between s 34 and cl 42 would not be important.

At [61] of the judgment, Brownie AJA left the matter open.

It will be seen that each of the three judges took different approaches. The question as to how s 34 will in future be applied can still be said to be an open one.

In *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2006) 66 NSWLR 624; [2006] NSWSC 874 (5 September 2006), a clause in the contract permitted the RTA to retain security provided by John Holland until the superintendent provided a "Final Statement" which was required in 28 days after the end of the last "Defence Liability Period". It was submitted on behalf of John Holland that this clause contravened s 34 in that:

> [I]t would permit a principal which has suffered an adverse adjudication determination to reverse the result of that determination without pursuing the procedure envisaged by

> the Act, namely, commencing proceedings in which an order for restitution of adjudication monies may be made under s 32(3)(b) of the Act. Instead, a principal could have recourse to security. It could, as in the present case, refuse to reduce the amount of security – notwithstanding that the Contractor's obligations of performance under the Contract have been discharged and Practical Completion has been achieved …

See [43] of the judgment. At [52] of his judgment, McDougall J rejected this submission and said:

> [t]here is no reason why a final determination by the superintendent could not "undo" the effect of a prior determination by an adjudicator, in just the same way as a final determination by a court or arbitral or other tribunal might do so. Of course, the contract provides for a process of review of determinations by the superintendent (cl 45); there is no equivalent review process for the decisions of courts or arbitral or other tribunals (and such rights of appeal as there may be are not to be equated to the kinds of review for which cl 45 provides). But this relates to the finality of the superintendent's determination. It says nothing as to the subject matter of that determination, or as to its effects on prior determinations by adjudicators.

In *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798, McDougall J held that a contractual provision (clause 45) to the effect that where the builder wished to claim an amount over and above the Contract Amount (for example, for a variation, or for delay or disruption costs), it must as a precondition of such a claim give notice to the Principal – so as to in effect bar claims if the notice were not given – was not inconsistent with the rights given under the Act, and did not attract the operation of one or other of the alternatives set out in s 34(2). His Honour said:

> [82] As I have said, the ground of invalidity alleged by John Goss was that the requirement to notify a claim within 10 business days of the occurrence of the events giving rise to it was inconsistent with the right given by s 13(4) to bring a payment claim within 12 months after cessation of work under the contract. I do not accept that submission. Clause 45 says nothing about the time when a payment claim may be made. Its concern is to limit entitlement to work that might be comprised in a payment claim, whenever the payment claim is made. Provided notice is given in accordance with cl 45, the work that is the subject of the notice may be included in a payment claim made at any time, subject of course to the general provisions of the Act relating to progress claims and their contents.

At [43] of *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd* [2009] NSWSC 320 (27 April 2009), Brereton J emphasised that the Act did not create a right to remuneration for construction work. That right was created by the construction contract. The Act created and regulated a right to obtain a progress payment.

Inherent in that concept was that there be a payment on account of the ultimate contract sum. His Honour held that an agreement between the parties to a construction contract that some "extras" or "variations" will not attract additional remuneration or that a specified sum will be the agreed amount for such work is part and parcel of the contractual regime according to which the rights of the parties under the Act as well as at law are regulated, and there is no inconsistency between any such provision and the rights given by the Act to claim a progress payment.

In *Proactive Building Solutions v Mackenzie Keck Pty Ltd* [2013] NSWSC 1500, cl 27.2 of the Building and Construction Contract provided for English law to be the law that governs the contract between the parties, and thus the law pursuant to which disputes under the contract were to be resolved. It further provided that the courts of England had exclusive jurisdiction to determine disputes between the parties. At [29]–[30], McDougall J reasoned as follows:

> [29] Thus, as I understand the present state of the law, the effect of cl 27.2 would be that the courts of England would apply English law excluding its choice of law rules, and would not apply, as part of that law, legislation of this State. That conclusion seems to me to be consistent with the commercial reasons underpinning choice of law rules. The parties bargained for a particular system of law to apply so that, among other things, disputes between them would be resolved by reference to the legal principles established by that system. They did not bargain for an outcome that, by reason of the rules of private international law of that system, some process of renvoi might lead to the application of laws of a different legal system. Far less did they bargain for a process whereby, because of the particular private international law rules of the two systems, there would be an infinite regression on the procedural point and never a resolution on the point of substance (if I may be so bold as to paraphrase, entirely out of context, the observations of McHugh J in dissent in *Neilson* at [41]).
>
> [30] It follows that acceptance of the position for which MK contends in this case would mean, among other things, that Proactive would be shut out of its rights under the *Security of Payment Act*. It may very well mean also that Proactive would be shut out its rights under the *Contractors Debts Act*. That is because, by s 7 of that Act, the debt certificate is to be issued when judgment is given or entered up by the court in which judgment is given or entered up. That poses no problem where the action is heard in and determined by a court of this State. It poses a very considerable problem where the action is heard in and determined by a court in England, in circumstances where (at the risk of excessive repetition) the *Contractors Debts Act* forms no part of the law of England.

At [35], his Honour held that, in the circumstances, it seemed to him that it was not just a question of the difficulties raised by s 34(2)(b). His Honour said that if cl 27.2 applied, it had the effect of excluding, modifying or restricting the operation of the *Building and Construction Industry Security of Payment Act 1999* (NSW) in the manner indicated by his Honour in the judgment. At [36], his Honour said that this resulted in depriving Proactive of the legitimate juridical advantage given to it by the procedure set out in the relevant parts of s 15 of the *Building and Construction Industry Security of Payment Act 1999*.

At [38], his Honour concluded as follows:

> In those circumstances, it seems to me, it must follow that to the extent that cl 27.2 formed a part of any of the contracts (and as I have said, I think that in at least six cases it does), it is void. More importantly, as to the remaining thirteen contracts, if Ms Steele is right in her submission that cl 27.2 applies then it must also be void for the same reasons.

In *Patterson Building Group Pty Ltd v Holroyd City Council* [2013] NSWSC 1484, cl 5.2 of the Building Contract entitled the Defendant to call on security in two cases, namely, either where the Defendant remained unpaid after the time for payment had come and gone or where it claims to be owed moneys by the Plaintiff. At [59]–[75] of White J's judgment in *Patterson*, his Honour considered cl 5.2 was in conflict with the provisions of the no contracting out provisions as set out in s 34 of the New South Wales Act.

At [75] of *Patterson*, White J concluded thus:

> Whilst the significant difference between the circumstances of the present case and those which obtained in *John Holland Pty Ltd v Roads & Traffic Authority* (NSW) [2007] NSWCA 140 must be acknowledged, nonetheless, I think the reasoning in that case applies also to the present. I think it would be straining the operation of s 34 to find that it rendered void or required the reading down of clause 5.2.

A discussion on this subject would not be complete without reference to the judgment of Margaret Wilson J in *Queensland v T & M Buckley Pty Ltd* [2012] QSC 265, and for which see [SOP8.100].

Besanko J, at [35] of *Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd* [2015] FCA 1371, referred to the decision in *Patterson Building Group Pty Ltd v Holroyd City Council* [2013] NSWSC 1484 per White J where his Honour had considered s 34 of the New South Wales Act (similar to, but not identical to s 99 of the Queensland Act), and noted that White J in *Patterson* held that recourse to security would not be contrary to s 34 of the New South Wales Act, where White J said:

> [73] The position can also be tested by considering what the position would have been if, for example, the defendant had recourse to the security to meet its claim to be owed money on account of liquidated damages before there was a reference to adjudication. There would be nothing I think in the Act that could preclude the defendant from having recourse to the security in those circumstances and it does not appear to me that the plaintiff could undo the effect of the defendant's having recourse to the security by recourse to the procedures in the Act.
>
> …
>
> [75] Whilst the significant difference between the circumstances of the present case and those which obtained in *John Holland Pty Ltd v Roads and Traffic Authority of NSW* must be acknowledged, nonetheless, I think the reasoning in that case applies also to the present. I think it would be straining the operation of s 34 to find it rendered void or required the reading down of clause 5.2.

[SOP34.55] A contractual condition precedent to payment

At [49] of *Clyde Bergemann v Varley Power* [2011] NSWSC 1039, McDougall J said:

> The question arose more recently in the Court of Appeal, in *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279*Transgrid* and *John Holland*, saying that he adhered to the views there expressed. His Honour explained those views as follows, at [54]:
>
> > This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as the obtaining of a superintendent's certificate, has not been satisfied; and it means equally that contractors are not *ipso facto* entitled to payment because of the operation of a deeming provision such as cl 37(2) of the contract in this case.

In *BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd* [2012] QSC 214, cl 7(d) of the contract stated:

> [8] Clause 7 of the respondent's standard terms and conditions deals with payment and permits the subcontractor to claim payment progressively on the 25th day of each month which is described in the clause as a "progress claim". The respondent relies on cl 7(d) of its standard terms and conditions:
>
> > (d) A progress claim, including a final progress claim, shall:
> >
> > (i) contain details of the actual cost of work carried out by the Subcontractor up to and including the date the Subcontractor submits its claim;
> >
> > (ii) provide copies of tax invoices for any outlays claimed; and
> >
> > (iii) a declaration in the form in Schedule Three, each of which shall be a precondition to payment and if not provided or incomplete or false the Contractor may withhold payment until received.

Mullins J held in [13]–[17] of *BHW* as follows:

> [13] The applicant relies on the approach in *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] QCA 150 where the issue was the effect of clauses in the subcontract requiring a statutory declaration to be

included in the payment claim as to payments having been made to subcontractors and employed workers and providing for a warranty by the subcontractor that, if the payment claim did not comply with the conditions (including the provision of the statutory declaration), the payment claim was void and the reference date for the purposes of the Act would become the same day on the following month. The subcontractor had not provided the relevant statutory declaration with the payment claim. The contractor sought to rely on the subcontractor's warranty to withhold payment on the basis there was no reference date for the payment claim.

[14] Fraser JA who delivered the leading judgment in John Holland explained the nature of the statutory entitlement to progress claims conferred by s 12 of the Act at [18]:

> Section 12 confers upon a person who has undertaken to carry out construction work a statutory entitlement to recover a progress payment from each "reference date under a construction contract", which is defined to mean, so far as is presently relevant, "a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, ...under the contract...". Accordingly, the contractual provisions to which reference may be made for the purpose of ascertaining the "reference date" are those which state, or provide for the working out of, the date on which a progress payment claim "may be made". The latter expression refers to an entitlement to make a progress claim. It does not comprehend reference to warranties which concern the form and content of progress claims or the consequences of breaching warranties about the form and content of progress claims.

[15] Fraser JA concluded at [21] that if the impugned clauses operated to defer what would have been the subcontractor's statutory entitlement to a progress payment from the reference date ascertained in accordance with the Act, they would be void under s 99 of the Act. It is also relevant to refer to the statement made by Fraser JA at [19]:

> Bearing in mind the statutory object and the role of s 12 and the definition of "reference date" in giving effect to that object, those provisions are incapable of justifying an implication that the date upon which the statutory entitlement to a progress payment accrues may be qualified by contractual provisions other than those captured by the unambiguous terms of the definition of "reference date".

[16] The analysis of the operation of the provisions of the Act in conferring the statutory entitlement to a progress payment in John Holland shows that the words of s 12 of the Act are important. The summary of the effect of s 12 in Vis for the purpose of that case should not be used to put a gloss on the words and meaning of s 12 for the purpose of determining in other cases the relationship between the statutory entitlement and relevant contractual provisions.

[17] Clause 7(d) of the respondent's standard terms and conditions is concerned with how to make a "progress claim" under the contract, and is not concerned with regulating a payment claim under the Act. Section 17 of the Act regulates the form of a payment claim under the Act for the purpose of pursuing the statutory entitlement to a progress payment from each reference date under the construction contract where the claimant has carried out construction work under the contract. There is no requirement in the Act for payment claims to be accompanied by such a declaration. The applicant's payment claims in this matter are therefore not invalid in the absence of a declaration under cl 7(d)(iii).

[SOP34.57] A restrictive timeframe for bringing a dispute – New Zealand authority

There is New Zealand authority, that in a similarly worded section of the New Zealand *Construction Contracts Act 2002* that a contractual provision for a restrictive time frame for bringing a dispute does not impinge on the relevant section. At [15] of *DHC Assets Limited v Toon* [2016] NZHC 140, Duffy J held:

> [15] Section 12 of the *Construction Contracts Act* prohibits any contracting out from the provisions of that Act. I cannot see, therefore, how the more restrictive time frames for bringing a dispute under cl 13 can be superimposed on DHC's rights under the *Construction Contracts Act*. To allow that to occur would be in effect to allow a contracting out of that Act's provisions insofar as they impose time limits for bringing a proceeding under that Act. In my view there is a sound argument that cl 13 does not detract from the other rights and legal remedies that DHC may have either under the *Construction Contracts Act* or the law of contract. In this regard I consider that the legal issue raised in the present case has similarities with that raised in *Blain v Evan Jones Construction Ltd* where the Court of Appeal found that the disputes resolution procedures in cl 13 of NZS319:2003 could not preclude a party to the contract from bringing proceedings in negligence for defective workmanship.[3]

The High Court found that cl 13 was "an exclusive process only during the construction period" and therefore it could not preclude a party from suing for breach of contract after the end of the construction period.[4] It also concluded therefore that cl 13 could not preclude a claim based in tort after the construction period had ended.

[SOP34.58] A contractual condition making a reference date conditional on provision of a statutory declaration or true statutory declaration concerning payment of other amounts owed by the subcontractor

In *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126, Ball J addressed the question as to whether or not a contractual provision which makes the occurrence of a reference date conditional on the provisions of a statutory declaration or a true statutory declaration concerning the payments of other amounts owed by the subcontractor is contrary to the provisions of s 34 of the Act. With respect, his Honour's judgment in this regard covers a point of such importance that it would not be inappropriate to cite the paragraphs of his judgment where this is dealt with. His Honour said:

> [27] In my opinion, a provision in a contract that makes the occurrence of a reference date conditional on the provision of a statutory declaration or a true statutory declaration concerning the payment of other amounts owed by the subcontractor falls into that category. That is not a provision which provides a mechanism for fixing a date. Rather, it is a provision that seeks to add an additional condition to the right to obtain a progress payment. As Applegarth J pointed out in *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd* [2014] QSC 293, when dealing with the equivalent provision in the *Building and Construction Industry Payments Act 2004* (Qld) (s 99), a contractual condition that facilitates the purposes of the Act may not infringe the prohibition contained in s 34. A condition that set out the form of a payment claim may, for example, fall into that category. However, the apparent purpose in this case of the requirement to supply a statutory declaration in the form of Annexure Part M is to make the payment of progress payments conditional on the payment by Glavcom of workers compensation premiums. It is not clear how that furthers the purposes of the Security of Payment Act, which is to ensure that those who do construction work have a cash flow from that work they do so that they are in a position to meet their financial obligations.
>
> [28] Hutchinson seeks to answer the point made in the previous paragraph in two ways. First, relying on the decision in *Lewence Constructions Pty Ltd v Southern Han*

Breakfast Point [2015] NSWCA 288, it submits that the question whether a reference date arises under a contract is not a jurisdictional fact. It is a question for the adjudicator and as a matter of fact the Adjudicator in this case thought that the truth or otherwise of the statutory declaration was material, indeed critical, to the question whether there was a valid payment claim. Second, Hutchinson submits that Glavcom conducted the case before the Adjudicator on the basis that cl 37.0 of the subcontract was valid and it submitted that the Adjudicator should accept the statutory declarations made by Mr Callipari, with the result that there was a valid reference date and payment claim. The Adjudicator accepted that submission. Glavcom is bound by the way it conducted the case before the Adjudicator: see *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd t/as Domus Homes & Anor* [2011] NSWSC 604 at [96] per Einstein J, citing *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at [44] per McHugh J.

[29] As to the first point, there can be no doubt that following the Court of Appeal's decision in *Lewence*, the question whether a reference date has arisen under a construction contract is not a jurisdictional fact. Whether a reference date had arisen or not was a question for the Adjudicator to decide. But it does not follow from that that any decision taken by the Adjudicator in relation to that question cannot involve jurisdictional error. Section 34 of the Security of Payment Act renders void provisions of contracts that restrict or modify the Act. It was not open to the Adjudicator to seek to apply a provision which was rendered void by s 34; and if the Adjudicator had done so in my opinion he would have made a jurisdictional error because he would have taken into account a matter which the Security of Payment Act made irrelevant. It follows that whether Glavcom had fraudulently failed to comply with cl 37.0 of the subcontract was irrelevant to the Adjudicator's decision, since that clause was void in any event.

[SOP34.59] The adjudicator's jurisdiction to determine any part of a contract is in conflict with s 34 of the New South Wales Act, and therefore void

In *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004] NSWSC 823 (13 September 2004), McDougall J cited the decision of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (4 December 2003) that the adjudicator had jurisdiction to determine whether any part of a construction contract was in conflict with the provisions of s 34, and therefore void. At [34] of that judgment his Honour said:

[34] I interrupt to note that I respectfully agree with, and accept, his Honour's analysis. Applied to the present case, it means (contrary to the submission for the Minister) that the adjudicator had power to determine whether the contractual provisions relied upon by the Minister to defeat Contrax' claim were rendered void by the operation of s 34 of the Act. That is no more than determining that (by reference to Palmer J's examples) that a term had been waived or could not be relied upon because of some estoppel.

In the light of the following observations at [36] of Spigelman CJ of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, it is doubtful whether an adjudicator has jurisdiction to determine whether or not any part of a contract is in conflict with s 34 (and similar provisions, where they exist, in the Acts of the other States and Territories). Spigelman CJ said:

[36] The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

[SOP34.60] Victoria — *"… is purported to be, excluded, modified or restricting …"*

(Under the provisions of the principal Act, prior to the commencement of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

There is no similar provision in the Victorian Act, so presumably a contract subject to that Act may validly contain a clause which is calculated to deter a party thereto from invoking the provisions of the Victorian Act.

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

See amendment Act s 38 which inserts the new s 48(2)(a) into the principal Act.

[SOP34.63] Queensland – validity of a condition contrary to the Act or which purports to annul, exclude, modify, restrict or otherwise change the provisions of the Act

Sections 99(1) – 99(2) of the Queensland Act provide as follows:

> (1) The provisions of this Act have effect despite any provision to the contrary in any contract, agreement or arrangement.
>
> (2) A provision of any contract, agreement or arrangement (whether in writing or not) is void to the extent to which it —
>
> (a) is contrary to this Act; or
>
> (b) purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of this Act; or
>
> (c) may reasonably be construed as an attempt to deter a person from taking action under this Act.

In *BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QSC 218, Applegarth J noted the following:

> [48] Provisions of this kind should be applied according to their terms and no more widely: *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798 at 722 [78], cited with approval in *John Holland* at 441 [14] and 443 [23]. In interpreting and applying the provisions of s 99, it is necessary to pay due regard to the objects of and policy underlying the Act. That said, the Act does not require the Court to "strain to find that a provision of a contract offends the Act".
>
> [49] I had occasion to consider the operation of s 99 of the Act in *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd* [2014] QSC 293 at [75] – [77] ("Lean Field") and observed that in assessing the validity of a condition, a useful inquiry is whether it facilitates or impedes the purpose of the Act. That observation was not intended to place a gloss upon s 99 or to be a substitute for the words of the statute. I accept BRB's submission that a contractual provision could not be contrary to the Act simply because it does not further the objects of the Act. In considering whether a provision of a contract is contrary to the provisions of the Act or otherwise is ineffective by reason of s 99, it is necessary to be specific about how the Act and its operation are said to be affected by the contractual provision. As I observed in *Lean Field*, the extent to which a particular condition is contrary to the Act, or purports to change the effect of the Act, depends upon its content and practical consequences. A provision which has the purpose of regulating contractual rights to progress payments may not be appropriate to condition a statutory right to a progress payment. The condition is likely to be contrary to the Act or unjustifiably change the effect of the Act's provisions "where it does not facilitate a statutory entitlement to progress

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payments or the resolution of payment claims made under the Act": *Lean Field* at [75]. This is likely to be the case where the condition impedes the making of a payment claim with no corresponding benefit in achieving the Act's purpose.

[50] If, absent a contractual provision, a contractor would have a statutory entitlement to make a claim for a progress payment under the Act, then the provision will have the effect of excluding, modifying, restricting or otherwise changing the effect of the Act. The position is otherwise where, even absent the provision, there would be no entitlement under the Act, for example, because no reference date will have arisen.

[SOP34.65] Queensland — *"… reference date …"*

In Queensland legislation, "reference date" is defined in Sch 2 of the *Building and Construction Industry Payments Act 2004* (Qld) as follows:

> reference date, under a construction contract, means—
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
>
> (b) if the contract does not provide for the matter—
>
> (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later named month.

One of the authorities in Queensland on this point is, and to which reference should be made, is the judgment of Margaret Wilson J in *Queensland v T & M Buckley Pty Ltd* [2012] QSC 265. For a discussion on this case, see [SOP8.100].

In *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] QCA 150, the Queensland Court of Appeal cited the judgment and the reasons of Bryson JA at [58] of his judgment in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142.

At [22] and [23] of *John Holland*, the Queensland Court of Appeal held:

> [22] Douglas J's observation in *Simcorp Developments & Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162 at [26] that the Act does not override contractual provisions must be understood as being subject to any application of s 99. That decision is otherwise not on point. His Honour's conclusions that the contractor's claim in that case should have been treated simply as a progress claim under the contract and not as a payment claim under the Act, and that the "issuing or deemed issuing of a progress certificate by the superintendent is a necessary pre-condition to the delivery of a payment claim under s 17 of the Act", turned upon the construction of quite different contractual provisions and the application of s 17.
>
> [23] The approach I have adopted is, I think, consistent with McDougall J's general observations in *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798 at 722 [NSWLR] [82] which are quoted in [14] of these reasons. That case also concerned a different point, namely, whether a contractual provision requiring notification of a claim within a specified time of the occurrence of the events giving rise to the claim was inconsistent with the right given by s 13(4) of the New South Wales Act to bring a payment claim within twelve months after cessation of the contractual work. McDougall J found that the contractual provision was not rendered void by s 34 of the New South Wales Act because the contractual provision did not say anything about the time when a payment claim might be made but instead limited the entitlement to work that might

be comprised in a payment claim whenever it was made. The point in issue in this appeal was not considered in that decision.

34A Nature of proceedings for offences

Proceedings for an offence under this Act may be dealt with summarily before the Local Court.

[S 34A insrt Act 103 of 2010, Sch 1[2]]

SECTION 34A COMMENTARY

[SOP34A.50] Section 34A was introduced into the New South Wales Act by Sch 1 of the *Building and Construction Industry Security of Payment Amendment Act 2010*. The Amendment Act was assented to on 29 November 2010, but has not yet come into effect as of this update. When the Amendment Act comes into effect, it will apply retroactively and thus may be of importance in regard to adjudication applications that have been served before the commencement of the amendment.

35 Regulations

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The regulations may, either unconditionally or subject to conditions, exempt:

(a) any specified person or class of persons, or

(b) any specified matter or class of matters,

from the operation of this Act or of any specified provision of this Act.

(3) The commencement of a regulation referred to in section 5, 6 or 7 does not affect the operation of this Act with respect to construction work carried out, or related goods and services supplied, under a construction contract entered into before that commencement.

SECTION 35 COMMENTARY

[SOP35.50] Relevant regulations

The following regulations are relevant:

New South Wales – *Building and Construction Industry Security of Payment Regulation 2008*.

Victoria – *Building and Construction Industry Security of Payment Regulations 2003*.

Queensland – *Building and Construction Industry Payments Regulation 2004*.

Northern Territory – *Construction Contracts (Security of Payments) Regulations 2005*.

36 Investigation of compliance with provisions regarding supporting statements

(1) The Director-General of the Department of Finance and Services may, by order in writing, appoint a Public Service employee (an ***authorised officer***) for the purpose of investigating compliance with section 13(7) or (8).

(2) An authorised officer may, by notice in writing, require a person whom the officer reasonably believes:

(a) is or was a head contractor, or

(b) is or was employed or engaged by a person whom the officer reasonably believes is or was a head contractor,

to provide the officer with information, and all documents, relating to compliance with section 13(7) or (8) and in particular relating to the payment of subcontractors by or on behalf of the head contractor in respect of specified construction work.

(3) A person must not:

(a) refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it, or

(b) in purported compliance with such a notice, provide information or a document knowing that the information or document is false or misleading in a material particular.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.

(4) A person is not excused from providing information or a document in response to a notice under this section on the ground that the information or document may tend to incriminate the head contractor.

[S 36 reinsrt Act 93 of 2013, Sch 1[9]; rep Act 82 of 2003, s 4 and Sch 3]

36A Dealing with documents produced

(1) An authorised officer may inspect a document produced in response to a notice under section 36 and may make copies of, or take extracts from, the document.

(2) An authorised officer may:

(a) take possession, and

(b) retain possession for as long as is necessary for the purposes of this Act,

of a document produced in response to a notice under section 36, if the person otherwise entitled to possession of the document is supplied, as soon as practicable, with a copy certified by an officer to be a true copy.

(3) A certified copy provided under subsection (2) is receivable in all courts as if it were the original.

(4) Until a certified copy of a document is provided under subsection (2), the person having possession of the document must, at such times and places as he or she thinks appropriate, permit:

(a) the person otherwise entitled to possession of the document, or

(b) a person authorised by the person so entitled,

to inspect the document and make copies of, or take extracts from, the document.

[S 36A insrt Act 93 of 2013, Sch 1[9]]

36B Preservation of secrecy

(1) A person engaged in the administration of this Act must not:

(a) in the course of that administration, disclose to another person so engaged any information or the contents of any document provided in response to a notice under section 36 without informing the other person that the information or document was so provided, or

(b) otherwise than in the course of that administration, disclose any such information or contents to any person without the written permission of the Director-General of the Department of Finance and Services given in relation to the disclosure.

Maximum penalty: 200 penalty units.

(2) A person who was, but is no longer, engaged in the administration of this Act

must not, without the written permission of the Director-General of the Department of Finance and Services, disclose to any other person any information or the contents of any document provided in response to a notice under section 36 that came to his or her knowledge in the course of that administration.
Maximum penalty: 200 penalty units.

(3) It is not a contravention of subsection (1) or (2) if a person discloses any such information or contents:

(a) in any proceedings for an offence against this Act, or

(b) in any civil proceedings arising under a construction contract, whether under Part 3 or otherwise, or

(c) in any legal proceedings where the disclosure is made in answering a question that the person is compellable to answer in those proceedings.

[S 36B insrt Act 93 of 2013, Sch 1[9]]

37 Savings and transitional provisions

Schedule 2 has effect.

38 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 3 months after the end of the period of 3 years.

(4) A further review of this Act (as amended by the *Building and Construction Industry Security of Payment Amendment Act 2002*) is to be undertaken by the Minister as soon as possible after the period of 12 months from the commencement of Schedule 1[29] to that Act.

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[49]]

(5) A report on the outcome of the further review is to be tabled in each House of Parliament within 3 months after the end of that period of 12 months.

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[49]]

[S 38 am Act 133 of 2002]

SECTION 38 COMMENTARY

[SOP38.50] Anomalies and inadequacies

Some of the anomalies and inadequacies in the provisions of the Act have been pointed out above.

In *Ballast plc v Burrell Co (Construction Management) Ltd* [2001] SLT 1039; [2001] BLR 529, Lord Reed said the following at [35]:

> The potential for irremediable injustice is equally apparent. Dyson J commented in *Bouygues UK Ltd v Dahl-Jensen UK Ltd* (2000) BLR 49; [1999] EWHC Technology

182, at 55:

> It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.
>
> Notwithstanding the ephemeral and subordinate character of an adjudicator's decision, and the deemed intention that adjudication should be an expeditious procedure rooted in commercial common sense, I would be slow to attribute to the parties an intention that the adjudicator's decision should always be binding notwithstanding errors of law, procedural unfairness or lack of consideration of relevant material submitted to him by the parties, no matter how fundamental such a breach of the adjudicator's obligations might be.

Urgent attention must be given to balancing the objects of the Act with fairness to the respondent, possibly by the institution of a specialist tribunal of Supreme Court status, that can, without pleadings summarily review an adjudicator's determination on certain specific grounds.

[SOP38.60] Queensland — various provisions in regard to the adjudicator's obligations to provide a copy of the adjudication determination to the authorised nominating authority

Under ss 38 – 39 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld), (The Act was assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), ss 101 – 102 of the *Building and Construction Industry Payments Act 2004* (Qld) are omitted. New provisions are set out in regard to the adjudicator's obligation to provide a copy of the adjudication determination to the registrar.

It is to be noted that Under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

[SOP38.65] Queensland - administration of BCIP Act - miscellaneous

Section 101 of the Queensland Act requires the Adjudicator to give a copy of the decision to the authorised nominating authority.

Under s 38 of the *Building and Construction Industry Payments Amendment Act 2014* (Qld), (The Act was assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s 101 of the *Building and Construction Industry Payments Act 2004* (Qld) are omitted and a new s 101 was inserted in its place.

The new s 101 reads as follows:

101 Queensland Building and Construction Board's policy

(1) The Queensland Building and Construction Board may make a policy governing the administration of this Act.

(2) The policy does not take effect until approved by regulation.

(3) Section 19(4) of the Queensland Building and Construction Commission Act 1991 applies for a policy made under this section as if the policy were made under section 19 of that Act.

(4) In this section — Queensland Building and Construction Board means the Queensland Building and Construction Board established under the Queensland Building and Construction Commission Act 1991, section 10.

[SOP38.70] Queensland — dictionary

Subsections 45(1) – (2) of the *Building and Construction Industry Payments Amendment Act 2014* (Qld) (Amendment Act), amend Schedule 2 of the *Building and Construction Industry Payments Act 2004* (Qld). The amendments to Schedule 2 are:

(a) The definitions of "adjudication certificate", "adjudication fees", "authorised nominating authority" and "business day" have been omitted.

(b) The insertions to Schedule 2 are:

> ***adjudication certificate*** means a certificate provided by the registrar under this Act.
>
> ***adjudication fees*** means fees or expenses charged by an adjudicator under this Act.
>
> ***business day*** does not include —
>
> (a) a Saturday or Sunday; or
>
> (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done; or
>
> (c) any day occurring within any of the following periods —
>
> (i) 22 to 24 December;
>
> (ii) 27 to 31 December;
>
> (iii) 2 to 10 January.
>
> ***claimant's reply*** for an adjudication application, see section 24B(2).
>
> ***complex payment claim*** means a payment claim for an amount more than $750,000 (exclusive of GST) or, if a greater amount is prescribed by regulation, the amount prescribed.
>
> ***standard payment claim*** means a payment claim that is not a complex payment claim.

Further, subsection 45(3) of the Amendment Act omits from the definition of "adjudication response", "24(1)" and inserts "24(2)" in its place.

Under subsection 45(4), the definition of "relevant offence", paragraph (f), "authorised nominating authority or an" is omitted.

It is to be noted that Under s 44 of the *Building and Construction Industry Payments Amendment Act 2014*, (assented to 26/09/2014. Ss 1 and 2 of the Act commenced on the same day and the remainder of the Act commenced by proclamation on 15/12/2014 (SLI 2014)), s115 has been inserted in the Queensland Act. In the main, it provides that existing contracts are not subject to the new recovery of progress payment procedures in the Amending Act.

s 27-Sch 2

SCHEDULE 1 – AMENDMENT OF COMMERCIAL ARBITRATION ACT 1984 [REPEALED]

[Sch 1 rep Act 82 of 2003, s 4 and Sch 3]

SCHEDULE 2 – SAVINGS AND TRANSITIONAL PROVISIONS

(Section 37)

Part 1 – Preliminary

1 Savings and transitional regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

(2) Such a provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.

(3) To the extent to which such a provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of that publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of that publication.

[Cl 1 am Act 93 of 2013, Sch 1[10]; Act 103 of 2010, Sch 1[3]; Act 133 of 2002, s 3 and Sch 1[50]]

Part 2 – Provisions consequent on enactment of Building and Construction Industry Security of Payment Act 1999

2 Certain construction contracts not affected

A provision of this Act does not apply to a construction contract entered into before the commencement of that provision.

Part 3 – Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2002

3 Application of amendments

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2002* does not apply to or in respect of a payment claim served before the commencement of the amendment and any such payment claim is to be dealt with in accordance with this Act as if the amendment had not been made.

[Cl 3 insrt Act 133 of 2002, s 3 and Sch 1[51]]

Part 4 – Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2010

4 Application of amendments

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2010* extends to matters arising before the commencement of the amendment (including an adjudication application made before that commencement and pending on that commencement).

[Cl 4 insrt Act 103 of 2010, Sch 1[4]]

[Pt 4 insrt Act 103 of 2010, Sch 1[4]]

Part 5 – Provision consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2013

5 Application of amendments

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2013* does not apply in relation to a construction contract entered into before the commencement of the amendment.

[Cl 5 insrt Act 93 of 2013, Sch 1[11]]

[Pt 5 insrt Act 93 of 2013, Sch 1[11]]

[Sch 2 am Act 93 of 2013; Act 103 of 2010; Act 133 of 2002]

SCHEDULE 2 COMMENTARY

[SOPSCH2.50] New South Wales — *"… this Act …"*

The phrase "this Act" probably means the principal 1999 Act, and not the amending Act/s.

Davenport, in *Adjudication in the Building Industry* (2nd ed, The Federation Press, Leichhardt, NSW, 2004) at p 8, argues "[i]f the provisions in the 2002 amending Act did not apply to a construction contract entered into before 3 March 2003 there would be a hiatus. There would be no right to make payment claims or to an adjudication of claims after 2 March 2003 in respect of contracts entered before 3 March 2003."

[SOPSCH2.55] Queensland — transitional provisions

Sections 43 – 44 of the *Building and Construction Industry Payments Act 2004* (Qld), insert new and amended transitional provisions (Divisions 1 – 2) into the *Building and Construction Industry Payments Act 2004* (Qld).

[SOPSCH2.60] Victora — miscellaneous provisions

(Under the provisions of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* which relates to construction contracts in Victoria entered into from 30 March 2007.)

Under s 37 of the amendment Act, a new Pt 3A, containing new ss 47A, 47B and 47C are inserted, and s 38 of the amendment Act inserts, in substitution, new provisions for ss 48 and 49 of the principal Act. These provide for the functions of the Building Commission, the register of authorised nominating authorities, the recording and publishing of determinations, confidentiality etc.

Legislation

Legislation

NSW LEGISLATION

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL 1999 (NSW) – EXPLANATORY NOTE

This Explanatory Note relates to this Bill as introduced into Parliament

Overview of bill

The objects of this Bill are:

(a) to entitle certain persons who carry out construction work (or who supply related goods and services) to timely payment for the work they carry out and the goods and services they supply, and

(b) to provide a procedure for securing payments to which persons become entitled under this Act, and

(c) to make consequential amendments to the *Commercial Arbitration Act 1984*, and

(d) to enact provisions of a savings or transitional nature.

Outline of provisions

Part 1 – Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 sets out the objects of the proposed Act.

Clause 4 defines certain words and expressions that are used in the proposed Act. These include the core concepts of ***construction contract*** (which means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party), ***construction work*** (which is defined in clause 5) and ***related goods and services*** (which is defined in clause 6).

Clause 5 defines the expression ***construction work*** for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.

Clause 6 defines the expression ***related goods and services*** for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.

Clause 7 provides for the application of the proposed Act to all construction contracts, whether written or oral, or partly written and partly oral. Certain classes of contract are excluded from the proposed Act, as are certain classes of contractual provisions. Other classes of construction contract can be excluded from the proposed Act by regulations under the proposed Act.

Part 2 – Rights to progress payments

Clause 8 provides that on and from each reference date, a person who has undertaken to carry out construction work, or to supply related goods and services, becomes entitled to a progress payment. A ***reference date*** is a date ascertained in accordance with the terms of the construction contract as a date for making a claim for a progress payment or as a date by reference to which the amount of a progress payment is to be calculated or, if the contract contains no such terms, a date occurring at 4-weekly intervals from the commencement of construction work, or the supply of related goods and services, under the contract.

Clause 9 provides for the amount of a progress payment to be ascertained in accordance with the terms of the construction contract or, if the contract contains no such terms, according to the value of construction work carried out, or related goods and services supplied, under the contract.

Clause 10 provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract is to be valued.

Clause 11 provides that a progress payment becomes due and payable in accordance with the terms of the construction contract or, if the contract contains no such terms, at the end of 2 weeks after a progress claim is made in relation to that payment under Part 3 of the proposed Act.

Clause 12 provides that a "pay when paid" provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a construction contract. A "pay when paid" provision is a provision that makes one person's payment dependent on another person's payment.

Part 3 – Procedure for recovering progress payments

Division 1 – Payment claims and payment schedules

Clause 13 enables a person who is entitled to a progress payment under proposed Part 2 (the ***claimant***) to serve a payment claim on the person who is liable to make the payment. The claim will set out the amount to which the claimant claims entitlement.

Clause 14 enables a person on whom a payment claim is made (the ***respondent***) to reply to the claim by providing a payment schedule to the claimant. The schedule will set out how much the respondent proposes to pay the claimant and when.

Clause 15 provides that a claimant will be able to recover the whole amount of his or her claim as a debt, and to suspend carrying out construction work, or supplying related goods and services, if the respondent fails to provide a payment schedule within the time allowed under clause 14.

Clause 16 provides that a claimant will be able to recover the amount set out in the respondent's payment schedule, and to suspend carrying out construction work, or supplying related goods and services, where the respondent provides the payment schedule within the time allowed under clause 14 but fails to pay that amount by the due date referred to in clause 11.

Division 2 – Adjudication of disputes

Clause 17 enables a claimant to apply for adjudication of the amount of a progress payment payable in the event that the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim. The application will have to be made within 5 days after the claimant receives the payment schedule, and will be able to be made directly to an adjudicator agreed between the claimant and respondent or to an authority authorised to nominate adjudicators for the purposes of the proposed Act.

Clause 18 requires an adjudicator to be a natural person and to have such qualifications, expertise and experience as are prescribed by the regulations, and prohibits a person from being an adjudicator in relation to a particular construction contract if the person is a party to the contract or in such circumstances as are prescribed by the regulations.

Clause 19 provides that the appointment of an adjudicator is effected by the adjudicator causing notice of his or her acceptance of the adjudication application to be served on the claimant.

Clause 20 enables the respondent to lodge with an adjudicator the respondent's response to the claimant's adjudication application.

Clause 21 sets out the manner in which, and the time within which, an adjudicator is to determine an adjudication application.

Clause 22 provides that the adjudicator is to determine an adjudication application by determining the amount of the progress payment to be paid and the date on or before which it must be paid.

Clause 23 provides that if the adjudicator determines an amount that the respondent must pay as a progress payment, the respondent must pay that amount to the claimant or give the claimant security for payment of that amount. Acceptable security will consist of a guarantee from a recognised financial institution, a deposit into a designated trust account or any other security agreed between the claimant and the respondent.

Clause 24 deals with the establishment and operation of trust accounts that are used for the purposes of giving security as referred to in clause 23.

Clause 25 provides that a claimant will be able to recover the adjudicated amount as a debt, and to suspend carrying out construction work, or supplying related goods and services, while the amount remains unpaid.

Clause 26 enables a claimant to make a new adjudication application in the event that a previous application is not accepted by an adjudicator within 4 business days after it is made or if an adjudicator fails to determine the application within the time allowed under clause 21.

Division 3 – Claimant's right to suspend construction work

Clause 27 entitles a claimant to suspend the carrying out of construction work (or the supply of related goods and services) if at least 2 business days have passed since notice of intention to do so has been given as referred to in clause 15, 16 or 25. A claimant who

suspends the carrying out of construction work (or the supply of related goods and services) under the proposed section will be immune from civil liability as a consequence of doing so.

Division 4 – General

Clause 28 enables the Minister administering the proposed Act to authorise persons as nominating authorities (to nominate adjudicators for the purposes of the proposed Act) and to withdraw any authority so given. The Minister's decisions in this regard will be reviewable by the Administrative Decisions Tribunal.

Clause 29 provides for the fees payable to an adjudicator in relation to his or her adjudication of an adjudication application under proposed Division 2 of Part 3. In particular, an adjudicator will not be entitled to be paid any fees if he or she fails to determine such an application within the time allowed under clause 21.

Clause 30 ensures that no action will lie against an adjudicator or any other person for anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions under the proposed Act.

Clause 31 deals with the service of notices under the proposed Act.

Clause 32 ensures that nothing done under the proposed Act will affect any civil proceedings arising under a construction contract, except that a court will be required to make appropriate set-offs and any orders necessary to provide for the restitution of money paid as a consequence of its decision in the proceedings.

Part 4 – Miscellaneous

Clause 33 provides that the proposed Act is to bind the Crown.

Clause 34 avoids any provision of an agreement that purports to exclude, modify or restrict the operation of the proposed Act.

Clause 35 enables the Governor to make regulations for the purposes of the proposed Act. The clause also ensures that any regulation that affects the definition of ***construction work*** in clause 5 or ***related goods and services*** in clause 6, or that varies the application of the proposed Act under clause 7, will not apply to construction contracts entered into before the regulation takes effect.

Clause 36 is a formal provision that gives effect to Schedule 1 (Amendment of other Acts).

Clause 37 is a formal provision that gives effect to Schedule 2 (Savings and transitional provisions).

Clause 38 requires the Minister administering the proposed Act to review the Act at the end of 3 years after its date of assent and to report to Parliament on the outcome of the review.

Schedules

Schedule 1 amends the *Commercial Arbitration Act 1984* so as to ensure that nothing in that Act affects the operation of Part 3 of the proposed Act.

Schedule 2 contains savings and transitional provisions, of which:

(a) clause 1 is a provision that enables the regulations to make provision of a savings or transitional nature as a consequence of the enactment of the proposed Act; and

(b) clause 2 ensures that the proposed Act does not apply to construction contracts entered into before its commencement.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL 1999 (NSW) – SECOND READING SPEECH

Legislative Assembly, 29 June 1999

Mr IEMMA (Lakemba – Minister for Public Works and Services, and Minister Assisting the Premier on Citizenship) [3.20 pm]: I move:

That this bill be now read a second time.

Today marks an important occasion for small business and the construction industry. Today also marks an important step in the Government's support of the long fight by subcontractors in the construction industry for justice and security of payment. The Building and Construction Industry Security of Payment Bill is a key component of the Government reform package for security of payment in the New South Wales construction industry. It follows the 15 February announcement by the Premier of the Government's intention to stamp out the unAustralian practice of not paying contractors for work they undertake on construction. It is all too frequently the case that small subcontractors – such as bricklayers, carpenters, electricians and plumbers – are not paid for their work. Many of them cannot survive financially when that occurs, with severe consequences for themselves and their families.

The Government is determined to rid the construction industry of such totally unacceptable practices. The Government recognises that any action taken to achieve this should not add unnecessary cost to industry, its participants and clients. An exposure draft bill, on which this proposed legislation is comprehensively based, was issued for public comment by the Premier on 15 February 1999 as part of a package of reforms. Other elements of the package, namely, an industry registration scheme and compulsory insolvency insurance, are under active consideration by the Government.

The exposure draft bill has received widespread support and recognition from all sectors of the industry, including bodies representing contractors, subcontractors, suppliers and property developers. They include the National Electrical Contractors Association New South Wales Branch, the Master Plumbers and Mechanical Contractors Association, the Association of Wall and Ceiling Contractors of New South Wales, the Master Painters Australia New South Wales Branch, the Building Industry Specialist Contractors Organisation of New South Wales, the Metal Roofing and Cladding Association of Australia, the Metal Building Products Manufacturing Association, the Timber and Building Materials Association New South Wales Branch, the Concrete Pumping Association of New South Wales, the Australian Specialist Contractors Association, the Housing Industry Association (New South Wales), the Master Builders Australia (New South Wales), the Newcastle Master Builders Association, the Australian Constructors Association, and the Property Council of Australia.

The main thrust of the bill is to reform payment behaviour in the construction industry. The bill creates fair and balanced payment standards for construction contracts. The standards include use of progress payments, quick adjudication of disputes over progress payment amounts and provision of security for disputed payments while a dispute is being resolved. The bill will speed up payments by removing incentives to delay. Reforms include the power for an unpaid contractor or subcontractor to suspend work and a ban on "pay when paid" and "pay if paid" clauses. Contract provisions which make a party's entitlement to be paid conditional upon the payer receiving payment from a third party are not acceptable to the Government or the industry. Such inequitable provisions will no longer have effect in construction contracts in New South Wales.

Hundreds of subcontractors in New South Wales struggle to survive when they do not receive money owed to them for work undertaken. They do not have the cash flow allowing them to keep on working while waiting for payment. This causes hardship not only to them but also to their families. With certain exceptions, the bill benefits anyone who is party to a construction contract, whether written or oral. Construction contracts include contracts for the supply of related goods and services such as the provision of architectural, engineering and surveying services, the supply of building materials or components to form part of a building or structure, and the supply or hire of plant or materials for use in construction work. Builders are also able to use the legislation in relation to obtaining payments from their clients.

Particular types of contracts are excluded from the operation of the legislation. The main exclusions are: contracts for residential building work with the person who resides in or proposes to reside in the premises on which the work is carried out; employment contracts; contracts of insurance or loans or guarantees with recognised financial institutions; contracts in which the payment is not made in monetary terms, for example, a contract in which, in return for carrying out construction work, the contractor is to receive the right to lease or operate the building or structure; and contracts for construction work carried out outside New South Wales.

The bill covers civil engineering as well as architectural work, mechanical and electrical work in buildings, maintenance, and landscaping and decorating. It affects all parties who contract for that work, including owners, contractors, subcontractors and consultants, and applies to both commercial and residential work. The party that will be most affected by the legislation is the party that, for the party's improper financial benefit, delays making legitimate progress payments. The bill gives claimants a quicker and cheaper means of enforcing payment or ensuring that when in dispute, the debtor does not retain use of the disputed money but securely sets it aside until the dispute is resolved.

The bill is divided into four parts and two schedules. Part 1 deals with the broad objectives of the bill, its commencement and definitions. The legislation will not apply to construction contracts formed before the date of its commencement. Part 2 introduces a statutory right to receive progress payments for construction work. It also provides default provisions dealing with matters such as intervals at which progress claims are made, time for payment following a progress claim, and how to value work for progress payments. The default provisions operate if the construction contract is silent on these matters but do not override any such relevant provisions in the contract.

Part 3 of the bill deals with the procedure of claiming for progress payments and describes the adjudication process if a dispute arises over payment. It covers issues such as how adjudicators are appointed and consequences of adjudication such as provision of security for payment and rights to suspend work. Part 4 covers miscellaneous matters, including the regulation-making power and that the Act will bind New South Wales State Government contracts, but not contracts with the Commonwealth.

I shall now describe in more detail the many salient features of this bill. Some construction contracts do not explicitly provide for progress payments. A construction contract will now have to include provision for making progress payments and for determining the amount of each progress payment, otherwise these matters will be covered by the default provisions in the bill. The parties, in forming their contract, are free to agree upon the intervals for making payment claims, times for making payment and how such payments are valued. But if the contract does not cover these matters part 2 of the bill provides that payment claims can be made at four-weekly intervals with payment becoming due two weeks after a payment claim is made. If the construction contract is silent on how a payment is to be valued then part 2 also provides that the amount is calculated on the basis of the value of work carried out and related goods and services provided.

Some subcontracts provide that a subcontractor is not entitled to be paid until the principal pays the contractor, even though the principal is late in paying or withholds payment on

account of something unrelated to the subcontractor's performance. This is a "pay when paid" clause. Some provide that if the principal pays the contractor only portion of the subcontractor's claim, or none of it, the subcontractor is not entitled to recover any more from the contractor than the contractor received from the principal, even though the principal may have acted in breach of contract. This is a "pay if paid" clause. Sometimes the two types of clause overlap and are indistinguishable. Part 2 of the bill voids both such clauses because of their inequitable and unfair nature.

Under part 3, when a payment claim is made and the other party, called the respondent, does not intend to pay the full amount of the payment claim, it must issue a payment schedule stating the amount, if any, of the payment claim which will be paid and the reasons for not paying the amount claimed. The time for issue of the payment schedule is 10 business days after receipt of the payment claim. The payment schedule alerts the claimant to the existence of a dispute over payment and allows the claimant to immediately commence the adjudication process available under the legislation. This is a critical component of the bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full. To provide the incentive for the early warning to be given the respondent must pay the full amount of the payment claim when it becomes due for payment under the contract if a payment schedule is not given within time.

If no payment schedule is provided to the claimant within time and the full amount of the payment claim is not paid on time, or the payment schedule says that a particular amount will be paid and that amount is not paid on time, there is immediately a debt for the unpaid amount. The claimant can seek payment of that debt by way of proceedings in the Fair Trading Tribunal – for residential building work – the Local Court, the District Court or the Supreme Court, as appropriate. The respondent cannot raise defences of defective work or cross-claims in order to delay judgment in these proceedings, therefore ensuring a prompt decision by the court. If the claimant obtains judgment for the amount of the payment claim or any part thereof, the respondent must pay the judgment debt.

This does not prevent either party from arguing in other legal proceedings or by any dispute resolution process detailed in the contract that the final amount payable is more or less. If the claimant disagrees with the amount proposed for payment in a payment schedule, the claimant does not have to proceed to arbitration or through any other lengthy dispute resolution process specified in the construction contract to resolve such a dispute. Adjudication under the bill provides a much faster process by giving an interim decision on disputes over progress payments, and fixing the amount of the debt. When a claim is for a debt, as distinct from a claim for damages, the courts have rules to enable the obtaining of judgment swiftly.

In addition, if a payment schedule is not given within time, and payment in full of the payment claim is not made by the time for payment of that payment claim, the party entitled to payment is given a right to suspend construction work. The right to suspend work also exists if a payment made is less than the amount which a payment schedule states will be paid. The payment schedule is akin to the superintendent's or architect's progress certificate which is typically provided for in construction contracts. In adjudication under the bill, the respondent is unable to raise defences, set-offs or cross-claims which have not been identified in the payment schedule. This means that the respondent must treat payment schedules with the utmost care. The bill prevents parties contracting out of the effects of either providing or not providing a payment schedule or the adjudication which can follow a dispute over a payment claim.

To ensure that a claimant does not delay in initiating the adjudication process, the claimant has only five business days after receiving a payment schedule in which to give notice requiring an adjudication under the legislation. The notice requiring adjudication is called an adjudication application. If the claimant fails to make the adjudication application within time, the claimant forfeits the right to the adjudication available under the bill. The

claimant also forfeits the right given by the bill to suspend work and the right given by section 23 to have the other party provide security for payment following a decision by the adjudicator. However, other dispute resolution processes in the contract or provided by law are not affected. The adjudication application is simply a notice in writing identifying the relevant payment claim and payment schedule, and stating that the claimant requires adjudication under the Act. The claimant can include reasons why the full amount of the payment claim should be paid and why the respondent's reasons in the payment schedule for not paying are not justified.

The claimant sends the adjudication application to either an adjudicator agreed upon between the parties or, if no adjudicator has been agreed upon, to an authorised nominating authority. At the same time, the claimant must give a copy of the application to the respondent. The parties can agree on who will be adjudicator only after the claimant receives the payment schedule setting out the respondent's reasons for not paying. This means that a construction contract cannot beforehand compel a claimant to use only a particular adjudicator, but it can specify a particular authorised nominating authority.

The adjudicator must be a person acting independently. The adjudicator cannot be an employee of either party. The adjudicator is formally appointed when the adjudicator accepts an adjudication application by serving notice of acceptance on the claimant. Since the claimant has only five business days to lodge the adjudication application with an adjudicator or an authorised nominating authority, an agreement on who will be the adjudicator will have to be made very quickly. In many cases the claimant will need to lodge the adjudication application with an authorised nominating authority and the nominating authority will nominate the adjudicator, due to no agreement being reached.

An authorised nominating authority is an individual or organisation approved by the relevant Minister. There are presently a significant number of organisations which nominate arbitrators or mediators for disputes in the construction industry. It is expected that these organisations will apply to be approved as authorised nominating authorities. The Minister may decide to withdraw approval of any authorised nominating authority which is unable or unwilling to properly perform the role of a nominating authority.

An appeal is available to the Administrative Decisions Tribunal against the refusal of the Minister to authorise a person as a nominating authority or to withdraw authorisation. If the construction contract prescribes a particular authorised nominating authority, the claimant must first lodge the adjudication application with that authorised nominating authority. It must be a body authorised by the Minister. If no authorised nominating authority is prescribed in the construction contract, the claimant is free to use any such authority. If that authorised nominating authority fails to arrange an adjudicator within four business days, the claimant can go to any other authorised nominating authority.

The respondent can make the response up to a maximum of five business days after receiving a copy of the claimant's submission to the adjudicator or two business days after receiving a copy of the notice of the adjudicator's acceptance of appointment, whichever is the later. It is up to the claimant to ensure that the respondent is served with a copy of the adjudication application promptly to ensure a quick response time. The response must contain any submissions which the respondent wishes the adjudicator to consider when the adjudicator decides the claimant's adjudication application. If the respondent does not lodge the response in time, it cannot be considered by the adjudicator. The adjudicator will then proceed to make a determination only on the information provided by the claimant.

Sections 21 and 22 detail the powers and functions of the adjudicator. After receiving the initial submission from the parties, the adjudicator can call for further submissions, view the site and hold a conference. The process is not judicial, the provisions of the *Commercial Arbitration Act 1984* do not apply, and there is no power to call for witnesses or for evidence under oath. The adjudicator must decide the amount, if any, owed by the respondent to the claimant in respect of the payment claim and the date on which the amount became or will become payable. This date will be the date for payment prescribed

by the construction contract or, if no date is prescribed, two weeks after the payment claim was made as provided under section 11. The adjudicator must give brief reasons if so requested by either party prior to making a decision.

As the respondent's submission must be confined to reasons, amounts and grounds for withholding payment, as stated in the payment schedule, and any related issues raised in the claimant's submission, the ambit of the dispute to be decided is fixed by two documents, namely, the payment claim and the payment schedule. Provided that the adjudicator actually decides the dispute evidenced by these documents, there is ample judicial authority to show that the courts will not interfere with or set aside a decision of an adjudicator. Under section 10 the adjudicator attracts no liability for anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions. While the adjudicator must make a decision within 20 business days and communicate the decision in writing to the parties, the bill does not say that communication of the decision must be within the 10 business days.

The adjudicator could refuse to send the parties copies of the decision until the adjudicator's fees are paid. The bill does not take away any lien for fees which the adjudicator may have. Normally, payment of the adjudicator's fees are shared equally by the disputing parties. However, a party could ask the adjudicator to make a different apportionment. The adjudicator would have to give the other party an opportunity to make a submission on the point. The adjudicator could decide that there should be a different apportionment of liability for the adjudicator's costs. Neither party is entitled to recover from the other the costs of preparing or making submissions to the adjudicator.

As an alternative to paying the amount of the adjudicator's decision, the respondent can provide security for payment. Usually, if payment or security for payment is not provided within two business days after the adjudicator's decision, the claimant can suspend work but must give two business days notice of intention to do so. The claimant can also register the adjudicator's decision in a court and obtain a court judgment. The new *Contractors Debts Act 1997* can be used in this instance to seek orders which could result in payments made to the claimant by a third party who owes money to the respondent.

In summary, the adjudication timetable is short because the very purpose of adjudication is to have a decision from the adjudicator within as short a time as reasonably possible. The adjudication process should be completed within three weeks of the claimant receiving notice that a progress claim will not be paid in full. If, without the consent of both parties, the adjudicator fails to make a decision within 10 business days, the adjudicator forfeits any right to payment and the claimant can proceed to have another adjudicator nominated.

Adjudication therefore provides the claimant with important benefits, namely, a prompt interim decision on a disputed payment; the amount in the decision must be either paid to the claimant, or secured and set aside; and failure to do any of the above not only allows the claimant to sue for the adjudicated amount, but also to suspend work. Therefore, if the dispute is not resolved to both parties' satisfaction by the adjudication process, it will result in an independently determined amount being securely set aside until final resolution is achieved.

The bill does not specifically provide for an appeal from an adjudicator's decision. The adjudicator's decision is only an interim decision until the amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process. This is the "appeal". Inserting by statute yet a further adjudication appeal process between the adjudicator's interim decision and the final decision would be unnecessarily burdensome and costly for parties to construction contracts. It can also be a source of abuse by a desperate respondent seeking to delay payment. However, recourse to a legal or another dispute resolution process does not suspend the operation of the bill or the adjudicator's decision pending a final decision. The respondent must still pay the amount

decided by the adjudicator or provide security for payment. Section 34 states that a provision of any agreement which purports to exclude, modify or restrict the respondent's liability under the bill is void.

Provision of security for payment occurs only where the adjudicator decides that the respondent is liable to pay the claimant a sum of money and the respondent wants to dispute the decision. The respondent has two business days in which to pay or put up security for payment. Otherwise, the claimant can commence court proceedings for a judgment for the amount. The respondent may prefer to pay and have a final accounting at the end of the contract, rather than incur the extra cost of putting up security for payment. Even if the party found by the adjudicator to be liable to pay is, ultimately, in legal proceedings or other binding dispute resolution process, found not liable to pay, the costs of providing security for payment are not recoverable. The parties can agree upon a form of security for payment, but in the event that agreement is not reached, the bill provides two alternatives for the respondent to choose from.

The simple alternative is to provide the claimant with the common form of bank guarantee for the full amount of the debt or, alternatively, the respondent can deposit the amount in a designated trust account. This is a bank account which can be in the name of the respondent or a third party trustee. Interest earned by the account forms part of the trust fund. When the respondent pays money into the designated trust account, it ceases to be the respondent's own money to use as the respondent pleases. Any balance in the account after the dispute is finally resolved by agreement or in legal proceedings or other binding dispute resolution process, and payment is made, belongs to the respondent. New South Wales government departments and statutory authorities representing the Crown can avoid the need to provide payment or security for payment following an adjudicator's decision if they provided a written statement confirming that funds will be available to meet the amount decided by the adjudicator following completion of the dispute process.

The reason for special treatment for government is that there is no risk of insolvency and the expense of providing security for payment is not warranted. The right to suspend work given by this bill is in addition to any other right to suspend work. Sometimes a construction contract contains an express right to suspend. Such a right will not be affected by this bill. Generally speaking, the common law does not allow a contractor to suspend work simply because the other party has failed to make a payment on time. This bill changes the common law by providing such a right. There are limitations on the exercise of the right. Firstly, work can be suspended only on account of non-payment of an undisputed payment claim or adjudicator's decision. Secondly, time for payment must have passed and a notice of intention to suspend given. Suspension cannot commence until two business days after such a notice is given.

The suspension must be lifted if the respondent pays the debt or provides security for payment in one of the forms permitted by the bill. The claimant is not liable for any loss or damage which the respondent may suffer as a consequence of the suspension. Finally, since there are important notices to be given under the bill, in particular, the payment schedule under clause 14, the notice requiring adjudication under clause 17 and by the notice of intention to suspend work under clause 27, the manner and time of service of notices is not left unaddressed.

The bill provides that a notice is given when it is received by the person to whom it is addressed or is delivered to the address from which the person ordinarily carries on business. A written notice can be delivered, posted or faxed. The Carr Government committed itself to the introduction of this important legislation during this sitting of Parliament. In fulfilling this commitment on behalf of the Government I am pleased to note that the construction industry, and particularly subcontractors, will benefit substantially from its introduction, passage and implementation. I commend the bill to the House.

Debate adjourned on motion by Mr Fraser.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999 (NSW)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Act 1999	46 of 1999	5 Oct 1999	26 Mar 2000 Gaz 37, 17 Mar 2000, p 1955

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Amendment Act 2002	133 of 2002	18 Dec 2002	3 Mar 2003 (Gaz 54, 28 Feb 2003, p 3503)
Statute Law (Miscellaneous Provisions) Act (No 2) 2003	82 of 2003	27 Nov 2003	Sch 3: 27 Nov 2003
Statute Law (Miscellaneous Provisions) Act 2008	62 of 2008	1 Jul 2008	Sch 2.4: 1 Jul 2008
Personal Property Securities Legislation Amendment Act 2010	57 of 2010	28 Jun 2010	Sch 1.1: 30 Jan 2012 (Proc 661 of 2011, 16 Dec 2011)
Building and Construction Industry Security of Payment Amendment Act 2010	103 of 2010	29 Nov 2010	Sch 1: 28 Feb 2011 (Proc 1 of 2011, 14 Jan 2011)
Building and Construction Industry Security of Payment Amendment Act 2013	93 of 2013	20 Nov 2013	Sch 1: 21 Apr 2014 (Proc 182 of 2014, 11 Apr 2014)
Civil and Administrative Legislation (Repeal and Amendment) Act 2013	95 of 2013	20 Nov 2013	Sch 2.15: 1 Jan 2014

PART 1 – PRELIMINARY

1 Name of Act

This Act is the *Building and Construction Industry Security of Payment Act 1999*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

[Subs (1) subst Act 133 of 2002, s 3 and Sch 1[1]]

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[2]]

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

(a) the making of a payment claim by the person claiming payment, and

(b) the provision of a payment schedule by the person by whom the payment is payable, and

(c) the referral of any disputed claim to an adjudicator for determination, and

(d) the payment of the progress payment so determined.

[Subs (3) am Act 133 of 2002, s 3 and Sch 1[3]]

(4) It is intended that this Act does not limit:

(a) any other entitlement that a claimant may have under a construction contract, or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

[Subs (4) subst Act 133 of 2002, s 3 and Sch 1[4]]

[S 3 am Act 133 of 2002]

4 Definitions

(1) In this Act:

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable, as referred to in section 22.

adjudication application means an application referred to in section 17.

adjudication certificate means a certificate provided by an authorised nominating authority under section 24.

[Def insrt Act 133 of 2002, s 3 and Sch 1[5]]

adjudication fees means any fees or expenses charged by an authorised nominating authority, or by an adjudicator, under this Act.

[Def insrt Act 133 of 2002, s 3 and Sch 1[5]]

adjudication response means a response referred to in section 20.

adjudicator, in relation to an adjudication application, means the person appointed in accordance with this Act to determine the application.

authorised nominating authority means a person authorised by the Minister under section 28 to nominate persons to determine adjudication applications.

business day means any day other than:

(a) a Saturday, Sunday or public holiday, or

(b) 27, 28, 29, 30 or 31 December.

claimant means a person by whom a payment claim is served under section 13.

claimed amount means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 13.

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

construction work is defined in section 5.

designated trust account [Repealed]

[Def rep Act 133 of 2002, s 3 and Sch 1[6]]

due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 11.

exempt residential construction contract means a construction contract specified in section 7(2)(b) as a construction contract to which this Act does not apply.

[Def insrt Act 93 of 2013, Sch 1[1]]

exercise a function includes perform a duty.

function includes a power, authority or duty.

head contractor means the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the ***main contract***) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract.

Note: There is no head contractor when the principal contracts directly with subcontractors.

[Def insrt Act 93 of 2013, Sch 1[1]]

payment claim means a claim referred to in section 13.

payment schedule means a schedule referred to in section 14.

principal means the person for whom construction work is to be carried out or related goods and services supplied under a construction contract (the ***main contract***) and who is not themselves engaged under a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the main contract.

[Def insrt Act 93 of 2013, Sch 1[1]]

progress payment means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

[Def subst Act 133 of 2002, s 3 and Sch 1[7]]

public authority [Repealed]

[Def rep Act 133 of 2002, s 3 and Sch 1[6]]

recognised financial institution means a bank or any other person or body prescribed by the regulations for the purposes of this definition.

related goods and services is defined in section 6.

respondent means a person on whom a payment claim is served under section 13.

scheduled amount means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 14.

subcontractor means a person who is to carry out construction work or supply related goods and services under a construction contract otherwise than as head contractor.

Note: A subcontractor's contract can be with the head contractor or (when there is no head contractor) with the principal directly.

[Def insrt Act 93 of 2013, Sch 1[1]]

(2) A reference in this Act to a contract that is connected with an exempt residential construction contract is a reference to a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the exempt residential construction contract.

[Subs (2) insrt Act 93 of 2013, Sch 1[2]]

(3) Notes included in this Act do not form part of this Act.

[Subs (3) insrt Act 93 of 2013, Sch 1[2]]

[S 4 am Act 93 of 2013; Act 133 of 2002

Cross-reference: *Building and Construction Industry Security of Payment Regulation 2008*: cl 18 prescribes each person or body that is a ***body regulated by APRA*** within the meaning of *Australian Prudential Regulation Authority Act 1998* (Cth) as a ***recognised financial institution*** for the purposes of s 4.]

5 Definition of "construction work"

(1) In this Act, ***construction work*** means any of the following work:

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,

(d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,

(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including:
  (i) site clearance, earth-moving, excavation, tunnelling and boring, and
  (ii) the laying of foundations, and
  (iii) the erection, maintenance or dismantling of scaffolding, and
  (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and
  (v) site restoration, landscaping and the provision of roadways and other access works,
(f) the painting or decorating of the internal or external surfaces of any building, structure or works,
(g) any other work of a kind prescribed by the regulations for the purposes of this subsection.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[8] and [9]]

(2) Despite subsection (1), ***construction work*** does not include any of the following work:

(a) the drilling for, or extraction of, oil or natural gas,
(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose,
(c) any other work of a kind prescribed by the regulations for the purposes of this subsection.

[S 5 am Act 133 of 2002]

6 Definition of "related goods and services"

(1) In this Act, ***related goods and services***, in relation to construction work, means any of the following goods and services:

(a) goods of the following kind:
  (i) materials and components to form part of any building, structure or work arising from construction work,
  (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,
(b) services of the following kind:
  (i) the provision of labour to carry out construction work,
  (ii) architectural, design, surveying or quantity surveying services in relation to construction work,
  (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,
(c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), ***related goods and services*** does not include any goods or services of a kind prescribed by the regulations for the purposes of this subsection.

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

[Subs (3) insrt Act 133 of 2002, s 3 and Sch 1[10]]

[S 6 am Act 133 of 2002]

7 Application of Act

(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.

(2) This Act does not apply to:

(a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes:

(i) to lend money or to repay money lent, or

(ii) to guarantee payment of money owing or repayment of money lent, or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract, or

(b) a construction contract for the carrying out of residential building work (within the meaning of the *Home Building Act 1989*) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in, or

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

(3) This Act does not apply to a construction contract to the extent to which it contains:

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee (within the meaning of the *Industrial Relations Act 1996*) of the party for whom the work is to be carried out or the related goods and services are to be supplied, or

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution, or

(c) provisions under which a party undertakes:

(i) to lend money or to repay money lent, or

(ii) to guarantee payment of money owing or repayment of money lent, or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

(4) This Act does not apply to a construction contract to the extent to which it deals with:

(a) construction work carried out outside New South Wales, and

(b) related goods and services supplied in respect of construction work carried out outside New South Wales.

(5) This Act does not apply to any construction contract, or class of construction contracts, prescribed by the regulations for the purposes of this section.

[**Cross-reference:** *Building and Construction Industry Security of Payment Regulation 2008*: cl 20 exempts a person from the operation of Div 2A of Pt 3 in the person's capacity as a principal contractor under a s 7(2)(b) construction contract.]

PART 2 – RIGHTS TO PROGRESS PAYMENTS

8 Rights to progress payments

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[11]]

(2) In this section, ***reference date***, in relation to a construction contract, means:

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

[Subs (2) subst Act 133 of 2002, s 3 and Sch 1[12]]

[S 8 am Act 133 of 2002]

9 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

(a) the amount calculated in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

[S 9 am Act 133 of 2002, s 3 and Sch 1[13] and [14]]

10 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the work, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[15]]

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the goods and services, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the goods are defective, the estimated cost of rectifying the defect,

and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[16]]

[S 10 am Act 133 of 2002]

11 Due date for payment

(1) Subject to this section and any other law, a progress payment to be made under a construction contract is payable in accordance with the applicable terms of the contract.

[Subs (1) subst Act 93 of 2013, Sch 1[3]; am Act 133 of 2002, s 3 and Sch 1[17]]

(1A) A progress payment to be made by a principal to a head contractor under a construction contract becomes due and payable on:

(a) the date occurring 15 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or

(b) an earlier date as provided in accordance with the terms of the contract.

Note: This Act does not apply to a progress payment to be made by a principal to a head contractor under an exempt residential construction contract. (See section 7(2)(b).) Subsection (1C) applies to progress payments under a construction contract that is connected with an exempt residential construction contract.

[Subs (1A) insrt Act 93 of 2013, Sch 1[3]]

(1B) A progress payment to be made to a subcontractor under a construction contract (other than a construction contract that is connected with an exempt residential construction contract) becomes due and payable on:

(a) the date occurring 30 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or

(b) an earlier date as provided in accordance with the terms of the contract.

[Subs (1B) insrt Act 93 of 2013, Sch 1[3]]

(1C) A progress payment to be made under a construction contract that is connected with an exempt residential construction contract becomes due and payable:

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

[Subs (1C) insrt Act 93 of 2013, Sch 1[3]]

(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate:

(a) prescribed under section 101 of the *Civil Procedure Act 2005*, or

(b) specified under the construction contract,

whichever is the greater.

[Subs (2) am Act 62 of 2008, s 3 and Sch 2.4; insrt Act 133 of 2002, s 3 and Sch 1[18]]

(3) If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.

[Subs (3) insrt Act 133 of 2002, s 3 and Sch 1[18]]

(4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[18]]

(5) Subsection (3) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[18]]

(6) Except as otherwise provided by this section, the rules and principles of the common law and equity apply to the determination of priorities between a lien under subsection (3) over any unfixed plant and materials and any other interest in the plant and materials.

[Subs (6) insrt Act 57 of 2010, Sch 1.1]

(7) Section 73(2) of the *Personal Property Securities Act 2009* of the Commonwealth is declared to apply to liens under subsection (3).

[Subs (7) insrt Act 57 of 2010, Sch 1.1]

(8) A provision in a construction contract has no effect to the extent it allows for payment of a progress payment later than the relevant date it becomes due and payable under subsection (1A) or (1B).

[Subs (8) insrt Act 93 of 2013, Sch 1[4]]

[S 11 am Act 93 of 2013; Act 57 of 2010; Act 62 of 2008; Act 133 of 2002]

12 Effect of "pay when paid" provisions

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

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[19]]

(2) In this section:

money owing, in relation to a construction contract, means money owing for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract.

[Def am Act 133 of 2002, s 3 and Sch 1[20]]

pay when paid provision of a construction contract means a provision of the contract:

(a) that makes the liability of one party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or any part of that money, or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party, or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

[Def am Act 133 of 2002, s 3 and Sch 1[21]]

[S 12 am Act 133 of 2002]

12A Trust account requirements for retention money

(1) The regulations may make provision for or with respect to requiring retention money to be held in trust for the subcontractor entitled to the money and requiring the head contractor who holds retention money to pay the money into a trust account (a ***retention money trust account***) established and operated in accordance with the regulations.

(2) The regulations may provide for the trust account into which retention money is to be paid to be a trust account established with a financial institution by the head contractor or a trust account established and operated by the Small Business Commissioner.

(3) Without limitation, the regulations under this section may include provision for or with respect to the following:

(a) the procedures to be followed in connection with the authorisation of payments out of a retention money trust account,

(b) the keeping of records in connection with the operation of a retention money trust account and the inspection of those records by the Small Business Commissioner,

(c) the resolution of disputes in connection with the operation of a retention money trust account.

(4) A regulation may create an offence punishable by a penalty not exceeding 200 penalty units for any failure to comply with the requirements of the regulations under this section.

(5) In this section, ***retention money*** means money retained by a head contractor out of money payable by the head contractor to a subcontractor under a construction contract, as security for the performance of obligations of the subcontractor under the contract.

[S 12A insrt Act 93 of 2013, Sch 1[5]]

PART 3 – PROCEDURE FOR RECOVERING PROGRESS PAYMENTS

DIVISION 1 – PAYMENT CLAIMS AND PAYMENT SCHEDULES

13 Payment claims

(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

[Subs (1) subst Act 133 of 2002, s 3 and Sch 1[22]]

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***), and

(c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.

[Subs (2) am Act 93 of 2013, Sch 1[6]; Act 133 of 2002, s 3 and Sch 1[23]]

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27(2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

[Subs (3) insrt Act 133 of 2002, s 3 and Sch 1[24]]

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[24]]

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[24]]

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

[Subs (6) insrt Act 133 of 2002, s 3 and Sch 1[24]]

(7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

Maximum penalty: 200 penalty units.

[Subs (7) insrt Act 93 of 2013, Sch 1[7]]

(8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.

[Subs (8) insrt Act 93 of 2013, Sch 1[7]]

(9) In this section:

supporting statement means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

[Subs (9) insrt Act 93 of 2013, Sch 1[7]]

[S 13 am Act 93 of 2013; Act 133 of 2002
Cross-reference: *Building and Construction Industry Security of Payment Regulation 2008*: cl 19 prescribes a form (contained in Sch 1) for supporting statements relating to payment claims made under s 13.]

14 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

15 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent:

(a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17(1)(b) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[25]]

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the

unpaid portion of the claimed amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

[Subs (4) subst Act 133 of 2002, s 3 and Sch 1[26]]

[S 15 am Act 133 of 2002]

16 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent provides a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17(1)(a)(ii) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[27]]

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

[Subs (4) subst Act 133 of 2002, s 3 and Sch 1[28]]

[S 16 am Act 133 of 2002]

DIVISION 2 – ADJUDICATION OF DISPUTES

17 Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) An adjudication application:

(a) must be in writing, and

(b) must be made to an authorised nominating authority chosen by the claimant, and

(c) in the case of an application under subsection (1)(a)(i)—must be made within 10 business days after the claimant receives the payment schedule, and

(d) in the case of an application under subsection (1)(a)(ii)—must be made within 20 business days after the due date for payment, and

(e) in the case of an application under subsection (1)(b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2)(b), and

(f) must identify the payment claim and the payment schedule (if any) to which it relates, and

(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and

(h) may contain such submissions relevant to the application as the claimant chooses to include.

(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

[S 17 subst Act 133 of 2002, s 3 and Sch 1[29]]

18 Eligibility criteria for adjudicators

(1) A person is eligible to be an adjudicator in relation to a construction contract:

(a) if the person is a natural person, and

(b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract:

(a) if the person is a party to the contract, or

(b) in such circumstances as may be prescribed by the regulations for the purposes of this section.

19 Appointment of adjudicator

(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent.

[Subs (1) subst Act 133 of 2002, s 3 and Sch 1[30]]

(2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

[S 19 am Act 133 of 2002]

20 Adjudication responses

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within:

(a) 5 business days after receiving a copy of the application, or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[31]]

(2) The adjudication response:

(a) must be in writing, and

(b) must identify the adjudication application to which it relates, and

(c) may contain such submissions relevant to the response as the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14(4) or 17(2)(b).

[Subs (2A) insrt Act 133 of 2002, s 3 and Sch 1[32]]

(2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

[Subs (2B) insrt Act 133 of 2002, s 3 and Sch 1[32]]

(3) A copy of the adjudication response must be served on the claimant.

[S 20 am Act 133 of 2002]

21 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.

(3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:

(a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or

(b) within such further time as the claimant and the respondent may agree.

(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and

(b) may set deadlines for further submissions and comments by the parties, and

(c) may call a conference of the parties, and

(d) may carry out an inspection of any matter to which the claim relates.

(4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.

[Subs (4A) insrt Act 133 of 2002, s 3 and Sch 1[33]]

(5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

[S 21 am Act 133 of 2002]

22 Adjudicator's determination

(1) An adjudicator is to determine:

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***), and

(b) the date on which any such amount became or becomes payable, and

(c) the rate of interest payable on any such amount.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[34]]

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

(a) the provisions of this Act,

(b) the provisions of the construction contract from which the application arose,

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

[Subs (2) am Act 133 of 2002, s 3 and Sch 1[35]]

(3) The adjudicator's determination must:

(a) be in writing, and

(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

[Subs (3) subst Act 133 of 2002, s 3 and Sch 1[36]]

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:

(a) the value of any construction work carried out under a construction contract; or

(b) the value of any related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[36]]

(5) If the adjudicator's determination contains:

(a) a clerical mistake, or

(b) an error arising from an accidental slip or omission, or

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[36]]

[S 22 am Act 133 of 2002]

23 Respondent required to pay adjudicated amount

(1) In this section:

relevant date means:

(a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned, or

(b) if the adjudicator determines a later date under section 22(1)(b)—that later date.

(2) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

[S 23 subst Act 133 of 2002, s 3 and Sch 1[37]]

24 Consequences of not paying claimant adjudicated amount

(1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:

(a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and

(b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(2) A notice under subsection (1)(b) must state that it is made under this Act.

(3) An adjudication certificate must state that it is made under this Act and specify the following matters:

(a) the name of the claimant,

(b) the name of the respondent who is liable to pay the adjudicated amount,

(c) the adjudicated amount,

(d) the date on which payment of the adjudicated amount was due to be paid to the claimant.

(4) If any amount of interest that is due and payable on the adjudicated amount is not paid by the respondent, the claimant may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate. If it is specified in the adjudication certificate, any such amount is to be added to (and becomes part of) the adjudicated amount.

(5) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount (the ***unpaid share***), the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate. If it is specified in the adjudication certificate, any such unpaid share is to be added to (and becomes part of) the adjudicated amount.

[S 24 subst Act 133 of 2002, s 3 and Sch 1[37]]

25 Filing of adjudication certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

[S 25 subst Act 133 of 2002, s 3 and Sch 1[38]]

26 Claimant may make new application in certain circumstances

(1) This section applies if:

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21(3).

(2) In either of those circumstances, the claimant:

(a) may withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made, and

(b) may make a new adjudication application under section 17.

(3) Despite section 17(3)(c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

[Subs (3) am Act 133 of 2002, s 3 and Sch 1[39]]

(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17.

[S 26 am Act 133 of 2002]

DIVISION 2A – CLAIMANT'S RIGHTS AGAINST PRINCIPAL CONTRACTOR

[Div 2A insrt Act 103 of 2010, Sch 1[1]]

26A Principal contractor can be required to retain money owed to respondent

(1) A claimant who has made an adjudication application for a payment claim can require a principal contractor for the claim to retain sufficient money to cover the claim out of money that is or becomes payable by the principal contractor to the respondent.

(2) Such a requirement is made by serving on the principal contractor a request (a ***payment withholding request***) in the form approved by the Director-General of the Department of Finance and Services.

[Subs (2) am Act 93 of 2013, Sch 1[8]]

(3) A payment withholding request must include a statement in writing by the claimant in the form of a statutory declaration declaring that the claimant genuinely believes that the amount of money claimed is owed by the respondent to the claimant.

(4) A ***principal contractor*** for a claim is a person by whom money is or becomes payable to the respondent for work carried out or materials supplied by the respondent to the person as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply.

(5) A person who is served with a payment withholding request must, within 10 business days after receiving the request, notify the claimant concerned if the person is not (or is no longer) a principal contractor for the claim.
Maximum penalty: 5 penalty units.

Note: A person may no longer be a principal contractor as a result of money owed to the respondent having been paid by the person before the payment withholding request was served.

[S 26A am Act 93 of 2013; insrt Act 103 of 2010, Sch 1[1]]

26B Obligation of principal contractor to retain money owed to respondent

(1) A principal contractor who has been served with a payment withholding request must retain, out of money owed to the respondent, the amount of money to which the payment claim relates (or the amount owed by the principal contractor to the respondent if that amount is less than the amount to which the payment claim relates).

(2) The amount is only required to be retained out of money that is or becomes payable by the principal contractor to the respondent for work carried out or materials supplied by the respondent to the principal contractor as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply.

(3) The obligation to retain money under this section remains in force only until whichever of the following happens first:

(a) the adjudication application for the payment claim is withdrawn,

(b) the respondent pays to the claimant the amount claimed to be due under the payment claim,

(c) the claimant serves a notice of claim on the principal contractor for the purposes of section 6 of the *Contractors Debts Act 1997* in respect of the payment claim,

(d) a period of 20 business days elapses after a copy of the adjudicator's determination of the adjudication application is served on the principal contractor.

(4) A part payment of the amount claimed to be due under the payment claim removes the obligation under this section to retain money to the extent of the payment.

(5) When the claimant's adjudication application is determined, the claimant must serve a copy of the adjudicator's determination on the principal contractor within 5 business days after the adjudicator's determination is served on the claimant.
Maximum penalty: 5 penalty units.

[S 26B insrt Act 103 of 2010, Sch 1[1]]

26C Contravention of requirement by principal contractor

(1) If a principal contractor discharges the principal contractor's obligation to pay money owed under a contract to the respondent in contravention of a requirement under this Division to retain the money, the principal contractor becomes jointly and severally liable with the respondent in respect of the debt owed by the respondent to the claimant (but only to the extent of the amount of money to which the contravention relates).

(2) The principal contractor can recover as a debt from the respondent any amount that the claimant recovers from the principal contractor pursuant to a right of action conferred by this section.

[S 26C insrt Act 103 of 2010, Sch 1[1]]

26D Protections for principal contractor

(1) An obligation under this Division to retain money owed by a principal contractor to the respondent operates (while the obligation continues) as a defence against recovery of the money by the respondent from the principal contractor.

(2) Any period for which a principal contractor retains money pursuant to an obligation under this Division is not to be taken into account for the purposes of reckoning any period for which money owed by the principal contractor to the respondent has been unpaid.

(3) A claimant who has served a payment withholding request on a principal contractor in connection with an adjudication application must, if the adjudication application is withdrawn, give the principal contractor written notice of the withdrawal of the application within 5 business days after it is withdrawn.
Maximum penalty: 10 penalty units.

(4) The principal contractor is entitled to rely in good faith on a statement in writing by the respondent in the form of a statutory declaration that:

(a) a specified amount claimed to be due under an adjudication application has been paid, or

(b) an adjudication application has been withdrawn.

[S 26D insrt Act 103 of 2010, Sch 1[1]]

26E Respondent to provide information about principal contractor

(1) An adjudicator may, in connection with an adjudication application and at the request of the claimant, direct the respondent to provide information to the claimant as to the identity and contact details of any person who is a principal contractor in relation to the claim.

(2) A respondent must comply with a direction of an adjudicator under this section. Maximum penalty: 10 penalty units.

(3) A respondent must not, in purported compliance with a direction of an adjudicator under this section, provide information that the respondent knows is false or misleading in a material particular.
Maximum penalty: 10 penalty units.

[S 26E insrt Act 103 of 2010, Sch 1[1]]

26F Other rights of claimant not affected

This Division (including any action taken by a claimant under this Division) does not limit or otherwise affect the taking of any other action by a claimant to enforce a payment claim or adjudication determination.

[S 26F insrt Act 103 of 2010, Sch 1[1]]

DIVISION 3 – CLAIMANT'S RIGHT TO SUSPEND CONSTRUCTION WORK

27 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 24.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[40]]

(2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15(1), 16(1) or 23(2).

[Subs (2) subst Act 133 of 2002, s 3 and Sch 1[41]]

(2A) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.

[Subs (2A) insrt Act 133 of 2002, s 3 and Sch 1[41]]

(3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension.

[S 27 am Act 133 of 2002]

DIVISION 4 – GENERAL

28 Nominating authorities

(1) Subject to the regulations, the Minister:

(a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act, and

(b) may withdraw any authority so given.

(1A) The Minister may:

(a) limit the number of persons who may, for the time being, be authorised under this section, and

(b) refuse an application under subsection (1) if authorising the applicant would result in any such number being exceeded.

[Subs (1A) insrt Act 133 of 2002, s 3 and Sch 1[42]]

(2) A person:

(a) whose application for authority to nominate adjudicators for the purposes of this Act is refused (otherwise than on the ground referred to in subsection (1A)(b)), or

(b) whose authority to nominate adjudicators is withdrawn,

may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of the Minister's decision to take that action.

[Subs (2) am Act 95 of 2013, Sch 2.15; Act 133 of 2002, s 3 and Sch 1[43]]

(3) An authorised nominating authority may charge a fee for any service provided by

the authority in connection with an adjudication application made to the authority. The amount that may be charged for any such service must not exceed the amount (if any) determined by the Minister.

[Subs (3) insrt Act 133 of 2002, s 3 and Sch 1[44]]

(4) The claimant and respondent are:

(a) jointly and severally liable to pay any such fee, and

(b) each liable to contribute to the payment of any such fee in equal proportions or in such proportions as the adjudicator to whom the adjudication application is referred may determine.

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[44]]

(5) An authorised nominating authority must provide the Minister with such information as may be requested by the Minister in relation to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[44]]

[S 28 am Act 95 of 2013; Act 133 of 2002]

29 Adjudicator's fees

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application:

(a) such amount, by way of fees and expenses, as is agreed between the adjudicator and the parties to the adjudication, or

(b) if no such amount is agreed, such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator.

(2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.

[Subs (3) subst Act 133 of 2002, s 3 and Sch 1[45]]

(4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21(3).

(5) Subsection (4) does not apply:

(a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid, or

(b) in such other circumstances as may be prescribed by the regulations for the purposes of this section.

[S 29 am Act 133 of 2002]

30 Protection from liability for adjudicators and authorised nominating authorities

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:

(a) in exercising the adjudicator's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.

(2) No action lies against an authorised nominating authority or any other person

with respect to anything done or omitted to be done by the authorised nominating authority in good faith:

(a) in exercising the nominating authority's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act.

[S 30 subst Act 133 of 2002, s 3 and Sch 1[46]]

31 Service of notices

(1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:

(a) by delivering it to the person personally, or

(b) by lodging it during normal office hours at the person's ordinary place of business, or

(c) by sending it by post or facsimile addressed to the person's ordinary place of business, or

(d) in such other manner as may be prescribed by the regulations for the purposes of this section, or

(e) in such other manner as may be provided under the construction contract concerned.

[Subs (1) am Act 133 of 2002, s 3 and Sch 1[47]]

(2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected when the notice is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.

[S 31 am Act 133 of 2002]

32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

PART 4 – MISCELLANEOUS

33 Act binds Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

34 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void.

[S 34 subst Act 133 of 2002, s 3 and Sch 1[48]]

34A Nature of proceedings for offences

Proceedings for an offence under this Act may be dealt with summarily before the Local Court.

[S 34A insrt Act 103 of 2010, Sch 1[2]]

35 Regulations

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The regulations may, either unconditionally or subject to conditions, exempt:

(a) any specified person or class of persons, or

(b) any specified matter or class of matters,

from the operation of this Act or of any specified provision of this Act.

(3) The commencement of a regulation referred to in section 5, 6 or 7 does not affect the operation of this Act with respect to construction work carried out, or related goods and services supplied, under a construction contract entered into before that commencement.

36 Investigation of compliance with provisions regarding supporting statements

(1) The Director-General of the Department of Finance and Services may, by order in writing, appoint a Public Service employee (an ***authorised officer***) for the purpose of investigating compliance with section 13(7) or (8).

(2) An authorised officer may, by notice in writing, require a person whom the officer reasonably believes:

(a) is or was a head contractor, or

(b) is or was employed or engaged by a person whom the officer reasonably believes is or was a head contractor,

to provide the officer with information, and all documents, relating to compliance with section 13(7) or (8) and in particular relating to the payment of subcontractors by or on behalf of the head contractor in respect of specified construction work.

(3) A person must not:

(a) refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it, or

(b) in purported compliance with such a notice, provide information or a document knowing that the information or document is false or misleading in a material particular.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.

(4) A person is not excused from providing information or a document in response to a notice under this section on the ground that the information or document may tend to incriminate the head contractor.

[S 36 reinsrt Act 93 of 2013, Sch 1[9]; rep Act 82 of 2003, s 4 and Sch 3]

36A Dealing with documents produced

(1) An authorised officer may inspect a document produced in response to a notice under section 36 and may make copies of, or take extracts from, the document.

(2) An authorised officer may:

(a) take possession, and

(b) retain possession for as long as is necessary for the purposes of this Act,

of a document produced in response to a notice under section 36, if the person otherwise entitled to possession of the document is supplied, as soon as practicable, with a copy certified by an officer to be a true copy.

(3) A certified copy provided under subsection (2) is receivable in all courts as if it were the original.

(4) Until a certified copy of a document is provided under subsection (2), the person having possession of the document must, at such times and places as he or she thinks appropriate, permit:

(a) the person otherwise entitled to possession of the document, or

(b) a person authorised by the person so entitled,

to inspect the document and make copies of, or take extracts from, the document.

[S 36A insrt Act 93 of 2013, Sch 1[9]]

36B Preservation of secrecy

(1) A person engaged in the administration of this Act must not:

(a) in the course of that administration, disclose to another person so engaged any information or the contents of any document provided in response to a notice under section 36 without informing the other person that the information or document was so provided, or

(b) otherwise than in the course of that administration, disclose any such information or contents to any person without the written permission of the Director-General of the Department of Finance and Services given in relation to the disclosure.

Maximum penalty: 200 penalty units.

(2) A person who was, but is no longer, engaged in the administration of this Act must not, without the written permission of the Director-General of the Department of Finance and Services, disclose to any other person any information or the contents of any document provided in response to a notice under section 36 that came to his or her knowledge in the course of that administration.

Maximum penalty: 200 penalty units.

(3) It is not a contravention of subsection (1) or (2) if a person discloses any such information or contents:

(a) in any proceedings for an offence against this Act, or

(b) in any civil proceedings arising under a construction contract, whether under Part 3 or otherwise, or

(c) in any legal proceedings where the disclosure is made in answering a question that the person is compellable to answer in those proceedings.

[S 36B insrt Act 93 of 2013, Sch 1[9]]

37 Savings and transitional provisions

Schedule 2 has effect.

38 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 3 months after the end of the period of 3 years.

(4) A further review of this Act (as amended by the *Building and Construction Industry Security of Payment Amendment Act 2002*) is to be undertaken by the Minister as soon as possible after the period of 12 months from the commencement of Schedule 1[29] to that Act.

[Subs (4) insrt Act 133 of 2002, s 3 and Sch 1[49]]

(5) A report on the outcome of the further review is to be tabled in each House of Parliament within 3 months after the end of that period of 12 months.

[Subs (5) insrt Act 133 of 2002, s 3 and Sch 1[49]]

[S 38 am Act 133 of 2002]

SCHEDULE 1 – AMENDMENT OF COMMERCIAL ARBITRATION ACT 1984 [REPEALED]

[Sch 1 rep Act 82 of 2003, s 4 and Sch 3]

SCHEDULE 2 – SAVINGS AND TRANSITIONAL PROVISIONS

(Section 37)

Part 1 – Preliminary

1 Savings and transitional regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

(2) Such a provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.

(3) To the extent to which such a provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of that publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of that publication.

[Cl 1 am Act 93 of 2013, Sch 1[10]; Act 103 of 2010, Sch 1[3]; Act 133 of 2002, s 3 and Sch 1[50]]

Part 2 – Provisions consequent on enactment of Building and Construction Industry Security of Payment Act 1999

2 Certain construction contracts not affected

A provision of this Act does not apply to a construction contract entered into before the commencement of that provision.

Part 3 – Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2002

3 Application of amendments

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2002* does not apply to or in respect of a payment claim served before the commencement of the amendment and any such payment claim is to be dealt with in accordance with this Act as if the amendment had not been made.

[Cl 3 insrt Act 133 of 2002, s 3 and Sch 1[51]]

Part 4 – Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2010

4 Application of amendments

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2010* extends to matters arising before the commencement of the amendment (including an adjudication application made before that commencement and pending on that commencement).

[Cl 4 insrt Act 103 of 2010, Sch 1[4]]

[Pt 4 insrt Act 103 of 2010, Sch 1[4]]

Part 5 – Provision consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2013

5 Application of amendments

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2013* does not apply in relation to a construction contract entered into before the commencement of the amendment.

[Cl 5 insrt Act 93 of 2013, Sch 1[11]]

[Pt 5 insrt Act 93 of 2013, Sch 1[11]]

[Sch 2 am Act 93 of 2013; Act 103 of 2010; Act 133 of 2002]

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT REGULATION 2008 (NSW)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Regulation 2008	**139 of 2008**	**23 May 2008**	**1 Sep 2008**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Amendment Regulation 2011	89 of 2011	25 Feb 2011	Cl 3: 28 Feb 2011
Building and Construction Industry Security of Payment Amendment (Supporting Statement) Regulation 2014	185 of 2014		Sch 1: 21 Apr 2014
Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015	111 of 2015		Sch 1: 1 May 2015

PART 1 – PRELIMINARY

[Pt 1 heading insrt Reg 111 of 2015, Sch 1[1]]

1 Name of Regulation

This Regulation is the *Building and Construction Industry Security of Payment Regulation 2008*.

2 Commencement

This Regulation commences on 1 September 2008.

Note: This Regulation replaces the *Building and Construction Industry Security of Payment Regulation 2001* which is repealed on 1 September 2008 by section 10(2) of the *Subordinate Legislation Act 1989*.

3 Interpretation

(1) In this Regulation:

the Act means the *Building and Construction Industry Security of Payment Act 1999*.

(2) Notes included in this Regulation do not form part of this Regulation.

PART 2 – TRUST ACCOUNTS FOR RETENTION MONEY

[Pt 2 insrt Reg 111 of 2015, Sch 1[2]]

DIVISION 1 – PRELIMINARY

4 Definitions

In this Part:

approved ADI means an authorised deposit-taking institution approved under section 87 of the *Property, Stock and Business Agents Act 2002* or approved by the Chief Executive by order in writing.

Chief Executive means the Chief Executive of the Office of Finance and Services.

retention money means money retained by a head contractor out of money payable by the head contractor to a subcontractor under a construction contract, as security for the performance of obligations of the subcontractor under the contract.

Note: Money is retention money only while it is held as security for the performance of the subcontractor's obligations. If the head contractor becomes entitled to money held as retention money, the money ceases to be retention money and the requirement under this Part that the money be held in trust for the subcontractor in a retention money trust account ceases.

[Cl 4 insrt Reg 111 of 2015, Sch 1[2]]

5 Application of Part—projects with a value of at least $20 million

(1) This Part applies to retention money held by a head contractor only when the construction project (that is, the head contractor's construction contract with the principal) has a value of at least $20 million (***the $20 million threshold***) and only when that construction contract was entered into after the commencement of this Part.

(2) The ***value*** of a construction contract is the amount of the consideration that the contract provides is payable for construction work carried out under the contract or for related goods and services supplied under the contract or (if the contract does not provide for that amount) the market value of the work to be carried out and the value of the goods and services to be supplied.

(3) The value of a construction contract is its value including any variation to the contract after the contract is entered into, with the result that the value of a construction project can increase and reach the $20 million threshold after the head contractor's construction contract with the principal is first entered into.

(4) When the value of a construction project reaches the $20 million threshold after the head contractor's construction contract with the principal was first entered into, retention money held by the head contractor becomes subject to this Part but only for construction contracts between the head contractor and subcontractors entered into after the value of the construction project reached the $20 million threshold.

[Cl 5 insrt Reg 111 of 2015, Sch 1[2]]

DIVISION 2 – TRUST ACCOUNT REQUIREMENTS

6 Retention money to be held in trust account

(1) A head contractor who holds retention money is to hold the money in trust for the subcontractor from whom the money has been retained and must ensure that the money is paid into and retained in a trust account (a ***retention money trust account***) established with an approved ADI.
Maximum penalty: 200 penalty units.

(2) A retention money trust account may be established as:

(a) a separate trust account for the retention money held in respect of a particular subcontractor, or

(b) a separate trust account for all retention money held in connection with a particular construction project of the head contractor, or

(c) a separate trust account for all retention money held in connection with 2 or more (or all) construction projects of the head contractor.

[Cl 6 insrt Reg 111 of 2015, Sch 1[2]]

7 Requirements for establishment of trust account

(1) A head contractor who establishes a retention money trust account must ensure that the name of the account and the description of the account in the records of the head contractor include the name of the head contractor and the words "Trust Account".

(2) When establishing a retention money trust account with an approved ADI, a head contractor must ensure that the approved ADI is notified in writing that the account is a trust account required to be established for the purposes of this Part.

(3) A head contractor must, within 14 days after establishing a retention money trust account, notify the Chief Executive in writing of the following:

(a) the name of the approved ADI and the branch or BSB number of the branch of the approved ADI at which the account has been established,

(b) the name of the account,

(c) the number of the account,

(d) the opening balance of the account.

Maximum penalty: 200 penalty units.

[Cl 7 insrt Reg 111 of 2015, Sch 1[2]]

8 Withdrawals from trust account

(1) A head contractor must not withdraw retention money from a retention money trust account except:

(a) for the purpose of the payment of the money in accordance with the terms of the construction contract under which the money was retained by the head contractor, or

(b) as may be agreed in writing by the head contractor and the subcontractor concerned, or

(c) in accordance with an order of a court or tribunal.

(2) A head contractor must not withdraw retention money from a retention money trust account otherwise than by cheque or electronic funds transfer.
Maximum penalty: 200 penalty units.

[Cl 8 insrt Reg 111 of 2015, Sch 1[2]]

9 Interest earned on trust account

Interest earned on retention money held in a retention money trust account is to be held on the same trust as the retention money and dealt with accordingly unless the contract between the head contractor and the subcontractor under which the money is held as retention money otherwise provides or the head contractor and subcontractor otherwise agree in writing.

[Cl 9 insrt Reg 111 of 2015, Sch 1[2]]

10 Retention money not available to pay head contractor's debts

(1) Retention money held by a head contractor is not available for the payment of the debts of the head contractor, or liable to be attached or taken in execution for satisfying a judgment against the head contractor.

(2) This clause does not take away or affect any just claim that a head contractor may have against or upon retention money.

[Cl 10 insrt Reg 111 of 2015, Sch 1[2]]

11 Overdrawn trust account

A head contractor must, within 5 days after becoming aware that a retention money trust account of the head contractor has become overdrawn, notify the Chief Executive in writing of:

(a) the name and number of the account, and

(b) the amount by which the account is overdrawn, and

(c) the reason for the account becoming overdrawn.

Maximum penalty: 200 penalty units.

[Cl 11 insrt Reg 111 of 2015, Sch 1[2]]

12 Closure of trust account

A head contractor must, within 14 days after closing a retention money trust account, notify the Chief Executive of the closure in writing.

Maximum penalty: 200 penalty units.

[Cl 12 insrt Reg 111 of 2015, Sch 1[2]]

13 Financial institutions not subject to certain obligations and liabilities

(1) An approved ADI with which a retention money trust account is established by a head contractor under this Part:

(a) is not under any obligation to control or supervise transactions in relation to the account or to see to the application of money disbursed from the account, and

(b) does not have, in relation to any liability of the head contractor to the approved ADI, any recourse or right (whether by way of set-off counterclaim, charge or otherwise) against money in the account.

(2) Subclause (1) does not relieve an approved ADI from any liability to which it is subject apart from this Part.

[Cl 13 insrt Reg 111 of 2015, Sch 1[2]]

DIVISION 3 – RECORDS AND INFORMATION

14 Trust account records

(1) A head contractor must keep records in relation to a retention money trust account established by the head contractor showing the amounts deposited into or withdrawn from the account.

(2) A head contractor must retain a record made in relation to a retention money trust account for the purposes of this clause for not less than 3 years after the account is closed.

Maximum penalty: 200 penalty units.

[Cl 14 insrt Reg 111 of 2015, Sch 1[2]]

15 Power to require information

(1) The Chief Executive may by direction in writing require any of the following persons to provide specified information to the Chief Executive that is relevant to the enforcement or administration of this Part:

(a) a head contractor,

(b) a subcontractor,

(c) an approved ADI.

(2) Without limitation, a direction under this clause may require the provision of information in respect of any of the following matters:

(a) the value of any construction contract entered into with a principal by the head contractor,

(b) retention money retained by the head contractor under a construction contract with a subcontractor,

(c) a retention money trust account established by the head contractor for the purposes of this Part.

(3) A person to whom a direction is given under this clause must comply with the direction by providing the required information in writing to the Chief Executive within 7 days after the direction is given or within such longer period as may be specified in the direction or as the Chief Executive may allow by notice in writing to the person.

Maximum penalty: 200 penalty units.

[Cl 15 insrt Reg 111 of 2015, Sch 1[2]]

16 Annual report on trust account

(1) The head contractor who operates a retention money trust account during a financial year must, within 3 months after the end of the financial year, provide the Chief Executive with the following:

(a) an account review report for the account in respect of the financial year,

(b) a retention account statement for the account in respect of the financial year in the form set out in Schedule 2.

Maximum penalty: 200 penalty units.

(2) An ***account review report*** for a retention money trust account is a report given by a registered company auditor (within the meaning of the *Corporations Act 2001* of the Commonwealth) certifying that, based on a review of the operation of the account, it is the auditor's opinion that the account operator has complied with all of the requirements of this Part in relation to the account during the financial year for which the report is given.

(3) A fee of $1,500 must accompany an account review report and retention account statement provided to the Chief Executive for the purposes of this clause.

(4) A head contractor must not provide a retention account statement to the Chief

Executive for the purposes of this clause knowing that the statement is false or misleading in a material particular.
Maximum penalty: 200 penalty units.

(5) In this clause:

financial year means a period of 12 months commencing on 1 July.

[Cl 16 insrt Reg 111 of 2015, Sch 1[2]]

17 Offence of providing false or misleading information

A person who in purported compliance with a requirement imposed by or under this Part provides information to the Chief Executive knowing the information to be false or misleading in a material particular is guilty of an offence.
Maximum penalty: 200 penalty units.

[Cl 17 insrt Reg 111 of 2015, Sch 1[2]]

PART 3 – MISCELLANEOUS

[Pt 3 heading insrt Reg 111 of 2015, Sch 1[2]]

18 Recognised financial institutions

Each person or body that is a ***body regulated by APRA***, within the meaning of the *Australian Prudential Regulation Authority Act 1998* of the Commonwealth, is prescribed for the purposes of the definition of ***recognised financial institution*** in section 4 of the Act.

[Former cl 4 renum Reg 111 of 2015, Sch 1[3]]

19 Supporting statements

(1) For the purposes of the definition of ***supporting statement*** in section 13(9) of the Act, the form contained in Schedule 1 is prescribed.

(2) A reference to an amount due and payable in a supporting statement does not include a reference to an amount in dispute between the head contractor and a subcontractor. Any subcontractors with whom an amount is in dispute with the head contractor must be separately identified in the attachment to the supporting statement.

(3) A reference to an amount due and payable in a supporting statement includes a reference to a retention amount due and payable.

(4) The requirement for a head contractor to provide a supporting statement under section 13(7) of the Act relates only to those subcontractors or suppliers directly engaged by the head contractor.

(5) Any payments referred to in a supporting statement that are due and payable and not in dispute must be paid in full before any declaration in the prescribed form is signed.

[Former cl 4A renum Reg 111 of 2015, Sch 1[3]; insrt Reg 185 of 2014, Sch 1[1]]

20 Exemptions

A person is exempt from the operation of Division 2A of Part 3 of the Act in the person's capacity as a principal contractor (within the meaning of that Division) under a construction contract of a kind referred to in section 7(2)(b) of the Act.

[Former cl 5 renum Reg 111 of 2015, Sch 1[3]; insrt Reg 89 of 2011, cl 3]

SCHEDULE 1 – FORM OF SUPPORTING STATEMENT

(Clause 19(1))

[Sch 1 note subst Reg 111 of 2015, Sch 1[5]]

[Sch 1 heading subst Reg 111 of 2015, Sch 1[4]]

Supporting statement by head contractor regarding payment to subcontractors

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms "principal", "head contractor", "subcontractor", and "construction contract" have the meanings given in section 4 of the *Building and Construction Industry Security of Payment Act 1999*.

Head contractor: [*business name of head contractor*]

ABN: [*ABN*]

* 1. has entered into a contract with: [*business name of subcontractor*]

ABN: [*ABN*]

Contract number/identifier: [*contract number/identifier*]

OR

* 2. has entered into a contract with the subcontractors listed in the attachment to this statement.

* [*Delete whichever of the above does not apply*]

This statement applies for work between [*start date*] and [*end date*] inclusive (the construction work concerned), subject of the payment claim dated [*date*].

I, [*full name*], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature: ..... Date: .....

Full name: ..... Position/Title: .....

Attachment

Schedule of subcontractors paid all amounts due and payable				
Subcontractor	**ABN**	**Contract number/ identifier**	**Date of works (period)**	**Date of payment claim (head contractor claim)**

Schedule 1

Schedule of subcontractors for which an amount is in dispute and has not been paid				
Subcontractor	**ABN**	**Contract number/ identifier**	**Date of works (period)**	**Date of payment claim (head contractor claim)**

[Sch 1 insrt Reg 185 of 2014, Sch 1[2]]

SCHEDULE 2 – FORM OF RETENTION ACCOUNT STATEMENT

(Clause 16)

Annual retention account statement for retention money trust account

This statement is to be provided along with an account review report for a retention money trust account under clause 16 of the *Building and Construction Industry Security of Payment Regulation 2008*.

Expressions used in this statement have the same meanings as in the *Building and Construction Industry Security of Payment Regulation 2008*.

Head contractor: [*business name of head contractor*]

ABN: [*ABN*]

Retention money retained by the head contractor from the subcontractor(s) listed in the attachment to this statement has been paid into the trust account to which the accompanying account review report relates.

Date of account review report: .....

Trust account name: .....

Name of approved ADI at which trust account established: .....

Date account opened: .....

Total retention money paid out of account during audit period: .....

Total retention money held in account at end of audit period: .....

I, [*full name*], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the information contained in this statement and that to the best of my knowledge and belief the information contained in this statement about retention money held in the trust account to which the accompanying account review report relates is complete and correct.

Signature: ..... Date: .....

Full name: ..... Position/Title: .....

Attachment

Schedule of retention money retained from subcontractor(s)				
Subcontractor	**ABN**	**Full retention amount retained from subcontractor**	**Retention amount paid to subcontractor during audit period**	**Retention amount held at end of audit period**

[Sch 2 insrt Reg 111 of 2015, Sch 1[6]]

VICTORIAN LEGISLATION

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL 2002 (VIC) – EXPLANATORY MEMORANDUM

General

The purpose of this Bill is to address delays in payment under construction contracts to parties who carry out construction work or who supply related goods and services under those contracts. The Bill establishes a right to progress payments in relation to construction contracts and establishes a process for claims for those payments.

If a claim for a progress payment is disputed the Bill provides for an adjudication process and for determination of the payment due. Payment of the adjudicated amount may be made or alternatively, where there is a dispute process initiated under the contract, security for payment may be provided. The Bill also gives a claimant the right to suspend work where a progress payment is due under the claims and adjudication process and the payment remains unpaid or security for the payment has not been provided. The Bill also provides for a mechanism enabling the claimant to recover the unpaid amount from a third party under a related construction contract in certain limited circumstances.

The recovery procedures in the Bill are not intended to affect any other rights that parties may have under a construction contract.

Clause notes

PART 1 – PRELIMINARY

Clause 1 sets out the purpose of the Bill.

Clause 2 provides for the commencement of the Bill, being the day on which it is proclaimed. However, if the Bill has not been proclaimed to come into operation prior to 31 January 2003, it comes into operation on that day.

Clause 3 sets out the objects of the Bill and the means by which the Bill ensures that a person is able to recover progress payments. It is provided that the Bill does not limit any other entitlement or remedy a person may have under a construction contract.

Clause 4 sets out the definitions used in the Bill. These include the key definitions of "construction contract", "construction work" (defined in more detail in cl 5) and "related goods and services" (defined in more detail in cl 6).

Clause 5 inserts a detailed definition of "construction work".

Clause 6 inserts a detailed definition of "related goods and services".

Clause 7 provides for the application of the Bill to construction contracts. It excludes certain classes of construction contracts from the scope of the Bill. Among the exclusions are domestic building contracts within the meaning of the *Domestic Building Contracts Act 1995* between a builder and a building owner for the carrying out of domestic building work the whole of which is carried out on any part of a premises that the building owner resides in or proposes to reside in.

Clause 8 provides that the Bill binds the Crown.

PART 2 – RIGHTS TO PROGRESS PAYMENTS

Clause 9 establishes a right to progress payments for construction work carried out under, or the provision of related goods and services provided under, a construction contract.

Clause 10 provides for the amount of a progress payment to be calculated in accordance with the terms of the construction contract or, if there is no express provision, it is to be based upon the value of the work carried out or the goods and services supplied under the contract.

Clause 11 provides for the method of valuation of the construction work carried out or related goods and services supplied under a construction contract.

Clause 12 provides that a progress payment becomes due and payable in accordance with the terms of the construction contract, or, if the contract contains no such terms, at the end of 10 business days after a payment claim is made under Pt 3 in relation to the payment.

Clause 13 provides that a "pay when paid" provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a construction contract. A "pay when paid" provision is a provision that makes one person's payment dependent on another person's payment.

PART 3 – PROCEDURE FOR RECOVERING PROGRESS PAYMENTS

Division 1 – Payment Claims and Payment Schedules

Clause 14 enables a person who is entitled to a progress payment under Pt 2 (the claimant) to serve a payment claim on the person who is liable to make the payment. The claim will set out the amount to which the claimant claims entitlement.

Clause 15 enables a person on whom a payment claim is made (the respondent) to reply to the claim by providing a payment schedule to the claimant. The Schedule will set out how much the respondent proposes to pay the claimant and when. If the respondent does not provide a payment schedule he or she becomes liable to pay the claimed amount on the due date for the progress payment.

Clause 16 provides that if the respondent fails to pay the whole of the claimed amount on or before the due date, the claimant may recover the unpaid portion of that amount from the respondent as a debt due in a court of competent jurisdiction. The claimant may also serve notice to suspend the carrying out of construction work or the supply of goods or services under the construction contract.

Clause 17 provides that if payment is not made in accordance with the payment schedule on or before the due date for payment, the claimant may recover the unpaid portion of the scheduled amount as a debt due in a court of competent jurisdiction. The claimant may also serve notice to suspend the carrying out of construction work or the supply of goods or services under the construction contract.

Division 2 – Adjudication of Disputes

Clause 18 enables a claimant to apply for adjudication of the amount of a progress payment payable in the event that the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim. The application will have to be made within five business days after the claimant receives the payment schedule, and will be able to be made directly to an adjudicator agreed between the claimant and respondent or to an authority authorised to nominate adjudicators for the purposes of the proposed Act.

Clause 19 requires an adjudicator to be a natural person and to have such qualifications, expertise and experience as are prescribed by the regulations, and prohibits a person from being an adjudicator in relation to a particular construction contract if the person is a party or employee of a party to the contract or in such circumstances as are prescribed by the regulations.

Clause 20 provides for acceptance of an adjudication application by an adjudicator to take effect when notice of his or her acceptance has been served on both the claimant and the respondent. The adjudicator is then appointed. A copy of the notice must be served on the Building Commission by the adjudicator.

Clause 21 allows the respondent to lodge a response to the adjudication application with the adjudicator and sets out what the response must contain. A copy of the response must be served on the claimant. The response must set out the name and address of any relevant principal (as defined in sub-cl (4)) of the respondent.

Clause 22 sets out the manner in which, and the time within which, an adjudicator is to determine an adjudication application. It also requires the adjudicator to serve notice on any relevant principal named in the adjudication response. (See cl 21 for a definition of relevant principal.)

Clause 23 provides for the determination of the adjudication application and sets out the matters the adjudicator is to consider in making a determination. This clause requires a determination as to the amount of the progress payment (the "adjudicated amount") and the date it is payable. The determination must be in writing. It must include the reasons and basis for the determination if requested. It also requires a copy of the determination to be given to the Building Commission.

Clause 24 allows an adjudicator to correct an error, mistake or defect in a determination at his or her initiative or on application of a party.

Clause 25 provides that if the adjudicator determines an amount that the respondent must pay as a progress payment, the respondent must pay that amount to the claimant or give the claimant security for payment of that amount pending the final determination of matters in dispute between them. Acceptable security will consist of a guarantee from a recognised financial institution, a deposit into a designated trust account or any other security agreed between the claimant and the respondent. This clause provides that if a respondent is the Crown or a public authority representing the Crown, security for payment may be given in the form of a written statement that sufficient money will be legally available for payment if and when the amount becomes payable. The clause also provides that any security given under this clause cannot be enforced until at least two business days after the final determination of the dispute relating to the progress payment.

Clause 26 provides for the establishment and operation of trust accounts that are used for the purpose of giving security as referred to in cl 25. The clause requires the respondent to give notice of payment of money into a designated trust account to the claimant, and provides for the conditions and purpose upon which money is to be held in trust as security for payment.

Clause 27 provides that if the respondent fails to pay the adjudicated amount or to give security for payment, the claimant may recover the amount and interest as a debt due in a court of competent jurisdiction. The claimant may also serve a notice on the respondent to suspend the carrying out of construction work or the supply of related goods and services.

Clause 28 allows a claimant to withdraw an adjudication application and make a new application if an adjudicator's notice of acceptance is not received within 4 business days of the application being made or an adjudicator fails to determine an application within the time allowed.

Division 3 – Claimant's Right to Suspend Construction Work

Clause 29 confers a right on the claimant to suspend the carrying out of construction work or the supply of related goods and services after at least two business days have passed since giving notice to the respondent (as referred to in cll 16, 17 and 27). The right continues for so long as the respondent fails to comply with its payment obligations. The suspension does not constitute a breach of the construction contract by the claimant.

Division 4 – Recovery from Principal

Clause 30 provides that this Division applies if an adjudicated amount has not been paid or security for payment provided, and the claimant has obtained judgment for the adjudicated amount.

Clause 31 provides that, in the circumstances set out in cl 30, a claimant may obtain payment of an adjudicated amount out of money that is payable or becomes payable to the respondent by another person (the "principal") under a construction contract, providing the construction work carried out or goods and services supplied under the contract between the claimant and the respondent are incidental to or part of the construction work or goods and services provided under the construction contract between the principal and the respondent.

Clause 32 establishes the procedure for a claimant to obtain payment from a principal in respect of money owed by the respondent to the claimant. The claimant must obtain a debt certificate from a court (see cl 33) and then serve a notice of claim on the principal.

Clause 33 allows a court to issue a debt certificate when judgment has been entered for recovery of an adjudicated amount as a debt.

Clause 34 provides that if a notice of claim is served on a principal by a claimant it operates to assign to the claimant the debt owed by the principal to the respondent to the extent of the amount of the certified debt.

Clause 35 provides that payment by the principal to the claimant of money owed by the principal to the respondent must be made until the certified debt is discharged or payments are no longer payable to the respondent by the principal.

Clause 36 provides that the priority of assignments under this Division is to be determined by the order of service of notices of claim on the principal where debts are owed by a respondent to a number of claimants. It provides that notices of claim received in the first

seven day period, taken from when the first notice of claim was served, have equal priority and that payments on those claims must be made pro rata in proportion to the relevant claimants' certified debts.

Clause 37 allows the principal to apply to a court for a stay of payments under this Division providing he or she has commenced dispute proceedings against the respondent in a court before being served with a notice of claim under that Division.

Clause 38 provides that if the principal fails to make payment in accordance with this Division, the claimant may sue for recovery of the debt under that Division. However the right of recovery is subject to any defences the principal would have had against the recovery of the debt by the respondent.

Clause 39 provides that if a certified debt is discharged or a judgment that resulted in the debt certificate being issued is set aside by a court, the assignment of the debt under the Division ceases to operate. It provides an exception where the principal has not been notified of the discharge or setting aside of the debt.

Clause 40 requires the claimant, on request, to give to the principal or respondent a discharge notice in prescribed form with respect to any payment of the certified debt. The discharge notice must be given within seven days of the payment and request – otherwise the amount is forfeited and can be recovered from the claimant by the person who made the payment.

Clause 41 requires the respondent to provide to the claimant the name of any person from whom the claimant may be able to recover the adjudicated amount by way of recovery from a principal under this Division. It is an offence to knowingly provide false or misleading material under this provision.

Division 5 – General Provisions Relating to Adjudicators

Clause 42 empowers the Building Commission to authorise or withdraw an authorisation of a person to nominate adjudicators for the purposes of the Bill. The Building Commission must have regard to Ministerial guidelines in doing so.

Clause 43 provides that the Building Commission may impose or vary or revoke conditions on any authorisation of a person to nominate adjudicators.

Clause 44 allows the Minister to issue guidelines relating to the giving, variation or withdrawal of authorities under Div 5.

Clause 45 allows an adjudicator to charge fees and expenses for work done in undertaking an adjudication and for the apportionment and payment of those fees and expenses. If a respondent refuses to pay his or her contribution, the claimant may pay it and that amount is then added to the adjudicated amount determined under cl 23.

Clause 46 provides an exclusion of liability for the adjudicator for anything done in good faith in the exercise of a power or the discharge of a duty under the Bill or regulations.

Division 6 – Effect of Part on Civil Proceedings

Clause 47 This clause is intended to ensure that the Bill does not limit any other entitlement that a person may have under a construction contract or any other remedy that a person may have for recovering that other entitlement.

Sub-clause (1) provides that nothing in Pt 3 of the Bill affects any rights that a party to a construction contract may have under the contract or may have under Pt 2 in respect of the contract or may have apart from the Bill in respect of anything done or omitted to be done under the contract, provided cl 48 is complied with.

Sub-clause (2) provides that nothing done under or for the purposes of Pt 3 affects any proceedings under a construction contract except as provided in sub-cl (3) of (4).

Sub-clause (3) provides that in any proceedings before a court or tribunal in relation to a matter arising under a construction contract, the court or tribunal must allow for any amount paid to a party to the contract under Pt 3 in any order, determination or award it makes in those proceedings and may make orders for the restitution of any amount so paid and other ancillary orders.

Sub-clause (4) provides that in any arbitration proceedings or other dispute resolution proceedings under a construction contract, the person determining the arbitration or

dispute must allow for any amount paid to a party to the contract under Pt 3 in any order, determination or award the person makes in those proceedings.

Sub-clause (5) provides that nothing in Pt 3 affects any right that a principal may have under any contract except as provided for in the Bill.

PART 4 – MISCELLANEOUS

Clause 48 provides that a provision of an agreement that excludes, modifies or restricts the operation of the Bill is void.

Clause 49 requires the Building Commission, Building Commissioner and staff members of the Building Commission to only use or disclose information received under Pt 3 of the Bill for the purposes of monitoring the operation of the Bill.

Clause 50 provides for the service of notices and other documents under the Bill. Service may be effected by personal delivery, by lodgement at a person's place of business, or by posting or sending notices or documents by facsimile to a person's ordinary place of business. If notices or documents are posted or sent by facsimile, service is taken to be effected two business days after posting, or in the case of a facsimile, at the time the facsimile is received.

Clause 51 states that it is the intention of cl 46 of the Bill (which deals with the exclusion of liability for adjudicators) to alter or vary s 85 of the *Constitution Act 1975*.

Clause 52 provides regulation-making powers for the Bill.

Clause 53 amends the *Building Act 1993* to insert a new provision to provide for appeals to the Building Appeals Board relating to the authorisation of nominating authorities and the imposition or variation of conditions on authorities given under cl 42 of the Bill.

Clause 54 makes a consequential amendment to the *Commercial Arbitration Act 1984* to ensure that nothing in that Act will affect the operation of Pt 3 of the Bill.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL (VIC) – SECOND READING SPEECH

Legislative Council, 24 April 2002

For **Hon J M MADDEN** (Minister for Sport and Recreation), Hon M R Thomson (Minister for Small Business) – By leave, I move:

That this bill be now read a second time.

I have great pleasure in introducing this bill.

The bill gives effect to the government's commitment to securing payment for contractors, subcontractors, consultants and others in the building and construction industry, which has been a major concern in the industry for some time. Accounts of small businesses and companies failing due to later companies going broke or refusing to pay, and issues relating to cash flow problems, are prevalent within the industry. Up until now Victoria has been one of the few states across Australia without legislation protecting subcontractors and others involved in the industry that have legitimate claims against defaulting companies.

The Bracks government's election commitment to create a task force and bring owners, builders, subcontractors and unions together to produce a detailed package for legislation has been delivered. The task force was created by the previous minister, the honourable member for Albert Park, and chaired by the member for Mitcham. The recommendations of the task force had the broad support of key stakeholders in the building and construction industry: developers, industry peak bodies, and unions.

The Kennett government had a range of opportunities to act on the issue, but it failed the building and construction industry every time, while other states initiated legislation. The Kennett government's only response was a weak voluntary code that applied to government projects only.

This government has been able to tackle the issue head on. Through consultation with all key stakeholders in the building and construction industry across the Victorian building and construction industry we have developed legislation which I believe will ensure that all contractors, subcontractors, suppliers, consultants and allied workers in the building and construction industry receive fair and timely payments.

The main purpose of this bill is to provide for an entitlement to progress payments for persons who carry out building and construction work or who supply related goods and services under construction contracts. This bill represents a major initiative by the government to remove the inequitable practices in the building and construction industry whereby small contractors are not paid on time, or at all, for their work. This can be due to poor payment practices of contractors or financial failure of a head contractor when a dispute or litigation is in progress.

The bill substantially adopts the recommendations of the industry task force, which was appointed by the government to review the remedial action that may be taken to address poor payment practices under building and construction contracts. The main thrust of the task force recommendations was for the introduction of legislation reflecting the New South Wales *Building and Construction Industry Security of Payment Act 1999*, which has proved successful in that jurisdiction. The bill is modelled on the provisions and processes of the New South Wales act and this has the benefit of allowing building and construction firms with national operations to be subject to common payment requirements in both jurisdictions.

The bill will alleviate the hardship which subcontractors suffer by reason of poor payment practices in the industry. The bill creates standards and a balanced and equitable process for payment and will reform payment behaviour in the industry.

The essential elements of the bill are that if the contract does not provide for progress payments, a progress payment process is implied into the contract; quick adjudication of disputes is provided for with an obligation to pay or provide security of payment.

The bill substantially adopts the recommendations of the industry task force, which was appointed by the government to review the remedial action that may be taken to address poor payment practices under building and construction contracts.

The bill is divided into four parts.

Part 1 provides for the commencement of the bill, sets out the object of the bill, defines certain terms used throughout the bill, and deals with the application of the bill to construction contracts. The object of the bill is to ensure that any person who carries out construction work or who supplies related goods and services under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of that work and the supplying of those goods and services. "Construction contract" is very broadly defined, and includes the construction, alteration or repair (including demolition) of any works forming part of land including roadworks, buildings, railways and drainage construction. Related goods and services which are supplied under construction contracts are also included, as are engineering, landscaping and technical and advisory services relating to construction work.

The act does not apply to a construction contract entered into before the commencement of the operation of the act.

Some types of contracts are excluded from the operation of the legislation. The main exclusions are:

contracts of insurance or loans or guarantees with recognised financial institutions;
domestic building contracts for construction work on the residence of the building owner;
contracts where consideration is not to be calculated by reference to the value of the work or goods or services;
employment contracts;
contracts for construction work carried out outside Victoria; and
contracts entered into before the commencement of the act.

Part 2 of the act provides a statutory entitlement to receive progress payments for construction work, and provides, in clause 9, that a payment claim may be made every 20 business days. These provisions do not override any relevant provisions in the contract. Provision is made for valuation of work performed or goods and services provided, if the construction contract does not specify how a payment is to be valued. The bill explicitly provides that arrangements known in the industry as "pay when paid" provisions are of no effect.

Part 3 of the bill deals with the procedures for recovering progress payments. It sets out the procedures for making a payment claim, adjudication of disputes, appointment of adjudicators, the claimant's right to suspend work in certain circumstances and the circumstances in which claimants may seek recovery from the principal.

Part 4 of the bill sets out a number of miscellaneous provisions, including provisions dealing with contracting out, confidentiality of information provided to the Building Commission, service of notices, regulation-making powers and consequential amendments to other legislation.

Statement under section 85(5) of the Constitution Act 1975

I wish to make a statement pursuant to section 85(5) of the *Constitution Act 1975* of the reason for altering or varying section 85 of that act by the bill.

Clause 51 of the bill states that it is the intention of section 46 to alter or vary section 85 of the *Constitution Act 1975*.

Clause 46 provides that an adjudicator is not personally liable for anything done or omitted to be done in good faith in the exercise of his or her powers or the discharge of his or her

duties under the act or the regulations or in the reasonable belief that the act or omission was in the exercise of those powers or the discharge of those duties. The reason for limiting the jurisdiction of the Supreme Court with respect to this provision is to permit adjudicators to exercise their powers and discharge their duties without fear of litigation.

In the absence of a statutory exclusion from liability it is unlikely that individuals would accept appointment as adjudicators as they are required to provide rapid determination of amounts due with limited ability to consider all of the detailed arguments that may be raised in subsequent proceedings.

The exclusion from liability is intended to facilitate the adjudication process and does not affect the rights of any party to have the overall dispute between the parties resolved in accordance with law.

I commend the bill to the house.

Debate adjourned for Hon P A KATSAMBANIS (Monash) on motion of Hon Bill Forwood.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT (AMENDMENT) BILL 2006 (VIC) – EXPLANATORY MEMORANDUM

Clause notes

Clause 1 sets out the purpose of the Bill which is to amend the *Building and Construction Industry Security of Payment Act 2002* to make further provision with respect to payments for construction work and for the supply of related goods and services under construction contracts.

Clause 2 provides for the commencement of the Act. Sections 1, 2, 3, 38, 39 and 41 come into effect on the day after the day that the Act receives the Royal Assent. The remainder of the Act comes into effect on a day or days to be proclaimed with a forced commencement date of 30 March 2007.

Clause 3 states that the *Building and Construction Industry Security of Payment Act 2002* is called the Principal Act.

Clause 4 amends the object of the Principal Act, which is to ensure that persons can recover progress payments they are entitled to.

Clause 5 amends s 4 of the Principal Act to insert the definitions of "adjudication certificate", "adjudication determination", "adjudication fees", "adjudication review", "adjudication review application", "claimable variation", "excluded amounts", "review adjudicator", "review determination", and "variation".

This clause also amends the definition of "designated trust account" and "scheduled amount" and it amends the definition of "progress payment" to provide that a progress payment can include a final payment, single or one-off payment or milestone payment.

Clause 6 amends the definition of "construction work" to include "works".

Clause 7 provides that, in the definition of "related goods and services", a reference to related goods and services includes a reference to related goods or services.

Clause 8 substitutes s 7(2)(b) of the Principal Act to provide that the Principal Act does not apply to construction contracts that are domestic building contracts within the meaning of the *Domestic Building Contracts Act 1995* between a builder and a building owner for the carrying out of domestic building work. This "exemption" does not apply to a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business.

This clause also inserts new s 7(2)(ba) into the Principal Act. This provision provides that the Principal Act also does not apply to a construction contract for work of a kind referred to in s 6 of the *Domestic Building Contracts Act 1995* relating to residences other than where the person for whom the work is carried out is in the business of building residences and the contract is entered into in the course of, or in connection with, that business or the construction work is carried out by a sub-contractor.

Clause 9 amends s 9(2) of the Principal Act to relate reference dates to specific items of construction work or related goods and services.

This clause also inserts new paras (c) and (d) into s 9(2) of the Principal Act to provide a method for calculating a reference date where a progress payment is a single, one-off or final payment and the contract makes no express provision for a reference date. Paragraph (d) refers to the fact that a final payment may include money retained by the respondent for the rectification or omission of works or the supply of goods and services under the construction contract.

Clause 10 amends s 10(b) of the Principal Act to refer to construction works undertaken to be carried out or related goods and services undertaken to be supplied under a construction contract.

This clause also inserts new ss 10(2) and 10(3). New s 10(2) ensures that claimable variations can be taken into account in calculating the amount of the progress payment to which a person is entitled under a construction contract.

New s 10(3) provides that, despite s 10(1) and anything to the contrary in the construction contract, excluded amounts must not be taken into account in calculating the amount of the progress payment to which a person is entitled under the contract.

Clause 11 inserts new ss 10A and 10B into the Principal Act.

New s 10A sets out what is a claimable variation. There are two types of claimable variations provided for in this section.

New s 10B sets out the classes of excluded amounts that are not to be taken into account when calculating the amount of progress payment to which a person is entitled under a construction contract.

Clause 12 amends s 11(1) of the Principal Act to refer to construction work undertaken to be carried out under a construction contract.

This clause also substitutes s 11(1)(b)(iii) of the Principal Act, which provides that a claimable variation will be taken into account in valuing the construction work where a contract does not make an express provision for valuing the work.

This clause also amends s 11(2) of the Principal Act (which relates to related goods and services supplied under a construction contract) in the same way as s 11(1) has been amended.

Clause 13 inserts new s 12(2) of the Principal Act, which provides that interest is payable on unpaid amounts of progress payments.

Clause 14 inserts new s 12A into the Principal Act, which enables a lien to be exercised by the claimant if a progress payment has not been paid.

New subs (1) provides that a claimant is entitled to exercise a lien in respect of any unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of the construction work for the respondent.

New subs (2) requires the claimant to serve notice on the respondent in the prescribed form before exercising the lien.

New subs (3) provides that the lien is extinguished when the claimant receives the progress payment.

New subs (4) provides that a lien for unfixed plant or materials existing prior to the date that the progress payment is due and payable takes priority over a lien under subs (1).

New subs (5) states that subs (1) does not confer on the claimant a right against a third party that owns the unfixed plant or materials.

Clause 15 amends s 13(1) of the Principal Act to refer to construction work undertaken to be carried out and related goods and services undertaken to be supplied under the construction contract.

This clause also amends the term "pay when paid provision" in s 13(2) of the Principal Act by inserting new para (c) which adds further to the meaning of that term.

Clause 16 substitutes s 14 of the Principal Act.

New subs (1) enables a person who is or claims to be entitled to a progress payment (the "claimant") to serve a payment claim on a person who is or may be liable to make the payment (the "respondent").

New subs (2) sets out what must be included in a payment claim.

New subs (3) provides that a claimed amount may include an amount that the respondent is liable to pay in respect of any loss or expenses incurred by the claimant under s 29(4) of the Principal Act but that an excluded amount must not be included.

New subss (4) and (5) provide when a payment claim may be served.

New subs (6) bars any further payment claims under the Principal Act to be served if a payment claim in respect of a final, single or one-off payment has been served under that Act.

New subs (7) provides that nothing in subs (6) prevents a payment claim for an amount in respect of a final, single or one-off payment to be served under the Principal Act if a claim for the amount has already been made under the construction contract but has not been paid.

New subs (8) restricts a person from serving more than one payment claim in regard to each reference date under the construction contract.

New subs (9) provides that subs (8) does not prevent a claimant from including an amount in a payment claim that was included in a previous claim but not paid.

Clause 17 amends s 15(2) of the Principal Act to insert new para (c), which requires a payment schedule to identify any amount of the claim that the respondent considers to be an excluded amount.

Clause 18 substitutes s 16(2)(a) of the Principal Act. New s 16(2)(a) provides an alternative to the claimant going to a court to recover the unpaid portion of the claimed amount. The alternative is for the claimant to make an application for adjudication in respect of the payment claim.

This clause also substitutes s 16(4) of the Principal Act. New s 16(4) provides that, before judgment in favour of a claimant may be given in a court, the court is to be satisfied of the existence of the circumstances set out in s 16(1) and that the claimed amount does not include any excluded amount. In addition a respondent is restricted from bringing any cross claim against the claimant or raise any defence in relation to any matters arising under the construction contract.

Clause 19 substitutes s 17(2)(a) of the Principal Act. New s 17(2)(a) provides an alternative to the claimant going to a court to recover the unpaid portion of the claimed amount. The alternative is for the claimant to make an application for adjudication in respect of the payment claim.

This clause also substitutes s 17(4) of the Principal Act. New s 17(4) provide provides that, before judgment in favour of a claimant may be given in a court, the court is to be satisfied of the existence of the circumstances set out in s 17(1). In addition a respondent is restricted from bringing any cross claim against the claimant or raise any defence in relation to any matters arising under the construction contract.

Clause 20 substitutes ss 18(1) to 18(4) of the Principal Act.

New subs (1) provides that a claimant may apply for adjudication of a payment claim if the payment schedule indicates an amount that is less than the claimed amount or the respondent fails to pay the whole or part of the scheduled amount by the due date or the respondent fails to provide a payment schedule and fails to pay the whole or part of the claimed amount by the due date.

New subs (2) provides that where a respondent has failed to provide a payment schedule and pay the whole or part of the claimed amount by the due date for payment, the claimant cannot make an adjudication application unless the claimant notifies the respondent within 10 business days of the due date of the intention to make an adjudication application and the respondent has been given an opportunity to provide a payment schedule within 2 business days after receiving the notice from the claimant.

New subs (3) sets out the requirements for the adjudication application. These include that the application is to be made to an authorised nominating authority chosen by the claimant.

New subs (4) limits the choice of the claimant of an authorised nominating authority to one of those listed in the construction contract if at least 3 or more authorities are listed in that contract.

The clause also repeals s 18(6) of the Principal Act which provided that s 18 did not limit the operation of dispute resolution provisions of the construction contract. This is to ensure that the dispute resolution provisions in this section would apply without conflict with the construction contract.

Section 18(8) of the Principal Act is also amended to reflect the fact that the adjudicator is no longer chosen by agreement of the claimant and the respondent.

Clause 21 amends s 21 of the Principal Act. It substitutes new s 21(2)(c) which requires the adjudication response to include, in addition to the name of any relevant principal of the respondent, the name of any other person that the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application.

This clause also inserts new s 21(2)(ca), which requires that the adjudication response must identify any amount in the payment claim that the respondent alleges is an excluded amount.

Clause 21 also inserts new subss (2A) and (2B) into s 21 of the Principal Act. New subs (2A) restricts the respondent's ability to lodge an adjudication response to only where the respondent has provided a payment schedule within the required time. New subs (2B) provides that if an adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant setting out the reasons included in the adjudication response and stating that the claimant has two business days after being served with the notice to lodge a response to the reasons with the adjudicator.

Finally this clause amends the definition of "relevant principal" in s 21 to ensure that it does not include persons that the respondent has entered into a contract with, where the contract is of the type of construction contract that is exempted from the Principal Act under s 7(2)(b) or 7(2)(ba) of that Act.

Clause 22 substitutes s 22(2) of the Principal Act. New subs (2) requires the adjudicator to serve a notice to any relevant principal and any other person that is included in an adjudication response under s 21(2)(c) and to any other person that the adjudicator reasonably believes on the basis of submissions from the claimant or the respondent, to have a financial or contractual interest in the matter that is the subject of the adjudication application. This is to ensure that other persons who are not parties to the application but might be affected by the outcome of the adjudication are advised.

This clause also substitutes s 22(4)(b) of the Principal Act. This enables the time for the adjudicator to make a determination to be extended by up to a further 15 days on the agreement of the claimant.

This clause also inserts new s 22(4A) which provides that a claimant may not unreasonably withhold their consent to the extension of time for making the determination.

Finally this clause inserts new s 22(5A) into the Principal Act, which provides that any conference called under s 22(5)(c) is to be conducted informally and without legal representation unless the adjudicator permits legal representation.

Clause 23 makes a number of amendments to s 23 of the Principal Act.

New s 23(1)(c) is inserted, which provides that interest on an adjudicated amount may be determined by the adjudicator.

The note to s 23(1) is amended to correct a cross-reference to new s 45.

Section 23(2) is amended to make it clear that in determining an adjudication application an adjudicator must consider certain matters and only those matters. Section 23(2)(b) is amended to make it subject to the Principal Act. Section 23(2)(d) is amended to insert the words "(if any)" after the words "payment schedule".

This clause also inserts new ss 23(2A) and 23(2B) into the Principal Act. New s 23(2A) provides that an adjudicator in determining an adjudication application must not take into account any part of a claimed amount that is an excluded amount or any other matter that is prohibited by the Principal Act to be taken into account.

New s 23(2B) provides that an adjudicator's determination is void to the extent that it did not take into account the matters that were required to be considered under s 23(2). It is also void if the adjudicator took into account any amount or matter that was not to be taken into account under s 23(2A) to the extent that the determination was based on that amount or matter.

These amendments are designed to make it clear to the adjudicator and to the parties in a dispute the matters to be considered by the adjudicator in determining an adjudication application.

Finally this clause substitutes ss 23(3) and 23(4) of the Principal Act.

New subs (3) provides that the adjudicators determination must be in writing and include the reasons for the determination and the basis for deciding on the amount and date.

New subs (4) requires the adjudicator, if he or she has determined the value of construction work carried out or of goods and services supplied under a construction contract, to in subsequent adjudications give the same value to the construction work or the goods and services supplied in the previous determination. For the adjudicator to vary the value the claimant or the respondent must satisfy the adjudicator that the values have changed since the previous determination.

Clause 24 inserts new s 23A into the Principal Act. This requires the authorised nominating authority to give a copy of the adjudication determination to the parties and to the Building Commission. The parties are to receive the copy as soon as practicable after it is made and the Building Commission is to receive a copy within 5 business days.

Clause 25 inserts new subss (3) and (4) into s 24 of the Principal Act, which provides for the correction of determinations. The new provisions require a copy of a corrected determination to be given to the parties and the Building Commission and prevent a correction being made after an adjudication review application is made.

Clause 26 repeals ss 25 to 27 of the Principal Act. New Div 2B of Pt 3 inserted by cl 28 sets out new procedures for payment and recovery of adjudicated amounts.

Clause 27 amends s 28(3) of the Principal Act to refer to the provisions of new s 18(3) that relate to the time for making an adjudication application.

Clause 28 inserts new Divs 2A (Review of Adjudication) and 2B (Payment and Recovery of Adjudicated Amounts) into Pt 3 of the Principal Act.

New s 28A sets out the threshold to be met before an application for review of an adjudication determination may be made.

New s 28B enables a respondent to apply for review of the adjudicator's determination but only on the ground that the adjudicated amount contains an excluded amount.

However, before an application may be made a respondent would have had to have provided a payment schedule (subs (2)); identified the amount as an excluded amount in the payment schedule (subs (4)); paid the adjudicated amount that is not considered to be an excluded amount (subs (5)); and paid the alleged excluded amounts into a designated trust account (subs (6)).

New s 28C enables a claimant to apply for review of the adjudicator's determination but only on the ground that the adjudicated failed to take into account a relevant amount because it was wrongly determined to be an excluded amount.

New s 28D sets out the procedure for making adjudication review applications. Subsection (4) requires the applicant to give a copy of the application to the other party within one business day after making the application. Subsection (5) requires the authorised nominating authority to give a copy of the application for the review of an adjudication to the adjudicator who made the determination that is the subject of review and to the Building Commission.

New s 28E provides a right for a party to make a submission in response to the application for review and sets a time in which this is to be done.

New s 28F provides for the setting up of a designated trust account into which the respondent pays the alleged excluded amounts and sets out the trusts on which the amounts are held.

Subsection (3) sets out what is to happen to the money (including interest) in the trust account in the event that the respondent withdraws the application for review of the adjudication.

Subsection (4) provides that regulations may make provision for the establishment and operation of the trust account.

New s 28G provides for the appointment of a review adjudicator.

New s 28H sets out the procedures for the adjudication review. This includes the calculation of the commencement of the adjudication review and what information is to be provided by the authorised nominating authority to the review adjudicator.

New s 28I sets out the process for making an adjudication review determination.

New s 28J provides that the authorised nominating authority must notify the persons specified in the provision of the review determination.

New s 28K enables an applicant to withdraw an adjudication review application by serving a notice of withdrawal on those specified in the provision.

New s 28L enables the provisions of s 24 of the Act relevant to the correction of mistakes in an adjudication determination to apply in respect of the review adjudicator and adjudication review.

New s 28M requires a respondent to pay an adjudicated amount within the required time lines, subject to the respondent making an application for review and its outcome.

New s 28N sets out the payment time frame for the respondent to pay the claimant or for the claimant to pay the respondent where the review determination determines that either must pay an amount.

New s 28O provides for the consequences of the respondent not paying the adjudicated amount. In this case the claimant may request the relevant authorised nominating authority to supply an adjudication certificate and the claimant may serve notice of the claimant's intention to suspend work or the supply of goods and services on the respondent. The notice to suspend work cannot be served until after the time allowed for making an application for review.

New s 28P provides that where the claimant fails to pay the adjudicated amount the respondent may request an adjudication certificate from the relevant authorised nominating authority.

New s 28Q provides that what may be specified in an adjudication certificate.

New s 28R sets out procedures for the bringing of proceedings for the recovery of an unpaid adjudicated amount for which an adjudication certificate has been issued. This clause also places restrictions on a person seeking to set aside a judgement under those proceedings. The person cannot bring across-claim, raise a defence under the construction contract or challenge the adjudication determination or review determination. This is to ensure that the proceedings under s 28R can be dealt with in a timely and streamlined way. This provision does not prevent a person bringing separate proceedings under the construction contract to recover any amount allegedly overpaid or underpaid under the progress payment process. Section 46 of the Act expressly preserves this right.

Clause 29 amends s 29(1) of the Principal Act to extend the period before a claimant may suspend work or the supply of related goods and services under a construction contract because of non-payment.

This clause also substitutes s 29(2) of the Principal Act. New subs (2) provides the maximum period for which a claimant is able to suspend the carrying out of construction work or supply of related goods and services after receiving payment of the amount owed.

Finally this clause inserts after s 29(3) of the Principal Act new subss (4) and (5).

New subs (4) provides that where the claimant has exercised the right to suspend work or supply goods and services and the claimant has suffered loss or expenses because the respondent has taken out of the contract any part of the work or supply, the respondent is then liable to pay for those losses or expenses.

New subs (5) prevents the claimant from incurring any liability for any loss or damage suffered by the respondent or other person during the time that the claimant exercised their

right to suspend construction work or the supply of related goods and services and in which time the claimant did not carry out the work or supply the goods and services.

Clause 30 inserts new s 29A into the Principal Act which inserts new definitions into Div 4 of Pt 3 and provides that "adjudicated amount" includes an amount payable under a review determination and "adjudication determination" includes a review determination.

Clause 31 substitutes ss 30(a) and 30(b) of the Principal Act to refer to the adjudication review process. These paragraphs set out the circumstances in which Div 4 (Recovery from Principal) of Pt 3 of the Principal Act applies.

This clause also amends s 31 of the Principal Act to make it consistent with s 21(4) of the Principal Act as amended by this Bill.

New s 31(A) provides that the ability of the claimant to obtain payment of the adjudicated amount or part of the adjudicated amount from the money owing to the respondent by some other person (the "principal") does not apply where the principal engaged the respondent under a construction contract exempted under s 7(2)(b) or 7(2)(ba) of the Principal Act.

Clause 32 substitutes the heading for Div 5 of Pt 3 of the Principal Act to include review adjudicators.

Clause 33 inserts new ss 43A, 43B and 43C into the Principal Act.

New s 43A sets out the functions of the authorised nominating authority. These include the nominating of adjudicators for the purposes of the Act, the receiving of adjudication and adjudication review applications and submissions in response to those applications and to appoint review adjudicators as well as the carrying out of any other functions or duties given to an authority, or imposed on an authority, by the Act.

New s 43B requires an authorised nominating authority to provide non-identifying information to the Building Commission as reasonably requested by the Commission in relation to the activities of the authority under the Principal Act. For the purposes of the section non-identifying information is information that does not identify any person or disclose their address or location or from which a person's identity, address or location could not be deduced.

New s 43C provides that an authorised nominating authority may charge a fee for services provided by the authority in connection with an adjudication determination or review adjudication determination. The authorised nominating authority is required to have regard to the guidelines made by the Minister under s 44 of the Principal Act in the setting of fees.

Clause 34 substitutes s 44(1) of the Principal Act. This enables the Minister, in addition to issuing guidelines relating to the giving, variation or withdrawal of authorities under Div 5, to issue guidelines relating to appropriate fees that may be charged by an authorised nominating authority, an adjudicator or a review adjudicator.

Clause 35 substitutes s 45 of the Principal Act.

New subs (1) defines the term "adjudicator" to include a review adjudicator and the term "adjudication application" to include an adjudication review application.

New subs (2) provides that the adjudicator is entitled to be paid fees and expenses for determining an adjudication application.

New subss (3) and (4) provide for the responsibility of the claimant and the respondent regarding payment of any fees and expenses.

New subs (5) provides that an adjudicator is not entitled to be paid any fees and expenses connected with the determination of the application if that adjudicator failed to make a determination in the time allowed.

New subs (6) states that subs (5) does not apply where the adjudicator refuses to communicate his or her decision until he or she is paid or in some other cases as prescribed.

New subss (7) and (8) provide for the situation where a party refuses to pay their required contribution to the fees and expenses of the adjudicator.

Clause 36 amends s 46 to give the review adjudicator the protections from liability that the review adjudicator has.

Clause 37 inserts new Pt 3A into the Principal Act. This new Part contains new ss 47A, 47B and 47C.

New s 47A sets out the functions of the Building Commission. These include the keeping of records of adjudication and review determinations as well as publishing those determinations.

New s 47B requires the Building Commission to keep a register of the names of the principals and contact details of authorised nominating authorities and to make that register available for inspection.

New s 47C requires the Building Commission to keep a record of the adjudication and review determinations that it receives. The Building Commission may publish non-identifying information in those determinations.

Clause 38 substitutes ss 48 and 49 of the Principal Act.

The intent of new s 48 is to strengthen the no contracting out provision of the Principal Act.

New s 49 clarifies that information received by the Commission under the Act cannot be used or disclosed except to the extent necessary for the performance of any functions or duties or the exercise of the powers of the Building Commission under the Act. This will enable the Building Commission to publish non-identifying information about adjudication and review determinations.

Clause 39 amends s 50 of the Principal Act to enable the service of notices to be in the manner specified in the relevant construction contract.

Clause 40 amends s 51 of the Principal Act to insert a new provision stating that it is the intention of s 28R to alter or vary s 85 of the *Constitution Act 1975*. This provision is inserted because of the inclusion in s 28R of the restriction on a person bringing proceedings to set aside a judgment to enforce an adjudicated amount preventing that person from challenging the adjudication determination or review determination. The notes on proposed new s 28R set out the purpose of this restriction.

Clause 41 amends s 52 of the Principal Act to insert additional regulation making powers.

Clause 42 substitutes s 53 of the Principal Act. The new s 53 provides for transitional provisions needed as a result of the amendments made by the *Building and Construction Industry Security of Payment (Amendment) Act 2006*. The old s 53 is an amending provision and is spent.

Clause 43 repeals s 54 of the Principal Act. This is a spent provision and is no longer required.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT (AMENDMENT) BILL 2006 (VIC) – SECOND READING SPEECH

Legislative Council, 15 June 2006

For Mr GAVIN JENNINGS (Minister for Aged Care), Hon M R Thomson (Minister for Consumer Affairs) – I move:

That, pursuant to sessional order 34, the second-reading speech, except for the statement under s 85(5) of the *Constitution Act 1975*, be incorporated into Hansard.

Deputy President, house amendments were made in the other place. The first house amendment extends the range of disputed variations that can be claimed under the legislation.

The amendment will no longer require the parties to agree that the work has been carried out or the goods and services supplied and that the person was directed to carry out the work or supply the goods and services. This will provide certainty that the adjudicator will be able to determine whether this has occurred.

The amendment also provides for a cap on considerations under the construction contract to which a claim for disputed variation may be dealt with under the Act. This will apply to claims for disputed variations where the consideration under the construction contract at the time that the contract is entered into is $5 million or less.

In the case where a consideration is $5 million or less, claims may be made until claims for disputed variations reach 10% of the consideration.

Claims made above that percentage are to be dealt with under the construction contract. The amendment also provides that considerations under the contract that are for $150,000 or less are not limited by the 10% rule.

The amendment provides a safeguard for where the contract does not have a dispute resolution clause. In this case the Act is to apply no matter what the consideration under the contract is.

The second house amendment is a consequence of the first house amendment. It makes it clear that a payment schedule is to be in the prescribed form and contain the prescribed information if they are prescribed. Those are all contained within the second-reading speech.

Motion agreed to.

Hon M R THOMSON (Minister for Consumer Affairs) – I move:

That the Bill be now read a second time.

Incorporated speech as follows:

The main purpose of this Bill is to amend the *Building and Construction Industry Security of Payment Act 2002* to make it more effective in enabling any person who carries out building or construction work to promptly recover progress payments.

The proposed amendments will build on the foundations of the existing legislation by introducing new features and improving existing provisions, consistent with the policy intention of the Act.

The *Building and Construction Industry Security of Payment Act 2002* has now been in operation for three years. The Act has delivered on the government's commitments to improve protection of the rights of subcontractors and others in the industry to fair and prompt payment and assist them to recover legitimate payment claims against defaulting parties.

The construction industry strongly supports the existing legislation, which has improved payment prospects and cash flow outcomes for many industry participants.

However, the first three years of the Act's operation has revealed that there is room for improvement.

The previous Minister for Planning, the Honourable Member for Northcote, initiated a review of the *Building and Construction Industry Security of Payment Act 2002*. In June 2004, a detailed discussion paper was released by the Building Commission to which all sectors of the industry responded. To ensure a balanced response to industry concerns, an industry working group was established, chaired by Tony Robinson MLA, with representation from all key sectors of the industry. It was given the task of evaluating the issues and assisting in finalising recommendations for amendments to the Act.

The Bill substantially adopts the recommendations of the industry working group.

The main thrust of these recommendations was to match the improvements made to similar NSW legislation and to enhance the effectiveness of the existing Victorian legislation.

The Bill is modelled on the provisions and processes of the amended NSW Act and the similar recently enacted legislation in Queensland. The changes will benefit building and construction firms with national or interstate operations by improving consistency between payment regimes across all three jurisdictions. The Productivity Commission and key industry associations across Australia strongly support national consistency in building industry legislation.

At present, claimants can enforce payment only with expensive and time-consuming proceedings in a court or tribunal. The Bill provides claimants with the option of applying for adjudication allowing such payments to be recovered quickly.

The Bill expands the application of the legislation to include a wider range of payments, including final payments, single payments and milestone (key event) payments. It will also allow subcontractors to use the adjudication process to access amounts clients or head contractors hold on trust for subcontractors until works are completed.

The Bill also makes it clear that claims for damages, delay costs and latent conditions are "excluded amounts" and cannot be claimed under the Act.

The Bill will enable some disputed variations to be dealt with under the Act. This is where the variation results from a direction being given by the person for whom the work is being undertaken or the goods and services provided. These changes are aimed at avoiding uncertainties that have been experienced in other jurisdictions.

In the case where a contractor has been directed to carry out the work the Act will now apply to claims for disputed variations where the consideration under the construction contract at the time that the contract is entered into is below $5 million.

Claims for disputed variations in contracts below $5 million are considered to be suitable for assessment and interim decision within the time normally allowed by the security of payment scheme for the respondent to assess (10 days) and for the adjudicator to review (10 days).

The effect of the $5 million cap is that disputed variations in contracts in the small contracting sector and almost all the subcontracting sector would be subject to the scheme. Disputed variations on large contracts, initiated by building owners and big contractors will be exempt from the scheme.

This addresses the concern that such disputes on major contracts should not be subject to the security of payment scheme and the normal contract methods of dispute resolution should continue to apply.

In the case where the consideration under the construction contract is between $150,000 and $5 million, claims may be made in relation to disputed variations until the claims reach 10% of the consideration under the construction contract.

Where the construction contract does not have a dispute resolution clause which includes the disputes under new s 10A(3)(c), then the Act is to apply. This will ensure that contractors do not find that they have no means of dealing with disputes in this regard. The Act becomes the fail-safe mechanism.

I emphasise that the limitation on the application of the Act to the consideration under the contract only applies to disputed variations. Claims for payments in respect of consideration under the construction contract where there is no dispute remain subject to the scheme for all values of considerations under the construction contract.

The Bill also provides that an adjudicator's determination, insofar as it takes into account matters that are not permitted to be claimed under the Act, is void and of no effect. This amendment will ensure that where an adjudicator steps beyond the scope of the Act those parts of the adjudicator's determination that are within power can be saved.

The Bill introduces a review process for aggrieved parties to seek review of an adjudicated determination. The review process, by a single adjudicator, will only be available in limited circumstances.

This would be where the respondent's response to the claim (the payment schedule) has been supplied by the respondent prior to adjudication and where the adjudicated amount is at least $100,000. The sole ground for review is that the adjudicator has taken into account amounts which are excluded by the Act. These limits ensure the Act does not disadvantage small contractors who rely on prompt payment to stay in business.

Furthermore, the Bill creates an expedited process for enforcing statutory liability through the courts. This is modelled on the NSW system. It applies where a respondent fails to pay an adjudicated amount by the due date. A claimant will be able to request a certificate (stating the adjudicated amount) from the authorised nominating authority, and lodge the certificate in an appropriate court, as an application for judgment debt. This process avoids the time and costs of a court hearing, while also preventing a respondent from delaying payment by raising inappropriate defences and counterclaims.

Cash flow is the lifeblood of the construction industry. It is critical that industry participants obtain prompt interim payment, pending a final determination of the matters in dispute.

The Bill reinforces this principle by providing that after an adjudicator has made a determination, the respondent must pay the adjudicated amount. The existing legislation allows respondents to provide security for payment (such as placement of the amount in a trust fund) rather than money. This has been removed because the NSW experience demonstrated that some parties delayed payment by providing security and failing to take prompt action to resolve the dispute.

Although the ability to use a trust account for the payment of security is to be removed, the concept of trust accounts is being retained for another purpose.

In the event that a respondent applies for a review of the adjudicator's determination disputed amounts are to be paid into a trust account. Undisputed amounts must be paid to the claimant. This has a twofold benefit in that neither the claimant nor the respondent is disadvantaged. The money in trust is readily available to either party whatever the outcome of the review adjudication.

To further enhance security for payment, the Bill introduces a right to exercise a statutory lien or a right over unfixed goods, to the value of the unpaid amount. The Bill, however, specifies that the claimant's right will not take precedence over any pre-existing right over the goods such as where the client has already paid for them.

Another new measure is the proposed time limit on the making of payment claims under the Act.

In relation to claims for progress payments, the time limit is to be three months from the reference date for payment for each item of work carried out or goods provided, or such longer period as a contract may provide.

The time limit is to ensure prompt payment for works completed. The Act is not intended to encourage or reward claimants who delay making progress payments claims until long after works are completed.

The Bill also places some restrictions on the right under the existing legislation to suspend works when payment is not made when due. It is proposed that claimants return to work promptly after payment is made. This will minimise exposing a respondent to unnecessary delays to work on site and the resultant costs. The Bill also offers greater protection to claimants who exercise the right to suspend, by protecting them from any liability for losses resulting from the suspension of works.

These amendments do not reduce or change any of the parties' obligations or responsibilities for safety under the relevant contract, common law or other legislation.

The Bill makes minor amendments to improve clarity and strengthen the application of the Act. This includes new provisions stating the role, functions and powers of Authorised Nominating Authorities and the Building Commission, extending the scope of the current "no contracting out" provision and preventing "adjudicator shopping" by claimants seeking favourable determinations.

Other minor amendments include the establishment of a right to claim interest from the date that payments first become due and permitting adjudicators to exercise wider discretion.

Such discretion includes allowing legal representation during adjudication conferences, apportioning of fees between the parties to a dispute and extending the time for making a determination.

Statement under s 85 of the *Constitution Act 1975*:

Hon M R THOMSON – I make the following statement under s 85 of the *Constitution Act 1975* of the reasons for altering or varying that section in this Bill.

Clause 40 of the Bill amends s 51 of the principal act to provide that it is the intention of s 28R (to be inserted by cl 28 of the Bill) to alter or vary s 85 of the *Constitution Act 1975*.

Proposed s 28R sets out a procedure for the bringing of proceedings in a court of competent jurisdiction for judgment to enable recovery of an unpaid adjudicated amount. It also provides that a person who brings proceedings to have that judgment set aside cannot challenge the adjudication determination or review determination made by the adjudicator or review adjudicator except on specified grounds. The reason for this restriction is to provide a timely, streamlined process for enforcing the adjudicated debt. This provision will not prevent a person from bringing separate proceedings under the construction contract to recover any amount allegedly overpaid or underpaid under the progress payment process. Section 47 of the principal act preserves this right.

I commend the Bill to the house.

Debate adjourned for Hon D McL DAVIS (East Yarra) on motion of Hon A Coote.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002 (VIC) [HISTORICAL VERSION PRE 30 MARCH 2007]

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Act 2002	**15 of 2002**	**14 May 2002**	**31 Jan 2003, s 2(2)**

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment (Amendment) Act 2006	42 of 2006	25 Jul 2006	25 Jul 2006, ss 1, 3, 38, 39, 41. Remainder not yet commenced.

Part 1 – Preliminary

1 Purpose

The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.

2 Commencement

(1) Subject to sub-section (2), this Act comes into operation on a day to be proclaimed.

(2) If this Act does not come into operation before 31 January 2003, it comes into operation on that day.

3 Object of Act

(1) The object of this Act is to ensure that any person who carries out construction work or who supplies related goods and services under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in circumstances where the relevant construction contract fails to do so.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves –

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the amount of the progress payment determined by the adjudicator or the setting aside of money as security for payment of the progress payment; and

(e) the recovery of the progress payment in the event of a failure to pay.

(4) It is intended –

(a) that this Act does not limit any other entitlement that a person may have under a construction contract, or any other remedy that a person may have for recovering that other entitlement; and

(b) in particular –

(i) that the payment of the amount of the progress payment determined by the adjudicator or the setting aside of money as security does not prejudice any claim, counter-claim or defence that may be raised in proceedings (including arbitration proceedings or other dispute resolution proceedings) concerning the work or the supply of goods and services to which the payment claim relates; and

(ii) that the payment of the amount of the progress payment determined by the adjudicator is allowed for in any proceedings (including arbitration proceedings or other dispute resolution proceedings) brought under the construction contract concerning the work or the supply of goods and services to which the payment claim relates.

4 Definitions

In this Act –

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable as referred to in section 23 together with any amount added to that amount under section 45(7);
adjudication application means an application referred to in section 18;
adjudication response means a response referred to in section 21;
adjudicator, in relation to an adjudication application, means the person appointed in accordance with this Act to determine the application;
authorised nominating authority means a person authorised by the Building Commission under section 42 to nominate persons to determine adjudication applications;
Building Commission means the Building Commission established under the Building Act 1993;
business day means a day that is not –

(a) a Saturday or Sunday; or

(b) a day that is wholly or partly observed as a public holiday throughout Victoria;

certified debt in relation to a claimant, means the amount specified in a debt certificate as being owed to the claimant;
claimant means a person who serves a payment claim under section 14;
claimed amount means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 14;
construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party;
construction work has the meaning given in section 5;
debt certificate means a certificate issued under section 33;
designated trust account means an account kept with a recognised financial institution (whether in the name of the respondent or otherwise) for the purpose of holding adjudicated amounts payable to claimants under this Act;
discharge notice means a notice referred to in section 40;
due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 12;
exercise in relation to a function, includes perform a duty;
function includes power, authority or duty;
judgment includes order;
notice of claim means a notice referred to in section 32;
payment claim means a claim referred to in section 14;
payment schedule means a schedule referred to in section 15;
principal means a principal referred to in section 31;
progress payment means a payment to which a person is entitled under section 9;
recognised financial institution means an authorised deposit-taking institution within the meaning of the Banking Act 1959 of the Commonwealth;
related goods and services has the meaning given in section 6;
respondent means a person on whom a payment claim is served under section 14;
scheduled amount means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 15.

5 Definition of "construction work"

(1) In this Act, "construction work" means any of the following work –

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not);

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to

form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purposes of land drainage or coast protection;

(c) the installation in any building or structure of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

(d) the external or internal cleaning of buildings and structures, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;

(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including –

(i) site clearance, earth-moving, excavation, tunnelling and boring; and

(ii) the laying of foundations; and

(iii) the erection, maintenance or dismantling of scaffolding; and

(iv) the prefabrication of components to form part of any building or structure, whether carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of roadways and other access works;

(f) the painting or decorating of the internal or external surfaces of any building or structure;

(g) any other work of a kind prescribed for the purposes of this sub-section.

(2) Despite sub-section (1), "construction work" does not include any of the following work –

(a) the drilling for, or extraction of, oil or natural gas;

(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;

(c) any other work of a kind prescribed for the purposes of this sub-section.

6 Definition of "related goods and services"

(1) In this Act, "related goods and services", in relation to construction work, means any of the following goods and services –

(a) goods of the following kind –

(i) materials and components to form part of any building, structure or work arising from construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind –

(i) the provision of labour to carry out construction work;

(ii) architectural, design, surveying or quantity surveying services in relation to construction work;

(iii) building, engineering, interior or exterior decoration or landscape advisory or technical services in relation to construction work;

(c) goods and services of a kind prescribed for the purposes of this sub-section.

(2) Despite sub-section (1), "related goods and services" does not include any goods or services of a kind prescribed for the purposes of this sub-section.

7 Application of Act

(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than Victoria.

(2) This Act does not apply to –

(a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes –

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract; or

(b) a construction contract which is a domestic building contract within the meaning of the Domestic Building Contracts Act 1995 between a builder and a building owner (within the meaning of that Act), for the carrying out of domestic building work (within the meaning of that Act) the whole of which is carried out on any part of a premises that the building owner resides in or proposes to reside in; or

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

(3) This Act does not apply to a construction contract to the extent to which it contains –

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution; or

(c) provisions under which a party undertakes –

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

(4) This Act does not apply to a construction contract to the extent to which it deals with –

(a) construction work carried out outside Victoria; and

(b) related goods and services supplied in respect of construction work carried out outside Victoria.

(5) This Act does not apply to any construction contract, or class of construction contracts, prescribed for the purposes of this section.

(6) This Act does not apply to a construction contract entered into before the commencement of this section.

8 Act binds the Crown

This Act binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

Part 2 – Rights to Progress Payments

9 Rights to progress payments

(1) On and from each reference date under a construction contract, a person –

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract – is entitled to a progress payment under this Act, calculated by reference to that date.

(2) In this section, "reference date", in relation to a construction contract, means –

(a) a date determined by or in accordance with the terms of the contract as –

(i) a date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated –

in relation to work carried out or to be carried out or related goods and services supplied or to be supplied under the contract; or

(b) if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after –

(i) construction work was first carried out under the contract; or

(ii) related goods and services were first supplied under the contract.

10 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be –

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of –

(i) construction work carried out by the person under the contract; or

(ii) related goods and services supplied by the person under the contract – as the case requires.

11 Valuation of construction work and related goods and services

(1) Construction work carried out under a construction contract is to be valued –

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to –

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied under a construction contract are to be valued –

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to –

(i) the contract price for the goods and services; and

(ii) any other rates or prices set out in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and

(iv) if any goods are defective, the estimated cost of rectifying the defect.

(3) For the purposes of sub-section (2)(b), the valuation of materials and components that are to form part of any building, structure or work arising from construction work is to be on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

12 Due date for payment

A progress payment under a construction contract becomes due and payable –

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

13 Effect of "pay when paid" provisions

(1) A pay when paid provision of a construction contract has no effect in relation to any payment for –

(a) construction work carried out or undertaken to be carried out under the contract; or

(b) related goods and services supplied.

(2) In this section –

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

(a) construction work carried out under the contract; or

(b) related goods and services supplied under the contract;

"**pay when paid provision**" of a construction contract means a provision of the contract –

(a) that makes the liability of one party (the "first party") to pay money owing to another party (the "second party") contingent on payment to the first party by a further party (the "third party") of the whole or any part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party.

Part 3 – Procedure for Recovering Progress Payments

Division 1 – Payment Claims and Payment Schedules

14 Payment claims

(1) A person who is entitled to a progress payment under a construction contract (the "claimant") may serve a payment claim on the person who under the contract is liable to make the payment.

(2) A claimant may serve only one payment claim in respect of a specific progress payment.

(3) A payment claim –

(a) must identify the construction work or related goods and services to which the progress payment relates; and

(b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done or related goods and services supplied to which the payment relates (the "claimed amount"); and

(c) must state that it is made under this Act.

15 Payment schedules

(1) A person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule –

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount").

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If –

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not provide a payment schedule to the claimant –

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served;

whichever time expires earlier –

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

16 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent –

(a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant –

(a) may recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; and

(b) may serve notice on the respondent of the claimant's intention –

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

(3) A notice referred to in sub-section (2)(b) must state that it is made under this Act.

(4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in sub-section (1).

17 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if –

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent provides a payment schedule to the claimant –

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served –

whichever time expires earlier; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant –

(a) may recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; and

(b) may serve notice on the respondent of the claimant's intention to suspend –

(i) carrying out construction work under the construction contract; or

(ii) supplying related goods and services under the construction contract.

(3) A notice referred to in sub-section (2)(b) must state that it is made under this Act.

(4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in sub-section (1).

Division 2 – Adjudication of Disputes

18 Adjudication applications

(1) If the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim, the claimant may apply for adjudication of the progress payment to be made (an "adjudication application").

(2) An adjudication application –

(a) must be in writing; and

(b) must state that the adjudication application is made under this Act; and

(c) must identify the payment claim and the payment schedule to which it relates; and

(d) may contain any submissions relevant to the application that the claimant chooses to include.

(3) An adjudication application –

(a) must be made –

(i) to an adjudicator chosen by agreement between the claimant and the respondent; or

(ii) if no adjudicator is agreed on, to an authorised nominating authority chosen by agreement between the claimant and the respondent; or

(iii) if no nominating authority is agreed on, to an authorised nominating authority chosen by the claimant; and

(b) must be made within 5 business days after the claimant receives the payment schedule.

(4) No agreement between the claimant and the respondent that was made before the claimant received the payment schedule has any effect in relation to the choice of an adjudicator under sub-section (3)(a)(i).

(5) A copy of the adjudication application must be served on the respondent.

(6) This section does not limit the operation of any provision of the construction contract in relation to the resolution of disputes between the claimant and the respondent.

(7) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator as soon as practicable.

(8) An adjudicator chosen by agreement between the claimant and the respondent or to whom an application is referred under sub-section (7) must be a person who is eligible to be an adjudicator as referred to in section 19.

19 Eligibility criteria for adjudicators

(1) A person is eligible to be an adjudicator in relation to a construction contract –

(a) if the person is a natural person; and

(b) if the person has any qualifications, expertise and experience that may be prescribed for the purposes of this section.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract –

(a) if the person is a party to the contract; or

(b) if the person is an employee of a party to the contract; or

(c) in the circumstances that are prescribed for the purposes of this section; or

(d) if the person is in a class of person that is prescribed for the purposes of this section.

20 Appointment of adjudicator

(1) An adjudicator accepts an adjudication application by causing notice of acceptance to be served on the claimant and the respondent.

(2) The acceptance takes effect when the last of the notices is served under sub-section (1).

(3) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

(4) An adjudicator must give a copy of a notice of acceptance under sub-section (1) to the Building Commission within 10 business days after accepting an adjudication application under sub-section (1).

21 Adjudication responses

(1) The respondent may lodge with the adjudicator a response to the claimant's adjudication application (the "adjudication response") at any time within –

(a) 5 business days after receiving a copy of the application; or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application – whichever time expires later.

(2) The adjudication response –

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) must include the name and address of any relevant principal of the respondent; and

(d) may contain any submissions relevant to the response that the respondent chooses to include.

(3) A copy of the adjudication response must be served on the claimant.

(4) In this section "relevant principal" in relation to the respondent, means any person with whom the respondent has entered into a contract for the provision by the respondent of construction work or goods and services if the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the first-mentioned person engaged the respondent to carry out or supply.

22 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator must serve a written notice on any person who is included as a relevant principal in the adjudication response advising that the adjudicator has commenced to determine an adjudication application.

(3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(4) Subject to sub-sections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case –

(a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or

(b) within any further time that the claimant and the respondent may agree.

(5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator –

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within the time or to comply with the adjudicator's call for a conference of the parties.

23 Adjudicator's determination

(1) An adjudicator is to determine –

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the "adjudicated amount"); and

(b) the date on which that amount became or becomes payable.

Note

The adjudicated amount may be added to under section 45(7).

(2) In determining an adjudication application, the adjudicator is to consider the following matters only –

(a) the provisions of this Act and any regulations made under this Act;

(b) the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

(d) the payment schedule to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(3) The adjudicator's determination must be in writing and must include –

(a) the reasons for the determination; and

(b) the basis on which any amount or date has been decided –

if, before the making of the determination, either the claimant or the respondent requests the adjudicator to include those matters in the determination.

(4) An adjudicator must give a copy of any determination that he or she makes to the Building Commission within 5 business days of making that determination.

24 Correcting mistakes in determinations

(1) An adjudicator may correct a determination made by him or her if the determination contains –

(a) a clerical mistake; or

(b) an error arising from an accidental slip or omission; or

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination; or

(d) a defect of form.

(2) The correction may be made –

(a) on the adjudicator's own initiative; or

(b) on the application of the claimant or the respondent.

25 Respondent's obligations following adjudicator's determination

(1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent –

(a) must pay that amount to the claimant; or

(b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them.

(2) The respondent may only give security under sub-section (1)(b), if the respondent has commenced proceedings (including arbitration proceedings or other dispute resolution proceedings) against the claimant in relation to a dispute under the construction contract.

(3) The security given by a respondent may be in any of the following forms –

(a) a written unconditional undertaking by a recognised financial institution to pay the claimant, on demand, the adjudicated amount;

(b) payment of the adjudicated amount into a designated trust account;

(c) any other form that may be agreed between the claimant and the respondent.

(4) If the respondent is the Crown or a public authority representing the Crown, the security may be in the form of a written statement by the Department Head of the relevant Government Department or by the public authority to the effect that sufficient money will be legally available for payment of any amount up to the adjudicated amount if and when that amount becomes payable.

(5) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least 2 business days after any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined.

(6) For the purposes of sub-section (5), a determination becomes final –

(a) in the case of a determination from which there is no right of appeal or review, when the determination is made; or

(b) in the case of a determination from which there is a right of appeal or review –

(i) when the right of appeal or review expires; or

(ii) if the determination becomes subject to appeal or review proceedings, when those proceedings have been finally disposed of.

26 Designated trust accounts

(1) On paying money into a designated trust account as referred to in section 25(3)(b), the respondent must give the claimant notice of that payment together with particulars identifying the account and the recognised financial institution with which the account is kept.

(2) Money held in a designated trust account (including any interest accruing to that money) is taken to be held on the following trusts –

(a) to the extent to which the money is required to satisfy the claimant's entitlements, the money is to be applied in satisfaction of those entitlements;

(b) the claimant's entitlements in respect of an earlier progress claim are to be satisfied before the claimant's entitlements in respect of a later progress claim;

(c) to the extent to which any of the money remains in the account after the claimant's entitlements have been fully satisfied, the money is to be paid to the respondent.

(3) Subject to sub-section (2), the regulations may make provision for or with respect to the establishment and operation of designated trust accounts.

(4) In this section, "claimant's entitlements", in relation to money held in a designated trust account, means the amount (if any) to which the claimant becomes entitled after any matters in dispute between the claimant and the respondent in connection with the progress payment to which the money relates have been finally determined.

(5) For the purposes of sub-section (4), a determination becomes final –

(a) in the case of a determination from which there is no right of appeal or review, when the determination is made; or

(b) in the case of a determination from which there is a right of appeal or review –

(i) when the right of appeal or review expires; or

(ii) if the determination becomes subject to appeal or review proceedings, when those proceedings have been finally disposed of.

27 Consequences of not complying with adjudicator's determination

(1) This section applies if, on or before the relevant date, a respondent fails to do one or other of the following –

(a) to pay the whole or any part of the adjudicated amount to a claimant;

(b) to give security for payment of the whole or any part of the adjudicated amount to a claimant.

(2) In those circumstances, the claimant –

(a) may recover from the respondent, as a debt due to the claimant, in any court of competent jurisdiction –

(i) the unpaid, or unsecured, portion of the adjudicated amount; and

(ii) interest at the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* on the adjudicated amount calculated from the relevant date until judgment is entered in respect of the debt; and

(b) may serve notice on the respondent of the claimant's intention –

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

(3) A notice referred to in sub-section (2)(b) must state that it is made under this Act.

(4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in sub-section (1).

(5) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

(6) In this section, "relevant date" means –

(a) the date occurring 4 business days after the date in which the relevant determination is made under section 23; or

(b) if the adjudicator determines a later date under section 23(1)(b), that later date.

28 Claimant may make new application if previous application refused or not determined

(1) This section applies if –

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 22(4).

(2) In either of those circumstances, the claimant –

(a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 18.

(3) Despite section 18(3)(b), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under sub-section (2).

(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 18.

Division 3 – Claimant's Right to Suspend Construction Work

29 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work or the supply of related goods and services under a construction contract if at least 2 business days have passed since the claimant has caused a notice of intention to do so to be given to the respondent under section 16, 17 or 27.

(2) The right conferred by sub-section (1) exists for so long as the respondent fails to comply with the requirements referred to in section 16(1), 17(1) or 27(1), as the case may be.

(3) The suspension in accordance with this section by a claimant of the carrying out of construction work or the supply of goods and services under a construction contract does not constitute a breach by the claimant of that contract.

Division 4 – Recovery from Principal

30 Application

This Division applies if –

(a) an adjudicator has determined that an adjudicated amount is payable by a respondent to a claimant in respect of a construction contract; and

(b) on or before the relevant date, the respondent fails to do one or other of the following –

(i) to pay the whole or any part of the adjudicated amount to the claimant;

(ii) to give security for payment of the whole or any part of the adjudicated amount to the claimant; and

(c) the claimant has obtained judgment for the adjudicated amount or part of the adjudicated amount as a debt in a court of competent jurisdiction.

31 Recovery from principal

(1) If the circumstances set out in section 30 apply, the claimant may obtain payment of the adjudicated amount or part of that amount in accordance with this Division out of money that is payable or becomes payable to the respondent by some other person (the "principal") for construction work or goods and services that the principal engaged the respondent to carry out or supply under a construction contract.

(2) However, the claimant can obtain payment from the principal under this Division only if the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the principal engaged the respondent to carry out or supply.

32 Procedure for obtaining payment

(1) The following procedure must be followed to obtain payment of the money owed –

(a) firstly, a debt certificate must have been issued for the money owed (as provided by section 33); and

(b) secondly, the claimant must serve a notice of claim on the principal.

(2) A notice of claim is a notice in the prescribed form together with a copy of the debt certificate.

33 Certification of debt by court

(1) When judgment is given or entered in proceedings for the recovery of an adjudicated amount as a debt, the court may, by order made on the application of the claimant, issue a certificate (a "debt certificate") in respect of the debt under this section.

(2) A debt certificate is to be in a prescribed form.

(3) In this section, "judgment" includes a default judgment.

34 Notice of claim operates as assignment of debt

(1) The service of a notice of claim on the principal operates to assign to the claimant the obligation of the principal to pay the money owed under the contract to the respondent.

(2) The assignment is limited to the claimant's certified debt.

(3) The assignment is subject to any prior assignment under this Division that is binding on the principal and the respondent.

35 Payment of respondent's debt by principal

(1) After a notice of claim is served on a principal in accordance with this Division, the principal must pay to the claimant the money that the principal owes to the respondent under the contract with the respondent.

(2) The principal must make the payments to the claimant as they become payable under the contract with the respondent until whichever of the following first occurs –

(a) the principal receives a discharge notice or discharge notices, indicating that the certified debt has been fully discharged; or

(b) the payments are no longer payable under the contract between the principal and the respondent.

36 Priority of assignments

(1) The priority of assignments under this Division is to be determined by the order of service of notices of claim on the principal.

(2) All notices of claim in respect of debts owed by the same respondent that are served on the principal within the period of 7 days after the first notice of claim in respect of the respondent is served on the principal are taken to be served at the same time and, accordingly, take equal priority.

(3) Despite section 35, the principal is not to make any payment to a claimant who serves a notice of claim until that 7 day period has elapsed.

(4) If assignments take equal priority, the principal is to make the payments by distributing the money payable between the claimants who have equal priority pro rata in proportion to the amount of their respective certified debts.

(5) The principal must continue to make those payments to each claimant until whichever of the following first occurs –

(a) the principal receives a discharge notice, or discharge notices, indicating that each certified debt has been fully discharged; or

(b) the payments are no longer payable under the contract.

37 Stay of payments

(1) If –

(a) a notice of claim is served on a principal under this Division in relation to the payment of money owed to a respondent under a contract; and

(b) before the notice was served, the principal had commenced proceedings in a court against the respondent in relation to that contract –

the principal may apply to the court for a stay of payments under this Division in respect of the notice of claim.

(2) The court may grant a stay applied for under sub-section (1) and make any ancillary orders it considers necessary.

(3) Despite anything to the contrary in this Division, if a stay is granted under this section the principal is not required to make payments under this Division for the period of the stay.

38 Right of recovery if principal fails to pay

(1) An assignment effected by operation of this Division is valid at law.

(2) Accordingly, if the principal fails to make any payment required to be made by this Division, the claimant may sue for and recover the debt assigned to the claimant, in the claimant's own name.

(3) Proceedings for recovery of the debt may be taken in any manner in which the respondent might have taken them if there had been no assignment.

(4) A claimant's right of recovery under this section is subject to any defence that the principal would have had against recovery of the debt by the respondent had there been no assignment, other than a defence based on something done by the principal after the notice of claim was served by the claimant.

Example

If the principal continues to make contract payments to the respondent, rather than the claimant, after having been served with a notice of claim, the claimant is still entitled to recover the money from the principal.

39 When assignment ceases to operate

(1) If a certified debt is discharged, or the judgment that resulted in a debt certificate being issued in respect of the certified debt is set aside by a court, any assignment effected by operation of this Division in connection with that debt ceases to operate.

(2) If only part of the certified debt is discharged, the assignment effected in respect of that part of the certified debt ceases to operate.

(3) This section does not affect any payment or dealing that is made by a principal in good faith before the principal receives notice, and sufficient evidence of, the discharge or setting aside of the debt. To the extent necessary to give effect to that payment or dealing, the assignment effected by operation of this Division is taken to continue in force.

Note

If a principal makes a payment to a claimant (as required by section 35), instead of paying the respondent, without knowing that the debt owed to the claimant has been discharged by the respondent, this section protects the principal from being required by the respondent to make payment to the respondent.

40 Claimant to provide discharge notice

(1) If a principal or the respondent makes a payment to the claimant in partial or full discharge of a certified debt, the claimant must, on the request of the person making the payment, give the person a discharge notice in respect of the payment.

(2) A discharge notice must –

(a) be in the prescribed form; and

(b) acknowledge the payment of the amount paid; and

(c) be signed by the claimant.

(3) If the claimant does not give the notice within 7 days of the payment and request, the claimant is to forfeit and pay to the person who made the payment a sum equal to the amount paid.

(4) The person who made the payment may recover the forfeited amount in any court of competent jurisdiction as a debt due to the person.

41 Respondent to give information about principal

(1) If an adjudication determination has been made under this Part in respect of a construction contract, the respondent must, on the demand of the claimant, supply to the claimant a notice in the prescribed form that sets out the name of any person from whom the claimant may be able to recover the adjudicated amount or part of the adjudicated amount under this Division.

(2) A person who gives or purports to give a person a notice under this section knowing that it is false or misleading in a material particular is guilty of an offence and liable to a penalty of up to 60 penalty units.

Division 5 – General Provisions Relating to Adjudicators

42 Authorised nominating authorities

(1) The Building Commission –

(a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act; and

(b) may withdraw any authority so given.

(2) Before giving an authority under this section, the Building Commission must have regard to any guidelines issued by the Minister under section 44.

Note

An applicant can appeal to the Building Appeals Board under section 144A of the *Building Act 1993* against a decision of the Building Commission to refuse an application or withdraw an authority under section 42.

43 The Building Commission may impose conditions

The Building Commission may, in accordance with the guidelines issued by the Minister under section 44 –

(a) impose conditions on an authority given under section 42; and

(b) at any time, vary or revoke any conditions previously imposed on that authority.

Note

An applicant can appeal to the Building Appeals Board under section 144A of the *Building Act 1993* against the imposition or variation of a condition under section 43.

44 Ministerial guidelines

(1) The Minister may from time to time issue guidelines relating to the giving, variation or withdrawal of authorities under this Division.

(2) The guidelines may provide for –

(a) the procedures for making applications;

(b) the information to be provided with applications;

(c) the qualifications and experience that are relevant to the carrying out of the functions of an authorised nominating authority;

(d) the financial resources necessary for carrying out the functions of an authorised nominating authority;

(e) any other matters relating to the capacity of applicants to carry out the functions of an authorised nominating authority;

(f) the conditions that may be imposed on an authority, including conditions relating to the processes to be followed by an authorised nominating authority in nominating adjudicators for the purposes of this Act.

(3) Any guidelines issued by the Minister under sub-section (1) must be published in the *Government Gazette*.

45 Adjudicator's fees

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application –

(a) the amount, by way of fees and expenses, that is agreed between the adjudicator and the parties to the adjudication; or

(b) if no amount is agreed, the amount, by way of fees and expenses, that is reasonable having regard to the work done and expenses incurred by the adjudicator.

(2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(3) As between themselves, the claimant and respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions or, if the adjudicator determines that the adjudication application or the adjudication response was wholly unfounded, in such proportions as the adjudicator may determine.

(4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 22(4).

(5) Sub-section (4) does not apply –

(a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid; or

(b) in such other circumstances as may be prescribed for the purposes of this section.

(6) If a respondent refuses to pay his or her required contribution to the amount of the fees and expenses that are payable to the adjudicator, the claimant may elect to pay both the respondent's contribution and the claimant's contribution to the adjudicator.

(7) If a claimant elects under sub-section (6) to pay the respondent's contribution to the adjudicator, the adjudicator must determine that that amount is to be added to the adjudicated amount determined under section 23 and the total of those amounts is then to be taken to be the adjudicated amount for the purposes of this Act.

46 Liability of adjudicator

An adjudicator is not personally liable for anything done or omitted to be done in good faith –

(a) in the exercise of a power or the discharge of a duty under this Act or the regulations; or

(b) in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under this Act or the regulations.

Division 6 – Effect of Part on Civil Proceedings

47 Effect of Part on civil proceedings

(1) Subject to section 48, nothing in this Part affects any right that a party to a construction contract –

(a) may have under the contract; or

(b) may have under Part 2 in respect of the contract; or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any proceedings arising under a construction contract (including any arbitration proceedings or other dispute resolution proceedings), whether under this Part or otherwise, except as provided by sub-sections (3) and (4).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal –

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order, determination or award it makes in those proceedings; and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

(4) In any arbitration proceedings or other dispute resolution proceedings under the construction contract, the person determining the arbitration or dispute must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or determination or award the person makes in those proceedings.

(5) Nothing in this Part affects any right that a principal may have under any contract except as expressly provided for in this Act.

Part 4 – Miscellaneous

48 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement, whether in writing or not –

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act –

is void.

[S 48 subst Act No 42, 2006, ss 3 and 38.]

49 Confidentiality

The Building Commission, the Commissioner (within the meaning of the *Building Act 1993*) and any member of staff of the Building Commission must not use or disclose any information received by the Building Commission under this Act except to the extent necessary for the performance of any functions or duties or the exercise of any powers of the Building Commission under this Act.

[S 49 subst Act No 42, 2006, s 38.]

50 Service of notices

(1) Any notice or document that by or under this Act is authorised or required to be given to or served on a person may be given to or served on the person –

(a) by delivering it to the person personally; or

(b) by lodging it during normal office hours at the person's ordinary place of business; or

(c) by sending it by post or facsimile addressed to the person's ordinary place of business; or

(d) in such manner as may be prescribed for the purposes of this section; or

(e) in any other manner specified in the relevant construction contract.

[Subs (1) am Act No 42, 2006, ss 3 and 39.]

(2) The giving of, or service of, a notice or document that is sent to a person's ordinary place of business, as referred to in sub-section (1)(c), is taken to have been effected –

(a) in the case of posting – 2 business days after the day on which the notice or document was posted;

(b) in the case of a facsimile – at the time the facsimile is received.

(3) If a facsimile is received after 4.00 pm on any day, it must be taken to have been received on the next business day.

[S 50 am Act No 42, 2006, s 39.]

51 Supreme Court – limitation of jurisdiction

It is the intention of section 46 to alter or vary section 85 of the *Constitution Act 1975*.

52 Regulations

(1) The Governor in Council may make regulations for or with respect to –

(a) prescribing forms for any purpose of this Act;

(b) prescribing information to be provided under this Act;

(c) any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.

[Subs (1) subst Act 42, 2006, s 41.]

(2) Regulations made under this Act –

(a) may provide in a specified case or class of cases for the exemption of persons or things or a class of persons or things from any of the provisions of this Act whether unconditionally or on specified conditions and either wholly or to such an extent as is specified; and

(b) may differ according to differences in time, place and circumstance.

[Subs (2) subst Act No 42, 2006, s 41.]

(3) The commencement of a regulation referred to in section 5, 6 or 7 does not affect the operation of this Act with respect to construction work carried out, or related goods and services supplied, under a construction contract entered into before that commencement.

[S 52 am Act No 42, 2006, s 41.]

53 Amendment of Building Act 1993 – New section 144A inserted

After section 144 of the *Building Act 1993* insert –

144A. Appeals – *Building and Construction Industry Security of Payment Act 2002*

(1) A person may appeal to the Building Appeals Board against a decision of the Building Commission under section 42 of the *Building and Construction Industry Security of Payment Act 2002* –

(a) to refuse an application by the person for an authority to nominate adjudicators for the purposes of that Act; or

(b) to withdraw the person's authority to nominate adjudicators for the purposes of that Act.

(2) A person may appeal to the Building Appeals Board against a decision of the Building Commission under section 43 of the *Building and Construction Industry Security of Payment Act 2002* –

(a) to impose a condition on the person's authority to nominate adjudicators for the purposes of that Act; or

(b) to vary a condition of the person's authority to nominate adjudicators for the purposes of that Act.

54 Amendment of Commercial Arbitration Act 1984

After section 3(7) of the *Commercial Arbitration Act 1984* insert –

(8) Nothing in this Act affects the operation of Part 3 of the *Building and Construction Industry Security of Payment Act 2002*.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002 (VIC) [CURRENT VERSION]

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Act 2002	**15 of 2002**	**14 May 2002**	**31 Jan 2003**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment (Amendment) Act 2006	42 of 2006	25 Jul 2006	Ss 1, 3, 38, 39 and 41: 26 Jul 2006; ss 4–37, 40, 42 and 43: 30 Mar 2007
Building and Planning Legislation Amendment (Governance and Other Matters) Act 2013	34 of 2013	18 Jun 2013	Sch 2: 1 Jul 2013

PART 1 – PRELIMINARY

1 Purpose

The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.

2 Commencement

(1) Subject to subsection (2), this Act comes into operation on a day to be proclaimed.

(2) If this Act does not come into operation before 31 January 2003, it comes into operation on that day.

3 Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

[Subs (1) am Act 42 of 2006, s 4]

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.

[Subs (2) am Act 42 of 2006, s 4]

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the amount of the progress payment determined by the adjudicator; and

(e) the recovery of the progress payment in the event of a failure to pay.

[Subs (3) am Act 42 of 2006, s 4]

(4) It is intended that this Act does not limit—

(a) any other entitlement that a claimant may have under a construction contract; or

(b) any other remedy that a claimant may have for recovering that other entitlement.

[Subs (4) subst Act 42 of 2006, s 4]

[S 3 am Act 42 of 2006]

4 Definitions

In this Act—

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable as referred to in section 23 together with any amount added to that amount under section 45(7);

adjudication application means an application referred to in section 18;

adjudication certificate means a certificate provided by an authorised nominating authority under section 28Q;

[Def insrt Act 42 of 2006, s 5]

adjudication determination means a determination made by an adjudicator under section 23;

[Def insrt Act 42 of 2006, s 5]

adjudication fees means any fees or expenses charged by an authorised nominating authority or by an adjudicator or review adjudicator under this Act;

[Def insrt Act 42 of 2006, s 5]

adjudication response means a response referred to in section 21;

adjudication review means a review of an adjudication determination under Division 2A of Part 3;

[Def insrt Act 42 of 2006, s 5]

adjudication review application means an application under section 28B or 28C;

[Def insrt Act 42 of 2006, s 5]

adjudicator, in relation to an adjudication application, means the person appointed in accordance with this Act to determine the application;

authorised nominating authority means a person authorised by the Authority under section 42 to nominate persons to determine adjudication applications;

[Def am Act 34 of 2013, s 35 and Sch 2 item 1.1(a)]

Authority means the Victorian Building Authority established under the *Building Act 1993*;

[Def insrt Act 34 of 2013, s 35 and Sch 2 item 1.1(b)]

Building Commission [Repealed]

[Def rep Act 34 of 2013, s 35 and Sch 2 item 1.1(c)]

business day means a day that is not—

(a) a Saturday or Sunday; or

(b) a day that is wholly or partly observed as a public holiday throughout Victoria;

certified debt in relation to a claimant, means the amount specified in a debt certificate as being owed to the claimant;

claimable variation has the meaning given in section 10A;

[Def insrt Act 42 of 2006, s 5]

claimant means a person who serves a payment claim under section 14;

claimed amount means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 14;

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party;

construction work has the meaning given in section 5;

debt certificate means a certificate issued under section 33;

designated trust account means an account kept with a recognised financial institution (whether in the name of the respondent or otherwise) for the purpose of holding amounts payable to claimants under this Act;

[Def am Act 42 of 2006, s 5]

discharge notice means a notice referred to in section 40;

due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 12;

excluded amount has the meaning given in section 10B;

[Def insrt Act 42 of 2006, s 5]

exercise in relation to a function, includes perform a duty;

function includes power, authority or duty;

judgment includes order;

notice of claim means a notice referred to in section 32;

payment claim means a claim referred to in section 14;

payment schedule means a schedule referred to in section 15;

principal means a principal referred to in section 31;

progress payment means a payment to which a person is entitled under section 9, and includes (without affecting that entitlement)—

(a) the final payment for—

(i) construction work carried out under a construction contract; or

(ii) related goods and services supplied under the contract; or

(b) a single or one-off payment for—

(i) construction work carried out under a construction contract; or

(ii) related goods and services supplied under the contract; or

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment");

Note: The amount of a progress payment is calculated in accordance with sections 10, 10A, 10B and 11.

[Def subst Act 42 of 2006, s 5]

recognised financial institution means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* of the Commonwealth;

related goods and services has the meaning given in section 6;

respondent means a person on whom a payment claim is served under section 14;

review adjudicator in relation to an adjudication review application, means the adjudicator appointed in accordance with this Act to determine the application;

[Def insrt Act 42 of 2006, s 5]

review determination means the determination made by a review adjudicator under section 28I in respect of an adjudication review application;

[Def insrt Act 42 of 2006, s 5]

scheduled amount means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 15;

[Def am Act 42 of 2006, s 5]

variation in relation to a construction contract, means a change in the scope of the construction work to be carried out, or the related goods and services to be supplied, under the contract.

[Def insrt Act 42 of 2006, s 5]

[S 4 am Act 34 of 2013; Act 42 of 2006]

5 Definition of *construction work*

(1) In this Act, ***construction work*** means any of the following work—

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not);

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purposes of land drainage or coast protection;

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

(d) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;

(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including—

(i) site clearance, earth-moving, excavation, tunnelling and boring; and

(ii) the laying of foundations; and

(iii) the erection, maintenance or dismantling of scaffolding; and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of roadways and other access works;

(f) the painting or decorating of the internal or external surfaces of any building, structure or works;

(g) any other work of a kind prescribed for the purposes of this subsection.

[Subs (1) am Act 42 of 2006, s 6]

(2) Despite subsection (1), ***construction work*** does not include any of the following work—

(a) the drilling for, or extraction of, oil or natural gas;

(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;

(c) any other work of a kind prescribed for the purposes of this subsection.

[S 5 am Act 42 of 2006]

6 Definition of *related goods and services*

(1) In this Act, ***related goods and services***, in relation to construction work, means any of the following goods and services—

(a) goods of the following kind—

(i) materials and components to form part of any building, structure or work arising from construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind—

(i) the provision of labour to carry out construction work;

(ii) architectural, design, surveying or quantity surveying services in relation to construction work;

(iii) building, engineering, interior or exterior decoration or landscape advisory or technical services in relation to construction work;

(c) goods and services of a kind prescribed for the purposes of this subsection.

(2) Despite subsection (1), ***related goods and services*** does not include any goods or services of a kind prescribed for the purposes of this subsection.

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

[Subs (3) insrt Act 42 of 2006, s 7]

[S 6 am Act 42 of 2006]

7 Application of Act

(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than Victoria.

(2) This Act does not apply to—

(a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes—

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract; or

(b) a construction contract which is a domestic building contract within the meaning of the *Domestic Building Contracts Act 1995* between a builder and a building owner (within the meaning of that Act), for the carrying out of domestic building work (within the meaning of that Act), other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business; or

(ba) a construction contract for the carrying out of any work of a kind referred to in section 6 of the *Domestic Building Contracts Act 1995* relating to a residence other than—

(i) a contract where the person for whom the work is, or is to be, carried out is a person who is in the business of building residences and the contract is entered into in the course of, or in connection with, that business; or

(ii) a contract where the work carried out, or to be carried out, under the contract is, or is part of or is incidental to work to be carried out under another construction contract; or

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

[Subs (2) am Act 42 of 2006, s 8]

(3) This Act does not apply to a construction contract to the extent to which it contains—

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution; or

(c) provisions under which a party undertakes—

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

(4) This Act does not apply to a construction contract to the extent to which it deals with—

(a) construction work carried out outside Victoria; and

(b) related goods and services supplied in respect of construction work carried out outside Victoria.

(5) This Act does not apply to any construction contract, or class of construction contracts, prescribed for the purposes of this section.

(6) This Act does not apply to a construction contract entered into before the commencement of this section.

[S 7 am Act 42 of 2006]

8 Act binds the Crown

This Act binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

PART 2 – RIGHTS TO PROGRESS PAYMENTS

9 Rights to progress payments

(1) On and from each reference date under a construction contract, a person—

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract—

is entitled to a progress payment under this Act, calculated by reference to that date.

(2) In this section, ***reference date***, in relation to a construction contract, means—

(a) a date determined by or in accordance with the terms of the contract as—

(i) a date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated—

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

(b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after—

(i) construction work was first carried out under the contract; or

(ii) related goods and services were first supplied under the contract; or

(c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that—

(i) construction work was last carried out under the contract; or

(ii) related goods and services were last supplied under the contract; or

(d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following—

(i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or

(ii) the issue under the contract of a certificate specifying the final amount payable under the contract ***a final certificate***; or

(iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that—

(A) construction work was last carried out under the contract; or

(B) related goods and services were last supplied under the contract.

[Subs (2) am Act 42 of 2006, s 9]

[S 9 am Act 42 of 2006]

10 Amount of progress payment

(1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—

(i) construction work carried out or undertaken to be carried out by the person under the contract; or

(ii) related goods and services supplied or undertaken to be supplied by the person under the contract—

as the case requires.

[Subs (1) am Act 42 of 2006, s 10]

(2) Despite subsection (1) and anything to the contrary in the construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

[Subs (2) insrt Act 42 of 2006, s 10]

(3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

[Subs (3) insrt Act 42 of 2006, s 10]

[S 10 am Act 42 of 2006]

10A Claimable variations

(1) This section sets out the classes of variation to a construction contract (the ***claimable variations***) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(2) The first class of variation is a variation where the parties to the construction contract agree—

(a) that work has been carried out or goods and services have been supplied; and

(b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and

(c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and

(d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

(e) as to the value of that amount or the method of valuing that amount; and

(f) as to the time for payment of that amount.

(3) The second class of variation is a variation where—

(a) the work has been carried out or the goods and services have been supplied under the construction contract; and

(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following—

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into—

(i) is $5 000 000 or less; or

(ii) exceeds $5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to "$5 000 000" were a reference to "$150 000".

Example

A building contractor enters into a construction contract. The consideration (***contract sum***) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the ***new claim***) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (***disputed variation***). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350 000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150 000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act.

[S 10A insrt Act 42 of 2006, s 11]

10B Excluded amounts

(1) This section sets out the classes of amounts (***excluded amounts***) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The excluded amounts are—

(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

[S 10B insrt Act 42 of 2006, s 11]

11 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued—

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

[Subs (1) am Act 42 of 2006, s 12]

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued—

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the goods and services; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any goods are defective, the estimated cost of rectifying the defect.

[Subs (2) am Act 42 of 2006, s 12]

(3) For the purposes of subsection (2)(b), the valuation of materials and components that are to form part of any building, structure or work arising from construction work is to be on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

[S 11 am Act 42 of 2006]

12 Due date for payment

(1) A progress payment under a construction contract becomes due and payable—

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with subsection (1) at the greater of the following rates—

(a) the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983*; or

(b) the rate specified under the construction contract.

[Subs (2) insrt Act 42 of 2006, s 13]

[S 12 am Act 42 of 2006]

12A Lien in respect of unpaid progress payment

(1) If a progress payment under a construction contract becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.

(2) The claimant must serve a notice in the prescribed form on the respondent before exercising a lien under subsection (1).

(3) A lien under subsection (1) is extinguished on the claimant receiving the progress payment.

(4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (1).

(5) Subsection (1) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.

[S 12A insrt Act 42 of 2006, s 14

Cross-reference: *Building and Construction Industry Security of Payment Regulations 2013*: reg 6 prescribes the form of notice of intention to exercise a lien as Form 1 in the Schedule, for the purposes of s 12A.]

13 Effect of *pay when paid* provisions

(1) A pay when paid provision of a construction contract has no effect in relation to any payment for—

(a) construction work carried out or undertaken to be carried out under the contract; or

(b) related goods and services supplied or undertaken to be supplied under the contract.

[Subs (1) am Act 42 of 2006, s 15]

(2) In this section—

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

(a) construction work carried out under the contract; or

(b) related goods and services supplied under the contract;

pay when paid provision of a construction contract means a provision of the contract—

(a) that makes the liability of one party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or any part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

[Subs (2) am Act 42 of 2006, s 15]

[S 13 am Act 42 of 2006]

PART 3 – PROCEDURE FOR RECOVERING PROGRESS PAYMENTS

DIVISION 1 – PAYMENT CLAIMS AND PAYMENT SCHEDULES

14 Payment claims

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim—

(a) must be in the relevant prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must identify the construction work or related goods and services to which the progress payment relates; and

(d) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***); and

(e) must state that it is made under this Act.

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);

(b) must not include any excluded amount.

Note: Section 10(3) provides that a progress payment must not include an excluded amount.

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or

(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—

whichever is the later.

(5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract; or

(b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

(6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.

(7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if—

(a) a claim for the payment of that amount has been made in respect of that payment under the contract; and

(b) that amount was not paid by the due date under the contract for the payment to which the claim relates.

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

[S 14 subst Act 42 of 2006, s 16]

15 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***); and

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

(d) must be in the relevant prescribed form (if any); and

(e) must contain the prescribed information (if any).

[Subs (2) am Act 42 of 2006, s 17]

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not provide a payment schedule to the claimant—

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served;

whichever time expires earlier—

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

[S 15 am Act 42 of 2006]

16 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant —

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention—

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

[Subs (2) am Act 42 of 2006, s 18]

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied—

(i) of the existence of the circumstances referred to in subsection (1); and

(ii) that the claimed amount does not include any excluded amount; and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

[Subs (4) subst Act 42 of 2006, s 18]

[S 16 am Act 42 of 2006]

17 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent provides a payment schedule to the claimant—

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served—

whichever time expires earlier; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(a)(ii) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend—

(i) carrying out construction work under the construction contract; or

(ii) supplying related goods and services under the construction contract.

[Subs (2) am Act 42 of 2006, s 19]

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

[Subs (4) subst Act 42 of 2006, s 19]

[S 17 am Act 42 of 2006]

DIVISION 2 – ADJUDICATION OF DISPUTES

18 Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if—

(a) the respondent provides a payment schedule under Division 1 but—

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

[Subs (1) subst Act 42 of 2006, s 20]

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless—

(a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

[Subs (2) subst Act 42 of 2006, s 20]

(3) An adjudication application—

(a) must be in writing; and

(b) subject to subsection (4), must be made to an authorised nominating authority chosen by the claimant; and

(c) in the case of an application under subsection (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule; and

(d) in the case of an application under subsection (1)(a)(ii), must be made within 10 business days after the due date for payment; and

(e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b); and

(f) must identify the payment claim and the payment schedule (if any) to which it relates; and

(g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and

(h) may contain any submissions relevant to the application that the claimant chooses to include.

[Subs (3) subst Act 42 of 2006, s 20]

(4) If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.

[Subs (4) subst Act 42 of 2006, s 20]

(5) A copy of the adjudication application must be served on the respondent.

(6) [Repealed]

[Subs (6) rep Act 42 of 2006, s 20]

(7) It is the duty of an authorised nominating authority to which an adjudication

application is made to refer the application to an adjudicator as soon as practicable.

(8) An adjudicator to whom an application is referred under subsection (7) must be a person who is eligible to be an adjudicator as referred to in section 19.

[Subs (8) am Act 42 of 2006, s 20]

[S 18 am Act 42 of 2006]

19 Eligibility criteria for adjudicators

(1) A person is eligible to be an adjudicator in relation to a construction contract—

(a) if the person is a natural person; and

(b) if the person has any qualifications, expertise and experience that may be prescribed for the purposes of this section.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract—

(a) if the person is a party to the contract; or

(b) if the person is an employee of a party to the contract; or

(c) in the circumstances that are prescribed for the purposes of this section; or

(d) if the person is in a class of person that is prescribed for the purposes of this section.

20 Appointment of adjudicator

(1) An adjudicator accepts an adjudication application by causing notice of acceptance to be served on the claimant and the respondent.

(2) The acceptance takes effect when the last of the notices is served under subsection (1).

(3) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

(4) An adjudicator must give a copy of a notice of acceptance under subsection (1) to the Authority within 10 business days after accepting an adjudication application under subsection (1).

[Subs (4) am Act 34 of 2013, s 35 and Sch 2 item 1.2]

[S 20 am Act 34 of 2013]

21 Adjudication responses

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within—

(a) 5 business days after receiving a copy of the application; or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application—

whichever time expires later.

[Subs (1) am Act 42 of 2006, s 21]

(2) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) must include the name and address of any relevant principal of the respondent and any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application; and

(ca) must identify any amount of the payment claim that the respondent alleges is an excluded amount; and

(d) may contain any submissions relevant to the response that the respondent chooses to include.

[Subs (2) am Act 42 of 2006, s 21]

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).

[Subs (2A) insrt Act 42 of 2006, s 21]

(2B) If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant—

(a) setting out those reasons; and

(b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.

[Subs (2B) insrt Act 42 of 2006, s 21]

(3) A copy of the adjudication response must be served on the claimant.

(4) In this section ***relevant principal*** in relation to the respondent, means any person with whom the respondent has entered into a contract (that is not a construction contract exempted from this Act under section 7(2)(b) or 7(2)(ba)) for the provision by the respondent of construction work or goods and services if the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the first-mentioned person engaged the respondent to carry out or supply.

[Subs (4) am Act 42 of 2006, s 21]

[S 21 am Act 42 of 2006]

22 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator must serve a written notice—

(a) on any relevant principal and any other person who is included in the adjudication response under section 21(2)(c); and

(b) on any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application.

[Subs (2) subst Act 42 of 2006, s 22]

(3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—

(a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or

(b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

[Subs (4) am Act 42 of 2006, s 22]

(4A) A claimant must not unreasonably withhold their agreement under subsection (4)(b).

[Subs (4A) insrt Act 42 of 2006, s 22]

(5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator—

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(5A) Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.

[Subs (5A) insrt Act 42 of 2006, s 22]

(6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within the time or to comply with the adjudicator's call for a conference of the parties.

[S 22 am Act 42 of 2006]

23 Adjudicator's determination

(1) An adjudicator is to determine—

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which that amount became or becomes payable; and

(c) the rate of interest payable on that amount in accordance with section 12(2).

Note: The adjudicated amount may be added to under section 45(8).

[Subs (1) am Act 42 of 2006, s 23]

(2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only—

(a) the provisions of this Act and any regulations made under this Act;

(b) subject to this Act, the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

[Subs (2) am Act 42 of 2006, s 23]

(2A) In determining an adjudication application, the adjudicator must not take into account—

(a) any part of the claimed amount that is an excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

[Subs (2A) insrt Act 42 of 2006, s 23]

(2B) An adjudicator's determination is void—

(a) to the extent that it has been made in contravention of subsection (2);

(b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

[Subs (2B) insrt Act 42 of 2006, s 23]

(3) The adjudicator's determination must be in writing and must include—

(a) the reasons for the determination; and

(b) the basis on which any amount or date has been decided.

[Subs (3) subst Act 42 of 2006, s 23]

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined—

(a) the value of any construction work carried out under a construction contract; or

(b) the value of any related goods and services supplied under a construction contract—

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

[Subs (4) subst Act 42 of 2006, s 23]

[S 23 am Act 42 of 2006]

23A Adjudication determination to be given to parties and Authority

The authorised nominating authority to whom the adjudication application was made must give a copy of the adjudication determination—

(a) to the claimant and the respondent, as soon as practicable after it is made; and

(b) to the Authority within 5 business days after it is made.

[Para (b) am Act 34 of 2013, s 35 and Sch 2 item 1.4]

[S 23A am Act 34 of 2013, s 35 and Sch 2 item 1.3; insrt Act 42 of 2006, s 24]

24 Correcting mistakes in determinations

(1) An adjudicator may correct a determination made by him or her if the determination contains—

(a) a clerical mistake; or

(b) an error arising from an accidental slip or omission; or

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination; or

(d) a defect of form.

(2) The correction may be made—

(a) on the adjudicator's own initiative; or

(b) on the application of the claimant or the respondent.

(3) If a correction is made to a determination under this section, the authorised nominating authority to whom the adjudication application was made must give a copy of the corrected determination to the claimant and the respondent and the Authority as soon as practicable after the correction is made.

[Subs (3) am Act 34 of 2013, s 35 and Sch 2 item 1.5; insrt Act 42 of 2006, s 25]

(4) An adjudicator cannot make a correction of a determination under this section if an application has been made under Division 2A for a review of the determination.

[Subs (4) insrt Act 42 of 2006, s 25]

[S 24 am Act 34 of 2013; Act 42 of 2006]

25 Respondent's obligations following adjudicator's determination [Repealed]

[S 25 rep Act 42 of 2006, s 26]

26 Designated trust accounts [Repealed]

[S 26 rep Act 42 of 2006, s 26]

27 Consequences of not complying with adjudicator's determination [Repealed]

[S 27 rep Act 42 of 2006, s 26]

28 Claimant may make new application if previous application refused or not determined

(1) This section applies if—

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 22(4).

(2) In either of those circumstances, the claimant—

(a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 18.

(3) Despite sections 18(3)(c), 18(3)(d) and 18(3)(e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

[Subs (3) am Act 42 of 2006, s 27]

(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 18.

[S 28 am Act 42 of 2006]

DIVISION 2A – REVIEW OF ADJUDICATION

[Div 2A insrt Act 42 of 2006, s 28]

28A Threshold for review

This Division applies in respect of an adjudication determination if the adjudicated amount exceeds the higher of—

(a) $100 000; or

(b) the amount prescribed for the purposes of this section.

[S 28A insrt Act 42 of 2006, s 28]

28B Application for review by respondent

(1) Subject to this section, a respondent may apply for a review of an adjudication determination (an ***adjudication review***).

(2) An application under this section may only be made if the respondent provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2).

(3) An application under this section may only be made on the ground that the adjudicated amount included an excluded amount.

(4) An application under this section may only be made if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.

(5) An application under this section may only be made if the respondent has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts.

(6) An application under this section may only be made if the respondent has paid the alleged excluded amounts into a designated trust account.

[S 28B insrt Act 42 of 2006, s 28]

28C Application for review by claimant

(1) Subject to this section, a claimant may apply for a review of an adjudication determination (an ***adjudication review***).

(2) An application under this section may only be made on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.

[S 28C insrt Act 42 of 2006, s 28]

28D Procedure for making application

(1) An adjudication review application must be made to the authorised nominating authority to which the adjudication application was made.

(2) An adjudication review application must be made within 5 business days after the respondent or claimant (as the case requires) receives a copy of the adjudication determination.

(3) An adjudication review application—

(a) must be in writing in the prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must be accompanied by the application fee (if any) determined by the authorised nominating authority.

(4) The applicant must give a copy of the adjudication review application to the other party to the adjudication review within one business day after the application is made.

(5) The authorised nominating authority must as soon as practicable after receiving an adjudication review application give a copy of the application to—

(a) the adjudicator who made the adjudication determination that is the subject of the adjudication review; and

(b) the Authority.

[Subs (5) am Act 34 of 2013, s 35 and Sch 2 item 1.6]

[S 28D am Act 34 of 2013; insrt Act 42 of 2006, s 28]

28E Right to make submissions

A party to an adjudication review may make a submission to the authorised nominating authority in response to the application for review within 3 business days after being given a copy of the adjudication review application.

[S 28E insrt Act 42 of 2006, s 28]

28F Designated trust account

(1) On paying money into a designated trust account in accordance with section 28B, the respondent must give the claimant notice of that payment together with particulars identifying the account and the recognised financial institution with which the account is kept.

(2) Subject to subsection (3), money held in a designated trust account (including any interest accruing to that money) is taken to be held on the following trusts—

(a) to the extent to which the money is required to satisfy the claimant's entitlements, the money is to be applied in satisfaction of those entitlements;

(b) to the extent to which any of the money remains in the account after the claimant's entitlements have been fully satisfied, the money is to be paid to the respondent.

(3) If the respondent withdraws the adjudication review application in accordance with section 28K, any money held in a designated trust account (including any interest accruing to that money) is to be paid to the claimant.

(4) Subject to subsections (2) and (3), the regulations may make provision for or with respect to the establishment and operation of designated trust accounts.

(5) In this section, ***claimant's entitlements***, in relation to money held in a designated trust account, means the amount (if any) to which the claimant becomes entitled under a review determination.

[S 28F insrt Act 42 of 2006, s 28]

28G Appointment of review adjudicator

(1) The authorised nominating authority must, within 5 business days after receiving an application for review, appoint a review adjudicator in accordance with this section (the ***review adjudicator***) to conduct the review.

(2) A review adjudicator must be a person who is eligible to be an adjudicator as referred to in section 19.

(3) The authorised nominating authority may not appoint an adjudicator who has been involved directly or indirectly with the adjudication determination that is the subject of the adjudication review.

(4) The authorised nominating authority must give each party to the review and the Authority written notice of the appointment of a review adjudicator.

[Subs (4) am Act 34 of 2013, s 35 and Sch 2 item 1.7]

(5) The notice under subsection (4) must include the date of the appointment.

[S 28G am Act 34 of 2013; insrt Act 42 of 2006, s 28]

28H Adjudication review procedures

(1) The adjudication review commences upon acceptance by the review adjudicator of his or her appointment as the review adjudicator.

(2) The authorised nominating authority must provide the following information to the review adjudicator as soon as practicable after the appointment of the review adjudicator—

(a) a copy of the adjudication review application; and

(b) a copy of any submission made by a party to the adjudication review in accordance with section 28E; and

(c) a copy of the adjudication determination that is the subject of the adjudication review; and

(d) a copy of the payment claim that relates to that adjudication determination; and

(e) a copy of each submission considered by the adjudicator who made that adjudication determination; and

(f) a copy of the payment schedule (if any) considered by the adjudicator who made that adjudication determination; and

(g) any other information that the adjudicator who made the adjudication determination considered in making that determination.

[S 28H insrt Act 42 of 2006, s 28]

28I Adjudication review determination

(1) A review adjudicator is not to determine an adjudication application until after the end of the period within which any party to the adjudication review may make a submission in accordance with section 28E.

(2) In determining an adjudication review application, the review adjudicator must consider the following matters and those matters only—

(a) the provisions of this Act and any regulations made under this Act; and

(b) the provisions of the construction contract from which the application arose; and

(c) the information provided by the authorised nominating authority under section 28H.

(3) In determining an adjudication review application, the review adjudicator must not take into account—

(a) any excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

(4) A review adjudicator's determination is void—

(a) to the extent that it has been made in contravention of subsection (2); or

(b) if it takes into account any amount or matter referred to in subsection (3), to the extent that the determination is based on that amount or matter.

(5) After conducting an adjudication review, a review adjudicator may—

(a) substitute a new adjudication determination (the ***review determination***) for the determination that is the subject of the adjudication review; or

(b) confirm the determination that is the subject of the adjudication review.

(6) In determining an adjudication review, the review adjudicator must—

(a) specify if the review determination varies the adjudication determination and how it varies the adjudication determination; and

(b) specify any amounts paid to the claimant by the respondent in respect of the adjudication determination; and

(c) determine any further amount that is to be paid by the respondent to the claimant; and

(d) determine any amount that is to be repaid by the claimant to the respondent; and

(e) determine any interest payable in accordance with section 12(2) on an amount referred to in paragraph (c); and

(f) specify the date on which an amount under paragraph (c), (d) or (e) becomes payable.

(7) A review determination must be in writing and set out the reasons for the review determination in that determination.

(8) A review adjudicator who makes a review determination may, if he or she thinks it appropriate, include a statement in the review determination that in his or her opinion the application for the adjudication review was not made in good faith.

(9) The date for payment referred to in subsection (6)(f) must be 5 business days after the respondent or claimant (as the case requires) is given a copy of the review determination.

(10) The review adjudicator must complete the adjudication review and provide a copy of the review determination to the authorised nominating authority that appointed him or her—

(a) within 5 business days after his or her appointment; or

(b) within any further time, not exceeding 10 business days after that appointment, to which the applicant for the adjudication review agrees.

(11) An applicant must not unreasonably withhold their agreement under subsection (10)(b).

[S 28I insrt Act 42 of 2006, s 28]

28J Authorised nominating authority must notify persons of review determination

The authorised nominating authority must, as soon as practicable, provide a copy of the review determination to—

(a) each party to the adjudication review; and

(b) the adjudicator who made the adjudication determination that is the subject of the adjudication review; and

(c) the Authority.

[Para (c) am Act 34 of 2013, s 35 and Sch 2 item 1.8]

[S 28J am Act 34 of 2013; insrt Act 42 of 2006, s 28]

28K Withdrawal of adjudication review application

An applicant may withdraw an adjudication review application at any time before the review adjudicator has made a review determination under section 28I by serving a notice of withdrawal on—

(a) the review adjudicator; and

(b) the authorised nominating authority that appointed the review adjudicator; and

(c) the other party to the adjudication review.

[S 28K insrt Act 42 of 2006, s 28]

28L Correcting mistakes in review determinations

Section 24 applies to review determinations as if a reference in that section—

(a) to an adjudicator were a reference to a review adjudicator; and

(b) to a determination made by an adjudicator were a reference to a review determination.

[S 28L insrt Act 42 of 2006, s 28]

DIVISION 2B – PAYMENT AND RECOVERY OF ADJUDICATED AMOUNTS

[Div 2B insrt Act 42 of 2006, s 28]

28M Respondent required to pay adjudicated amount

(1) Subject to sections 28B and 28N, if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

(2) In this section ***relevant date*** means—

(a) the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent under section 23A; or

(b) if the adjudicator determines a later date under section 23(1)(b), that later date.

[S 28M insrt Act 42 of 2006, s 28]

28N Payment after review determination

(1) If the respondent is required by a review determination to pay an amount to the claimant, the respondent must pay that amount on or before the date for that payment determined by the review adjudicator under section 28I(6)(f).

(2) If the claimant is required by a review determination to pay an amount to the respondent, the claimant must pay that amount on or before the date for that payment determined by the review adjudicator under section 28I(6)(f).

[S 28N insrt Act 42 of 2006, s 28]

28O Consequences of respondent not paying adjudicated amount

(1) If the respondent fails to pay the whole or any part of an adjudicated amount in accordance with section 28M or 28N, the claimant may—

(a) request the authorised nominating authority to whom the adjudication application or the adjudication review application was made to provide an adjudication certificate under section 28Q; and

(b) serve notice on the respondent of the claimant's intention—

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

(2) A notice under subsection (1)(b) must state that it is made under section 28O(1) of this Act.

(3) A notice cannot be served under subsection (1) in respect of a failure to pay the whole or any part of an adjudicated amount in accordance with section 28M until after the end of the period allowed for making an adjudication review application under section 28D.

(4) If the claimant has made an adjudication review application in respect of any part of the adjudicated amount, the claimant may not give a notice under subsection (1)(b) in respect of a failure to pay that adjudicated amount in accordance with section 28M until that adjudication review is completed.

(5) In this section ***adjudicated amount*** includes any amount payable by the respondent under a review determination.

[S 28O insrt Act 42 of 2006, s 28]

28P Consequences of claimant not paying adjudicated amount

If the claimant fails to pay the whole or part of the amount payable by the claimant under a review determination in accordance with section 28N, the respondent may request the authorised nominating authority to which the adjudication review application was made to provide an adjudication certificate under section 28Q.

[S 28P insrt Act 42 of 2006, s 28]

28Q Adjudication certificates

(1) An adjudication certificate provided by an authorised nominating authority on a request under this Division must state that it is made under this Act and specify the following matters—

(a) the name of the person requesting the certificate;

(b) the name of the person who is liable to pay the adjudicated amount;

(c) the amount payable under section 28M or 28N;

(d) the date on which payment of that amount was due to be paid to the person requesting the certificate.

(2) If any amount of interest that is due and payable on the amount payable under

section 28M or 28N is not paid by the respondent, the person requesting the adjudication certificate may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate.

(3) If an amount of interest is specified in the adjudication certificate to be paid by the respondent, the amount is to be added to, and becomes part of, the adjudicated amount.

(4) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication or the adjudication review fees in relation to any adjudication review (as the case requires) but has not been reimbursed by the respondent for that amount (the ***unpaid share***), the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate.

(5) If the respondent has paid the claimant's share of the adjudication review fees in relation to any adjudication review but has not been reimbursed by the claimant for that amount, the respondent may request the authorised nominating authority to specify that share of the fees in the adjudication certificate.

(6) If the unpaid share is specified in the adjudication certificate it is to be added to, and becomes part of, the adjudicated amount.

(7) In this section ***adjudicated amount*** includes an amount payable by the respondent or the claimant under a review determination.

[S 28Q insrt Act 42 of 2006, s 28]

28R Proceedings to recover amount payable under section 28M or 28N

(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

(2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court—

(a) the adjudication certificate; and

(b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.

(4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.

(5) If a person commences proceedings to have the judgment set aside, that person—

(a) subject to subsection (6), is not, in those proceedings, entitled—

(i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge an adjudication determination or a review determination; and

(b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.

(6) Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the

determination took into account a variation of the construction contract that was not a claimable variation.

(7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.

(8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

[S 28R insrt Act 42 of 2006, s 28]

DIVISION 3 – CLAIMANT'S RIGHT TO SUSPEND CONSTRUCTION WORK

29 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work or the supply of related goods and services under a construction contract if at least 3 business days have passed since the claimant has caused a notice of intention to do so to be given to the respondent under section 16, 17 or 28O.

[Subs (1) am Act 42 of 2006, s 29]

(2) The right conferred by subsection (1) exists until—

(a) if the construction contract provides for a period of at least 1 business day for a return to work after the claimant receives payment from the respondent of an amount referred to in section 16(1), 17(1), 28M or 28N, the end of that period; or

(b) in any other case, the end of the period of 3 business days immediately following the date on which the claimant receives payment from the respondent of an amount referred to in section 16(1), 17(1), 28M or 28N.

[Subs (2) subst Act 42 of 2006, s 29]

(3) The suspension in accordance with this section by a claimant of the carrying out of construction work or the supply of goods and services under a construction contract does not constitute a breach by the claimant of that contract.

(4) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.

[Subs (4) insrt Act 42 of 2006, s 29]

(5) A claimant who suspends construction work or the supply of related goods and services in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out the work or not supplying those goods and services during the period of suspension.

[Subs (5) insrt Act 42 of 2006, s 29]

[S 29 am Act 42 of 2006]

DIVISION 4 – RECOVERY FROM PRINCIPAL

29A Definitions

In this Division—

adjudicated amount includes an amount payable under a review determination;

[Def insrt Act 42 of 2006, s 30]

adjudication determination includes a review determination.

[Def insrt Act 42 of 2006, s 30]

[S 29A insrt Act 42 of 2006, s 30]

30 Application

This Division applies if—

(a) an adjudicator or a review adjudicator has determined that an adjudicated amount or part of an adjudicated amount is payable by a respondent to a claimant in respect of a construction contract; and

[Para (a) subst Act 42 of 2006, s 31]

(b) the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 28M or 28N; and

[Para (b) subst Act 42 of 2006, s 31]

(c) the claimant has obtained judgment for the adjudicated amount or part of the adjudicated amount as a debt in a court of competent jurisdiction.

[S 30 am Act 42 of 2006]

31 Recovery from principal

(1) If the circumstances set out in section 30 apply, the claimant may obtain payment of the adjudicated amount or part of that amount in accordance with this Division out of money that is payable or becomes payable to the respondent by some other person (the ***principal***) for construction work or goods and services that the principal engaged the respondent to carry out or supply under a contract.

[Subs (1) am Act 42 of 2006, s 31]

(2) However, the claimant can obtain payment from the principal under this Division only if the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the principal engaged the respondent to carry out or supply.

(3) Subsection (1) does not apply to allow the claimant to obtain payment from a person who has engaged the respondent to carry out construction work or to supply goods and services under a construction contract exempted from this Act under section 7(2)(b) or 7(2)(ba).

[Subs (3) insrt Act 42 of 2006, s 31]

[S 31 am Act 42 of 2006]

32 Procedure for obtaining payment

(1) The following procedure must be followed to obtain payment of the money owed—

(a) firstly, a debt certificate must have been issued for the money owed (as provided by section 33); and

(b) secondly, the claimant must serve a notice of claim on the principal.

(2) A notice of claim is a notice in the prescribed form together with a copy of the debt certificate.

[**Cross-reference:** *Building and Construction Industry Security of Payment Regulations 2013*: reg 7 prescribes the form of a notice of claim as Form 2 in the Schedule, for the purposes of s 32(2).]

33 Certification of debt by court

(1) When judgment is given or entered in proceedings for the recovery of an adjudicated amount as a debt, the court may, by order made on the application of the claimant, issue a certificate (a ***debt certificate***) in respect of the debt under this section.

(2) A debt certificate is to be in a prescribed form.

(3) In this section, ***judgment*** includes a default judgment.

[**Cross-reference:** *Building and Construction Industry Security of Payment Regulations 2013*: reg 8 prescribes the form of a debt certificate as Form 3 in the Schedule, for the purposes of s 33(2).]

34 Notice of claim operates as assignment of debt

(1) The service of a notice of claim on the principal operates to assign to the claimant the obligation of the principal to pay the money owed under the contract to the respondent.

(2) The assignment is limited to the claimant's certified debt.

(3) The assignment is subject to any prior assignment under this Division that is binding on the principal and the respondent.

35 Payment of respondent's debt by principal

(1) After a notice of claim is served on a principal in accordance with this Division, the principal must pay to the claimant the money that the principal owes to the respondent under the contract with the respondent.

(2) The principal must make the payments to the claimant as they become payable under the contract with the respondent until whichever of the following first occurs—

(a) the principal receives a discharge notice or discharge notices, indicating that the certified debt has been fully discharged; or

(b) the payments are no longer payable under the contract between the principal and the respondent.

36 Priority of assignments

(1) The priority of assignments under this Division is to be determined by the order of service of notices of claim on the principal.

(2) All notices of claim in respect of debts owed by the same respondent that are served on the principal within the period of 7 days after the first notice of claim in respect of the respondent is served on the principal are taken to be served at the same time and, accordingly, take equal priority.

(3) Despite section 35, the principal is not to make any payment to a claimant who serves a notice of claim until that 7 day period has elapsed.

(4) If assignments take equal priority, the principal is to make the payments by distributing the money payable between the claimants who have equal priority pro rata in proportion to the amount of their respective certified debts.

(5) The principal must continue to make those payments to each claimant until whichever of the following first occurs—

(a) the principal receives a discharge notice, or discharge notices, indicating that each certified debt has been fully discharged; or

(b) the payments are no longer payable under the contract.

37 Stay of payments

(1) If—

(a) a notice of claim is served on a principal under this Division in relation to the payment of money owed to a respondent under a contract; and

(b) before the notice was served, the principal had commenced proceedings in a court against the respondent in relation to that contract—

the principal may apply to the court for a stay of payments under this Division in respect of the notice of claim.

(2) The court may grant a stay applied for under subsection (1) and make any ancillary orders it considers necessary.

(3) Despite anything to the contrary in this Division, if a stay is granted under this section the principal is not required to make payments under this Division for the period of the stay.

38 Right of recovery if principal fails to pay

(1) An assignment effected by operation of this Division is valid at law.

(2) Accordingly, if the principal fails to make any payment required to be made by this Division, the claimant may sue for and recover the debt assigned to the claimant, in the claimant's own name.

(3) Proceedings for recovery of the debt may be taken in any manner in which the respondent might have taken them if there had been no assignment.

(4) A claimant's right of recovery under this section is subject to any defence that the principal would have had against recovery of the debt by the respondent had there been no assignment, other than a defence based on something done by the principal after the notice of claim was served by the claimant.

Example: If the principal continues to make contract payments to the respondent, rather than the claimant, after having been served with a notice of claim, the claimant is still entitled to recover the money from the principal.

39 When assignment ceases to operate

(1) If a certified debt is discharged, or the judgment that resulted in a debt certificate being issued in respect of the certified debt is set aside by a court, any assignment effected by operation of this Division in connection with that debt ceases to operate.

(2) If only part of the certified debt is discharged, the assignment effected in respect of that part of the certified debt ceases to operate.

(3) This section does not affect any payment or dealing that is made by a principal in good faith before the principal receives notice, and sufficient evidence of, the discharge or setting aside of the debt. To the extent necessary to give effect to that payment or dealing, the assignment effected by operation of this Division is taken to continue in force.

Note: If a principal makes a payment to a claimant (as required by section 35), instead of paying the respondent, without knowing that the debt owed to the claimant has been discharged by the respondent, this section protects the principal from being required by the respondent to make payment to the respondent.

40 Claimant to provide discharge notice

(1) If a principal or the respondent makes a payment to the claimant in partial or full discharge of a certified debt, the claimant must, on the request of the person making the payment, give the person a discharge notice in respect of the payment.

(2) A discharge notice must—

(a) be in the prescribed form; and

(b) acknowledge the payment of the amount paid; and

(c) be signed by the claimant.

(3) If the claimant does not give the notice within 7 days of the payment and request, the claimant is to forfeit and pay to the person who made the payment a sum equal to the amount paid.

(4) The person who made the payment may recover the forfeited amount in any court of competent jurisdiction as a debt due to the person.

[**Cross-reference:** *Building and Construction Industry Security of Payment Regulations 2013*: reg 9 prescribes the form of a discharge notice as Form 4 in the Schedule, for the purposes of s 40(2).]

41 Respondent to give information about principal

(1) If an adjudication determination has been made under this Part in respect of a construction contract, the respondent must, on the demand of the claimant, supply to the claimant a notice in the prescribed form that sets out the name of any person from whom the claimant may be able to recover the adjudicated amount or part of the adjudicated amount under this Division.

(2) A person who gives or purports to give a person a notice under this section knowing that it is false or misleading in a material particular is guilty of an offence and liable to a penalty of up to 60 penalty units.

[**Cross-reference:** *Building and Construction Industry Security of Payment Regulations 2013*: reg 10 prescribes the form of notice relating to names of persons from whom claimant may recover as Form 5 in the Schedule, for the purposes of s 41(1).]

DIVISION 5 – AUTHORISED NOMINATING AUTHORITIES, ADJUDICATORS AND REVIEW ADJUDICATORS

[Div 5 heading subst Act 42 of 2006, s 32]

42 Authorised nominating authorities

(1) The Authority—

(a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act; and

(b) may withdraw any authority so given.

[Subs (1) am Act 34 of 2013, s 35 and Sch 2 item 1.9]

(2) Before giving an authority under this section, the Authority must have regard to any guidelines issued by the Minister under section 44.

[Subs (2) am Act 34 of 2013, s 35 and Sch 2 item 1.9]

Note: An applicant can appeal to the Building Appeals Board under section 144A of the *Building Act 1993* against a decision of the Authority to refuse an application or withdraw an authority under section 42.

[S 42 am Act 34 of 2013, s 35 and Sch 2 item 1.9]

43 The Authority may impose conditions

The Authority may, in accordance with the guidelines issued by the Minister under section 44—

(a) impose conditions on an authority given under section 42; and

(b) at any time, vary or revoke any conditions previously imposed on that authority.

Note: An applicant can appeal to the Building Appeals Board under section 144A of the *Building Act 1993* against the imposition or variation of a condition under section 43.

[S 43 am Act 34 of 2013, s 35 and Sch 2 items 1.10 and 1.11]

43A Functions of an authorised nominating authority

The functions of an authorised nominating authority are—

(a) to nominate adjudicators for the purposes of this Act; and

(b) to receive and refer adjudication applications to adjudicators; and

(c) to receive adjudication review applications and submissions in response to those applications and to appoint review adjudicators; and

(d) to serve copies of adjudication determinations, adjudication review applications and review determinations on certain persons; and

(e) to provide information to review adjudicators; and

(f) to provide adjudication certificates; and

(g) to provide information to the Authority in accordance with this Division; and

[Para (g) am Act 34 of 2013, s 35 and Sch 2 item 1.12]

(h) to generally carry out any other function or duty given to an authority, or imposed on an authority, by this Act.

[S 43A am Act 34 of 2013; insrt Act 42 of 2006, s 33]

43B Authorised nominating authority to provide information

(1) An authorised nominating authority must provide the Authority with such non-identifying information as may be reasonably requested by the Authority in relation to the activities of the authority under this Act.

[Subs (1) am Act 34 of 2013, s 35 and Sch 2 item 1.13]

(2) Information requested under subsection (1) may include information regarding—

(a) the nomination of adjudicators and appointment of review adjudicators; and

(b) the assessment of the eligibility of persons to be adjudicators; and

(c) the fees charged by the authorised nominating authority; and

(d) the fees charged by adjudicators.

(3) In this section ***non-identifying information*** means information—

(a) that does not identify any person or disclose their address or location; or

(b) from which any person's identity, address or location cannot reasonably be determined.

[S 43B am Act 34 of 2013; insrt Act 42 of 2006, s 33]

43C Authorised nominating authority fees

(1) An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application or an adjudication review application made to the authority.

(2) In deciding on a fee under subsection (1), an authorised nominating authority must have regard to the guidelines regarding such fees issued by the Minister under section 44.

[S 43C insrt Act 42 of 2006, s 33]

44 Ministerial guidelines

(1) The Minister may from time to time issue guidelines relating to—

(a) the giving, variation or withdrawal of authorities under this Division; and

(b) appropriate fees that may be charged by an authorised nominating authority, an adjudicator or a review adjudicator.

[Subs (1) subst Act 42 of 2006, s 34]

(2) The guidelines may provide for—

(a) the procedures for making applications;

(b) the information to be provided with applications;

(c) the qualifications and experience that are relevant to the carrying out of the functions of an authorised nominating authority;

(d) the financial resources necessary for carrying out the functions of an authorised nominating authority;

(e) any other matters relating to the capacity of applicants to carry out the functions of an authorised nominating authority;

(f) the conditions that may be imposed on an authority, including conditions relating to the processes to be followed by an authorised nominating authority in nominating adjudicators for the purposes of this Act.

(3) Any guidelines issued by the Minister under subsection (1) must be published in the Government Gazette.

[S 44 am Act 42 of 2006]

45 Adjudicator's and review adjudicator's fees

(1) In this section—

adjudicator includes a review adjudicator;

adjudication application includes an adjudication review application.

(2) An adjudicator is entitled to be paid for determining an adjudication application—

(a) the amount, by way of fees and expenses, that is agreed between the adjudicator and the parties to the adjudication; or

(b) if no amount is agreed, the amount, by way of fees and expenses, that is reasonable having regard to the work done and expenses incurred by the adjudicator.

(3) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(4) As between themselves, the claimant and respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.

(5) An adjudicator is not entitled to be paid any fees or expenses in connection with the determination of an application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 22(4) or 28I(10) (as the case requires).

(6) Subsection (5) does not apply—

(a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid; or

(b) in such other circumstances as may be prescribed for the purposes of this section.

(7) If a party refuses to pay his or her required contribution to the amount of the fees and expenses that are payable to the adjudicator, the other party may elect to pay both parties' contribution to the adjudicator.

(8) If a party elects under subsection (7) to pay the other party's contribution to the adjudicator, the adjudicator, as the case requires—

(a) must determine that that amount is to be added to the adjudicated amount determined under section 23 and the total of those amounts is then to be taken to be the adjudicated amount for the purposes of this Act; or

(b) must determine that that amount is to be added to the amount payable (if any) by the other party under the review determination and the total of those amounts is then to be taken to be the amount payable by the other party under the review determination for the purposes of this Act.

[S 45 subst Act 42 of 2006, s 35]

46 Liability of adjudicator

An adjudicator (including a review adjudicator) is not personally liable for anything done or omitted to be done in good faith—

(a) in the exercise of a power or the discharge of a duty under this Act or the regulations; or

(b) in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under this Act or the regulations.

[S 46 am Act 42 of 2006, s 36]

DIVISION 6 – EFFECT OF PART ON CIVIL PROCEEDINGS

47 Effect of Part on civil proceedings

(1) Subject to section 48, nothing in this Part affects any right that a party to a construction contract—

(a) may have under the contract; or

(b) may have under Part 2 in respect of the contract; or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any proceedings arising under a construction contract (including any arbitration proceedings or other dispute resolution proceedings), whether under this Part or otherwise, except as provided by subsections (3) and (4).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order, determination or award it makes in those proceedings; and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

(4) In any arbitration proceedings or other dispute resolution proceedings under the construction contract, the person determining the arbitration or dispute must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or determination or award the person makes in those proceedings.

(5) Nothing in this Part affects any right that a principal may have under any contract except as expressly provided for in this Act.

PART 3A – ADMINISTRATION

[Pt 3A insrt Act 42 of 2006, s 37]

47A Functions of the Authority

The functions of the Authority under this Act are—

(a) to keep under regular review the administration and effectiveness of this Act and the regulations; and

(b) to keep a register of authorised nominating authorities in accordance with section 47B; and

(c) to keep records of adjudication determinations and review determinations in accordance with section 47C; and

(d) to publish adjudication determinations and review determinations in accordance with section 47C; and

(e) generally to carry out any other function or duty given to it, or imposed on it, by this Act.

[S 47A am Act 34 of 2013, s 35 and Sch 2 items 1.14 and 1.15; insrt Act 42 of 2006, s 37]

47B Register of authorised nominating authorities

(1) The Authority must keep a register containing details of authorised nominating authorities including the names of the principals and the contact details of those authorities.

[Subs (1) am Act 34 of 2013, s 35 and Sch 2 item 1.16]

(2) The Authority must make the register available for inspection without charge to any person at the business address of the Authority during normal business hours.

[Subs (2) am Act 34 of 2013, s 35 and Sch 2 item 1.16]

[S 47B am Act 34 of 2013; insrt Act 42 of 2006, s 37]

47C Recording and publishing of determinations

(1) The Authority must keep a record of any adjudication determinations or review determinations that it receives.

[Subs (1) am Act 34 of 2013, s 35 and Sch 2 item 1.17]

(2) The Authority may publish information in a determination received under section 23A or 28J if—

(a) the information does not identify any person or body referred to in the determination or disclose the address or location of that person or body; and

(b) the identity, address or location of any person or body referred to in the determination cannot reasonably be determined from the information.

[Subs (2) am Act 34 of 2013, s 35 and Sch 2 item 1.17]

[S 47C am Act 34 of 2013; insrt Act 42 of 2006, s 37]

PART 4 – MISCELLANEOUS

48 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement, whether in writing or not—

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act—

is void.

[S 48 subst Act 42 of 2006, s 38]

49 Confidentiality

The Authority, a Commissioner (within the meaning of the *Building Act 1993*), the chief executive officer of the Authority and any member of staff of the Authority must not use or disclose any information received by the Authority under this Act except to the extent necessary for the performance of any functions or duties or the exercise of any powers of the Authority under this Act.

[S 49 am Act 34 of 2013, s 35 and Sch 2 item 1.18; subst Act 42 of 2006, s 38]

50 Service of notices

(1) Any notice or document that by or under this Act is authorised or required to be given to or served on a person may be given to or served on the person—

(a) by delivering it to the person personally; or

(b) by lodging it during normal office hours at the person's ordinary place of business; or

(c) by sending it by post or facsimile addressed to the person's ordinary place of business; or

(d) in such manner as may be prescribed for the purposes of this section; or

(e) in any other manner specified in the relevant construction contract.

[Subs (1) am Act 42 of 2006, s 39]

(2) The giving of, or service of, a notice or document that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected—

(a) in the case of posting—2 business days after the day on which the notice or document was posted;

(b) in the case of a facsimile—at the time the facsimile is received.

(3) If a facsimile is received after 4.00 p.m. on any day, it must be taken to have been received on the next business day.

[S 50 am Act 42 of 2006]

51 Supreme Court—limitation of jurisdiction

(1) It is the intention of section 46 to alter or vary section 85 of the *Constitution Act 1975*.

(2) It is the intention of section 28R to alter or vary section 85 of the *Constitution Act 1975*.

[Subs (2) insrt Act 42 of 2006, s 40]

[S 51 am Act 42 of 2006]

52 Regulations

(1) The Governor in Council may make regulations for or with respect to—

(a) prescribing forms for any purpose of this Act;

(b) prescribing information to be provided under this Act;

(c) any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.

[Subs (1) subst Act 42 of 2006, s 41]

(2) Regulations made under this Act—

(a) may provide in a specified case or class of cases for the exemption of persons or things or a class of persons or things from any of the provisions of this Act whether unconditionally or on specified conditions and either wholly or to such an extent as is specified; and

(b) may differ according to differences in time, place and circumstance.

[Subs (2) subst Act 42 of 2006, s 41]

(3) The commencement of a regulation referred to in section 5, 6 or 7 does not affect the operation of this Act with respect to construction work carried out, or related goods and services supplied, under a construction contract entered into before that commencement.

[S 52 am Act 42 of 2006]

53 Transitional provision—Building and Construction Industry Security of Payment (Amendment) Act 2006

This Act as amended by the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (***the 2006 Act***) does not apply to or in respect of a payment claim for a progress payment to which a person is entitled under a construction contract entered into before the commencement of section 42 of the 2006 Act and any such payment claim is to be dealt with in accordance with this Act as if the 2006 Act had not been enacted.

[S 53 subst Act 42 of 2006, s 42]

54 Amendment of Commercial Arbitration Act 1984 [Repealed]

[S 54 rep Act 42 of 2006, s 43]

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT REGULATIONS 2003 (VIC) – [REPEALED]

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Regulations 2003	**50 of 2003**	**3 Jun 2003**	**3 Jun 2003**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment (Amendment) Regulations 2007	19 of 2007	27 Mar 2007	Regs 4–6: 30 Mar 2007

1 Objective

The objective of these Regulations is to prescribe forms for the purposes of the *Building and Construction Industry Security of Payment Act 2002*.

[Reg 1 am SR 19 of 2007, reg 4]

2 Authorising provision

These Regulations are made under section 52 of the *Building and Construction Industry Security of Payment Act 2002*.

3 Definition

In these Regulations, ***the Act*** means the *Building and Construction Industry Security of Payment Act 2002*.

4 Notice of claim

For the purposes of section 32(2) of the Act, a notice of claim is in the prescribed form if it is in the form of Form 1 in the Schedule.

5 Debt certificate

For the purposes of section 33(2) of the Act, a debt certificate is in the prescribed form if it is in the form of Form 2 in the Schedule.

6 Discharge notice

For the purposes of section 40(2) of the Act, a discharge notice is in the prescribed form if it is in the form of Form 3 in the Schedule.

7 Notice of names of persons from whom the claimant may recover

For the purposes of section 41(1) of the Act, a notice is in the prescribed form if it is in the form of Form 4 in the Schedule.

8 Notice of lien

For the purposes of section 12A of the Act, a notice of lien is in the prescribed form if it is in the form of Form 5 in the Schedule.

[Reg 8 insrt SR 19 of 2007, reg 5]

Schedules – Forms

Form 1 – Notice of claim

Regulation 4

Building and Construction Industry Security of Payment Regulations 2003

(Section 32(2) of the *Building and Construction Industry Security of Payment Act 2002*)

To: [*name and address of principal*]

An adjudicator has determined that an adjudicated amount is payable by [*insert name and address of respondent*] to me, [*insert name and address of claimant*], in respect of a construction contract dated [*insert relevant date of contract*] between me and the respondent. The adjudicated amount is in respect of:

[*insert details of the time and place that the construction work was carried out and, if relevant, the time and place any goods and services were supplied*].

A debt certificate has been issued under section 33 of the Act by the [*insert name of Court*] dated [*insert date certificate was issued*] and is attached [*attach a copy of the certificate*].

Unless, on your application, a court grants a stay of payments under section 37 of the Act, section 35 of the Act provides that after a notice of claim is served on you, you are required to pay me the amount you owe to the respondent under a related contract with the respondent, as set out in the attached debt certificate.

If you fail to make such payment, under section 38 of the Act, I am entitled to sue and recover the debt from you.

Signature of claimant:

Print name and address of claimant:

Form 2 – Debt certificate

Regulation 5

Building and Construction Industry Security of Payment Regulations 2003

(Section 33(2) of the *Building and Construction Industry Security of Payment Act 2002*)

IN THE [*name of court*] of VICTORIA

AT [*insert place*]

In proceedings between:

[*name of claimant*] of [*address*]

and

[*name of respondent*] of [*address*]

On the application of the claimant under section 33 of the *Building and Construction Industry Security of Payment Act 2002*, judgment having been *given/*entered in these proceedings for the recovery of [*insert amount*] being an adjudicated amount ordered on [*insert date*] to be recovered as a debt, this certificate for [*insert amount*] is issued with respect to the debt.

Date of issue: [*insert relevant date*]

[*Signature of relevant court officer*]

[*Court seal*]

*delete whichever is not applicable.

Form 3 – Discharge notice

Regulation 6

Building and Construction Industry Security of Payment Regulations 2003

(Section 40(2) of the *Building and Construction Industry Security of Payment Act 2002*)

To: [*name and address of principal/respondent**]

I acknowledge the payment of $ ..... by [*insert name of* **principal/***respondent*] to me as *partial/*full discharge of the amount due to me in accordance with the debt certificate issued by the [*insert name of Court*] under section 33 of the Act on [*insert date certificate issued*].

Dated:

Signature of claimant:

Print name and address of claimant:

*delete whichever is not applicable

Form 4 – Notice of names of persons from whom a claimant may recover

Regulation 7

Building and Construction Industry Security of Payment Regulations 2003

(Section 41(1) of the *Building and Construction Industry Security of Payment Act 2002*)

To: [*name and address of claimant*]

I have carried out construction work or supplied goods and services in respect of: [*insert details of the time and place the construction work was carried out and, if relevant, the time and place any goods and services were supplied*] to the following *person/*persons: [*insert name of person or persons*]

Dated:

Signature of respondent:

Print name and address of respondent:

*delete whichever is not applicable

Form 5 – Notice of lien

Regulation 8

Building and Construction Industry Security of Payment Regulations 2003

(Section 12A of the *Building and Construction Industry Security of Payment Act 2002*)

To: [*name and address of respondent*]

On [*date*] I [*insert name and address of claimant*] served on you a payment claim for a progress payment identified as [*insert information identifying the payment claim*].

The payment claim was made in respect of *construction work carried out/*goods and services supplied by me under the construction contract identified as [*insert information identifying the contract*].

The progress payment became due and payable on [*date*].

I supplied the following *unfixed plant/*materials in connection with carrying out the construction work under that contract: [*clearly identify any unfixed plant or materials to which this notice refers*].

At the date of this notice, I have not received the progress payment. Accordingly I am exercising a lien in respect of the unpaid amount of the progress payment over the unfixed plant and materials listed in this notice.

The lien will be extinguished when I receive the progress payment.

Signature of claimant:

Print name and address of claimant:

Date:

**delete if inapplicable*

Note:

Section 12A(1) of the Act provides that if a progress payment under a construction contract becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.

[Form 5 insrt SR 19 of 2007, reg 6]

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT REGULATIONS 2013 (VIC) [CURRENT VERSION]

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Regulations 2013	**56 of 2013**		**3 Jun 2013**

There have been no further amendments to this legislation.

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement

1 Objective

The objective of these Regulations is to prescribe forms for the purposes of the *Building and Construction Industry Security of Payment Act 2002*.

2 Authorising provision

These Regulations are made under section 52 of the *Building and Construction Industry Security of Payment Act 2002*.

3 Commencement

These Regulations come into operation on 3 June 2013.

4 Revocation

The following regulations are **revoked**—

(a) the *Building and Construction Industry Security of Payment Regulations 2003*;

(b) the *Building and Construction Industry Security of Payment (Amendment) Regulations 2007*.

5 Definition

In these Regulations, ***the Act*** means the *Building and Construction Industry Security of Payment Act 2002*.

6 Notice of intention to exercise lien

For the purposes of section 12A of the Act, the prescribed form of a notice of intention to exercise a lien is Form 1 in the Schedule.

7 Notice of claim

For the purposes of section 32(2) of the Act, the prescribed form of a notice of claim is Form 2 in the Schedule.

8 Debt certificate

For the purposes of section 33(2) of the Act, a prescribed form of a debt certificate is Form 3 in the Schedule.

9 Discharge notice

For the purposes of section 40(2) of the Act, the prescribed form of a discharge notice is Form 4 in the Schedule.

10 Notice of names of persons from whom claimant may recover

For the purposes of section 41(1) of the Act, the prescribed form of a notice is Form 5 in the Schedule.

Schedule – Forms

Form 1 – Notice of Intention to Exercise Lien

Section 12A(1) of the *Building and Construction Industry Security of Payment Act 2002*

To: [*name and address of ordinary place of business of respondent*]

Under section 12(1) of the *Building and Construction Industry Security of Payment Act 2002* (the Act), a progress payment became due and payable to me by you under the construction contract between you and me dated [*insert date and other information identifying the construction contract*].

The progress payment became due and payable on [*date*] *in accordance with the terms of the construction contract/*because 10 business days have passed since [*insert date of service*] being the date on which I served a payment claim on you.

The progress payment is in respect of the following *construction work carried out/*related goods and services supplied by me under the construction contract:

[*insert details of construction work, including the time and place the work was carried out, OR details of related goods and services supplied, including the time and place they were supplied, OR details of both*]

I supplied the following *unfixed plant/*materials in connection with carrying out the construction work under the construction contract:

[*clearly identify the unfixed plant or materials to which this notice refers*]

At the date of this notice, I have not received the progress payment. Accordingly, I intend to exercise a lien in respect of the unpaid amount of the progress payment over the *unfixed plant/*materials listed above.

The lien will be extinguished when I receive the progress payment.

Signature of claimant:

Print name and address of ordinary place of business of claimant:

Date:

*delete whichever is not applicable

Form 2 – Notice of Claim

Regulation 7

Building and Construction Industry Security of Payment Regulations 2013

Section 32(2) of the *Building and Construction Industry Security of Payment Act 2002*

To: [*name and address of ordinary place of business of principal*]

An *adjudicator/*review adjudicator has determined that an adjudicated amount is payable by [*insert name and address of ordinary place of business of respondent*] (the respondent) to me, in respect of a construction contract dated [*insert relevant date of contract*] between the respondent and me. The adjudicated amount is in respect of:

[*insert details of construction work, including the time and place the work was carried out, OR details of related goods and services supplied, including the time and place they were supplied, OR details of both*]

A debt certificate has been issued under section 33 of the *Building and Construction Industry Security of Payment Act 2002* (the Act) by the [*insert name of Court*] dated [*insert date certificate was issued*]. A copy of the debt certificate is attached.

Unless, on your application, a court grants a stay of payments under section 37 of the Act, section 35 of the Act provides that, after this notice of claim is served on you, you are required to pay me the amount you owe to the respondent under a related contract with the respondent. The amount you are required to pay me is set out in the attached debt certificate.

You are required to pay this amount by making payments to me as they become payable under the related contract with the respondent (see section 35 of the Act).

If you fail to make any payment in accordance with section 35 of the Act, I am entitled under section 38 of the Act to sue you and recover the debt.

Dated:

Signature of claimant:

Print name and address of ordinary place of business of claimant:

*delete whichever is not applicable

(See attached debt certificate)

Form 3 – Debt Certificate

Regulation 8

Building and Construction Industry Security of Payment Regulations 2013

Section 33(2) of the *Building and Construction Industry Security of Payment Act 2002*

IN THE [*name of court*] of VICTORIA

AT [*insert place*]

In proceedings between:

[*name of claimant*] ("Claimant")

of [*address of ordinary place of business*]

and

[*name of respondent*] ("Respondent")

of [*address of ordinary place of business*]

ORDER

On the application of the Claimant under section 33 of the *Building and Construction Industry Security of Payment Act 2002*, judgment having been *given/*entered in these proceedings on [*insert date of judgment*] for the recovery of [*insert adjudicated amount*], being an adjudicated amount, IT IS CERTIFIED that the amount of [*insert judgment amount*] is a debt owed by the Respondent to the Claimant.

Date of issue: [*insert relevant date*]

[*Signature of relevant court officer*]

[*Court seal*]

*delete whichever is not applicable

Form 4 – Discharge Notice

Regulation 9

Building and Construction Industry Security of Payment Regulations 2013

Section 40(2) of the *Building and Construction Industry Security of Payment Act 2002*

To: [*name and address of ordinary place of business of* *principal/*respondent*]

For the purposes of section 40(2) of the *Building and Construction Industry Security of Payment Act 2002* (the Act), I acknowledge your payment of $ to me as *partial/*full discharge of the amount owed to me specified in the debt certificate issued by the [*insert name of Court*] under section 33 of the Act on [*insert date debt certificate issued*]. A copy of the debt certificate is attached.

Dated:

Signature of claimant:

Print name and address of ordinary place of business of claimant:

*delete whichever is not applicable

(See attached debt certificate)

Form 5 – Notice of Person from Whom Claimant may Recover

Regulation 10

Building and Construction Industry Security of Payment Regulations 2013

Section 41(1) of the *Building and Construction Industry Security of Payment Act 2002*

To: [*name and address of ordinary place of business of claimant*]

For the purposes of section 41(1) of the *Building and Construction Industry Security of Payment Act 2002* (the Act), in response to your demand of [*insert date of demand*] for this notice, I notify you that, under a contract with the following *person/*persons:

[*insert name(s) of person(s)*]

I have *carried out the following construction work/*supplied the following related goods and services:

[*insert details of construction work, including the time and place the work was carried out, OR details of the goods and services, including the time and place they were supplied, OR details of both*]

I provide this notice in the knowledge that, if I give it knowing that it is false or misleading in a material particular, I am guilty of an offence and liable to a penalty under section 41(2) of the Act.

Dated:

Signature of respondent:

Print name and address of ordinary place of business of respondent:

*delete whichever is not applicable

QUEENSLAND LEGISLATION

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS BILL 2004 (QLD) – EXPLANATORY NOTES

Note

General outline

Objectives of the Legislation

The objective of the legislation is to entitle certain persons who carry out construction work (or who supply related goods or services) to a timely payment for the work they carry out and the goods and services they supply.

This will be achieved through establishing a procedure for securing progress payments to which a person becomes entitled under this Bill.

Reasons for the objectives and how they will be achieved

Security of payment has been an issue in the building and construction industry over many decades. Recently the Royal Commission into the Building and Construction Industry (the Royal Commission) flagged security of payment as a significant industry matter requiring Federal legislation where specific State legislation appears to be deficient. It also found that traditional remedies under Commonwealth *Corporations Law*, common law and contract law were not sufficient to address the issue.

The building and construction industry is particularly vulnerable to security of payment issues because it typically operates under a hierarchical chain of contracts with inherent imbalances in bargaining power. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow, and in some cases, insolvency.

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS BILL 2004 (QLD) – SECOND READING SPEECH

Legislative Assembly, 18 March 2004

Hon R E SCHWARTEN (Rockhampton – ALP) (Minister for Public Works, Housing and Racing) (12.16 pm): I move –

That the bill be now read a second time.

Honourable members will recall that I introduced the *Building and Construction Industry Payments Bill 2003* on 25 November 2003 during the previous parliament. Following the dissolution of parliament the bill lapsed and now must be reintroduced.

Improving payment outcomes for all parties operating in the building and construction industry is a key priority for this government. Security of payment has been an issue for many decades, particularly in relation to subcontractors. While bad debts are not unique to the building and construction industry, the industry is particularly vulnerable to payment problems because it generally operates under a hierarchical chain of contracts. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow and in some cases insolvency. I seek leave to have the remainder of my speech incorporated in *Hansard*.

Leave granted.

Since 1998 the Beattie Government has introduced major legislative initiatives, which have improved payment outcomes for subcontractors working in the building and construction industry.

In October 1999 the "Better Building Industry Reforms" came into effect. Amongst a host of initiatives the reforms included the introduction of tough financial criteria for contractor licensing, a series of commercial contractual protection measures and the banning of persons from holding a contractor's licence in the event of their being associated in any significant manner with a failed business venture.

More recently, in July 2003, building on the previous reforms, significant amendments to the *Queensland Building Services Authority Act 1991* came into effect extending the power of the BSA to ban persons from the industry who continually display a total lack of regard for their contractual and payment obligations.

These recent legislative reforms, coupled with the long standing *Subcontractors' Charges Act 1974*, mean subcontractors working in Queensland currently enjoy a raft of legislative protection measures designed to improve their payment prospects. However, these legislative measures of themselves will not necessarily result in improved cash flow outcomes for parties operating in the building and construction industry.

There are instances in the industry where a claim for payment by a subcontractor or supplier is disputed by his or her superior contractor resulting in payments being held up for lengthy periods while the dispute is being resolved. There is potential in the industry for these payments to be withheld unfairly to the disadvantage of the claimant.

The Bill now further builds on the previous reforms by establishing, in relation to construction contracts, a statutory based system of rapid adjudication for the quick resolution of payment disputes on an interim basis by an appropriately qualified and independent adjudicator. This will allow for payments to flow quickly down the contractual chain.

Rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final determination of a payment dispute by a court or tribunal of competent jurisdiction. The significance of an adjudicator's decision, however, is that pending final determination of the payment dispute, the party with the most commendable case, as determined by the

adjudicator retains the moneys in dispute. Significantly, decisions by an adjudicator are enforceable as a judgment debt if a contracting party fails to pay moneys to a contracted party as determined by the adjudicator.

This represents a significant shift from the current system where responsibility for enforcing payment has ordinarily been left to the contracted party who has performed the construction work or supplied the related goods or services for the benefit of the contracting party.

The application of the Bill covers all forms of construction contracts other than contracts involving "resident owners" under the *Domestic Building Contracts Act 2000*. The Bill will, however, cover owner-builders who engage contractors and tradespeople in a building contractor role.

The Bill will not in any way affect the operations of the *Subcontractors' Charges Act 1974*. Subcontractors may continue to utilise this Act as they have always done. However, a subcontractor will not be permitted to start, continue or enforce an adjudication once they lodge a notice of charge under the *Subcontractors' Charges Act 1974*.

In essence, subcontractors will be required to choose which statutory initiative they wish to utilise to obtain payment for construction work done. There will be nothing to stop subcontractors switching from one statutory initiative to the other if they believe that due to changing circumstances, the alternative option will result in a better payment outcome.

There is a default provision in the Bill which will apply when parties have not in the formation of their contract included the intervals for making progress claims, times for making payment and how such payments are to be valued.

In the absence of a contractual provision the Bill provides that payment claims must be made at monthly intervals with payment becoming due 10 business days after the payment claim is made. If the construction contract is silent on how a payment is to be valued, the Bill provides that the amount is calculated on the basis of the value of work carried out, including related goods and services provided.

An independent adjudicator with relevant expertise and registered to hear disputes will be contracted by authorised nominating authorities. As in other States it is proposed that private adjudicators conduct the adjudication on a user pays basis.

An adjudicator must make a decision on the dispute within 10 business days from either receiving the respondent's adjudication response or the expiry of the specified time frame for receiving an adjudication response. The adjudicator has the power to call for further submissions, hold a conference and view the relevant construction site.

An adjudicator must provide to both parties reasons for a decision including the adjudicated amount and the payment date. If payment of the adjudicated amount is not made, the claimant can request an adjudication certificate, which can then be lodged in a court of competent jurisdiction as a judgment debt.

The important benefits of the rapid adjudication process are that it allows for a prompt interim decision on disputed payments, encourages communication between the parties about disputed matters and provides parties with a much faster and cheaper alternative to resolve the dispute without entering the court system. The adjudication process also allows unpaid parties to suspend work or the supply of goods until payment of the adjudicated amount is received.

The Bill also amends Part 4A of the *Queensland Building Services Authority Act 1991* to complement and align with the rapid adjudication process.

There is no doubting this Bill is groundbreaking and will impact in a significant manner on payment relationships between parties involved in the performance of construction work.

The Beattie government's track record with regard to consultation with industry on all important issues is widely recognised. The government intends to review the operations of the new legislation after it has been in effect for 12 months.

The building and construction industry, and particularly subcontractors will benefit substantially from the introduction of this Bill. I commend the Bill to the House.

Debate, on motion of Mr Hopper, adjourned.

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004 (QLD)

Note

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Payments Act 2004	**6 of 2004**	**20 May 2004**	**Ss 1–2**: 20 May 2004; ss 9, 36–98, 104–106, 108–113 and Sch 2: 1 Jul 2004 (SL 91 of 2004); Sch 1 amdts 1, 3 (to the extent it repeals the definition of "building contract"), 4 (to the extent it inserts the definition of "building contract") and 5 of the ***Queensland Building Services Authority Act 1991***: 30 Sep 2005 (SL 238 of 2005); remainder; 1 Oct 2004 (SL 186 of 2004)

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Housing and Other Acts Amendment Act 2005	33 of 2005	18 Aug 2005	S 13: 18 Aug 2005
Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009	24 of 2009	26 Jun 2009	Ss 1648–1653: 1 Dec 2009 (SL 252 of 2009)
Civil Proceedings Act 2011	45 of 2011	6 Dec 2011	Sch 1A item 1: 1 Sep 2012 (SL 146 of 2012)
Queensland Building Services Authority Amendment Act 2013	38 of 2013	29 Aug 2013	Sch 1: 1 Dec 2013 (SL 240 of 2013)
Treasury and Trade and Other Legislation Amendment Act 2013	39 of 2013	23 Sep 2013	Sch 4: 23 Sep 2013
Building and Construction Industry Payments Amendment Act 2014 (am by *Health and Other Legislation Amendment Act 2014*)	50 of 2014	26 Sep 2014	Ss 4–45: 15 Dec 2014 (SL 310 of 2014)

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Payments Act 2004	**6 of 2004**	**20 May 2004**	**Ss 1–2**: 20 May 2004; ss 9, 36–98, 104–106, 108–113 and Sch 2: 1 Jul 2004 (SL 91 of 2004); Sch 1 amdts 1, 3 (to the extent it repeals the definition of "building contract"), 4 (to the extent it inserts the definition of "building contract") and 5 of the ***Queensland Building Services Authority Act 1991***: 30 Sep 2005 (SL 238 of 2005); remainder; 1 Oct 2004 (SL 186 of 2004)

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Queensland Building and Construction Commission and Other Legislation Amendment Act 2014	57 of 2014	27 Oct 2014	Sch 1: 1 Jul 2015 (SL 28 of 2015)

PART 1 – PRELIMINARY

DIVISION 1 – INTRODUCTION

1 Short title

This Act may be cited as the *Building and Construction Industry Payments Act 2004*.

2 Commencement

This Act commences on a day to be fixed by proclamation.

DIVISION 2 – APPLICATION AND OPERATION OF ACT

3 Application of Act

(1) Subject to this section, this Act applies to construction contracts entered into after the commencement of parts 2 and 3—

(a) whether written or oral, or partly written and partly oral; and

(b) whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland.

(2) This Act does not apply to—

(a) a construction contract to the extent that it forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes—

(i) to lend an amount or to repay an amount lent; or

(ii) to guarantee payment of an amount owing or repayment of an amount lent; or

(iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract; or

(b) a construction contract for the carrying out of domestic building work if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside; or

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated other than by reference to the value of the work carried out or the value of the goods and services supplied.

(3) This Act does not apply to a construction contract to the extent it contains—

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services in relation to construction work, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services in relation to construction work, as a condition of a loan agreement with a recognised financial institution; or

(c) provisions under which a party undertakes—

(i) to lend an amount or to repay an amount lent; or

(ii) to guarantee payment of an amount owing or repayment of an amount lent; or

(iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract.

(4) This Act does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland.

(5) In this section—

resident owner, in relation to a construction contract for carrying out domestic building work, means a resident owner under the *Queensland Building and Construction Commission Act 1991*, schedule 1B, section 1, but does not include a person—

(a) who holds, or should hold, an owner-builder permit under the *Queensland Building and Construction Commission Act 1991* relating to the work; or

(b) who is a building contractor within the meaning of the *Queensland Building and Construction Commission Act 1991*.

[Def am Act 57 of 2014, s 80 and Sch 1 item 1; Act 38 of 2013, s 14 and Sch 1]

[S 3 am Act 57 of 2014; Act 38 of 2013]

4 Effect of giving notice of claim of charge under Subcontractors' Charges Act 1974

(1) This section applies if a person gives a notice of claim of charge under the *Subcontractors' Charges Act 1974* in relation to construction work or related goods and services the subject of a construction contract.

(2) Proceedings or other action may not be started or continued by the person under part 3 in relation to all or part of the construction work or related goods and services.

(3) Without limiting subsection (2), subsection (4) applies if the person has served a payment claim relating to all or part of the construction work or related goods and services on a respondent before the notice of claim of charge is given.

(4) For subsection (3)—

(a) the respondent is not required to pay an amount to the person under section 19(2) in relation to the claim; and

(b) amounts may not be recovered by the person under section 19(3)(a)(i) or 20(2)(a)(i) in relation to the claim; and

(c) if the person made an adjudication application in relation to the claim and the application has not been decided by an adjudicator before the notice of the claim of charge is given, the person is taken to have withdrawn the application; and

(d) if the person made an adjudication application in relation to the claim and the application has been decided by an adjudicator before the notice of the claim of charge was given—

(i) the respondent to the application is not required to pay the adjudicated amount under section 29; and

(ii) the registrar must not give the person an adjudication certificate under section 30 relating to the adjudication; and

(iii) any adjudication certificate provided in relation to the adjudication can not be enforced by the person under section 31 as a judgement of a court; and

(e) the person may not suspend, or continue to suspend, carrying out all or part of the construction work or the supply of the related goods and services under section 33.

[Subs (4) am Act 50 of 2014, s 4(1)–(3)]

(5) This section does not affect the operation of section 35 and an adjudication

application taken to have been withdrawn by the person under subsection (4)(c) is taken to have been withdrawn for the purpose of section 35(4).

[Subs (5) am Act 50 of 2014, s 4(4)]

(6) This section does not stop the person serving under this Act a payment claim in relation to all or part of the construction work or related goods and services and taking other action under this Act in relation to that claim, if the notice of claim of charge in so far as it relates to the construction work or related goods and services, or part, is withdrawn.

[S 4 am Act 50 of 2014]

5 Act does not limit claimant's other rights

A claimant's entitlements and remedies under this Act do not limit—

(a) another entitlement a claimant may have under a construction contract; or

(b) any remedy a claimant may have for recovering the other entitlement.

6 Act binds all persons

This Act binds all persons, including the State, and, as far as the legislative power of the Parliament permits, the Commonwealth and the other States.

DIVISION 3 – OBJECT OF ACT

7 Object of Act

The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person—

(a) undertakes to carry out construction work under a construction contract; or

(b) undertakes to supply related goods and services under a construction contract.

8 How object is to be achieved

The object is to be achieved by—

(a) granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and

(b) establishing a procedure that involves—

(i) the making of a payment claim by the person claiming payment; and

(ii) the provision of a payment schedule by the person by whom the payment is payable; and

(iii) the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and

(iv) the payment of the progress payment decided by the adjudicator.

DIVISION 4 – INTERPRETATION

9 Definitions

The dictionary in schedule 2 defines particular words used in this Act.

10 Meaning of *construction work*

(1) ***Construction work*** means any of the following work—

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, airconditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

(d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;

(e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—

(i) site clearance, earthmoving, excavation, tunnelling and boring; and

(ii) the laying of foundations; and

(iii) the erection, maintenance or dismantling of scaffolding; and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of roadways and other access works;

(f) the painting or decorating of the internal or external surfaces of any building, structure or works;

(g) carrying out the testing of soils and road making materials during the construction and maintenance of roads;

(h) any other work of a kind prescribed under a regulation for this subsection.

(2) To remove doubt, it is declared that ***construction work*** includes building work within the meaning of the *Queensland Building and Construction Commission Act 1991*.

[Subs (2) am Act 38 of 2013, s 14 and Sch 1]

(3) Despite subsections (1) and (2), ***construction work*** does not include any of the following work—

(a) the drilling for, or extraction of, oil or natural gas;

(b) the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose.

[S 10 am Act 38 of 2013]

11 Meaning of *related goods and services*

(1) ***Related goods and services***, in relation to construction work, means any of the following—

(a) goods of the following kind—

(i) materials and components to form part of any building, structure or work arising from construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind—

(i) the provision of labour to carry out construction work;

(ii) architectural, design, surveying or quantity surveying services relating to construction work;

(iii) building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;

(iv) soil testing services relating to construction work;

(c) goods and services, in relation to construction work, of a kind prescribed under a regulation for this subsection.

(2) In this Act, a reference to related goods and services includes a reference to related goods or services.

PART 2 – RIGHTS TO PROGRESS PAYMENTS

12 Rights to progress payments

From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.

13 Amount of progress payment

The amount of a progress payment to which a person is entitled in relation to a construction contract is—

(a) the amount calculated under the contract; or

(b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract.

14 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued—

(a) under the contract; or

(b) if the contract does not provide for the matter, having regard to—

(i) the contract price for the work; and

(ii) any other rates or prices stated in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued—

(a) under the terms of the contract; or

(b) if the contract does not provide for the matter, having regard to—

(i) the contract price for the goods and services; and

(ii) any other rates or prices stated in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and

(iv) if any of the goods are defective, the estimated cost of rectifying the defect.

(3) For subsection (2)(b), for materials and components that are to form part of any building, structure or work arising from construction work, the only materials and components to be included in the valuation are those that have become or, on payment, will become the property of the party or other person for whom construction work is being carried out.

15 Due date for payment

(1) A progress payment under a construction contract becomes payable—

(a) if the contract contains a provision about the matter that is not void under section 16 or under the *Queensland Building and Construction Commission Act 1991*, section 67U or 67W—on the day on which the payment becomes payable under the provision; or

(b) if the contract does not contain a provision about the matter or contains a provision that is void under section 16 or under the *Queensland Building and Construction Commission Act 1991*, section 67U or 67W—10 business days after a payment claim for the progress payment is made under part 3.

[Subs (1) am Act 38 of 2013, s 14 and Sch 1]

(2) Subject to subsection (3), interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—

(a) the rate prescribed under the *Civil Proceedings Act 2011*, section 59(3) for a money order debt;

(b) the rate specified under the contract.

[Subs (2) am Act 45 of 2011, s 217 and Sch 1A item 1]

(3) For a construction contract to which *Queensland Building and Construction Commission Act 1991*, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section.

[Subs (3) am Act 38 of 2013, s 14 and Sch 1]

[S 15 am Act 38 of 2013; Act 45 of 2011]

16 Effect of pay when paid provisions

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

(2) In this section—

an amount owing, in relation to a construction contract, means an amount owing for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the construction contract.

pay when paid provision, of a construction contract, means a provision of the contract—

(a) that makes the liability of one party (the ***first party***) to pay an amount owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or any part of that amount; or

(b) that makes the due date for payment of an amount owing by the first party to the second party dependent on the date on which payment of the whole or any part of that amount is made to the first party by the third party; or

(c) that otherwise makes the liability to pay an amount owing, or the due date for payment of an amount owing, contingent or dependent on the operation of another contract.

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PART 3 – PROCEDURE FOR RECOVERING PROGRESS PAYMENTS

DIVISION 1 – PAYMENT CLAIMS AND PAYMENT SCHEDULES

17 Payment claims

(1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the ***respondent***).

(2) A payment claim—

(a) must identify the construction work or related goods and services to which the progress payment relates; and

(b) must state the amount of the progress payment that the claimant claims to be payable (the ***claimed amount***); and

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount—

(a) that the respondent is liable to pay the claimant under section 33(3); or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A claimant can not serve more than 1 payment claim for each reference date under the construction contract, but may include in any payment claim an amount that has been the subject of a previous payment claim.

[Subs (4) subst Act 50 of 2014, s 5]

(5) [Repealed]

[Subs (5) rep Act 50 of 2014, s 5]

(6) [Repealed]

[Subs (6) rep Act 50 of 2014, s 5]

[S 17 am Act 50 of 2014]

17A Time requirements for payment claims

(1) This section applies if a claimant serves a payment claim on a respondent.

(2) Unless the payment claim relates to a final payment, the claim must be served within the later of—

(a) the period, if any, worked out under the relevant construction contract; or

(b) the period of 6 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(3) If the payment claim relates to a final payment, the claim must be served within the later of the following—

(a) the period, if any, worked out under the relevant construction contract;

(b) 28 days after the end of the last defects liability period, if any, worked out under the relevant construction contract;

(c) 6 months after the later of—

(i) completion of all construction work to be carried out under the relevant construction contract; or

(ii) complete supply of related goods and services to be supplied under the relevant construction contract.

(4) In this section—

defects liability period, for a construction contract, means the period, if any, worked out under the contract as being the period—

(a) starting on the day the construction work is practically or substantially completed, or the related goods and services are supplied, under the contract; and

(b) ending on the last day any omission or defect in the construction work or related goods or services may be required or directed to be rectified under the contract.

final payment means a progress payment that is the final payment for construction work carried out, or for related goods and services supplied, under a construction contract.

[S 17A insrt Act 50 of 2014, s 6]

18 Payment schedules

(1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

(b) must state the amount of the payment, if any, that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.

(4) [Repealed]

[Subs (4) rep Act 50 of 2014, s 7]

(5) [Repealed]

[Subs (5) rep Act 50 of 2014, s 7]

[S 18 am Act 50 of 2014]

18A Time requirements for payment schedules

(1) This section applies if, in reply to a payment claim, the respondent serves a payment schedule on the claimant.

(2) The payment schedule, if it relates to a standard payment claim, must be served on the claimant within the earlier of—

(a) the time required, if any, by the relevant construction contract; or

(b) 10 business days after the payment claim is served.

(3) The payment schedule, if it relates to a complex payment claim, must be served on the claimant within the earlier of—

(a) the time required, if any, by the relevant construction contract; or

(b) whichever of the following applies—

(i) if the claim was served on the respondent 90 days or less after the reference date to which the claim relates—15 business days after the claim is served;

(ii) if the claim was served on the respondent more than 90 days after the reference date to which the claim relates—30 business days after the claim is served.

[S 18A insrt Act 50 of 2014, s 8]

19 Consequences of not paying claimant if no payment schedule

(1) This section applies if a respondent served with a payment claim does not serve a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant.

(2) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

(3) If the respondent fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates, the claimant—

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.

(4) A notice under subsection (3)(b) must state that it is made under this Act.

(5) The claimant can not start proceedings under subsection (3)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt unless—

(a) the claimant gives the respondent a notice under section 20A(2); and

(b) the 5 business days for the respondent to serve the payment schedule, as stated in the notice, has ended.

(6) If the claimant starts proceedings under subsection (3)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied the respondent—

(i) did not serve a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant; and

(ii) failed to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates; and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any counterclaim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

[S 19 subst Act 50 of 2014, s 9]

20 Consequences of not paying claimant under payment schedule

(1) This section applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent serves a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant; and

(c) the payment schedule states a scheduled amount that the respondent proposes to pay to the claimant; and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

[Subs (1) am Act 50 of 2014, s 10]

(2) The claimant—

(a) may—

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 21(1)(a)(ii) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.

(3) A notice under subsection (2)(b) must state that it is made under this Act.

(4) If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—

(a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any counterclaim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

[S 20 am Act 50 of 2014]

20A Notice required before starting particular proceedings

(1) This section applies if a claimant serves a payment claim on a respondent and—

(a) the respondent—

(i) fails to serve a payment schedule on the claimant under this part; and

(ii) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates; and

(b) the claimant intends to—

(i) start proceedings to recover an unpaid portion of the claimed amount as a debt owing to the claimant; or

(ii) apply for adjudication of the payment claim.

(2) Before taking the intended action mentioned in subsection (1)(b), the claimant must first give the respondent notice of the claimant's intention to take the action.

(3) The notice must—

(a) be given to the respondent within 20 business days immediately following the due date for payment; and

(b) state that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the notice; and

(c) state it is made under this Act.

(4) However, this section does not apply if the claimant previously gave the respondent a notice under this section for the unpaid portion of the claimed amount.

(5) The giving of a notice under subsection (2) does not—

(a) require the claimant to complete the action stated in the notice; or

(b) prevent the claimant from taking different action to that stated in the notice.

[S 20A insrt Act 50 of 2014, s 11]

DIVISION 2 – ADJUDICATION OF DISPUTES

21 Adjudication application

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if—

(a) the respondent serves a payment schedule under this part but—

(i) the scheduled amount stated in the payment schedule is less than the claimed amount stated in the payment claim; or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to serve a payment schedule on the claimant under this part and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

[Subs (1) am Act 50 of 2014, s 12(1)]

(2) An adjudication application to which subsection (1)(b) applies can not be made unless—

(a) the claimant gives the respondent a notice under section 20A(2); and

(b) the 5 business days for the respondent to serve the payment schedule, as stated in the notice, has ended.

[Subs (2) am Act 50 of 2014, s 12(2)]

(3) An adjudication application—

(a) must be in the approved form; and

(b) must be made to the registrar; and

(c) must be made within the following times—

(i) for an application under subsection (1)(a)(i)—within 10 business days after the claimant receives the payment schedule;

(ii) for an application under subsection (1)(a)(ii)—within 20 business days after the due date for payment;

(iii) for an application under subsection (1)(b)—within 10 business days after the end of the 5 business days referred to in subsection (2)(b); and

(d) must identify the payment claim and the payment schedule, if any, to which it relates; and

(e) must be accompanied by the fee prescribed by regulation for the application; and

(f) may contain the submissions relevant to the application the claimant chooses to include.

[Subs (3) am Act 50 of 2014, s 12(3)–(5)]

(4) The amount of an application fee must not exceed the amount, if any, prescribed under a regulation.

(5) A copy of an adjudication application must be served on the respondent.

(6) The registrar must refer the application, as soon as practicable, to a person eligible to be an adjudicator under section 22.

[Subs (6) am Act 50 of 2014, s 12(6)]

[S 21 am Act 50 of 2014
Cross-reference: *Building and Construction Industry Payments Regulation 2004*: s 4 and Sch 2 prescribe fees for an adjudication application under s 21(3)(e).]

22 When person may be an adjudicator

(1) A person may be an adjudicator in relation to a construction contract if registered as an adjudicator under this Act.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract—

(a) if the person is a party to the contract; or

(b) in circumstances prescribed under a regulation for this section.

(3) A regulation may be made under subsection (2)(b) only to prescribe circumstances in which the appointment of an adjudicator might create a conflict of interest.

23 Appointment of adjudicator

(1) If the registrar refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by serving notice of the acceptance on the claimant and the respondent.

[Subs (1) am Act 50 of 2014, s 13]

(2) On accepting an adjudication application, the adjudicator is taken to have been appointed to decide the application.

[S 23 am Act 50 of 2014]

24 Adjudication responses

(1) This section applies if—

(a) an adjudicator accepts a claimant's adjudication application under section 23; and

(b) the respondent served a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant.

(2) The respondent may give the adjudicator a response to the adjudication application (the ***adjudication response***).

(3) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may contain the submissions relevant to the response the respondent chooses to include.

(4) If the adjudication application is about a standard payment claim, the adjudication response can not include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant.

(5) If the adjudication application is about a complex payment claim, the adjudication response may include any reasons for withholding payment whether or not those reasons were included in the payment schedule when served on the claimant.

[S 24 subst Act 50 of 2014, s 14]

24A Time requirements for adjudication response

(1) Subsection (2) applies for an adjudication response to an adjudication application about a standard payment claim.

(2) The respondent must give the adjudicator the adjudication response within the later of the following to end—

(a) 10 business days after receiving a copy of the adjudication application;

(b) 7 business days after receiving notice of the adjudicator's acceptance of the adjudication application.

(3) Subsections (4) to (7) apply for an adjudication response to an adjudication

application about a complex payment claim.

(4) The respondent must give the adjudicator the adjudication response within the later of the following to end—

(a) 15 business days after receiving a copy of the adjudication application;

(b) 12 business days after receiving notice of the adjudicator's acceptance of the adjudication application.

(5) However, the respondent may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the adjudication response.

(6) The application must—

(a) be made within the later of the following to end—

(i) 5 business days after receiving a copy of the adjudication application;

(ii) 2 business days after receiving notice of the adjudicator's acceptance of the adjudication application; and

(b) be in writing; and

(c) include the reasons for requiring the extension of time.

(7) If the application is granted, the respondent may give the adjudicator the adjudication response no later than the end of the extension of time granted by the adjudicator.

(8) A copy of an adjudication response must be served on the claimant no more than 2 business days after it is given to the adjudicator.

[S 24A insrt Act 50 of 2014, s 14]

24B Reply to new reasons for withholding payment

(1) This section applies if, under section 24(5), the respondent includes in an adjudication response reasons for withholding payment that were not included in the payment schedule when served on the claimant (the ***new reasons***).

(2) The claimant may give the adjudicator a reply to the new reasons (the ***claimant's reply***) within 15 business days after receiving a copy of the adjudication response.

(3) However, the claimant may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the claimant's reply if, because of the complexity or volume of the new reasons, an extension of time is required to adequately prepare the claimant's reply.

(4) The application must—

(a) be made within 5 business days after receiving a copy of the adjudication response; and

(b) be in writing; and

(c) include the reasons for requiring the extension of time.

(5) If the application is granted, the claimant may give the adjudicator the claimant's reply no later than the end of the extension of time granted by the adjudicator.

(6) A copy of the claimant's reply must be served on the respondent no more than 2 business days after it is given to the adjudicator.

(7) If the claimant proposes to give the adjudicator a claimant's reply, the claimant must give the adjudicator notice of the proposal within 5 business days after receiving a copy of the adjudication response unless the claimant gives the reply within the 5 business days.

[S 24B insrt Act 50 of 2014, s 14]

25 Adjudication procedures

(1) Subject to the time requirements under section 25A, an adjudicator must decide the following as quickly as possible—

(a) an adjudication application;

(b) applications for extensions of time under this part.

(2) An adjudicator must not consider an adjudication response or a claimant's reply unless it was given to the adjudicator within the time that the respondent or claimant may give it to the adjudicator.

(3) For a proceeding conducted to decide an adjudication application, an adjudicator—

(a) must decide whether he or she has jurisdiction to adjudicate the application; and

(b) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and

(c) may set deadlines for further submissions and comments by the parties; and

(d) may call a conference of the parties; and

(e) may carry out an inspection of any matter to which the claim relates.

(4) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation.

(5) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

[S 25 subst Act 50 of 2014, s 15]

25A Time requirements for adjudication proceedings

(1) An adjudicator must decide an adjudication application on or before the deadline for deciding the application but not before the end of the minimum consideration period for deciding the application.

(2) However, the claimant and respondent may, before or after the deadline, agree in writing that the adjudicator has additional time to decide the application.

(3) The ***minimum consideration period*** for deciding an adjudication application is—

(a) the period within which the respondent may give an adjudication response to the adjudicator under section 24A; but

(b) if the claimant may give a claimant's reply under section 24B—the period mentioned in paragraph (a) plus the period within which the claimant may give the reply.

Note: Only a complex payment claim may involve a claimant's reply. See section 24B.

(4) The ***deadline***, for deciding an adjudication application relating to a standard payment claim, is the day that is 10 business days after—

(a) if the adjudicator was given an adjudication response in compliance with section 24A—the day on which the adjudicator receives the response; or

(b) otherwise—the last day on which the respondent could have given the adjudicator the response.

(5) The ***deadline***, for deciding an adjudication application relating to a complex payment claim, is the day that is 15 business days after—

(a) if the adjudicator was given an adjudication response in compliance with section 24A—the day on which the adjudicator receives the response; or

(b) otherwise—the last day on which the respondent could have given the adjudicator the response.

(6) However, if the claimant may give the adjudicator a claimant's reply under section 24B, the ***deadline*** for deciding the adjudication application is the day that is 15 business days after—

(a) if the adjudicator was given a claimant's reply in compliance with section 24B—the day on which the adjudicator receives the reply; or

(b) otherwise—the last day on which the claimant could have given the adjudicator the reply.

[S 25A insrt Act 50 of 2014, s 15]

25B Extension of time requirements by adjudicator

(1) This section applies if—

(a) an adjudication application relates to a complex payment claim; and

(b) in the opinion of the adjudicator, the claimant and respondent fail to reach agreement under section 25A(2).

(2) The adjudicator may, despite section 25A(5) or (6), decide the application within 5 business days after the time the adjudicator would otherwise have to decide the application under section 25A(5) or (6).

[S 25B insrt Act 50 of 2014, s 15]

26 Adjudicator's decision

(1) An adjudicator is to decide—

(a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which any amount became or becomes payable; and

(c) the rate of interest payable on any amount.

(2) In deciding an adjudication application, the adjudicator is to consider the following matters only—

(a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building and Construction Commission Act 1991*, part 4A;

(b) the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;

(d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

[Subs (2) am Act 38 of 2013, s 14 and Sch 1]

(3) The adjudicator's decision must—

(a) be in writing; and

(b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.

[S 26 am Act 38 of 2013]

27 Valuation of work etc. in later adjudication application

(1) Subsection (2) applies if, in deciding an adjudication application, an adjudicator has, under section 14, decided—

(a) the value of any construction work carried out under a construction contract; or

(b) the value of any related goods and services supplied under a construction contract.

(2) The adjudicator or another adjudicator must, in any later adjudication application that involves the working out of the value of that work or of those goods and services, give the work, or the goods and services, the same value as that previously decided unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision.

28 Adjudicator may correct clerical mistakes etc.

(1) Subsection (2) applies if the adjudicator's decision contains—

(a) a clerical mistake; or

(b) an error arising from an accidental slip or omission; or

(c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter mentioned in the decision; or

(d) a defect of form.

(2) The adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the decision.

29 Respondent required to pay adjudicated amount

(1) If an adjudicator decides that the respondent is required to pay an adjudicated amount, the respondent must pay the amount to the claimant on or before the relevant date.

(2) In this section—

relevant date means—

(a) the date that is 5 business days after the date on which the adjudicator's decision is served on the respondent; or

(b) if the adjudicator decides a later date under section 26(1)(b)—the later date.

30 Consequences of not paying claimant adjudicated amount

(1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant under section 29, the claimant—

(a) may ask the registrar to provide an adjudication certificate under this section; and

(b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.

[Subs (1) am Act 50 of 2014, s 16(1)]

(2) A notice under subsection (1)(b) must state that it is made under this Act.

(3) An adjudication certificate must state that it is made under this Act and state the following matters—

(a) the name of the claimant;

(b) the name of the respondent who is liable to pay the adjudicated amount;

(c) the adjudicated amount;

(d) the date on which payment of the adjudicated amount was required to be paid to the claimant.

(4) If an amount of interest payable on the adjudicated amount is not paid by the respondent, the claimant may ask the registrar to state the amount of interest payable in the adjudication certificate.

[Subs (4) am Act 50 of 2014, s 16(2)]

(5) If an amount of interest is specified in the adjudication certificate, the amount is to be added to, and becomes part of, the adjudicated amount.

(6) If the claimant has paid the respondent's share of the adjudication fees for the adjudication but has not been reimbursed by the respondent for that amount (the ***unpaid share***), the claimant may ask the registrar to state the unpaid share in the adjudication certificate.

[Subs (6) am Act 50 of 2014, s 16(3)]

(7) If the unpaid share is stated in the adjudication certificate, it is to be added to, and becomes part of, the adjudicated amount.

[S 30 am Act 50 of 2014]

31 Filing of adjudication certificate as judgement debt

(1) An adjudication certificate may be filed as a judgement for a debt, and may be enforced, in a court of competent jurisdiction.

(2) An adjudication certificate can not be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or a part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit states that part of the adjudicated amount has been paid, the judgement is for the unpaid part of the amount only.

(4) If the respondent commences proceedings to have the judgement set aside, the respondent—

(a) is not, in those proceedings, entitled—

(i) to bring any counterclaim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge the adjudicator's decision; and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final decision in those proceedings.

32 Claimant may make new application in certain circumstances

(1) This section applies if—

(a) a claimant does not receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or

(b) an adjudicator who accepts an adjudication application does not decide the application within the time allowed by section 25A or 25B.

[Subs (1) am Act 50 of 2014, s 17(1)]

(2) In either of those circumstances, the claimant—

(a) may withdraw the application, by notice served on the adjudicator or registrar; and

(b) may make a new adjudication application under section 21.

[Subs (2) am Act 50 of 2014, s 17(2)]

(3) Despite section 21(3)(c), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

(4) This division applies to a new application mentioned in this section in the same way as it applies to an application under section 21.

[S 32 am Act 50 of 2014]

DIVISION 3 – CLAIMANT'S RIGHT TO SUSPEND CONSTRUCTION WORK

33 Claimant may suspend work

(1) A claimant may suspend carrying out of construction work or the supply of related goods and services under a construction contract if at least 2 business days have passed since the claimant has given notice of intention to do so to the respondent under section 19, 20 or 30.

(2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment from the respondent of the amount mentioned in section 19(2), 20(1) or 29(1).

[Subs (2) am Act 50 of 2014, s 18]

(3) If the claimant, in exercising the right to suspend carrying out of construction work or the supply of related goods and services under a construction contract, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of the loss or expenses.

(4) A claimant who suspends carrying out construction work or the supply of related goods and services under a construction contract under the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, because of the claimant not carrying out that work or not supplying those goods and services, during the period of suspension.

[S 33 am Act 50 of 2014]

DIVISION 4 – GENERAL

34 Authorised nominating authority's fees [Repealed]

[S 34 rep Act 50 of 2014, s 19]

35 Adjudicator's fees

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application—

(a) the amount, by way of fees and expenses, agreed between the adjudicator and the parties to the adjudication; or

(b) if no amount is agreed, the amount, for fees and expenses, that is reasonable having regard to the work done and expenses incurred by the adjudicator.

(2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in the proportions the adjudicator decides.

(4) An adjudicator is not entitled to be paid any fees or expenses for the adjudication of an adjudication application if the adjudicator fails to make a decision on the application.

[Subs (4) am Act 50 of 2014, s 20(1)]

(5) However, subsection (4) does not apply if—

(a) the adjudication application is withdrawn; or

(b) the adjudicator decided he or she did not have jurisdiction to adjudicate the application.

[Subs (5) subst Act 50 of 2014, s 20(2)]

(6) Also, if a court finds that the adjudicator's decision is void and unenforceable, the adjudicator is still entitled to be paid any fees or expenses for the adjudication of the application if the adjudicator acted in good faith in adjudicating the application.

[Subs (6) insrt Act 50 of 2014, s 20(2)]

(7) For subsection (4), an adjudicator does not fail to make a decision merely because the adjudicator refuses to communicate the adjudicator's decision on an adjudication application until the adjudicator's fees and expenses are paid.

[Subs (7) insrt Act 50 of 2014, s 20(2)]

(8) In this section—

adjudicating, an adjudication application, includes accepting, considering and deciding the application.

[Subs (8) insrt Act 50 of 2014, s 20(2)]

[S 35 am Act 50 of 2014]

35A Matters to be considered in deciding fees

(1) This section applies if an adjudicator is making a decision about the proportion of the adjudicator's fees and expenses to be paid by the claimant and respondent under section 35(3).

(2) In making the decision, the adjudicator may consider the following matters—

(a) the relative success of the claimant or respondent in the adjudication;

(b) whether the claimant or respondent commenced or participated in the adjudication for an improper purpose;

(c) whether the claimant or respondent commenced or participated in the adjudication without reasonable prospects of success;

(d) whether the claimant or respondent has acted unreasonably leading up to the adjudication;

(e) whether the claimant or respondent has acted unreasonably in the conduct of the adjudication;

(f) the reasons given by the respondent for not making the progress payment the subject of the adjudication application;

(g) whether the respondent included additional reasons for withholding payment in the adjudication response that were not included in the payment schedule served on the claimant;

(h) whether an adjudication application is withdrawn;

(i) the services provided by the adjudicator in adjudicating the adjudication application, including the amount of time taken to consider discrete aspects of the amount claimed;

(j) another matter the adjudicator considers relevant in making the decision.

[S 35A insrt Act 50 of 2014, s 21]

35B Withdrawing from adjudication

An adjudication application is taken to have been withdrawn if—

(a) a claimant has served a notice of discontinuation on the adjudicator and respondent; or

(b) a respondent has paid the claimed amount the subject of the adjudication application to the claimant.

Note: Despite the withdrawal of an adjudication application an adjudicator is still entitled to be paid fees for considering the application—see section 35.

[S 35B insrt Act 50 of 2014, s 21]

PART 4 – ADMINISTRATION

DIVISION 1 – ESTABLISHING REGISTRY AND RELATED MATTERS

36 Registry established

(1) The Adjudication Registry (the ***registry***) is established.

(2) The registry consists of the Adjudication Registrar (the ***registrar***) and the staff of the registry.

37 Appointment of registrar and staff of registry

(1) A person is eligible for appointment as the registrar only if the person has particular knowledge and experience of—

(a) public administration; and

(b) something else of substantial relevance to the functions of the registrar.

(2) The registrar and other staff of the registry are to be appointed by the commission under this Act.

[Subs (2) am Act 38 of 2013, s 14 and Sch 1]

[S 37 am Act 38 of 2013]

38 Registrar's functions and powers

(1) Subject to the direction of the commissioner, the registrar is responsible for managing the registry and the administrative affairs of the registry.

[Subs (1) am Act 38 of 2013, s 14 and Sch 1]

(2) The registrar has the following functions—

(a) to refer adjudication applications to adjudicators;

(b) to keep a register, containing details of adjudicators, which may be kept in any form allowing it to be inspected as mentioned in paragraph (c);

(c) to ensure the register is available for inspection by an entity—

(i) without charge; or

(ii) if a regulation prescribes a fee for the inspection, on payment of the fee prescribed;

(d) to supply a certificate as to the correctness of a matter in the register to an entity paying any fee that may be prescribed under a regulation for the certificate;

(e) to keep records of decisions by adjudicators and to publish the decisions in a way approved by the commissioner;

(f) to keep account of fees paid or payable to the registrar;

(g) to collect statistical data and other information relevant to the administration of the registry for the commissioner's report to the Minister under section 41;

(h) any other functions given under this Act.

[Subs (2) am Act 50 of 2014, s 22; Act 38 of 2013, s 14 and Sch 1]

(3) The registrar has the powers reasonably necessary to perform the registrar's functions.

[S 38 am Act 50 of 2014; Act 38 of 2013]

39 Delegation by registrar

(1) The registrar may delegate the registrar's powers under this Act or another Act to an appropriately qualified member of the staff of the registry.

(2) [Repealed]

[Subs (2) rep Act 50 of 2014, s 23]

[S 39 am Act 50 of 2014]

40 Acting registrar [Repealed]

[S 40 rep Act 50 of 2014, s 24; am Act 38 of 2013]

41 Annual report on operation of Act and registry

(1) As soon as practicable after each financial year, but not later than 30 September, the commissioner must give the Minister a report containing—

(a) a review of the operation of this Act and the registry during the preceding financial year; and

(b) proposals for improving the operation of, and forecasts of the workload of, the registry in the present financial year.

[Subs (1) am Act 38 of 2013, s 14 and Sch 1]

(2) The report may be included in the commission's annual report.

[Subs (2) subst Act 50 of 2014, s 25]

(3) Unless the report is included in the commission's annual report, the Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving the report.

[Subs (3) insrt Act 50 of 2014, s 25]

(4) In this section—

annual report means an annual report prepared under the *Financial Accountability Act 2009*, section 63.

[Subs (4) insrt Act 50 of 2014, s 25]

[S 41 am Act 50 of 2014; Act 38 of 2013]

DIVISION 2 – REGISTRATION OF AUTHORISED NOMINATING AUTHORITIES

[Div 2, ss 42–55, rep Act 50 of 2014, s 26]

42 Application for registration [Repealed]

[S 42 rep Act 50 of 2014, s 26]

43 What the application must state [Repealed]

[S 43 rep Act 50 of 2014, s 26]

44 Consideration of application for registration [Repealed]

[S 44 rep Act 50 of 2014, s 26]

45 Criteria for granting application for registration [Repealed]

[S 45 rep Act 50 of 2014, s 26]

46 Suitability of person to be registered [Repealed]

[S 46 rep Act 50 of 2014, s 26]

47 Inquiries into application for registration [Repealed]

[S 47 rep Act 50 of 2014, s 26]

48 Decision on application for registration [Repealed]

[S 48 rep Act 50 of 2014, s 26]

49 Failure to decide application for registration [Repealed]

[S 49 rep Act 50 of 2014, s 26]

50 Term of registration [Repealed]

[S 50 rep Act 50 of 2014, s 26]

51 Conditions of registration [Repealed]

[S 51 rep Act 50 of 2014, s 26]

52 Registration required to perform functions of authorised nominating authority [Repealed]

[S 52 rep Act 50 of 2014, s 26]

53 Authorised nominating authority must ensure adjudicators are registered [Repealed]

[S 53 rep Act 50 of 2014, s 26]

54 Authorised nominating authority must comply with registration conditions [Repealed]

[S 54 rep Act 50 of 2014, s 26]

55 Form of certificate of registration [Repealed]

[S 55 rep Act 50 of 2014, s 26]

DIVISION 3 – REGISTRATION OF ADJUDICATORS

56 Application for registration

(1) An individual may apply to the registrar for registration as an adjudicator.

(2) The application must—

(a) be in the approved form; and

(b) be signed by or for the applicant; and

(c) be accompanied by the fee prescribed under a regulation for the application.

[**Cross-reference:** *Building and Construction Industry Payments Regulation 2004*: s 4 and Sch 2 prescribe a $743.80 fee for application for registration as an adjudicator under s 56(2)(c).]

57 What the application must state

The application must state the following—

(a) the name and address of the applicant;

(b) an address in Queensland for service of documents;

(c) the experience and qualifications of the applicant, relevant to deciding adjudication applications;

(d) other details, required in the approved form for the application, to enable the registrar to decide whether the applicant is a suitable person to be registered as an adjudicator.

58 Consideration of application for registration

The registrar must consider the application and either grant, or refuse to grant, the application.

59 Criteria for granting application for registration

The registrar may grant the application only if the registrar is satisfied the applicant is a suitable person to be registered as an adjudicator.

60 Suitability of person to be registered

(1) A person is not a suitable person to be registered as an adjudicator unless the person holds—

(a) an adjudication qualification; or

(b) another qualification that the registrar considers to be equivalent to an adjudication qualification.

(2) In deciding whether an applicant is a suitable person to be registered, the registrar may have regard to the following matters—

(a) whether the person has a conviction for a relevant offence, other than a spent conviction;

(b) whether the person—

(i) held a registration under this division, or a licence or registration under a corresponding law, that was suspended or cancelled; or

(ii) has been refused registration under this division or a licence or registration under a corresponding law;

(c) the experience and qualifications of the person;

(d) the matters stated in the application for registration under section 57;

(e) anything else relevant to the person's ability to carry out the person's functions as an adjudicator.

61 Inquiries into application for registration

(1) Before deciding the application, the registrar—

(a) may make inquiries to decide the suitability of the applicant to be registered; and

(b) may, by notice given to the applicant, require the applicant to give the registrar within the reasonable time of at least 28 days stated in the notice, further information or a document the registrar reasonably requires to decide the application.

(2) The applicant is taken to have withdrawn the application if, within the stated time, the applicant does not comply with a requirement under subsection (1)(b).

(3) A notice under subsection (1)(b) must be given to the applicant within 28 days after the registrar receives the application.

(4) The information or document under subsection (1)(b) must, if the notice requires, be verified by a statutory declaration.

62 Decision on application for registration

(1) If the registrar decides to grant the application, the registrar must issue a certificate of registration to the applicant.

(2) If the registrar decides to impose conditions on the registration, the registrar must immediately give the applicant an information notice for the decision.

(3) If the registrar decides to refuse to grant the application, the registrar must immediately give the applicant an information notice for the decision.

63 Failure to decide application for registration

(1) Subject to subsections (2) and (3), if the registrar fails to decide the application within 28 days after its receipt, the failure is taken to be a decision by the registrar to refuse to grant the application.

(2) Subsection (3) applies if—

(a) a person has made an application for registration; and

(b) the registrar has under section 61(1)(b), required the applicant to give the registrar further information or a document.

(3) The registrar is taken to have refused to grant the application if the registrar does not decide the application within 28 days after the registrar receives the further information or document.

(4) If the application is refused under this section, the applicant is entitled to be given an information notice for the decision by the registrar.

64 Term of registration

(1) A registration becomes effective on the day the certificate of registration is issued or on the day of the registration's renewal and ends either—

(a) 3 years after that day; or

(b) on the earlier day stated in the certificate of registration.

(2) The earlier day may be decided by the registrar.

65 Conditions of registration

(1) A registration is subject to the following conditions—

(a) the adjudicator must comply with this Act;

(b) other reasonable conditions the registrar considers appropriate to give effect to this Act and that are stated in the certificate of registration or in an information notice given under subsection (3).

(2) Conditions may be imposed under subsection (1)(b)—

(a) when registration first happens or is renewed or amended; or

(b) at another time if the registrar considers this is necessary to ensure that an adjudicator effectively performs the adjudicator's functions under this Act.

(3) If the registrar decides to impose conditions on the registration under subsection (2)(b)—

(a) the registrar must immediately give the adjudicator an information notice for the decision; and

(b) the conditions take effect when the information notice is received by the adjudicator or the later day stated in the notice.

66 Registration required to perform functions of adjudicator

A person must not accept or decide an adjudication application unless the person is an adjudicator.
Maximum penalty—500 penalty units.

67 Adjudicator must comply with registration conditions

(1) An adjudicator must not contravene a condition of the registration.
Maximum penalty—200 penalty units.

(2) The penalty under subsection (1) may be imposed whether or not the registration is suspended or cancelled because of the contravention.

68 Form of certificate of registration

A certificate of registration must state the following particulars—

(a) the adjudicator's name;

[Para (a) am Act 50 of 2014, s 27]

(b) the day the registration becomes effective;

(c) the day the registration expires;

(d) the registration number;

(e) the registration conditions.

[S 68 am Act 50 of 2014]

DIVISION 4 – RENEWALS OF REGISTRATIONS OF ADJUDICATORS

[Div 4 heading am Act 50 of 2014, s 28]

69 Definitions for div 4

In this division—

registrant means an adjudicator applying for a renewal of registration as an adjudicator.

[Def subst Act 50 of 2014, s 29(1)]

registration means renewal of registration as an adjudicator.

[Def subst Act 50 of 2014, s 29(2)]

[S 69 am Act 50 of 2014]

70 Applications for renewal of registration

(1) A registrant may apply to the registrar for the renewal of the registration.

(2) The application must be made at least 1 month before the registration ends and must—

(a) be in the approved form; and

(b) be signed by or for the applicant; and

(c) be accompanied by the fee prescribed under a regulation for the application.

(3) The registrar must consider the application and renew, or refuse to renew, the registration.

(4) In deciding whether to grant the application, the registrar may have regard to the matters to which the registrar may have regard in deciding whether an applicant for registration is a suitable person to be registered.

(5) If the registrar decides to refuse to renew the registration, the registrar must immediately give the registrant an information notice for the decision.

(6) If the registrar decides to impose conditions on the registration, the registrar must immediately give the registrant an information notice for the decision.

(7) A registration may be renewed by—

(a) endorsing the existing certificate of registration; or

(b) cancelling the existing certificate and issuing another certificate.

[**Cross-reference:** *Building and Construction Industry Payments Regulation 2004*: s 4 and Sch 2 prescribe a $743.80 fee for renewal of registration as an adjudicator under s 70(2)(c).]

71 Inquiries into application for renewal of registration

(1) Before deciding the application, the registrar may, by notice given to the registrant, require the registrant to give the registrar, within a reasonable period of at least 28 days stated in the notice, further information or a document the registrar reasonably requires to decide the application.

(2) The registrant is taken to have withdrawn the application if, within the stated period, the registrant does not comply with the requirement.

72 Registration taken to be in force while application for renewal is considered

(1) If an application is made under section 70, the registrant's registration is taken to continue in force from the day that it would, apart from this section, have ended until the application is decided under section 70 or taken to have been withdrawn under section 71(2).

(2) However, if the application is refused, the registration continues in force until the information notice for the decision is given to the registrant.

(3) Subsection (1) does not apply if the registration is earlier suspended or cancelled.

DIVISION 5 – AMENDMENT OF REGISTRATIONS OF ADJUDICATORS

[Div 5 heading am Act 50 of 2014, s 30]

73 Definitions for div 5

In this division—

registrant means an adjudicator applying for amendment of a registration as an adjudicator.

[Def subst Act 50 of 2014, s 31(1)]

registration means an amendment of a registration as an adjudicator.

[Def subst Act 50 of 2014, s 31(2)]

[S 73 am Act 50 of 2014]

74 Application for amendment of registration

(1) A registrant may apply to the registrar for an amendment of the registration including any conditions imposed by the registrar.

(2) The application must—

(a) be in the approved form; and

(b) be signed by or for the applicant; and

(c) be accompanied by the fee prescribed under a regulation for the application.

(3) The registrar must consider the application and amend, or refuse to amend, the registration.

(4) If the registrar decides to refuse to amend the registration, the registrar must immediately give the registrant an information notice for the decision.

(5) If the registrar decides to impose a condition on the amended registration, the registrar must immediately give the registrant an information notice for the decision.

(6) A registration may be amended by—

(a) endorsing the existing registration with details of the amendment; or

(b) cancelling the existing registration and issuing another registration containing the amendment.

75 Inquiries into application for amendment

(1) Before deciding the application, the registrar may, by notice given to the registrant, require the registrant to give the registrar, within a reasonable period of at least 28 days stated in the notice, further information or a document the registrar reasonably requires to decide the application.

(2) The registrant is taken to have withdrawn the application if, within the stated period, the registrant does not comply with the requirement.

DIVISION 6 – SUSPENSION OR CANCELLATION OF REGISTRATIONS OF ADJUDICATORS

[Div 6 heading am Act 50 of 2014, s 32]

76 Definitions for div 6

In this division—

registrant means a person registered as an adjudicator.

[Def subst Act 50 of 2014, s 33(1)]

registration means registration as an adjudicator.

[Def subst Act 50 of 2014, s 33(2)]

[S 76 am Act 50 of 2014]

77 Grounds for suspension or cancellation

(1) Each of the following is a ground for suspending or cancelling a registration—

(a) the registrant is not, or is no longer, a suitable person to hold the registration;

(b) the registrant has contravened a condition of the registration;

(c) the registration was issued because of a materially false or misleading representation or declaration.

(2) For forming a belief that the ground mentioned in subsection (1)(a) exists, the registrar may have regard to the matters to which the registrar may have regard in deciding whether a proposed registrant is a suitable person to hold the registration.

Editor's note:

See sections 46 and 60 (Suitability of person to be registered).

78 Show cause notice

(1) This section applies if the registrar believes a ground exists to suspend or cancel a registration.

(2) The registrar must give the registrant a notice under this section (a ***show cause notice***).

(3) The show cause notice must state—

(a) the action (the ***proposed action***) the registrar proposes taking under this division; and

(b) the grounds for the proposed action; and

(c) an outline of the facts and circumstances forming the basis for the grounds; and

(d) if the proposed action is suspension of the registration—the proposed suspension period; and

(e) an invitation to the registrant to show within a stated period (the ***show cause period***) why the proposed action should not be taken.

(4) The show cause period must be a period ending at least 21 days after the show cause notice is given to the registrant.

79 Representations about show cause notices

(1) The registrant may make written representations about the show cause notice to the registrar in the show cause period.

(2) The registrar must consider all representations (the ***accepted representations***) made under subsection (1).

80 Ending show cause process without further action

(1) This section applies if, after considering the accepted representations for the show cause notice, the registrar no longer believes a ground exists to suspend or cancel the registration.

(2) The registrar must not take any further action about the show cause notice.

(3) The registrar must give the registrant a notice that no further action is to be taken about the show cause notice.

81 Suspension or cancellation

(1) This section applies if—

(a) there are accepted representations for the show cause notice and, after considering them, the registrar still believes a ground exists to suspend or cancel the registration; or

(b) there are no accepted representations.

(2) If the registrar believes suspension or cancellation of the registration is warranted, the registrar may—

(a) if the proposed action stated in the show cause notice was to suspend the registration for a stated period—suspend the registration for not longer than the stated period; or

(b) if the proposed action stated in the show cause notice was to cancel the registration—either cancel the registration or suspend it for a period.

(3) The registrar must immediately give an information notice for the decision to the registrant.

(4) The decision takes effect on the later of the following days—

(a) the day the information notice is given to the registrant;

(b) the day stated in the information notice for that purpose.

82 Immediate suspension of registration

(1) The registrar may suspend a registration immediately if the registrar believes—

(a) a ground exists to suspend or cancel the registration; and

(b) it is necessary to suspend the registration immediately because there is an immediate and serious harm to the effectiveness of the adjudication of payment claims under this Act.

(2) The suspension—

(a) must be effected by an information notice for the decision given by the registrar to the registrant to suspend the registrant's registration together with a show cause notice; and

(b) operates immediately the notices are given; and

(c) continues to operate until the earliest of the following happens—

(i) the registrar cancels the remaining period of the suspension;

(ii) the show cause notice is finally dealt with;

(iii) 28 days have passed since the notices were given to the registrant.

(3) Subsection (4) applies if—

(a) a suspension under this section stops because—

(i) the registrar cancels the remaining period of the suspension; or

(ii) the show cause notice is finally dealt with by a decision being made not to cancel or suspend the registration; or

(iii) 28 days have passed since the notices mentioned in subsection (2)(a) were given to the registrant; and

(b) the registrant has returned the certificate of registration to the registrar under section 83.

(4) The registrar must, as soon as practicable, give the certificate of registration to the registrant.

83 Return of cancelled or suspended registration to registrar

(1) This section applies if the registrar has cancelled or suspended a registration and given an information notice for the decision to the registrant.

(2) The registrant must return the certificate of registration to the registrar within 7 days after receiving the information notice, unless the registrant has a reasonable excuse. Maximum penalty for subsection (2)—20 penalty units.

84 Effect of suspension or cancellation of registration of adjudicator

(1) This section applies if—

(a) the registration of an adjudicator is suspended or cancelled or otherwise ends; and

(b) an adjudication application has been made to the registrar, or referred to the adjudicator, for an adjudication of a payment claim; and

(c) an adjudicator has not made a decision under section 26 in relation to the adjudication application.

[Subs (1) am Act 50 of 2014, s 34(2) and (3)]

(2) The adjudication application is taken to have been withdrawn by the claimant under section 32(2)(a) and the claimant may make a new adjudication application under section 21.

(3) Despite section 21(3)(c), a new adjudication application may be made at any time within 5 business days after the claimant becomes aware the registration has ended.

(4) Part 3, division 2, applies to a new application mentioned in this section in the same way as it applies to an application under section 21.

(5) The adjudicator is not entitled to any fees or expenses in relation to the adjudication application taken to have been withdrawn under this section.

[Subs (5) subst Act 50 of 2014, s 34(4)]

[S 84 am Act 50 of 2014, s 34(1)]

85 Issue of adjudication certificate by registrar [Repealed]

[S 85 rep Act 50 of 2014, s 34A]

DIVISION 7 – OTHER PROVISIONS ABOUT REGISTRATIONS OF ADJUDICATORS

[Div 7 heading am Act 50 of 2014, s 35]

86 Definitions for div 7

In this division—

registrant means a person registered as an adjudicator.

[Def subst Act 50 of 2014, s 36(1)]

registration means registration as an adjudicator.

[Def subst Act 50 of 2014, s 36(2)]

[S 86 am Act 50 of 2014]

87 Surrender of registration

(1) A registrant may surrender the registrant's registration by notice given to the registrar.

(2) The registrant's certificate of registration must accompany the notice.

(3) The surrender takes effect on the later of the following—

(a) the day the notice is given;

(b) the day specified in the notice.

88 Application for replacement of certificate of registration

(1) A registrant may apply for replacement of the registrant's certificate of registration if the certificate has been damaged, destroyed, lost or stolen.

(2) The application must—

(a) be made to the registrar; and

(b) include information about the circumstances in which the certificate was damaged, destroyed, lost or stolen; and

(c) be accompanied by the fee prescribed under a regulation for the application.

89 Decision about application for replacement of certificate of registration

(1) The registrar must consider the application and either grant, or refuse to grant, the application.

(2) The registrar must grant the application if the registrar is satisfied the certificate of registration has been destroyed, lost or stolen, or damaged in a way to require its replacement.

(3) If the registrar decides to grant the application, the registrar must, as soon as practicable, issue another certificate of registration to the applicant to replace the damaged, destroyed, lost or stolen certificate.

(4) If the registrar decides to refuse to grant the application, the registrar must immediately give the applicant an information notice for the decision.

90 False or misleading statements

A person must not, for an application made under this part, state anything to the registrar the person knows is false or misleading in a material particular.
Maximum penalty—50 penalty units.

91 False or misleading documents

(1) A person must not, for an application made under this part, give a document to the registrar containing information the person knows is false or misleading in a material particular.
Maximum penalty—50 penalty units.

(2) Subsection (1) does not apply to a person if the person, when giving the document—

(a) tells the registrar, to the best of the person's ability, how it is false or misleading; and

(b) if the person has, or can reasonably obtain, the correct information—gives the correct information to the registrar.

PART 5 – REVIEW OF DECISIONS

DIVISION 1 – INTERNAL REVIEW OF DECISIONS

92 Review process starts with internal review

(1) Subject to this division, a person who is given, or is entitled to be given, an information notice for a decision under part 4 (the ***original decision***) may apply for a review of the decision under this part.

(2) The review must be, in the first instance, by way of an application for internal review under section 93.

93 Application for review to be made to the registrar

The person may apply to the registrar for a review of the original decision.

94 Applying for review

(1) The application must be made within 28 days after—

(a) if the person is given an information notice for the decision—the day the person is given the information notice; or

(b) if paragraph (a) does not apply—the day the person otherwise becomes aware of the decision.

(2) The registrar may, at any time, extend the time for applying for the review.

(3) The application must be in writing and state fully the grounds of the application.

95 Review decision

(1) After reviewing the original decision, the registrar must make a further decision (the ***review decision***) to—

(a) confirm the original decision; or

(b) amend the original decision; or

(c) substitute another decision for the original decision.

(2) The registrar must immediately give the applicant notice of the review decision (the ***review notice***).

(3) If the review decision is not the decision sought by the applicant, the review notice must comply with the QCAT Act, section 157(2).

[Subs (3) subst Act 24 of 2009, s 1648]

(4) If the registrar does not give the notice within 28 days after the application is made, the registrar is taken to have made a review decision confirming the original decision on the 28th day after the application is made.

(5) If the review decision confirms the original decision, for the purpose of an application to the tribunal for a review, the original decision is taken to be the review decision.

(6) If the review decision amends the original decision, for the purpose of an application to the tribunal for a review, the original decision as amended is taken to be the review decision.

[S 95 am Act 24 of 2009]

96 Stay of operation of decision

(1) If an application is made for a review of an original decision, the applicant may immediately apply, as provided under the QCAT Act, for a stay of the decision to the tribunal.

[Subs (1) am Act 24 of 2009, s 1649]

(2) The tribunal may stay the decision to secure the effectiveness of the review and any later review by the tribunal.

(3) The stay—

(a) may be given on conditions the tribunal considers appropriate; and

(b) operates for the period fixed by the tribunal; and

(c) may be revoked or amended by the tribunal.

(4) The period of the stay must not extend past the time when the registrar makes a review decision about the original decision and any later period the tribunal allows the applicant to enable the applicant to apply to the tribunal for a review of the review decision.

(5) The application affects the decision, or carrying out of the decision, only if the decision is stayed.

[S 96 am Act 24 of 2009]

DIVISION 2 – EXTERNAL REVIEW OF DECISIONS

[Div 2 heading subst Act 24 of 2009, s 1650]

97 Who may apply to tribunal for an external review

A person who has applied for the review of an original decision under division 1 and is dissatisfied with the review decision may apply, as provided under the QCAT Act, to the tribunal for a review of the review decision.

[S 97 am Act 24 of 2009, s 1651(1) and (2)]

98 Stay of operation of decision [Repealed]

[S 98 rep Act 24 of 2009, s 1652]

PART 6 – MISCELLANEOUS

99 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract, agreement or arrangement.

(2) A provision of any contract, agreement or arrangement (whether in writing or not) is void to the extent to which it—

(a) is contrary to this Act; or

(b) purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of this Act; or

(c) may reasonably be construed as an attempt to deter a person from taking action under this Act.

100 Effect of pt 3 on civil proceedings

(1) Subject to section 99, nothing in part 3 affects any right that a party to a construction contract—

(a) may have under the contract; or

(b) may have under part 2 in relation to the contract; or

(c) may have apart from this Act in relation to anything done or omitted to be done under the contract.

(2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—

(a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and

(b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.

(4) If, in any proceedings before a court in relation to any matter arising under a construction contract, the court finds that only a part of an adjudicator's decision under part 3 is affected by jurisdictional error, the court may—

(a) identify the part affected by the error; and

(b) allow the part of the decision not affected by the error to remain binding on the parties to the proceeding.

[Subs (4) insrt Act 50 of 2014, s 37]

[S 100 am Act 50 of 2014]

101 Queensland Building and Construction Board's policy

(1) The Queensland Building and Construction Board may make a policy governing the administration of this Act.

(2) The policy does not take effect until approved by regulation.

(3) Section 19(4) of the *Queensland Building and Construction Commission Act 1991* applies for a policy made under this section as if the policy were made under section 19 of that Act.

(4) In this section—

Queensland Building and Construction Board means the Queensland Building and Construction Board established under the *Queensland Building and Construction Commission Act 1991*, section 10.

[S 101 subst Act 50 of 2014, s 38
Cross-reference: *Building and Construction Industry Payments Regulation 2004*: s 2A and Sch 1 specify the Queensland Building and Construction Board's policies approved for the purposes of s 101(2).]

102 Adjudicator must give information to registrar

An adjudicator must, at the times specified by the registrar, give the registrar—

(a) a copy of the adjudicator's decisions; and

(b) the other information required in the approved form.

[S 102 subst Act 50 of 2014, s 39]

103 Service of notices

(1) A notice or other document that under this Act is authorised or required to be served on a person may be served on the person in the way, if any, provided under the construction contract concerned.

(2) Subsection (1) is in addition to, and does not limit or exclude, the *Acts Interpretation Act 1954*, section 39 or the provisions of any other law about the service of notices.

104 Proof of signature unnecessary

A signature purporting to be the signature of the registrar is evidence of the signature it purports to be.

105 Evidentiary aids

(1) A certificate signed by the registrar certifying anything about the contents of the register is evidence of the thing stated.

(2) A certificate signed by the registrar stating any of the following is evidence of the matters stated—

(a) that an individual was or was not at a time or during a period, or is or is not, an adjudicator;

(b) that a stated document is a record or document, a copy of a record or document, or an extract from a record or document, kept under this Act.

[Subs (2) am Act 50 of 2014, s 40]

[S 105 am Act 50 of 2014]

106 Protection from liability

(1) An official does not incur civil liability for an act done, or omission made, honestly and without negligence under this Act.

(2) If subsection (1) prevents a civil liability attaching to an official, the liability attaches instead to the State.

(3) In this section—

official means—

(a) the commissioner; or

(b) the registrar; or

(c) a member of the staff of the registry.

[Def am Act 38 of 2013, s 14 and Sch 1]

[S 106 am Act 38 of 2013]

107 Protection from liability for adjudicators

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith—

(a) in performing the adjudicator's functions under this Act; or

(b) in the reasonable belief that the thing was done or omitted to be done in the performance of the adjudicator's functions under this Act.

(2) [Repealed]

[Subs (2) rep Act 50 of 2014, s 41(2)]

[S 107 am Act 50 of 2014, s 41(1)]

108 Summary offences

(1) A proceeding for an offence against this Act is to be taken in a summary way under the *Justices Act 1886*.

(2) The proceedings must start—

(a) within 1 year after the commission of the offence; or

(b) within 6 months after the offence comes to the complainant's knowledge, but within 2 years after the commission of the offence.

109 Allegations of false or misleading information or document

In any proceeding for an offence against this Act defined as involving false or misleading information, or a false or misleading document, it is enough for a charge to state that the information or document was, without specifying which, "false or misleading".

110 Approved forms

The commissioner may approve forms for use under this Act.

[S 110 am Act 38 of 2013, s 14 and Sch 1]

111 Regulation-making power

(1) The Governor in Council may make regulations under this Act.

(2) A regulation may—

(a) provide for fees; and

(b) for an adjudication qualification, prescribe the following—

(i) the name of the qualification;

(ii) the bodies that may issue the qualification;

(iii) the name of the adjudication competency to be achieved to gain the qualification;

(iv) the elements that must be successfully completed to achieve the competency; and

(c) prescribe procedures for—

(i) the lodgement of adjudication applications with the registrar, including the last time during a day that applications may be lodged; and

(ii) the processing of adjudication applications by the registrar.

[Subs (2) am Act 50 of 2014, s 41A]

[S 111 am Act 50 of 2014

Cross-reference: *Building and Construction Industry Payments Regulation 2004*:

- s 3 and Sch 1A prescribe details of an adjudication qualification under s 111(2)(b);
- s 3A states that an adjudication application must be lodged between 8 am–5 pm on a business day for the purposes of s 111(2)(c)(i); and
- s 5 sets out transitional arrangements for current adjudication qualifications after the repeal of s 3 and Sch 1.]

PART 7 – TRANSITIONAL PROVISIONS

[Pt 7 heading subst Act 50 of 2014, s 42]

DIVISION 1 – TRANSITIONAL PROVISION FOR ACT NO. 6 OF 2004

112 Transitional provision for adjudication qualification

(1) This section applies if, at the commencement, the matters mentioned in section 111(2)(b) have not been prescribed for an adjudication qualification.

(2) Section 60(1) does not apply to a person applying for registration as an adjudicator if the application is received after the commencement and before the prescription of the matters mentioned in subsection (1).

(3) If the application is granted, it is a condition of the registration that the adjudicator must obtain an adjudication qualification within 3 months of the prescription of the matters mentioned in subsection (1).

(4) In this section—

commencement means the commencement of section 60

Editor's note:

Section 60 commenced 1 July 2004 (see 2004 SL No 91).

DIVISION 2 – TRANSITIONAL PROVISIONS FOR BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS AMENDMENT ACT 2014

[Div 2 insrt Act 50 of 2014, s 44 (am Act 65 of 2014)]

113 Definitions for div 2

In this division—

amendment Act means the *Building and Construction Industry Payments Amendment Act 2014*.

former, in relation to a provision, means the provision as in force immediately before the amendment of the provision under the amendment Act.

unamended Act means this Act as in force immediately before the commencement.

[S 113 reinsrt Act 50 of 2014, s 44 (am Act 65 of 2014); om Act 27 of 1992, ss 7(1)(k) and s 40, Reprint 1B]

114 Registration of authorised nominating authorities

(1) The registration of an authorised nominating authority ends.

(2) The registrar must refund the amount of the authorised nominating authority's registration fee that, on the ending of an authorised nominating authority's registration, is proportional to the unexpired period of the registration in whole months.

(3) An application for registration or application for renewal of registration made, but not decided, before the commencement is taken to be withdrawn.

(4) The registrar must refund to the authorised nominating authority the amount of the application fee for registration or for renewing his or her registration.

(5) In this section—

application for registration means an application for registration as an authorised nominating authority under repealed section 42.

application for renewal of registration means an application for renewal of a registration as an authorised nominating authority under former section 70.

[S 114 insrt Act 50 of 2014, s 44 (am Act 65 of 2014)]

115 Adjudication applications made to authorised nominating authorities for referral to adjudicators

(1) This section applies to an adjudication application made to an authorised nominating authority, but not yet referred to an adjudicator, under former section 21 before the commencement.

(2) The authorised nominating authority must refer the application, as soon as practicable, to a person eligible to be an adjudicator under section 22.

Note: Section 116 would apply in relation to the payment claim to which the adjudication application relates, including in relation to the adjudication of the payment claim.

(3) Former section 107(2) continues for the purpose of referring the adjudication application under subsection (2) despite the repeal of that section under the amendment Act.

(4) An adjudication application referred to an adjudicator under subsection (2) is taken to have been referred by the registrar.

[S 115 insrt Act 50 of 2014, s 44 (am Act 65 of 2014)]

116 Outstanding matters for existing payment claims to be dealt with under transitional version of the Act

(1) This section applies if a payment claim was served on a respondent before the commencement.

(2) From the commencement, the transitional version of the Act applies to any outstanding matters under this Act relating to the payment claim, including, for example, the following—

(a) replying to the payment claim by serving a payment schedule on the claimant;

(b) the consequences of not paying any or all of the claimed amount for the progress payment to which the payment claim relates;

(c) making an adjudication application for adjudication of the payment claim;

(d) the adjudication of the payment claim, including—

(i) the giving of an adjudication response;

(ii) the adjudication procedures;

(iii) the adjudicator's decision;

(iv) correcting a clerical mistake in an adjudicator's decision;

(v) the consequences of not paying the claimant the adjudicated amount;

(vi) the filing of an adjudication certificate as a judgement debt;

(vii) an adjudicator's entitlement to be paid for adjudicating the payment claim;

(e) the claimant suspending work under the construction contract relevant to the payment claim.

(3) However, a matter mentioned in subsection (2)(c) may be subject to section 115 and subsection (2) does not release an authorised nominating authority of its obligation under that section.

(4) To remove any doubt, it is declared that this section does not apply if—

(a) a payment claim was served on a respondent before the commencement and there are, at the commencement, no outstanding matters under this Act relating to the payment claim; or

(b) a payment claim is served on a respondent after the commencement and includes an amount that has been the subject of a payment claim that was served on a respondent before the commencement.

(5) In this section—

transitional version of the Act means the unamended Act as amended by the following amendments of the amendment Act—

(a) the amendment of the following sections to the extent a reference to the authorised nominating authority in the sections is replaced with a reference to the registrar—

(i) section 4(4)(d)(ii);

(ii) section 21(6);

(iii) section 23(1);

(iv) section 30(1)(a), (4) and (6);

(v) section 32(2)(a);

Example of the effect of paragraph (a)—

Claimants may ask the registrar for an adjudication certificate.

(b) the amendment of section 21(3)(a), (b) and (e);

Examples of the effect of paragraph (b)—

1 Adjudication applications are to be made to the registrar in the approved form.

2 Adjudication applications are to be accompanied by the fee prescribed by regulation for the application.

(c) the insertion of new section 35B;

(d) the amendment of section 84;

(e) the amendment of section 100;

(f) the replacement of section 101;

(g) the amendment of section 111(2);

(h) the amendment of the definition ***business day***, as defined in schedule 2.

outstanding matter, under this Act, includes a matter under this Act that has yet to be started or is incomplete.

[S 116 insrt Act 50 of 2014, s 44 (am Act 65 of 2014)]

117 New payment claims for existing contracts transitioned to new time requirements [Expired]

[S 117 exp Act 6 of 2004, s 117(3), with effect from 15 Jun 2015; insrt Act 50 of 2014, s 44 (am Act 65 of 2014)]

118 Previously expired payment claims not revived by new section 17A

To remove any doubt, it is declared that a claimant can not rely on section 17A(3)(b) to serve a payment claim if, before the commencement, the claimant failed to serve the claim on a respondent within the time required under former section 17(4).

[S 118 insrt Act 50 of 2014, s 44 (am Act 65 of 2014)]

119 Transitional regulation-making power [Expired]

[S 119 exp Act 6 of 2004, s 119(3), with effect from 15 Dec 2015; insrt Act 50 of 2014, s 44 (am Act 65 of 2014)]

120 Mandatory training about adjudication changes [Expired]

[S 120 exp Act 6 of 2004, s 120(2), with effect from 15 Jun 2015; insrt Act 50 of 2014, s 44 (am Act 65 of 2014)]

SCHEDULE 1 – AMENDMENTS OF ACTS [REPEALED]

[Sch 1 om Act 27 of 1992, s 40, Reprint 1B; am Act 33 of 2005]

SCHEDULE 2 – DICTIONARY

(section 9)

accepted representations see section 79(2).

adjudicated amount see section 26(1).

adjudication application see section 21(1).

adjudication certificate means a certificate provided by the registrar under this Act.

[Def subst Act 50 of 2014, s 45(1) and (2)]

adjudication fees means fees or expenses charged by an adjudicator under this Act.

[Def subst Act 50 of 2014, s 45(1) and (2)]

adjudication qualification means a certificate issued by a body prescribed under a regulation to an individual stating that the individual has achieved an adjudication competency standard prescribed under a regulation.

adjudication response see section 24(2).

[Def am Act 50 of 2014, s 45(3)]

adjudicator—

(a) in relation to an adjudication application—means an adjudicator appointed under this Act to decide the application; and

(b) otherwise—means an individual registered under part 4, division 3 as an adjudicator.

approved form means a form approved by the commissioner under section 110.

[Def am Act 38 of 2013, s 14 and Sch 1]

authorised nominating authority [Repealed]

[Def rep Act 50 of 2014, s 45(1)]

authority [Repealed]

[Def rep Act 38 of 2013, s 14 and Sch 1]

business day does not include—

(a) a Saturday or Sunday; or

(b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done; or

(c) any day occurring within any of the following periods—

(i) 22 to 24 December;

(ii) 27 to 31 December;

(iii) 2 to 10 January.

[Def subst Act 50 of 2014, s 45(1) and (2); am Act 39 of 2013, s 111 and Sch 4]

carry out construction work means—

(a) carry out construction work personally; or

(a) directly or indirectly, cause construction work to be carried out; or

(c) provide advisory, administrative, management or supervisory services for carrying out construction work.

claimant see section 17(1).

claimant's reply, for an adjudication application, see section 24B(2).

[Def insrt Act 50 of 2014, s 45(2)]

claimed amount see section 17(2).

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commission means the Queensland Building and Construction Commission established under the *Queensland Building and Construction Commission Act 1991*, section 5.

[Def insrt Act 38 of 2013, s 14 and Sch 1]

commissioner means the commissioner appointed under the *Queensland Building and Construction Commission Act 1991*, section 20D.

[Def insrt Act 38 of 2013, s 14 and Sch 1]

complex payment claim means a payment claim for an amount more than $750,000 (exclusive of GST) or, if a greater amount is prescribed by regulation, the amount prescribed.

[Def insrt Act 50 of 2014, s 45(2)]

construction contract means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.

construction work see section 10.

conviction means a finding of guilt, or the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded.

corresponding law means a law applying, or that applied, in another State, the Commonwealth or a foreign country that provides, or provided, for the same matter as this Act or a provision of this Act.

domestic building work see the *Queensland Building and Construction Commission Act 1991*, schedule 1B, section 4.

[Def subst Act 57 of 2014, s 80 and Sch 1 item 2]

due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 15.

function includes a power.

general manager [Repealed]

[Def rep Act 38 of 2013, s 14 and Sch 1]

home see the *Queensland Building and Construction Commission Act 1991*, schedule 1B, section 9.

[Def insrt Act 57 of 2014, s 80 and Sch 1 item 2]

information notice, for a decision of the registrar under part 5, is a notice stating—

(a) the decision; and

(b) the reasons for the decision; and

(c) that the person to whom the notice is given may have the decision reviewed within 28 days; and

(d) how the person may have the decision reviewed; and

(e) if the decision is that a licence be cancelled or suspended—a direction to the person to return the licence to the registrar within 7 days after receiving the notice.

notice means written notice.

original decision see section 92(1).

payment claim means a claim referred to in section 17.

payment schedule means a schedule referred to in section 18.

perform a function includes exercise a power.

progress payment means a payment to which a person is entitled under section 12, and includes, without affecting any entitlement under the section—

(a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or

(b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or

(c) a payment that is based on an event or date, known in the building and construction industry as a "milestone payment".

proposed action see section 78(3)(a).

recognised financial institution means a bank, or other financial institution prescribed under a regulation.

reference date, under a construction contract, means—

(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or

(b) if the contract does not provide for the matter—

(i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and

(ii) the last day of each later named month.

registrant—

(a) for part 4, division 4, see section 69; or

(b) for part 4, division 5, see section 73; or

(c) for part 4, division 6, see section 76; or

(d) for part 4, division 7, see section 86.

registrar see section 36(2).

registration—

(a) for part 4, division 4, see section 69; or

(b) for part 4, division 5, see section 73; or

(c) for part 4, division 6, see section 76; or

(d) for part 4, division 7, see section 86.

registry see section 36(1).

related goods and services see section 11.

relevant offence means—

(a) an indictable offence, other than an indictable offence that is taken to be a simple offence under the *Criminal Code*, section 659; or

(b) an offence against this Act; or

(c) an offence against a corresponding law; or

(d) an offence against the *Queensland Building and Construction Commission Act 1991* or a law of another State or the Commonwealth that provides for the same matter as that Act or a provision of that Act; or

(e) an offence against the repealed *Domestic Building Contracts Act 2000* or a law of another State or the Commonwealth that provides for the same matter as that Act or a provision of that Act; or

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(f) an offence, relating to the provision of services as an adjudicator, against a law applying, or that applied, in the State, the Commonwealth, another State or a foreign country.

[Def am Act 57 of 2014, s 80 and Sch 1 item 3; Act 50 of 2014, s 45(4); Act 38 of 2013, s 14 and Sch 1]

respondent see section 17(1).

review decision see section 95(1).

review notice see section 95(2).

scheduled amount see section 18(2)(b).

show cause notice see section 78(2).

show cause period see section 78(3)(e).

spent conviction means a conviction—

(a) for which the rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act 1986* has expired under that Act; and

(b) that is not revived as prescribed by section 11 of that Act.

standard payment claim means a payment claim that is not a complex payment claim.

[Def insrt Act 50 of 2014, s 45(2)]

tribunal means QCAT.

[Def subst Act 24 of 2009, s 1653]

[Sch 2 am Act 57 of 2014; Act 50 of 2014; Act 39 of 2013; Act 38 of 2013; Act 24 of 2009]

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS REGULATION 2004 (QLD)

Note

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Payments Regulation 2004	**92 of 2004**	**25 Jun 2004**	**Ss 1** and 2: 25 Jun 2004; remainder: 1 Jul 2004

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Payments Amendment Regulation (No 1) 2004	203 of 2004		1 Oct 2004
Building and Construction Industry Payments Amendment Regulation (No 1) 2005	6 of 2005		S 3: 11 Feb 2005
Queensland Building Services Authority and Other Legislation Amendment Regulation (No 1) 2005	96 of 2005		S 4: 27 May 2005; s 5: 1 Jul 2005
Queensland Building Services and Other Legislation Amendment Regulation (No 1) 2006	93 of 2006		Pt 2: 1 Jul 2006
Queensland Building Services Authority and Other Legislation Amendment Regulation (No 1) 2007	94 of 2007		Pt 2: 1 Jul 2007
Queensland Building Services Authority and Other Legislation Amendment Regulation (No 1) 2008	140 of 2008		Pt 2: 1 Jul 2008
Queensland Building Services Authority and Other Legislation Amendment Regulation (No 1) 2009	70 of 2009		Pt 3: 1 Jul 2009
Queensland Building Services Authority and Other Legislation Amendment Regulation (No 2) 2009	243 of 2009		Pt 2: 6 Nov 2009

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Payments Regulation 2004	**92 of 2004**	**25 Jun 2004**	**Ss 1** and 2: 25 Jun 2004; remainder: 1 Jul 2004

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Queensland Building Services Authority and Other Legislation Amendment Regulation (No 1) 2010	96 of 2010		Pt 2: 1 Jul 2010
Queensland Building Services Authority and Other Legislation Amendment Regulation (No 1) 2011	100 of 2011		Pt 2: 1 Jul 2011
Housing and Public Works Legislation Amendment Regulation (No 1) 2012	97 of 2012		Pt 4: 6 Jul 2012
Housing and Public Works Legislation (Fees) Amendment Regulation (No 1) 2013	128 of 2013		Pt 4: 1 Jul 2013
Housing and Public Works Legislation (Fees) Amendment Regulation (No 1) 2014	121 of 2014		Pt 4: 1 Jul 2014
Building and Construction Industry Payments Amendment Regulation (No 1) 2014	311 of 2014		Ss 4–9: 15 Dec 2014
Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No 1) 2015	29 of 2015		Pt 2: 1 Jun 2015
Housing and Public Works Legislation (Fees) Amendment Regulation (No 1) 2015	64 of 2015		Pt 4: 1 Jul 2015
Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No 1) 2016	5 of 2016		Pt 3: 29 Jan 2016
Housing and Public Works Legislation (Fees) Amendment Regulation (No 1) 2016	98 of 2016		Pt 3: 1 Jul 2016

1 Short title

This regulation may be cited as the *Building and Construction Industry Payments Regulation 2004*.

2 Commencement

This regulation commences on 1 July 2004.

2A Approval of Queensland Building and Construction Board's policies—Act, s 101(2)

For section 101(2) of the Act, the policies stated in schedule 1 are approved.

[S 2A subst SL 29 of 2015, s 4; insrt SL 311 of 2014, s 4]

3 Adjudication qualification—Act, s 111(2)(b)

The following are prescribed for an adjudication qualification—

(a) the name of the qualification is Certificate in Adjudication;

(b) a body mentioned in schedule 1A, part 1 may issue the qualification;

(c) the name of the adjudication competency to be achieved is Building and Construction Industry Payments Adjudication;

(d) the elements that must be successfully completed are the elements mentioned in schedule 1A, part 2.

[S 3 reinsrt SL 5 of 2016, s 6; rep SL 311 of 2014, s 5; insrt SL 203 of 2004, s 6]

3A Lodgement of adjudication applications—Act, s 111(2)(c)(i)

(1) For section 111(2)(c)(i) of the Act, an adjudication application must be lodged between 8a.m. and 5p.m. on a business day.

(2) An application lodged after 5p.m. is taken to be lodged on the following business day.

[S 3A insrt SL 311 of 2014, s 6]

3B Mandatory transition training and cost of training—Act, s 120(1)

(1) For section 120(1) of the Act—

(a) the mandatory transition training is the "Mandatory Transitionary Training Course" approved by the commission and notified by the commission on the commission's website; and

(b) the cost of the training is $650.

Editor's note—

The commission's website is at http://www.qbcc.qld.gov.au.

(2) To remove any doubt, it is declared that an adjudicator who has completed the Mandatory Transitionary Training Course before the commencement of this section is taken to have complied with the condition imposed under section 120(1) of the Act.

[S 3B insrt SL 29 of 2015, s 5]

4 Fees

The fees payable under the Act are stated in schedule 2.

[Former s 3 renum SL 203 of 2004, s 5; am SL 203 of 2004, s 4]

5 Transitional provision for Building and Construction Industry Payments Amendment Regulation (No. 1) 2014

(1) Despite their repeal by the amending regulation, section 3 and schedule 1, as in force immediately before the commencement, continue to apply in relation to a current adjudication qualification.

(2) In this section—

amending regulation means the *Building and Construction Industry Payments Amendment Regulation (No. 1) 2014*.

current adjudication qualification means a certificate that—

(a) is held by an individual; and

(b) was issued to the individual before the commencement; and

(c) was, immediately before the commencement, an adjudication qualification.

[S 5 insrt SL 311 of 2014, s 7]

SCHEDULE 1 – APPROVED POLICIES

section 2A

1 Adjudicator Grading and Referral Policy 2015 made by the Queensland Building and Construction Board on 6 May 2015

2 Adjudicator Responsibilities Policy 2015 made by the Queensland Building and Construction Board on 6 May 2015

[Sch 1 reinsrt SL 29 of 2015, s 6; rep SL 311 of 2014, s 8; am SL 243 of 2009; SL 96 of 2005, s 4; SL 6 of 2005; insrt SL 203 of 2004, s 7]

SCHEDULE 1A – ADJUDICATION QUALIFICATION

section 3(b) and (d)

PART 1 – BODIES THAT MAY ISSUE CERTIFICATE IN ADJUDICATION

	Name of body
1	Contract Administration Group Pty Limited ACN 052 986 544

PART 2 – ELEMENTS FOR BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ADJUDICATION

	Element code	Name of element
1	BCIPA-01	Role and functions of an Adjudicator
2	BCIPA-02	Role and functions of the Adjudication Registry
3	BCIPA-03	Analysis of the *Building and Construction Industry Payments Act 2004*
4	BCIPA-04	Practical Aspects of Adjudication
5	BCIPA-05	Ethics, Natural Justice and Good Faith
6	BCIPA-06	Decision making and Decision writing
7	BCIPA-07	Legal concepts for Adjudicators
8	BCIPA-08	Technical concepts for Adjudicators
9	BCIPA-09	Assessment–Examination
10	BCIPA-10	Assessment 2–Assignment: Mock Adjudication Decision

[Sch 1A insrt SL 5 of 2016, s 7]

SCHEDULE 2 – FEES

section 4

			$
1	Adjudication application (Act, s 21(3)(e))—		
	(a)	if the claimed amount is $10,000 or less	53.55
	(b)	if the claimed amount is more than $10,000 but not more than $50,000	160.70
	(c)	if the claimed amount is more than $50,000 but not more than $100,000	267.80
	(d)	if the claimed amount is more than $100,000 but not more than $250,000	374.95
	(e)	if the claimed amount is more than $250,000 but not more than $500,000	482.05
	(f)	if the claimed amount is more than $500,000 but not more than $750,000	589.15
	(g)	if the claimed amount is more than $750,000 but not more than $1,000,000	696.30
	(h)	if the claimed amount is more than $1,000,000	0.07% of the claimed amount but not more than 5356.15
2	Application for registration as an adjudicator (Act, s 56(2)(c))		743.80
3	Application for renewal of registration as an adjudicator (Act, s 70(2)(c))		743.80
4	Issue of an adjudication certificate—		
	(a)	if the claimed amount is $25,000 or less	53.55
	(b)	if the claimed amount is more than $25,000	107.10

[Sch 2 am SL 98 of 2016, s 6; subst SL 64 of 2015, s 8; SL 311 of 2014, s 9; SL 121 of 2014, s 8; SL 128 of 2013, s 8; SL 97 of 2012, s 7; SL 100 of 2011, s 4; SL 96 of 2010, s 4; SL 70 of 2009, s 12; SL 140 of 2008, s 4; SL 94 of 2007, s 4; SL 93 of 2006, s 4; SL 96 of 2005, s 5; SL 203 of 2004, s 7]

NT LEGISLATION

Construction Contracts (Security of Payments) Bill 2004 – Second Reading Speech

Legislative Assembly, 14 October 2004

Dr TOYNE (Justice and Attorney-General): Mr Deputy Speaker, I move that the bill be now read a second time.

The Bill is part of a package of reforms that this government is making to the building industry. A discussion paper was published in August 2002 which drew on recommendations for reform made by the Western Australian task force report on security of payments for Western Australian building and construction industry. Copies of the discussion paper were also sent to professional bodies, individuals, and companies who have participated in the government's examination of the construction and procurement issues. Submissions were received from several bodies and, subsequently, a construction industry reference group was established to consider contractors' payments issues, together with a number of other issues of concern to the construction industry. That reference group is comprised of representatives from the Territory Construction Association, Construction Accreditation Ltd, the Construction Forestry, Mining and Energy Union, builders, the Australian Institute of Building for Surveyors, the Housing Industry Association, and the Civil Contractors Association. Additionally, it is supported by government officers from the Office of Commissioner of Public Employment; the Department of Justice; the Department of Infrastructure, Planning and Environment; the Department of Employment, Education and Training; and the Department of Business, Industry and Resource Development; and a member of the Building Practitioners Board and Building Appeals Board.

The Bill is modelled on Western Australia's *Construction and Contracts Act 2004*. The differences between the Northern Territory Bill and the Western Australian legislation reflect different administrative arrangements in place in the Territory, and address the issues raised by the construction industry representatives over the past few months, and in the submission made by the Law Society Northern Territory and others in response to the 2002 discussion paper.

The result is the repeal of the *Workmen's Liens Act 1893*, a South Australian Act which dates back to 1893, and its replacement by this legislation, which will promote good payment practices in the building and construction industry. It does this by prohibiting provisions in contracts that slow, or halt the movement, of funds through the contracting chain. It will also help speed up the movement of funds by providing a rapid, and cost-effective adjudication process, for payment disputes. The building and construction industry is vital to the Territory's economy. The failure to pay at any stage in the contracting chain can have disastrous effects for those further down the chain waiting payment.

Until now, their only recourse was to register a lien against the title to land upon which the construction works were carried out, or to which materials were supplied in respect of those works, and then to litigate. The time limits and technical requirements of the *Workmen's Liens Act 1893* often meant that contractors lost their right to have a lien registered against the title. It also meant that titles would be encumbered by liens when disputes proceeded slowly through the courts. Sometimes the owner of the land would only be a spectator in a dispute between a contractor and a sub-contractor. Whilst the registration of the lien may have given some security for payment, it did little to speed up the payment process.

The Bill, subject to exceptions contained in the Bill, applies to all contracts for construction work and related services. It also covers contracts for the provision of related professional services, and for the supply of goods and materials, plant and equipment to construction sites. The Bill does not cover drilling work carried out for the purpose of discovering or extracting oil or natural gas, or mineral bearing substances. It also does not cover the construction of shafts, pits, or quarries for the purpose of discovering or extracting minerals. However, it does cover other construction work which may be carried out in conjunction with mining activities. In this regard, the Northern Territory's approach differs from that taken in Western Australia.

If need be, regulations can be used to clarify a role to the scope of the Bill should any uncertainty arise during the course of its operation, or should it be decided in the future to extend or reduce the scope of its operation. The legislation supports privacy of contract between the parties. A party commissioned construction work must pay for the work. The obligation to pay cannot be made contingent upon the party with that obligation being paid first under some separate contract. The legislation prohibits pay, if paid, or pay when paid clauses in construction contracts. Apart from prohibiting these particular practices, the Bill does not unduly restrict the normal commercial operation of the industry. The parties to a construction contract will continue to be free to set the range and actual terms, so long as they put those terms in writing and do not include these prohibited terms.

Where construction contracts are unwritten, the Bill will employ various provisions that the government and industry consider are fair and reasonable with various types of parties. These provisions deal with payment terms and the clarification of the rights of the parties to deal with unfixed materials when one of those parties becomes insolvent during the course of the contract. When a party to a construction contract believes it is not being paid in accordance with the contract, the Bill will provide a rapid adjudication process. It will operate in conjunction with any other legal or contractual remedy available to the parties. The adjudication process will allow an experienced and independent adjudicator to review the claim and, when satisfied that some payment is due, make a binding determination that money be paid. The primary objective of the process is to keep money flowing down the contracting chain by forcing timely payment, and sidelining protracted or complex disputes.

The process is kept simply and will therefore be cheap and accessible, even for small claims. If a party is not satisfied with the adjudication process, it retains its full rights to go to a court, or use any other dispute resolution mechanism available under the contract. Pending any such action, the determination of the adjudicator stands, unless an application is made to the local court for a review of the determination and the court exercises its discretion to order stay of the implementation of the determination pending the outcome of the review.

The aim is to ensure that court processes are not used to destroy the efficacy of the process for speedy adjudication outside the court system. The effectiveness of the adjudication process will depend on ready access to capable adjudicators. To achieve this, adjudicators will be registered by a Construction Contracts Registrar appointed under this Bill to ensure that adjudicators have the necessary expertise and are independent.

The government notes the views of the Law Society that there may be a limited number of such experts in the Northern Territory. However, the government is confident that the market for professional services will prevail to provide the services as needed.

The parties to a construction contract may agree at the outset who they want as their adjudicator if a dispute arises during the course of a project. If they cannot agree upon an adjudicator, the party wishing to make a claim may go to a prescribed appointor who will appoint a suitable registered adjudicator. Prescribed appointors will typically be heads of professional bodies active in the industry and free of any sectional interests. This reflects a common practice in construction contracts to have an independent dispute arbiter appointed by an independent professional with the knowledge and expertise necessary to

identify the issues in the dispute so as to be able to appoint someone with the appropriate expertise to arbitrate or adjudicate that particular dispute.

The Construction Contracts Registrar may be a public servant or may be appointed outside the public service. This Bill will not remedy every security payment issue, but it will provide members of the construction industry with simple and effective tools to clarify their rights to be paid and enforce those rights.

I also indicate that it is intended that a Bill providing for consequential amendments will be introduced at a subsequent sitting of the Assembly. This Bill will deal with matters arising from the repeal of the *Workmen's Liens Act 1983*, the most significant such amendment being that of re enacting some of the general provisions regarding liens that are contained in ss 41 and 42 of the *Workmen's Liens Act 1893*.

Madam Speaker, I commend the Bill to honourable members.

Debate adjourned.

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT 2004 (NT)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Construction Contracts (Security of Payments) Act 2004	66 of 2004	21 Dec 2004	Ss 1 and 2: 21 Dec 2004; S 66: 1 Aug 2006 (Gaz G27, 5 Jul 2006, p 2); remainder: 1 Jul 2005 (Gaz G21, 25 May 2005, p 3)

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/ assent/ registration	Date of commencement
Community Justice Centre Act 2005	40 of 2005	13 Dec 2005	Pt 8: 22 Feb 2006 (Gaz G8, 22 Feb 2006, p 5)
Justice Legislation Amendment Act 2006	13 of 2006	18 May 2006	S 12: 18 May 2006; ss 13 and 14: 1 Aug 2006
Justice Legislation Amendment Act (No 2) 2007	32 of 2007	12 Dec 2007	Pt 2: 8 Jan 2008 (Gaz S2, 8 Jan 2008, p 1)
Justice and Other Legislation Amendment Act 2009	12 of 2009	26 May 2009	Pt 2: 24 Jun 2009 (Gaz G25, 24 Jun 2009, p 2)
Statute Law Revision Act 2011	30 of 2011	31 Aug 2011	Sch: 21 Sep 2011 (Gaz G38, 21 Sep 2011, p 5)
Statute Law Revision Act 2014	38 of 2014	13 Nov 2014	Sch 1: 13 Nov 2014

Table of Related Provisions

This Table of Related Provisions is intended to allow easy verification of whether a provision of the *Construction Contracts (Security of Payments) Act 2004* (NT) relates to a provision of the *Construction Contracts (Security of Payments) Regulations 2005* (NT) or other material.

It briefly explains the relationship between the provisions of the Act and the provisions of the Regulation or other material.

This table is intended as a guide and is not an exhaustive list of related legislative provisions or other material. The table is set out as follows:

Act provision

The entries in this table are ordered by provisions of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Regulation provision

This identifies the provision/s of the *Construction Contracts (Security of Payments) Regulations 2005* (NT) related to the identified sections, Parts or Divisions of the Act.

Related material

This refers to the *Construction Contracts (Security of Payments) Regulations 2005* (NT) abbreviated as "CC (SoP) Reg".

Act provision	Regulation provision	Related material	Comment
s 4 defn "prescribed appointer"	reg 5	CC (SoP) Reg	Regulation 5 of the CC (SoP) Reg prescribes the following persons to be "prescribed appointer": • The Royal Australian Institute of Architects; • Housing Industry Association Limited; • Contractor Accreditation Limited; • The Institution of Engineers, Australia; • Law Society Northern Territory; • The Institute of Arbitrators & Mediators of Australia; • Australian Institute of Quantity Surveyors; • Territory Construction Association Incorporated.

Act provision	Regulation provision	Related material	Comment
s 28(2)(a)	regs 6, 4 and 3	CC (SoP) Reg	Regulation 6 of the CC (SoP) Reg prescribes the additional information in an application for adjudication. They are: (a) the name and contact details of the appointed adjudicator or prescribed appointer; (b) the applicant's name and contact details; and (c) the name and contact details of each other party to the contract. See also regulations 4 and 3 for the particulars of what contact details mean.
s 29(2)(a)	regs 7, 4 and 3	CC (SoP) Reg	Regulation 7 of the CC (SoP) Reg prescribes the additional information in response to an application. They are as follow: (a) the name and contact details of the appointed adjudicator or prescribed appointer; (b) the applicant's name and contact details; and (c) the respondent's name and contact details. See also regulations 4 and 3 for the particulars of what contact details mean.
s 38(1)(b)	regs 8, 4 and 3	CC (SoP) Reg	Regulation 8 of the CC (SoP) Reg prescribes the additional information an adjudicator must include in his or her decision. They are as follow: (a) the name of the adjudicator; (b) the applicant's name and contact details; (c) the respondent's name and contact details; and (d) the date and any identification number of the adjudicator's determination. See also regulations 4 and 3 for the particulars of what contact details mean.
ss 35(1)(b), 41(2) and Sch cl 7	reg 9	CC (SoP) Reg	Regulation 9 prescribes the interest rate to be the rate fixed in s 85 of the *Supreme Court Act 1979*.

Act provision	Regulation provision	Related material	Comment
s 44(2)(a)	regs 10, 4 and 3	CC (SoP) Reg	Regulation 10 prescribes the additional information required of a contractor's intention to suspend the performance of its obligations. They are as follow: (a) the name of the appointed adjudicator; (b) the principal's name and contact details; (c) the contractor's name and contact details; (d) the date and any identification number of the adjudicator's determination; (e) the amount to be paid to the contractor under the determination; and (f) the date by which the principal must pay that amount under the determination. See also regulations 4 and 3 for the particulars of what contact details mean.
s 52(1)	reg 11	CC (SoP) Reg	Regulation 11 cites the prescribed criteria for a natural person to be a registered adjudicator.
s 52(2)	reg 12	CC (SoP) Reg	Regulation 12 prescribes the types of documents which be accompanied an application or nomination.
s 52(3)	reg 13	CC (SoP) Reg	Regulation 13 prescribes $100 fee for making an application or nomination.

PART 1 – PRELIMINARY

[Pt 1 heading am Act 30 of 2011, s 3 and Sch]

DIVISION 1 – INTRODUCTION

1 Short title

This Act may be cited as the *Construction Contracts (Security of Payments) Act*.

2 Commencement

This Act comes into operation on the date, or respective dates, fixed by the Administrator by notice in the *Gazette*.

3 Object and its achievement

(1) The object of this Act is to promote security of payments under construction contracts.

(2) The object of this Act is to be achieved by:

(a) facilitating timely payments between the parties to construction contracts; and

(b) providing for the rapid resolution of payment disputes arising under construction contracts; and

(c) providing mechanisms for the rapid recovery of payments under construction contracts.

[Subs (2) am Act 30 of 2011, s 3 and Sch]

[S 3 am Act 30 of 2011]

DIVISION 2 – INTERPRETATION

4 Definitions

In this Act:

adjudication means the adjudication of a payment dispute under Part 3.

applicant, for an adjudication, means the person who, under section 28, makes application for the adjudication.

appointed adjudicator, for a payment dispute, means the registered adjudicator who, having been appointed under Part 3 to adjudicate the dispute, has been served with the application for adjudication.

civil works includes:

(a) a road, railway, tramway, aircraft runway, canal, waterway, harbour, port or marina; and

(b) a line or cable for electricity or telecommunications; and

(c) a pipeline for water, gas, oil, sewage or other material; and

(d) a path, pavement, ramp, tunnel, slipway, dam, well, aqueduct, drain, levee, seawall or retaining wall; and

(e) any works, apparatus, fittings, machinery or plant associated with any works mentioned in paragraph (a), (b), (c) or (d).

[Def am Act 30 of 2011, s 3 and Sch]

contractor, see section 5(1).

[Def am Act 30 of 2011, s 3 and Sch]

construction contract, see section 5.

[Def am Act 30 of 2011, s 3 and Sch]

construction work, see section 6.

[Def am Act 30 of 2011, s 3 and Sch]

determination means a determination made on an adjudication under Part 3 of the merits of a payment dispute.

goods, in relation to construction work, see section 7(1).

[Def am Act 30 of 2011, s 3 and Sch]

obligations, of a contractor under a construction contract, means the obligations mentioned in section 5(1) the contractor has under the contract.

on-site services, in relation to construction work, see section 7(3).

[Def am Act 30 of 2011, s 3 and Sch]

party, to an adjudication, means the applicant and any person on whom an application for the adjudication is served.

payment claim means a claim made under a construction contract:

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or

(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.

payment dispute, see section 8.

[Def am Act 30 of 2011, s 3 and Sch]

prescribed appointer means a person prescribed as such by the Regulations.

principal, for a construction contract, means the party to whom the contractor is bound under the contract.

professional services, in relation to construction work, see section 7(2).

[Def am Act 30 of 2011, s 3 and Sch]

registered adjudicator means an individual registered as such under section 52.

[Def am Act 30 of 2011, s 3 and Sch]

Registrar means the Construction Contracts Registrar appointed under section 49.

Regulations means the Regulations made under this Act.

site in the Territory means a site in the Territory, whether on land or off-shore.

working day means a day other than a Saturday or Sunday or a public holiday as defined in the *Public Holidays Act*.

[Def am Act 30 of 2011, s 3 and Sch]

[S 4 am Act 30 of 2011, s 3 and Sch

Cross-reference: *Construction Contracts (Security of Payments) Regulations*: reg 5 prescribes the following entitites as ***prescribed appointers*** for the purposes of s 4:

- The Royal Australian Institute of Architects;
- Housing Industry Association Limited;
- Contractor Accreditation Limited;
- RICS Dispute Resolution Service;
- Law Society Northern Territory;
- The Institute of Arbitrators & Mediators of Australia;
- Australian Institute of Quantity Surveyors; and
- Master Builders Association Northern Territory Incorporated.]

5 Construction contract

(1) A construction contract is a contract (whether or not in writing) under which a person (the ***contractor***) has one or more of the following obligations:

(a) to carry out construction work;

(b) to supply to the site where construction work is being carried out any goods that are related to construction work;

(c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work.

(2) In Part 3, a construction contract includes:

(a) a contract modified under section 13; and

(b) a contract in which a provision is implied under Part 2, Division 2.

6 Construction work

(1) Construction work is any of the following work on a site in the Territory:

(a) reclaiming land, draining land or preventing the subsidence, movement or erosion of land;

(b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any works, apparatus, fittings, machinery or plant associated with any work mentioned in paragraph (a);

(c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and whether or not in the Territory), part of land or the seabed (whether above or below it);

(d) fixing or installing on or in anything mentioned in paragraph (c) any fittings forming, or to form, (whether or not permanently) part of the thing, including:

(i) fittings for electricity, gas, water, fuel oil, air, sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing or the safety of people; and

(ii) lifts, escalators, insulation, furniture or furnishings;

(e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing anything mentioned in paragraph (c) or any fittings described in paragraph (d) that form part of the thing;

(f) any work that is preparatory to, necessary for, an integral part of or for the completion of any work mentioned in paragraph (a), (b), (c), (d) or (e), including:

(i) site or earthworks, excavating, earthmoving, tunnelling or boring; and

(ii) laying foundations; and

(iii) erecting, maintaining or dismantling temporary works, a temporary building or a temporary structure, including a crane or other lifting equipment and scaffolding; and

(iv) cleaning, painting, decorating or treating any surface; and

(v) site restoration or landscaping;

(g) any work that is prescribed by the Regulations to be construction work for this Act.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) However, construction work does not include any of the following work on a site in the Territory:

(a) drilling for the purposes of discovering or extracting oil or natural gas, whether or not on land;

(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;

(c) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing wholly artistic works including sculptures, installations and murals;

(d) work prescribed by the Regulations not to be construction work for this Act.

(3) In addition, construction work does not include constructing the whole or part of any watercraft.

[S 6 am Act 30 of 2011]

7 Goods and services related to construction work

(1) Goods are related to construction work if they are:

(a) materials or components (whether or not pre-fabricated) that will form part of anything mentioned in section 6(1)(b) or (c) or of any fittings mentioned in section 6(1)(d); or

(b) any fittings mentioned in section 6(1)(d) (whether or not pre-fabricated); or

(c) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of the construction work at the site of the construction work; or

(d) goods prescribed by the Regulations to be goods related to construction work for this Act.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) Professional services are related to construction work if they are:

(a) services that are provided by a profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds), including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying and project management services, but not including accounting, financial or legal services; or

(b) services that are provided by a profession that are prescribed by the Regulations to be professional services related to construction work for this Act.

(3) On-site services are related to construction work if they are services (other than professional services):

(a) that relate directly to construction work, including providing labour to carry out construction work; or

(b) prescribed by the Regulations to be on-site services related to construction work for this Act.

(4) The Regulations may prescribe goods, professional services or on-site services that are not related to construction work for this Act.

[S 7 am Act 30 of 2011]

8 Payment dispute

A payment dispute arises if:

(a) a payment claim has been made under a contract and either:

(i) the claim has been rejected or wholly or partly disputed; or

(ii) when the amount claimed is due to be paid, the amount has not been paid in full; or

[Para (a) subst Act 38 of 2014, s 2 and Sch 1; Act 30 of 2011, s 3 and Sch]

NT

(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or

(c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

[S 8 am Act 38 of 2014; Act 30 of 2011]

DIVISION 3 – OPERATION OF ACT

9 Construction contracts to which this Act applies

(1) This Act applies to a construction contract entered into after the commencement of this section.

(2) This Act applies to a construction contract:

(a) irrespective of whether it is written or oral or partly written and partly oral; and

(b) irrespective of where it is entered into; and

(c) irrespective of whether it is expressed to be governed by the law of a place other than the Territory.

[Subs (2) am Act 30 of 2011, s 3 and Sch]

(3) This Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods or services that are related to construction work, as a prescribed employee of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

(4) This Act, or a provision of this Act, does not apply to a construction contract, or a class of construction contracts, prescribed by the Regulations as a contract or class of contracts to which this Act, or that provision, does not apply.

(5) In this section:

prescribed employee means an employee subject to an award or a certified agreement made under the *Fair Work Act 2009* (Cth).

[Def am Act 30 of 2011, s 3 and Sch]

[S 9 am Act 30 of 2011]

10 No contracting out

(1) A provision in an agreement or arrangement (whether a construction contract or not and whether in writing or not) that purports to exclude, modify or restrict the operation of this Act has no effect.

(2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.

(3) Any purported waiver (whether in a construction contract or not and whether or not in writing) of an entitlement under this Act has no effect.

11 Act binds Crown

This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

11A Interaction with Community Justice Centre Act

The operation of this Act is subject to Part 4 of the *Community Justice Centre Act*.

Note for section 11A: Part 4 of the *Community Justice Centre Act* provides for the Director of the Community Justice Centre to be treated as a prescribed appointer for this Act. That Part also creates exceptions to some of the rules in this Act.

[S 11A insrt Act 40 of 2005, s 43]

NT

PART 2 – PROHIBITED AND IMPLIED PROVISIONS OF CONSTRUCTION CONTRACTS

DIVISION 1 – PROHIBITED PROVISIONS

12 Pay if paid and pay when paid provisions

A provision in a construction contract has no effect if it purports to make the liability of a party (***party A***) to pay an amount under the contract to another party contingent (whether directly or indirectly) on party A being paid an amount by another person (whether or not a party).

13 Provisions requiring payment to be made after 50 days

A provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed must be read as being amended to require the payment to be made within 28 days after it is claimed.

14 Prescribed provisions

A provision in a construction contract has no effect if it is a provision that is prescribed by the Regulations to be a prohibited provision.

15 Other provisions of contract not affected

A provision in a construction contract that has no effect because of section 12 or 14 or that is modified under section 13 does not prejudice or affect the operation of other provisions of the contract.

DIVISION 2 – IMPLIED PROVISIONS

16 Variations of contractual obligations

The provisions in the Schedule, Division 1 are implied in a construction contract that does not have a written provision about variations of the contractor's obligations under the contract.

17 Contractor's entitlement to be paid

The provisions in the Schedule, Division 2 are implied in a construction contract that does not have a written provision about the amount, or a way of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

18 Contractor's entitlement to claim progress payments

The provisions in the Schedule, Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations under the contract the contractor has performed.

19 Making payment claims

The provisions in the Schedule, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment.

20 Responding to payment claims and time for payment

The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:

(a) when and how a party must respond to a payment claim made by another party;

(b) by when a payment must be made.

21 Interest on overdue payments

The provisions in the Schedule, Division 6 are implied in a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract.

22 Ownership of goods

The provisions in the Schedule, Division 7 are implied in a construction contract that does not have a written provision about when the ownership of goods passes from the contractor for goods that are:

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations under the contract.

23 Duties as to unfixed goods on insolvency

The provisions in the Schedule, Division 8 are implied in a construction contract that does not have a written provision about what must happen to unfixed goods of a kind mentioned in section 22 if either of the following persons becomes insolvent:

(a) the principal;

(b) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods or services that are related to construction work.

24 Retention money

The provisions in the Schedule, Division 9 are implied in a construction contract that does not have a written provision about the status of an amount retained by the principal for the performance by the contractor of its obligations under the contract.

25 Interpretation of implied provisions

The *Interpretation Act* and sections 4 to 8 of this Act apply to the interpretation of a provision that is implied in a construction contract under this Part despite any provision in a construction contract to the contrary.

[S 25 am Act 30 of 2011, s 3 and Sch]

PART 3 – ADJUDICATION OF DISPUTES

DIVISION 1 – OBJECT OF ADJUDICATION

26 Object

The object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.

DIVISION 2 – STARTING ADJUDICATION

27 Who can apply for adjudication

If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless:

(a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2); or

[Para (a) am Act 12 of 2009, s 4]

(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract.

[S 27 am Act 12 of 2009]

28 Applying for adjudication

(1) To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b):

(a) prepare a written application for adjudication; and

(b) serve it on each other party to the contract; and

(c) serve it on:

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator; or

(ii) if the parties to the contract have appointed a prescribed appointer – the appointer; or

(iii) otherwise – a prescribed appointer chosen by the party; and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).

[Subs (1) am Act 30 of 2011, s 3 and Sch; Act 32 of 2007, s 4(1)]

(2) The application must:

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations; and

(b) state the details of or have attached to it:

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

[Subs (2) am Act 30 of 2011, s 3 and Sch]

(3) Subsection (1) applies to a dispute even if it arises within the 90 day period immediately preceding the commencement of this subsection.

[Subs (3) insrt Act 32 of 2007, s 4(2)]

[S 28 am Act 30 of 2011; Act 32 of 2007

Cross-reference: *Construction Contracts (Security of Payments) Regulations*: reg 6 prescribes the information which must be included in an application for adjudication including the name and contact details of applicant, each party to the contract, appointed adjudicator and prescribed appointer for the purposes of s 28(2)(a); and reg 4 provides that contact details include a person's address, phone and fax numbers and ABN.]

28A Withdrawing an application for adjudication

(1) If a party has applied for adjudication of a dispute under section 28(1), the party may withdraw the application before an adjudicator has been appointed by giving written notice to:

(a) the prescribed appointer served with the application under section 28(1)(c)(ii) or (iii); and

(b) each other party to the contract.

(2) If an adjudicator has been appointed, the party may withdraw the application by giving written notice to:

(a) the adjudicator; and

(b) each other party to the contract.

(3) However, the adjudicator must refuse the withdrawal if:

(a) a party to the contract objects to the withdrawal; and

(b) in the opinion of the adjudicator, the party objecting to the withdrawal has a legitimate interest in obtaining a determination of the application.

[S 28A insrt Act 32 of 2007, s 5]

29 Responding to application for adjudication

(1) Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on:

(a) the applicant and on any other party that has been served with the application; and

(b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointer on which the application was served under section 28(1)(c).

(2) The response must:

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations; and

(b) state the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

[Subs (2) am Act 30 of 2011, s 3 and Sch]

[S 29 am Act 30 of 2011

Cross-reference: *Construction Contracts (Security of Payments) Regulations*: reg 7 prescribes the information which must be included in a response to an application for adjudication including the name and contact details of applicant, respondent, appointed adjudicator and prescribed appointer for the purposes of s 29(2)(a); and reg 4 provides that contact details include a person's address, phone and fax numbers and ABN.]

30 Appointment of adjudicator in absence of agreed appointment

(1) If an application for adjudication is served on a prescribed appointer, the appointer must, within 5 working days after being served:

(a) appoint a registered adjudicator to adjudicate the payment dispute concerned; and

(b) send the application and any response received by it to the adjudicator; and

(c) give written notice to the parties and Registrar accordingly.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) If a prescribed appointer does not make an appointment under subsection (1), the Registrar may appoint a registered adjudicator to adjudicate the payment dispute concerned.

(3) If the Registrar makes an appointment under subsection (2), the Registrar must:

(a) give written notice to the prescribed appointer accordingly and require the appointer to serve the application and any response received by it on the adjudicator appointed by the Registrar; and

(b) give written notice to the parties accordingly.

[S 30 am Act 30 of 2011]

31 Disqualification of adjudicator on grounds of conflict of interest

(1) An appointed adjudicator is disqualified from adjudicating the dispute if the adjudicator has a material personal interest in:

(a) the payment dispute concerned; or

(b) the construction contract under which the dispute has arisen; or

(c) any party to the contract.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) If an appointed adjudicator is disqualified, the adjudicator must give written notice to the parties and Registrar of the disqualification and the reasons for it.

(3) A party to a payment dispute may apply to the Registrar for, and the Registrar may make, a declaration that the appointed adjudicator is disqualified under subsection (1) from adjudicating the dispute.

(4) The application must be made before the person is notified of a decision or determination made under section 33(1).

(5) If the Registrar makes the declaration sought, the Registrar must give written notice to the adjudicator and the parties of the declaration.

(6) If a notice (a ***disqualification notice***) is given by or to an appointed adjudicator under subsection (2) or (5), the adjudicator's appointment ends 5 working days after the date of the disqualification notice unless, before the end of that period, each party gives the adjudicator written authority to continue as the appointed adjudicator.

[Subs (6) subst Act 12 of 2009, s 5]

(6A) If the appointment of an appointed adjudicator ends under subsection (6):

(a) the applicant may make a further application for adjudication under section 28; and

(b) in calculating the period within which the application may be made, the period from the date on which the previous application was served under section 28(1)(c) to the date on which the appointment ends is not counted.

[Subs (6A) insrt Act 12 of 2009, s 5]

(6B) However if, as calculated under subsection (6A)(b), the applicant does not have

at least 14 days to make the further application, the further application may be made within 14 days after the date on which the appointment ends.

[Subs (6B) insrt Act 12 of 2009, s 5]

(7) If the Registrar refuses to make the declaration sought, the Registrar must give written notice to the adjudicator and the parties of the refusal.

(8) The notice under subsection (5) or (7) must state:

(a) the reasons for the decision; and

(b) a person given the notice may apply for a review of the decision to the Local Court within 28 days after receipt of the notice.

[S 31 am Act 30 of 2011; Act 12 of 2009]

32 Review of disqualification decision

A person who is aggrieved by a decision of the Registrar under section 31 to make or refuse to make a declaration that an appointed adjudicator is disqualified from adjudicating a dispute may apply to the Local Court for a review of the decision.

DIVISION 3 – ADJUDICATION PROCESS

33 Adjudicator's functions

(1) An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):

(a) dismiss the application without making a determination of its merits if:

(i) the contract concerned is not a construction contract; or

(ii) the application has not been prepared and served in accordance with section 28; or

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied it is not possible to fairly make a determination:

(A) because of the complexity of the matter; or

(B) because the prescribed time or any extension of it is not sufficient for another reason; or

(b) otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine:

(i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and

(ii) the date on or before which the amount must be paid or the security must be returned.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) If the application is not dismissed or determined under subsection (1) within the prescribed time, or any extension of it under section 34(3)(a), the application is taken to be dismissed when the time ends.

(3) In this section:

prescribed time means:

(a) if the appointed adjudicator is served with a response under section 29(1) – 10 working days after the date of the service of the response; or

(b) otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).

[S 33 am Act 30 of 2011]

34 Adjudication procedure

(1) For making a determination, an appointed adjudicator:

(a) must act informally and if possible make the determination on the basis of:

(i) the application and its attachments; and

(ii) if a response has been prepared and served in accordance with section 29, the response and its attachments; and

(b) is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate.

(2) In order to obtain sufficient information to make a determination, an appointed adjudicator may:

(a) request a party to make a, or a further, written submission or to provide information or documents, and may set a deadline for doing so; or

(b) request the parties to attend a conference with the adjudicator; or

(c) unless all the parties object:

(i) inspect any work or thing to which the payment dispute relates, provided the occupier of any place concerned consents to the entry and inspection; or

(ii) arrange for anything to which the payment dispute relates to be tested, provided the owner of the thing consents to the testing; or

(iii) engage an expert to investigate and report on any matter relevant to the payment dispute.

[Subs (2) am Act 30 of 2011, s 3 and Sch]

(3) An appointed adjudicator may:

(a) with the Registrar's consent, extend the time for making a determination under section 33(1); or

(b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties; or

(c) with the consent of all the parties concerned, adjudicate the payment dispute simultaneously with another payment dispute.

[Subs (3) am Act 30 of 2011, s 3 and Sch]

(4) If an appointed adjudicator adjudicates simultaneously 2 or more payment disputes, the adjudicator may, in adjudicating one, take into account information or documents the adjudicator receives in relation to the other and vice versa.

(5) An adjudicator's power to make a determination is not affected by the failure of either or both of the parties to make a submission or provide information or documents within time or to comply with the adjudicator's request to attend a conference with the adjudicator.

(6) To the extent that the practice and procedure in relation to adjudications is not regulated by this Part or the Regulations, an appointed adjudicator may determine the adjudicator's own procedure.

[S 34 am Act 30 of 2011]

35 Interest until determination

(1) If an appointed adjudicator determines that a party to a payment dispute is liable to make a payment, the adjudicator may also determine that interest must be paid on:

(a) if the payment is overdue under the construction contract – the payment in accordance with the contract; or

(b) otherwise – the whole or a part of the payment from the date the payment dispute arose at a rate not greater than the rate prescribed by the Regulations until and including the date of the determination.

(2) Subsection (1) does not authorise the awarding of interest on interest.

[**Cross-reference:** *Construction Contracts (Security of Payments) Regulations*: reg 9 prescribes interest rate for the purposes of s 35(1)(b) as the rate fixed from time to time for s 85 of the *Supreme Court Act*. This rate is fixed by the *Supreme Court Rules* as the rate specified in r 39.06 of the *Federal Court Rules 2011*.]

36 Costs of parties to payment disputes

(1) The parties to a payment dispute bear their own costs in relation to an adjudication of the dispute (including the costs the parties are liable to pay under section 46).

[Subs (1) am Act 32 of 2007, s 6]

(2) However, if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.

(3) If an appointed adjudicator makes a decision under subsection (2), the adjudicator must:

(a) decide the amount of the costs and the date on which the amount is payable; and

(b) give written notice of the decisions and the reasons for them to the parties.

(4) Divisions 4 and 5 apply (with the necessary changes) to a decision made under subsection (2) as if it were a determination of an appointed adjudicator.

[S 36 am Act 32 of 2007]

37 Evidentiary value of certificates of completion and amounts payable

(1) This section applies if:

(a) the construction contract to which a payment dispute relates provides for a person to certify:

(i) obligations under the contract have been performed; or

(ii) the amount of a payment that must be made by a party; and

(b) the certificate is provided by a party to an adjudication in the course of adjudication.

(2) For the adjudication:

(a) if the certificate relates to the final amount payable under the contract and has the effect of finalising the contract – the certificate is taken to be conclusive evidence of its contents; or

(b) otherwise – the certificate has the evidentiary weight the appointed adjudicator considers appropriate.

38 Content of determination

(1) An appointed adjudicator's decision made under section 33(1)(b) must:

(a) be in writing; and

(b) be prepared in accordance with, and contain the information prescribed by, the Regulations; and

(c) state:

(i) the amount to be paid and the date on or before which it must be paid; or

(ii) the security to be returned and the date on or before which it must be returned; and

(d) give reasons for the determination; and

(e) identify any information in it that, because of its confidential nature, is not suitable for publication by the Registrar under section 54.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) The adjudicator must give a copy of the decision to the parties to the adjudication and the Registrar.

[S 38 am Act 30 of 2011
Cross-reference: *Construction Contracts (Security of Payments) Regulations*: reg 8 prescribes the information which must be included in an adjudicator's decision including the name of adjudicator, applicant and respondent's name and contact details, and date/identification number of adjudicator's determination for the purposes of s 38(1)(b); and reg 4 provides that contact details include a person's address, phone and fax numbers and ABN.]

39 Dismissed applications

(1) If, under section 33(1)(a), an appointed adjudicator dismisses an application for adjudication, the adjudicator must give written notice of the decision and the reasons for it to the parties and to the Registrar.

[Subs (1) am Act 32 of 2007, s 7]

(2) If, under section 33(2), an application for an adjudication of a payment dispute is taken to be dismissed:

(a) this Part does not prevent a further application being made under this Part for an adjudication of the dispute; and

(b) any further application must be made within 28 days after the previous application is taken to be dismissed.

[S 39 am Act 32 of 2007]

DIVISION 4 – EFFECT OF DETERMINATIONS

40 Determinations have effect despite other proceedings

An appointed adjudicator's determination is binding on the parties to the construction contract under which the payment dispute concerned arose even if other proceedings relating to the payment dispute have been started before an arbitrator or other person or a court or other body.

41 Payment of amount determined and interest

(1) A party that is liable to pay an amount under a determination must do so on or before the date stated in the determination.

(2) Unless the determination provides otherwise, interest at the rate prescribed by the Regulations must be paid on the part of the amount that is unpaid after the date stated in the determination.

(3) The interest forms part of the determination.

(4) If, under section 45(1), a judgment is entered in the terms of a determination, interest under subsection (2) ceases to accrue.

[**Cross-reference:** *Construction Contracts (Security of Payments) Regulations*: reg 9 prescribes interest rate for the purposes of s 41(2) as the rate fixed from time to time for s 85 of the *Supreme Court Act*. This rate is fixed by the *Supreme Court Rules* as the rate specified in r 39.06 of the *Federal Court Rules 2011*.]

42 Progress payment under determination to be on account

(1) This section applies if:

(a) an appointed adjudicator:

(i) determines a payment dispute concerning a claim by a contractor for payment for part performance of its obligations under the contract but not for a final payment by the principal; and

(ii) determines that the principal must pay the contractor an amount for the claim; and

(b) the principal, in accordance with the determination, pays the amount.

(2) Payment of the amount is taken to be an advance towards the total amount payable under the contract by the principal to the contractor.

43 Determination final

(1) If on the adjudication of a payment dispute the appointed adjudicator makes a determination:

(a) the adjudicator cannot subsequently amend or cancel the determination except with the consent of the parties; and

(b) a party to the dispute cannot later apply for an adjudication of the dispute.

(2) Despite subsection (1)(a), the adjudicator may, on the application of a party or, after notifying the parties, on the adjudicator's own initiative, correct any of the following in the determination:

(a) an accidental slip or omission;

(b) a material arithmetic error;

(c) a material mistake in the description of any person, thing or matter.

DIVISION 5 – ENFORCING DETERMINATIONS

44 Contractor may suspend obligations for principal's non-compliance

(1) If a determination requires the principal to pay the contractor an amount and the principal does not pay in accordance with the determination, the contractor may give the principal written notice of the contractor's intention to suspend the performance of its obligations under the contract.

(2) The notice must:

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations; and

(b) state the date on which the contractor intends to suspend the performance of its obligations; and

(c) be given to the principal at least 3 working days before that date.

[Subs (2) am Act 30 of 2011, s 3 and Sch]

(3) If on the date stated in the notice the principal has not paid the contractor the amount in accordance with the determination, the contractor may suspend the performance of its obligations until no longer than 3 working days after the date on which the amount is paid.

(4) Subsection (3) does not prevent the contractor from at any time resuming the performance of its obligations.

(5) A contractor that suspends the performance of its obligations in accordance with this section:

(a) is not liable for any loss or damage suffered by the principal or by any person claiming through the principal; and

(b) retains its rights under the contract, including any right to terminate the contract.

[S 44 am Act 30 of 2011

Cross-reference: *Construction Contracts (Security of Payments) Regulations*: reg 10 prescribes information to be included in a contractor's notice of intention to suspend performance of obligations including the principal and contractor's name and contact details, name of appointed adjudicator, date/identification number of adjudicator's determination, amount to be paid under determination and date by which principal must pay that amount for the purposes of s 44(2)(a); and reg 4 provides that contact details include a person's address, phone and fax numbers and ABN.]

45 Determination may be enforced as judgment

(1) A determination may be enforced as a judgment for a debt in a court of competent jurisdiction.

[Subs (1) subst Act 13 of 2006, s 12(1)]

(2) For subsection (1), a determination signed by an adjudicator and certified by the Registrar as having been made by a registered adjudicator under this Part is taken to have been made under this Part.

(3) Subsection (1) applies regardless of whether the determination is made before or after the commencement of this subsection.

[Subs (3) insrt Act 13 of 2006, s 12(2)]

[S 45 am Act 13 of 2006]

DIVISION 6 – GENERAL

46 Costs of adjudications

(1) This section applies if:

(a) an adjudicator is appointed to adjudicate a payment dispute; and

(b) one of the following applies:

(i) the party who applied for the adjudication withdraws the application under section 28A;

(ii) the adjudicator dismisses the application for adjudication under section 33(1)(a);

(iii) the adjudicator makes a determination of the dispute under section 33(1)(b).

[Subs (1) subst Act 32 of 2007, s 8(1)]

(1A) The adjudicator is entitled:

(a) to be paid for the adjudicator's work:

(i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate prescribed by the Regulations; or

(ii) if a rate is not agreed — at the rate published under section 55 for the adjudicator; and

(b) to be reimbursed any expenses reasonably incurred in connection with the work.

[Subs (1A) insrt Act 32 of 2007, s 8(1)]

(2) An appointed adjudicator who is disqualified under section 31 has the entitlements in subsection (1A) for any adjudication work done before the disqualification is notified to the parties.

[Subs (2) am Act 32 of 2007, s 8(2)]

(3) Despite subsection (1A), an appointed adjudicator may refuse to give notice of the adjudicator's decision or determination under section 33(1) or 36(2) or subsection (9) until the adjudicator has been paid and reimbursed in accordance with subsection (1A).

[Subs (3) am Act 32 of 2007, s 8(2)]

(4) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.

(5) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

(6) Subsections (4) and (5) do not prevent a decision being made under section 36(2).

(7) An appointed adjudicator may at any time require one or more parties to provide a reasonable deposit, or reasonable security, for the costs or anticipated costs of the adjudication.

(8) A prescribed appointer, before appointing an adjudicator, may require the applicant for adjudication to provide a deposit, or reasonable security, for the costs or anticipated costs of the adjudication.

(9) If a party involved in a dispute has paid more than the party's share of the costs of an adjudication of the dispute, having regard to subsection (5), the appointed adjudicator may decide that another party must pay to the first party the amount of the costs that would result in all the parties paying an equal amount of the costs.

[Subs (9) am Act 30 of 2011, s 3 and Sch]

(10) If an appointed adjudicator makes a decision under subsection (9):

(a) the adjudicator must include in the decision the date on which the amount is payable; and

(b) Divisions 4 and 5 apply (with the necessary changes) to the decision as if it were a determination of an appointed adjudicator.

(11) An appointed adjudicator may recover the costs of an adjudication from a person liable to pay the costs in a court of competent jurisdiction as if the costs were a debt due to the adjudicator.

(12) In this section:

costs of an adjudication means:

(a) the entitlements of the appointed adjudicator under subsection (1A); and

(b) the costs of any testing done, or of any expert engaged, under section 34(2)(c)(ii) or (iii).

[Def am Act 32 of 2007, s 8(2)]

[S 46 am Act 30 of 2011; Act 32 of 2007]

47 Effect of this Part on civil proceedings

(1) This Part does not prevent a party to a construction contract from starting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.

(2) If other proceedings are started in relation to a payment dispute that is being adjudicated under this Part, the adjudication must proceed despite the proceedings unless all of the parties, in writing, require the appointed adjudicator to discontinue the adjudication.

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(3) Evidence of anything said or done in an adjudication is not admissible before an arbitrator or other person or a court or other body, except for an application made under section 31(3) or a review under section 48.

(4) An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract:

(a) must, in making any award, judgment or order, allow for any amount that has been or must be paid to a party under a determination of a payment dispute arising under the contract; and

(b) may make an order for the restitution of the amount paid and any other appropriate order relating to the determination.

48 Review of adjudicator's decision to dismiss application

(1) A person who is aggrieved by a decision made under section 33(1)(a) may apply to the Local Court for a review of the decision.

(2) If, on the review, the decision is set aside and referred back to the adjudicator, the adjudicator must make a determination under section 33(1)(b) within 10 working days after the date on which the decision is set aside or any extension of that time agreed on by the parties.

(3) Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

PART 4 – ADMINISTRATION

DIVISION 1 – CONSTRUCTION CONTRACTS REGISTRAR

49 Registrar

(1) There is to be a Construction Contracts Registrar.

(2) The Minister must, by *Gazette* notice, appoint a person to be the Registrar.

[Subs (2) am Act 30 of 2011, s 3 and Sch]

[S 49 am Act 30 of 2011]

50 Provisions relating to appointment of non-public sector employee

(1) This section applies if the person appointed to be the Registrar is not a public sector employee.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) The Registrar holds office for the period (not exceeding 5 years) stated in the appointment and is eligible for re-appointment.

(3) The Registrar holds office on the conditions (including conditions about remuneration, expenses and allowances) determined by the Minister.

(4) The Minister must terminate the appointment of a person as Registrar if the person:

(a) is found guilty of an indictable offence, whether in the Territory or elsewhere; or

(b) becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or

(c) engages in paid employment outside the duties of the office without the Minister's prior written approval.

[Subs (4) am Act 30 of 2011, s 3 and Sch]

(5) The Minister may terminate the appointment of a person as Registrar:

(a) on the ground of misbehaviour; or

(b) on the ground of inability to satisfactorily perform the duties of the office, whether because of physical or mental incapacity or for any other reason; or

(c) if the person is guilty of misconduct of a kind that would, if the person were a public sector employee, warrant dismissal under that Act; or

(d) if the person is absent, without leave and without reasonable excuse, for 14 consecutive days or 28 days in any 12 months.

[Subs (5) am Act 30 of 2011, s 3 and Sch]

(6) A termination under subsection (4) or (5) must be given in writing to the person.

(7) The Minister may grant leave of absence to the Registrar on the terms the Minister considers appropriate.

(8) The Registrar may resign from office by written notice given to the Minister.

[S 50 am Act 30 of 2011]

51 Functions

The Registrar has the functions conferred by this Act.

DIVISION 2 – ADJUDICATORS AND PRESCRIBED APPOINTERS

52 Registering adjudicators

(1) An individual is eligible to be a registered adjudicator if the person has the qualifications and experience prescribed by the Regulations.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) The Registrar may register a person as a registered adjudicator:

(a) on the application of the person; or

(b) on the nomination of a prescribed appointer.

(3) The Regulations may prescribe a fee to be paid for making the application or nomination.

(4) The Registrar must not register a person as a registered adjudicator unless satisfied the person is eligible to be registered.

(5) The Registrar may cancel a person's registration as a registered adjudicator if satisfied the person:

(a) has ceased to be eligible to be registered; or

(b) has misconducted, or is incompetent or unsuitable to conduct, adjudications under Part 3.

(6) The Registrar must keep a register of registered adjudicators and make it available for public inspection at no charge.

(7) If the Registrar refuses to register a person as a registered adjudicator or cancels a person's registration as a registered adjudicator, the Registrar must give the person written notice stating the following:

(a) the decision;

(b) the reasons for the decision;

(c) the person may apply for a review of the decision to the Local Court within 28 days after receipt of the notice.

[S 52 am Act 30 of 2011
Cross-reference: *Construction Contracts (Security of Payments) Regulations*:

- reg 11 sets out the qualifications and experience required for a natural person to be eligible to be a registered adjudicator for the purposes of s 52(1);
- reg 12 prescribes the documents which must accompany an application or nomination under s 52(2); and
- reg 13 prescribes a fee of 115 revenue units for the making of an application or nomination for the purposes of s 52(3).]

53 Review of registration decision

A person who is aggrieved by a decision of the Registrar under section 52 to refuse to register the person as a registered adjudicator or to cancel the person's registration as a registered adjudicator may apply to the Local Court for a review of the decision.

53A Adjudicators to give Registrar information

A registered adjudicator must, in accordance with the Regulations, give the Registrar information prescribed by the Regulations.

[S 53A insrt Act 40 of 2005, s 44
Cross-reference: *Construction Contracts (Security of Payments) Regulations*: reg 14 prescribes the information to be given by the registered adjudicator to the Registrar for the purposes of s 53A.]

54 Publication of adjudicators' decisions

(1) The Registrar must make available for public inspection at no charge the result or a report of the decisions of registered adjudicators.

(2) The Registrar must ensure there is not included in the result or report made available under subsection (1):

(a) the identities of the parties to the adjudication; or

(b) any information in the determination identified under section 38(1)(e) as being not suitable for publication because of its confidential nature.

55 Adjudicators' and prescribed appointers' rates to be published

(1) A registered adjudicator or prescribed appointer must ensure the rate at which the adjudicator or appointer charges for work under this Act is published in a way approved by the Registrar.

(2) Subsection (1) does not prevent any of the parties from agreeing on the rate to be charged by a registered adjudicator or prescribed appointer for work under this Act.

(3) The published or agreed rate must not be more than the maximum rate prescribed by the Regulations.

NT

DIVISION 3 – MISCELLANEOUS PROVISIONS

56 Protection from liability

(1) This section applies to a person who is or has been:

(a) an appointed adjudicator; or

(b) a prescribed appointer; or

(c) the Registrar.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) The person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise or purported exercise of a power, or the performance or purported performance of a function, under this Act.

(3) Subsection (2) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.

[S 56 am Act 30 of 2011]

57 Evidentiary provisions

(1) A document purporting to be signed by the Registrar is taken to have been signed by the person who was at the time duly appointed as the Registrar in the absence of evidence to the contrary.

(2) A certificate by the Registrar stating a person was or was not at a time or in a period, or is or is not, a registered adjudicator is proof of the content of the certificate in the absence of evidence to the contrary.

PART 5 – REVIEWS OF DECISIONS

58 Application of Part

This Part applies to a person who:

(a) under section 32 or 53, is entitled to apply to the Local Court for the review of a decision of the Registrar; or

(b) under section 48(1), is entitled to apply to the Local Court for the review of an appointed adjudicator's decision under section 33(1)(a).

59 Application for review

The application must:

(a) be made within 28 days after the person receives notice of the decision; and

(b) state fully the grounds on which it is made.

60 Review by Local Court

(1) On receipt of the application, the Local Court must review the merits of the decision.

(2) The review must be by way of hearing de novo.

61 Operation and implementation of decision

(1) The application does not affect the operation or implementation of the decision.

(2) However, the Local Court may make an order staying or otherwise affecting the operation or implementation of so much of the decision as the Court considers appropriate to effectively hear and decide the application.

(3) The order:

(a) is subject to any conditions stated in it; and

(b) has effect:

(i) for the period stated in it; or

(ii) if no period is stated in it – until the Court has decided the application.

62 Decision on review

(1) On reviewing the decision, the Local Court must make an order:

(a) confirming the decision; or

(b) setting the decision aside and substituting its own decision; or

(c) for a decision under section 33(1)(a) – setting the decision aside.

[Subs (1) am Act 30 of 2011, s 3 and Sch]

(2) If the Court makes an order under subsection (1)(b), the substituted decision is, for this Act (other than section 48(1) and this Part), taken to be the decision of the Registrar or appointed adjudicator.

(3) If the Court makes an order under subsection (1)(c), the Court must refer the matter back to the adjudicator with the directions the Court considers appropriate for making a determination under section 33(1)(b).

[S 62 am Act 30 of 2011]

PART 6 – MISCELLANEOUS PROVISIONS

63 Annual report

(1) The Chief Executive Officer of the Agency administering this Act must include in the Agency's annual report for each financial year a report about the operation and effectiveness of this Act for the year.

(2) In this section:

annual report means the annual report mentioned in section 28 of the *Public Sector Employment and Management Act*.

64 Regulations

(1) The Administrator may make regulations, not inconsistent with this Act, prescribing matters:

(a) required or permitted to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The Regulations may provide for any of the following:

(a) fees payable, and the refund (wholly or partly) of fees paid, under this Act;

(b) the practice and procedure in adjudications.

(3) The Regulations may:

(a) make different provision in relation to:

(i) different persons or matters; or

(ii) different classes of persons or matters; or

(b) apply differently by reference to stated exceptions or factors.

65 Review of Act

The Minister must, as soon as practicable, conduct a review of the first 5 years of operation of this Act.

PART 7 – REPEALS AND TRANSITIONAL MATTERS

[Pt 7 heading subst Act 13 of 2006, s 13]

66 Repeal of Workmen's liens legislation

The following Acts are repealed:

(a) Act No. 575 of 1893 (SA) as it applies in the Territory;

(b) the *Workmen's Liens Amendment Act 2002* (Act No. 17, 2002).

67 Transitional provision

(1) This section applies to a contract made before the repeal of the repealed Act.

(2) The repealed Act continues to apply to the contract as if it had not been repealed.

(3) This section does not limit section 12 of the *Interpretation Act*.

(4) In this section:

repealed Act means the *Workmen's Liens Act* as in force immediately before the commencement of section 66.

[S 67 insrt Act 13 of 2006, s 14]

Schedule – Implied Provisions

Sections 16 to 24

[Sch note am Act 30 of 2011, s 3 and Sch]

DIVISION 1 – VARIATIONS

1 Variations must be agreed

The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on —

(a) the nature and extent of the variation of the obligations; and

(b) the amount, or a way of calculating the amount, that the principal must pay the contractor in relation to the variation of the obligations.

DIVISION 2 – CONTRACTOR'S ENTITLEMENT TO BE PAID

2 Contractor entitled to be paid

(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.

(2) Subclause (1) applies whether or not the contractor performs all of its obligations.

DIVISION 3 – CLAIMS FOR PROGRESS PAYMENTS

3 Entitlement to make claim

The contractor is entitled to make one or more claims for a progress payment in relation to the contractor's obligations it has performed and for which it has not been paid by the principal.

4 When claim can be made

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making another claim for an amount payable to the contractor under or in connection with this contract.

DIVISION 4 – MAKING CLAIMS FOR PAYMENT

5 Content of claim for payment

(1) A payment claim under this contract must —

(a) be in writing; and

(b) be addressed to the party to which the claim is made; and

(c) state the name of the claimant; and

(d) state the date of the claim; and

(e) state the amount claimed; and

(f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and

(g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and

(h) be signed by the claimant; and

(i) be given to the party to which the claim is made.

(2) For a claim by the contractor, the amount claimed must be calculated in

accordance with this contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be —

(a) if this contract states that the principal must pay the contractor one amount (the ***contract sum***) for the performance by the contractor of all of its obligations under this contract (the ***total obligations***) – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or

(b) if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or

(c) otherwise – a reasonable amount for the obligations performed and detailed in the claim.

(3) Subclause (2) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subclause (2)(a), (b) and (c).

[Cl 5 am Act 30 of 2011, s 3 and Sch]

DIVISION 5 – RESPONDING TO PAYMENT CLAIMS

6 Responding to payment claim by notice of dispute or payment

(1) This clause applies if —

(a) a party receives a payment claim under this contract; and

(b) the party –

(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(ii) disputes the whole or part of the claim.

(2) The party must —

(a) within 14 days after receiving the payment claim –

(i) give the claimant a notice of dispute; and

(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or

(b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

(3) The notice of dispute must —

(a) be in writing; and

(b) be addressed to the claimant; and

(c) state the name of the party giving the notice; and

(d) state the date of the notice; and

(e) identify the claim to which the notice relates; and

(f) if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract; and

(g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(4) If under this contract the principal is entitled to retain part of an amount payable by the principal to the contractor —

(a) subclause (2)(b) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of an amount retained under the entitlement.

[Cl 6 am Act 30 of 2011, s 3 and Sch; Act 32 of 2007, s 9]

[Div 5 am Act 32 of 2007, s 9]

DIVISION 6 – INTEREST ON OVERDUE PAYMENTS

7 Interest payable on overdue payments

(1) Interest is payable on the part of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.

(2) The interest must be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.

(3) The rate of interest at any time is equal to that prescribed by the Regulations for that time.

[**Cross-reference:** *Construction Contracts (Security of Payments) Regulations*: reg 9 prescribes interest rate for the purposes of cl 7 of the Schedule as the rate fixed from time to time for s 85 of the *Supreme Court Act*. This rate is fixed by the *Supreme Court Rules* as the rate specified in r 39.06 of the *Federal Court Rules 2011*.]

DIVISION 7 – OWNERSHIP OF GOODS

8 When ownership of goods supplied by contractor passes

(1) Subclause (2) applies to goods that are —

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations under this contract.

(2) The ownership of the goods passes from the contractor when whichever of the following happens first:

(a) the contractor is paid for the goods;

(b) the goods become fixtures.

DIVISION 8 – DUTIES ABOUT UNFIXED GOODS ON INSOLVENCY

9 Duties of principal and other persons about unfixed goods on insolvency

(1) This clause applies if —

(a) goods that are related to construction work have been supplied to the site of the construction work by the contractor under its obligations under this contract; and

(b) the contractor has not been paid for the goods; and

(c) the goods have not become fixtures; and

(d) ownership of the goods has not passed from the contractor; and

(e) the goods are in the possession of or under the control of —

(i) the principal; or

(ii) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods or services that are related to construction work; and

(f) the principal or that person becomes an insolvent.

(2) The principal and the person must not, during the insolvency, allow the goods to become fixtures or to fall into the possession of or under the control of another person (other than the contractor) except with the prior written consent of the contractor.

(3) In addition, the principal and the person must allow the contractor a reasonable opportunity to repossess the goods.

(4) In this clause:

insolvent means –

(a) for an individual – an insolvent under administration as defined in section 9 of the *Corporations Act 2001*; or

(b) for a body corporate – an externally-administered body corporate as defined in section 9 of the *Corporations Act 2001*.

[Def am Act 30 of 2011, s 3 and Sch]

[Cl 9 am Act 30 of 2011, s 3 and Sch]

DIVISION 9 – RETENTION MONEY

10 Retention money to be held on trust

If the principal retains from an amount payable by the principal to the contractor for the performance by the contractor of its obligations part of that amount (the ***retention money***), the principal holds the retention money on trust for the contractor until whichever of the following happens first:

(a) the retention money is paid to the contractor;

(b) the contractor agrees in writing to give up any claim to the retention money;

(c) the retention money ceases to be payable to the contractor under this contract;

(d) an adjudicator, arbitrator or other person or a court or other body decides the retention money ceases to be payable to the contractor.

[Sch am Act 30 of 2011; Act 32 of 2007]

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) REGULATIONS 2005 (NT)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Construction Contracts (Security of Payments) Regulations	**20 of 2005**	**31 May 2005**	**1 Jul 2005**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Construction Contracts (Security of Payments) Amendment Regulations 2010	26 of 2010		29 Nov 2010

1 Citation

These Regulations may be cited as the *Construction Contracts (Security of Payments) Regulations*.

2 Commencement

These Regulations come into operation on the commencement of section 64 of the *Construction Contracts (Security of Payments) Act 2004*.

3 Definitions

In these Regulations:

ABN has the same meaning as in the *A New Tax System (Australian Business Number) Act 1999* (Cth).

ACN has the same meaning as in the *Corporations Act 2001*.

contact details has the meaning in regulation 4.

[Reg 3 am SL 26 of 2010, reg 6 and Sch]

4 Contact details

A person who is required to give the contact details of a person must give the following details, but only to the extent those details are known to the person:

(a) the address and telephone and facsimile numbers of the person;

(b) the ABN number of the person or the person's business or, if the person does not have an ABN, the ACN of the person.

5 Prescribed appointers

For the definition of ***prescribed appointer*** in section 4 of the Act, each of the following persons is prescribed:

(a) The Royal Australian Institute of Architects;

(b) Housing Industry Association Limited;

(c) Contractor Accreditation Limited;

(d) RICS Australasia Pty Ltd ACN 089 873 067 trading as RICS Dispute Resolution Service;

[Para (d) subst SL 26 of 2010, reg 3(1)]

(e) Law Society Northern Territory;

(f) The Institute of Arbitrators & Mediators of Australia;

(g) Australian Institute of Quantity Surveyors;

(h) Master Builders Association Northern Territory Incorporated.

[Para (h) subst SL 26 of 2010, reg 3(2)]

[Reg 5 am SL 26 of 2010]

6 Information in application for adjudication

For section 28(2)(a) of the Act, an application for adjudication must, in addition to the other information required by section 28(2) of the Act, contain:

(a) the name and contact details of the appointed adjudicator or prescribed appointer; and

[Para (a) am SL 26 of 2010, reg 6 and Sch]

(b) the applicant's name and contact details; and

(c) the name and contact details of each other party to the contract.

[Reg 6 am SL 26 of 2010]

7 Information in response to application

For section 29(2)(a) of the Act, a response to an application for adjudication must, in addition to the other information required by section 29(2) of the Act, contain:

(a) the name and contact details of the appointed adjudicator or prescribed appointer; and

[Para (a) am SL 26 of 2010, reg 6 and Sch]

(b) the applicant's name and contact details; and

(c) the respondent's name and contact details.

[Reg 7 am SL 26 of 2010]

8 Information in adjudicator's decision

For section 38(1)(b) of the Act, an appointed adjudicator's decision must, in addition to the other information required by section 38(1) of the Act, contain:

(a) the name of the adjudicator; and

[Para (a) am SL 26 of 2010, reg 6 and Sch]

(b) the applicant's name and contact details; and

[Para (b) am SL 26 of 2010, reg 6 and Sch]

(c) the respondent's name and contact details; and

(d) the date and any identification number of the adjudicator's determination.

[Reg 8 am SL 26 of 2010]

9 Interest rates

For sections 35(1)(b) and 41(2) of the Act and clause 7 of the Schedule to the Act, the interest rate is the rate fixed from time to time for section 85 of the *Supreme Court Act*.

10 Information for notice of intention to suspend performance of obligations

For section 44(2)(a) of the Act, a contractor's notice of intention to suspend the performance of its obligations must, in addition to the other information required by section 44(2) of the Act, contain:

(a) the name of the appointed adjudicator;

(b) the principal's name and contact details;

(c) the contractor's name and contact details;

(d) the date and any identification number of the adjudicator's determination;

(e) the amount to be paid to the contractor under the determination; and

(f) the date by which the principal must pay that amount under the determination.

11 Eligibility for registration

(1) For section 52(1) of the Act, a natural person is eligible to be a registered adjudicator if the person has the qualifications and experience stated in subregulations (3) to (5).

(2) However, the person must not be registered if the person is a disqualified person under subregulations (6) to (8).

(3) The person must:

(a) hold a degree from a university or other tertiary institution in Australia in any of the following courses:

(i) architecture;

(ii) building;

(iii) building surveying;

(iv) construction;

(v) engineering;
(vi) law;
(vii) project management;
(viii) quantity surveying; or

(b) have an equivalent qualification from a university or other tertiary institution outside Australia; or

(c) be eligible for membership of any of the following bodies:
(i) The Royal Australian Institute of Architects;
(ii) Australian Institute of Building;
(iii) Australian Institute of Building Surveyors;
(iv) The Institution of Engineers, Australia;
(v) Law Society Northern Territory;
(vi) The Institute of Arbitrators & Mediators of Australia;
(vii) Australian Institute of Project Management;
(viii) Australian Institute of Quantity Surveyors; or

(d) be registered under the *Building Act* in the category of building contractor.

[Subreg (3) am SL 26 of 2010, reg 6 and Sch]

(4) For subregulation (3)(b), 2 qualifications are equivalent if the courses of study to attain them cover approximately the same matters.

(5) The person must:

(a) have at least 5 years experience in:
(i) administering construction contracts; or
(ii) dispute resolution relating to construction contracts; and

(b) have successfully completed a training course that, in the opinion of the Registrar, qualifies the person to be an adjudicator under the Act.

(6) The person is a disqualified person if the person:

(a) is an undischarged bankrupt; or

(b) has applied to take the benefit of a law for the relief of bankrupt or insolvent debtors; or

(c) has compounded with creditors or made an assignment of the person's remuneration for their benefit; or

(d) is disqualified from registration under a law of a State or Territory in a profession mentioned in subregulation (3)(a); or

(e) is unsuitable to conduct adjudications under Part 3 of the Act.

[Subreg (6) am SL 26 of 2010, reg 6 and Sch]

(7) For subregulation (6)(e), in deciding whether the person is unsuitable to conduct adjudications, the Registrar must have regard to the criminal history check obtained in relation to the person as mentioned in regulation 12(2).

[Subreg (7) am SL 26 of 2010, reg 6 and Sch]

(8) Subregulation (7) does not limit the matters to which the Registrar may have regard in deciding whether a person is unsuitable to conduct adjudications.

[Reg 11 am SL 26 of 2010]

12 Information to be included in application or nomination

(1) An application or nomination under section 52(2) of the Act must:

(a) state whether the applicant or nominee knows of any reasons that might disqualify the applicant or nominee from registration as mentioned in regulation 11(6)(d); and

(b) if any such reasons are known — state those reasons.

(2) In addition, the application or nomination must be accompanied by an authorisation by the applicant or nominee for the Registrar to obtain a criminal history check of the applicant or nominee.

[Reg 12 subst SL 26 of 2010, reg 4]

13 Fee for application or nomination

For section 52(3) of the Act, the fee for making of an application or nomination is 115 revenue units.

[Reg 13 am SL 26 of 2010, reg 6 and Sch]

14 Information to be given by registered adjudicator

(1) For section 53A of the Act, the registered adjudicator must give the Registrar the following information for each payment dispute the adjudicator is appointed under section 30 of the Act to adjudicate:

(a) the adjudicator's name;

(b) if the adjudicator has a registration number given by the Registrar — that number;

(c) the name and contact details of:

(i) the applicant for the adjudication; and

(ii) each other party to the payment dispute;

(d) the nature of the work done by the applicant for the contract relating to the payment dispute (including the applicant's trade or profession in relation to the work);

(e) the location of the construction the subject of the contract;

(f) the amount of the payment dispute the subject of the application;

(g) the date on which the adjudicator was appointed to adjudicate the payment dispute;

(h) if the adjudicator dismissed the application under section 33(1)(a) of the Act without making a determination — the date of dismissal;

(i) if the adjudicator made a determination for the application under section 33(1)(b) of the Act:

(i) the amount to be paid or security to be returned; and

(ii) the amount of interest payable; and

(iii) how the amount of interest was calculated;

(j) if the application is taken to be dismissed under section 33(2) of the Act — the date of dismissal;

(k) the following amounts (***costs of the adjudication***):

(i) the amount the adjudicator is entitled to be paid under section 46(1A) of the Act;

(ii) the costs of testing under section 34(2)(c)(ii) of the Act;

(iii) the costs of engaging an expert under section 34(2)(c)(iii) of the Act;

(l) the amount each party must pay for the costs of the adjudication.

(2) However, if the adjudicator is disqualified under section 31(1) of the Act, the

adjudicator must give the Registrar the following information:

(a) the details specified in subregulation (1)(a) to (g);

(b) the date of the disqualification;

(c) the amount the adjudicator is entitled to be paid under section 46(1A) of the Act.

Note for subregulation (2)(c):

Under section 46(2) of the Act, an adjudicator who is disqualified has the entitlements mentioned in section 46(1A) of the Act for any adjudication work done before the disqualification is notified to the parties.

(3) The information specified in subregulation (1) must be given to the Registrar:

(a) if the adjudicator has dismissed the application under section 33(1)(a) of the Act — no later than 10 working days after the application is dismissed; or

(b) if the adjudicator has made a determination under section 33(1)(b) of the Act — at the same time as the adjudicator gives a copy of the determination to the Registrar; or

(c) if the application is taken to be dismissed under section 33(2) of the Act — no later than 10 working days after the application is taken to be dismissed.

(4) The information specified in subregulation (2):

(a) must be given to the Registrar no later than 10 working days after the disqualification; and

(b) is in addition to the information required to be given to the Registrar under section 31(2) of the Act.

[Reg 14 insrt SL 26 of 2010, reg 5]

WA LEGISLATION

CONSTRUCTION CONTRACTS BILL 2004 (WA) — SECOND READING SPEECH

Legislative Assembly, 3 March 2004

MS A J MacTIERNAN (Armadale – Minister for Planning and Infrastructure) [12.45 pm]: I move – That be Bill be now read a second time.

This Bill delivers the Government's commitment to introduce security of payment legislation for the building and construction industry. The building and construction industry is made up of many consultants, contractors, subcontractors and suppliers - all of whom work together to deliver buildings and infrastructure for the Western Australian economy. This interdependence makes security of payment a vital foundation for the industry. Failure to pay at any link in the contracting chain can be disastrous to those subcontractors and suppliers who are waiting to be paid in their turn and, until now, there has been little recourse available to those who are affected.

The Bill supports good payment practices in the building and construction industries by prohibiting payment provisions in contracts that slow or stop the movement of funds through the contracting chain; implying fair and reasonable payment terms into contracts that are not in writing; clarifying the right to deal in unfixed materials when a party to the contract becomes insolvent; and providing an effective rapid adjudication process for payment disputes.

The Bill draws on legislation already enacted in the United Kingdom, New South Wales and Victoria, but has been drafted to overcome a number of problems that have become apparent in those jurisdictions. In particular, it is based on enforcing the contract between the parties and does not introduce a separate, and possibly conflicting, statutory right to payment.

The Bill applies to contracts for the carrying out of construction work and related services. The Bill also covers contracts for the provision of related professional services and the supply of goods and materials to the construction site. To be covered by the Bill, contracts for services have to relate directly to construction work, and contracts for supply must require the materials or goods to be supplied to the site where the construction work takes place. The Bill does not cover the remote manufacture of components or their retail supply. Regulations can be used to clarify the scope of the Bill should any uncertainty arise in practice.

This legislation supports the privity of the contract between the parties. A party commissioning construction work must pay for the work. That party cannot make payment contingent on it being paid first, under some separate contract. The notorious "pay if paid" and "pay when paid" clauses will be banned. The financial health of the industry will improve when contractors and subcontractors know they will be paid on time and, equally, know that they have to pay on time.

Apart from these specific unfair practices, the Bill does not unduly restrict the normal commercial operation of the industry. Parties to a construction contract remain free to strike whatever bargains they wish between themselves, as long as they put the payment provisions in writing and do not include the prohibited terms.

When there is no written provision covering the basic payment provisions of the right to be paid, how to deal with variations, how to claim payment and how to dispute it, or the rate of interest on late payments, the Bill provides for fair and effective terms to be implied into the contract. The Bill also provides implied terms to deal with the contentious issues of ownership of unfixed goods or materials when a contractor becomes insolvent, as well as the status of retention moneys. This means the parties should have clear contractual payment rights and obligations so that misunderstanding and disputes are minimised.

When a party to a construction contract believes it has not been paid in accordance with the contract, the Bill provides a rapid adjudication process that operates in parallel to any other legal or contractual remedy. The rapid adjudication process allows an experienced and independent adjudicator to review the claim and, when satisfied that some payment is due, make a binding determination for money to be paid. The rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. The process is kept simple, and therefore cheap and accessible, even for small claims. In most cases the parties will be satisfied by an independent determination and will get on with the job. If a party is not satisfied, it retains its full rights to go to court or use any other dispute resolution mechanism available under the contract. In the meantime, the determination stands, and any payments ordered must be made on account pending an award under the more formal and precise process.

The effectiveness of rapid adjudication depends on rapid access to capable adjudicators. To ensure the expert and independent status of adjudicators, they will be registered by a registrar appointed under this Bill. The parties to a contract may agree on an adjudicator at the outset of the project or when a dispute arises. If the parties have not agreed on an adjudicator, the party wishing to make a claim may go to a prescribed appointer who will appoint a suitable registered adjudicator. Prescribed appointers will typically be professional bodies active in the industry but free of sectional interests.

This Bill cannot remedy every security of payment issue. Insolvency can be addressed only by commonwealth legislation. Participants in the industry still have to look after their own commercial interests. This Bill will provide the industry with simple and effective tools to clarify rights to be paid and to enforce those rights. I commend the Bill to the House.

Debate adjourned, on motion by Mr R F Johnson.

CONSTRUCTION CONTRACTS ACT 2004 (WA)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Construction Contracts Act 2004	**16 of 2004**	**8 Jul 2004**	**1 Jan 2005 (Gaz 216, 14 Dec 2004 p 5999)**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Statutes (Repeals and Miscellaneous Amendments) Act 2009	8 of 2009	21 May 2009	S 38: 22 May 2009
Building Services (Complaint Resolution and Administration) Act 2011	16 of 2011	25 May 2011	Pt 10 Div 2: 29 Aug 2011

PART 1 – PRELIMINARY

1 Short title

This Act may be cited as the *Construction Contracts Act 2004*.

SECTION 1 COMMENTARY

[SOPWA1.10] Act history

The *Construction Contracts Act 2004* (WA) received assent on 8 July 2004 and commenced on 1 January 2005.

The Western Australian Act contains a number of conceptual differences from that of any of the other States and the Northern Territory Acts. One of the fundamental differences is that it seeks to imply a number of obligations in a construction contract and also provides a remedy for the review of an adjudicator's decision. The Western Australian model has, with great respect, a lot to commend it and serious attention should be accorded to it by the other States and the Northern Territory legislatures in amending their existing legislation to remove inconsistencies, anomalies and doubts.

2 Commencement

(1) This Act comes into operation on a day fixed by proclamation.

(2) Different days may be fixed under subsection (1) for different provisions.

3 Terms used

In this Act, unless the contrary intention appears—

adjudication means the adjudication of a payment dispute in accordance with Part 3;

applicant, in relation to an adjudication, means the person who, under section 26, makes the application for the adjudication;

appointed adjudicator, in relation to a payment dispute, means the registered adjudicator who, having been appointed under Part 3 to adjudicate the dispute, has been served with the application for adjudication;

Building Commissioner means the officer referred to in the *Building Services (Complaint Resolution and Administration) Act 2011* section 85;

[Def insrt Act 16 of 2011, s 128(3)]

construction contract means a contract or other agreement, whether in writing or not, under which a person (the ***contractor***) has one or more of these obligations—

(a) to carry out construction work;

(b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);

(c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b);

construction work has the meaning given to that term in section 4;

contractor has the meaning given by the definition of "construction contract";

costs of an adjudication has the meaning given to that term in section 44;

determination means a determination, made on an adjudication under Part 3, of the merits of a payment dispute;

obligations, in relation to a contractor, means those of the obligations described in the definition of "construction contract" that the contractor has under the construction contract;

party, in relation to an adjudication, means the applicant and any person on whom an application for the adjudication is served;

party, in relation to a construction contract, means a party to the contract;

payment claim means a claim made under a construction contract—

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or

(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract;

payment dispute has the meaning given to that term in section 6;

prescribed appointor means a person prescribed as such by the regulations;

principal, in relation to a construction contract, means the party to whom the contractor is bound under the contract;

registered adjudicator means an individual registered as such under section 48.

[Def am Act 16 of 2011, s 128(4)]

Registrar [Repealed]

[Def rep Act 16 of 2011, s 128(2)]

[S 3 am Act 16 of 2011

Cross-reference: *Construction Contracts Regulations 2004*: reg 11 prescribes the following entities as appointors for the purposes of s 3:

- The Australian Institute of Building;
- Australian Institute of Project Management;
- The Australian Institute of Quantity Surveyors;
- Electrical and Communications Association of Western Australia (Union of Employers);
- The Institute of Arbitrators and Mediators Australia;
- Master Builders Association of Western Australia (Union of Employers);
- RICS Australasia Pty Ltd; and
- The Royal Australian Institute of Architects.]

WA

SECTION 3 COMMENTARY

[SOPWA3.10] Definitions

Section 3 is the interpretation section and contains definitions, some of which are not found in the comparative Acts. Reference also has to be made to s 4 for a definition of "civil works" and "construction work".

[SOPWA3.30] "Construction contract"

The definition of "construction contract" in s 3(a) and (b) is substantially the same as the definition of that phrase in the New South Wales legislation.

However, s 3(c) adds a further dimension, that sub-section reads as follows:

[t]o provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2).

Sub-section 3(d) continues:

[t]o provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b).

4 Construction work

(1) In this section—

civil works includes—

(a) a road, railway, tramway, aircraft runway, canal, waterway, harbour, port or marina; and

(b) a line or cable for electricity or telecommunications; and

(c) a pipeline for water, gas, oil, sewage or other material; and

(d) a path, pavement, ramp, tunnel, slipway, dam, well, aqueduct, drain, levee, seawall or retaining wall; and

(e) any works, apparatus, fittings, machinery or plant associated with any works referred to in paragraph (a), (b), (c) or (d);

site in WA means a site in Western Australia, whether on land or off-shore.

(2) In this Act—

construction work means any of the following work on a site in WA—

(a) reclaiming, draining, or preventing the subsidence, movement or erosion of, land;

(b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, any works, apparatus, fittings, machinery, or plant, associated with any work referred to in paragraph (a);

(c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form, whether permanently or not and whether in WA or not, part of land or the sea bed whether above or below it;

(d) fixing or installing on or in any thing referred to in paragraph (c) any fittings forming, or to form, whether permanently or not, part of the thing, including—

(i) fittings for electricity, gas, water, fuel oil, air, sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing, and the safety of people; and

(ii) lifts, escalators, insulation, furniture and furnishings;

(e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any thing referred to in paragraph (c) or any fittings described in paragraph (d) that form part of that thing;

(f) any work that is preparatory to, necessary for, an integral part of, or for the completion of, any work referred to in paragraph (a), (b), (c), (d) or (e), including—

(i) site or earth works, excavating, earthmoving, tunnelling or boring; and

(ii) laying foundations; and

(iii) erecting, maintaining or dismantling temporary works, a temporary building, or a temporary structure including a crane or other lifting equipment, and scaffolding; and

(iv) cleaning, painting, decorating or treating any surface; and

(v) site restoration and landscaping;

(g) any work that is prescribed by regulations to be construction work for the purposes of this Act.

(3) Despite subsection (2) construction work does not include any of the following work on a site in WA—

(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;

(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;

(c) constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance;

(d) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals;

(e) work prescribed by the regulations not to be construction work for the purposes of this Act.

(4) In this Act—

construction work does not include constructing the whole or part of any watercraft.

SECTION 4 COMMENTARY

[SOPWA4.10] "Civil works"

Reference should be made to s 4(1) for a definition of "civil works". It is to be noted that the definition of civil works relates only to a site in Western Australia, which means a site in Western Australia, whether on land or off-shore.

[SOPWA4.30] "Construction work"

The Western Australian Act contains a substantially expanded definition of "construction work" in s 4(2). Western Australian practitioners, or those who are involved in a claim under its legislation, should be aware of the substantial differences and before taking any action under its Act, the practitioner should make him/herself fully cognisant with the relevant definition.

Under s 4(4), and unlike any of the other Acts, there is an express statement that "'construction work' does not include constructing the whole or part of any watercraft".

Under the heading "Construction work", s 4(1) contains a definition of "civil works" and "site in WA" which is not found in any of the comparative legislation.

5 Goods and services related to construction work

(1) For the purposes of this Act, goods are related to construction work if they are—

(a) materials or components (whether pre-fabricated or not) that will form part of any thing referred to in section 4(2)(b) or 4(2)(c) or of any fittings referred to in section 4(2)(d); or

(b) any fittings referred to in section 4(2)(d) (whether pre-fabricated or not); or

(c) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of the construction work at the site of the construction work; or

(d) goods prescribed by the regulations to be related to construction work for the purposes of this Act.

(2) For the purposes of this Act, professional services are related to construction work if they are—

(a) services that are provided by a profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds)—

(i) including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management, services; but

(ii) not including accounting, financial, or legal, services; or

(b) services that are provided by a profession that are prescribed by the regulations to be professional services related to construction work for the purposes of this Act.

(3) For the purposes of this Act, on-site services—

(a) are services other than professional services referred to in subsection (2); and

(b) are related to construction work if they are—

(i) services that relate directly to construction work, including the provision of labour to carry out construction work; or

(ii) services prescribed by the regulations to be on-site services related to construction work for the purposes of this Act.

(4) The regulations may prescribe goods, professional services or on-site services that are not related to construction work for the purposes of this Act.

SECTION 5 COMMENTARY

[SOPWA5.10] "Goods and services related to construction work"

The relevant section of the Western Australian Act is s 5. There are some similarities but also differences in the definition of related goods and services.

Even the heading of the section is different, ie "Goods and services related to construction work".

Some of the major differences are:

(a) s 5(1)(b), there is a reference to "any fittings referred to in section 4(2)(d) (whether pre-fabricated or not)";

(b) s 5(2), there is a far more extensive definition of professional services that are related to construction work; and

(c) s 5(3), there is a separate sub-section devoted to on-site services.

6 Payment dispute

For the purposes of this Act, a payment dispute arises if—

(a) by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed; or

(b) by the time when any money retained by a party under the contract is due to be paid under the contract, the money has not been paid; or

(c) by the time when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

7 Construction contracts to which this Act applies

(1) This Act applies to a construction contract entered into after this Act comes into operation.

(2) This Act applies to a construction contract—

(a) irrespective of whether it is written or oral or partly written and partly oral; and

(b) irrespective of where it is entered into; and

(c) irrespective of whether it is expressed to be governed by the law of a place other than Western Australia.

(3) This Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods or services that are related to construction work, as an employee (as defined in the *Industrial Relations Act 1979* section 7) of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

(4) This Act, or a provision of this Act, does not apply to a construction contract, or a class of construction contracts, prescribed by the regulations as a contract or class of contracts to which this Act, or that provision, does not apply.

SECTION 7 COMMENTARY

[SOPWA7.10] Section 7

Under s 7, there is an extensive list of construction contracts to which the Act applies. It is to be noted that because of the legislative regime in Western Australia, which is entirely different from that of all of the other States and Territories, excepting the Northern Territory, and by virtue of which there are terms implied in a construction contract, unless it contains written terms to the contrary, certain portions of the Act will not apply to contracts which have written provisions to the contrary.

[SOPWA7.30] Section 7(3)

Under s 7(3) of the Western Australian Act, it is provided that the Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods and services that are related to construction work, as an employee, as defined in s 7 of the *Industrial Relations Act 1979*, of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

8 Application to Crown

This Act binds the Crown.

PART 2 – CONTENT OF CONSTRUCTION CONTRACTS

DIVISION 1 – PROHIBITED PROVISIONS

9 Prohibited: pay if paid/when paid provisions

A provision in a construction contract has no effect if it purports to make the liability of a party (***A***) to pay money under the contract to another party contingent, whether directly or indirectly, on A being paid money by another person (whether or not a party).

SECTION 9 COMMENTARY

[SOPWA9.10] Prohibited provisions

It is to be noted that ss 9 – 12 in Pt 2 Div 1 of the Act, contains a list of prohibited provisions, not found in any other similar legislation. In ss 13 – 23 in Pt 2 Div 2 of the Act, there is a list of provisions implied in a construction contract, which is not found in any other similar legislative provision in any of the other States or in the Northern Territory Act.

10 Prohibited: provisions requiring payment to be made after 50 days

A provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed is to be read as being amended to require the payment to be made within 50 days after it is claimed.

SECTION 10 COMMENTARY

[SOPWA10.10] Payment after 50 days

Under s 10 of the Western Australian Act, to be found in Pt 2 Div 1, it is provided that a provision in a contract that purports to require payment to be made more than 50 days after the payment is claimed, is to be read as being amended so as to require payment to be made within 50 days after it is claimed.

11 Prohibited: prescribed provisions

A provision in a construction contract has no effect if it is a provision that is prescribed by the regulations to be a prohibited provision.

12 Other provisions of contract not affected

A provision in a construction contract that has no effect because of section 9 or 11 or that is modified under section 10 does not prejudice or affect the operation of other provisions of the contract.

DIVISION 2 – IMPLIED PROVISIONS

13 Variations of contractual obligations

The provisions in Schedule 1 Division 1 are implied in a construction contract that does not have a written provision about variations of the contractor's obligations under the contract.

14 Contractor's entitlement to be paid

The provisions in Schedule 1 Division 2 are implied in a construction contract that does not have a written provision about the amount, or a means of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

SECTION 14 COMMENTARY

[SOPWA14.10] Section 14 of the Western Australian Act refers to the provisions in Sch 1 Div 2 which are implied in a construction contract that does not have a written provision about the amount, or means of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

In summary, it is provided as an implied term of the contract that the contractor is entitled to be paid a reasonable amount for performing its obligations. It would appear that wherever there is no specific provision in a Western Australian construction contract for valuing the contractor's work, the contractor is entitled to a quantum meruit, whether within the context of invoking the other provisions of the Western Australian Act, or not.

15 Contractor's entitlement to claim progress payments

The provisions in Schedule 1 Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed.

16 Making claims for payment

The provisions in Schedule 1 Division 4 are implied in a construction contract that does not have a written provision about how a party is to make a claim to another party for payment.

SECTION 16 COMMENTARY

[SOPWA16.10] Payment claim timing

Section 16 of the Western Australian Act, where there is no written provision about how a party is to make a claim to another party for payment, picks up Sch 1 Div 4 of that Act in regard to when progress claims can be made as an implied term. Clause 4(1) of Sch 1 Div 3 provides that:

> A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

Great care must be taken to make written provision in the construction contract for making payment claims.

It is not clear whether it was intended that the whole of the work is to be concluded before a progress payment can be required or whether it is sufficient if the whole of a particular segment of work will be sufficient to trigger a valid progress payment claim. The Western Australian Act does not provide for a "reference date" as contained in most other similar

Acts. It would be an anomalous position if the contractor could harass the person liable to make payment by making repeated progress claims at any time and without any limitations.

[SOPWA16.30] Details of payment claim

Section 16 of the Western Australian Act picks up the provisions of Sch 1 Div 4, which are implied in a construction contract where there is no provision as to how a party is to make a progress claim. The provisions of Sch 1 Div 4 are contained in cl 5(1) – (4) of that Schedule and are in substantially greater detail than any provision found in any other Act. Specific reference can be made to cl 5(2)(f) which states:

> A payment claim must –
>
> (f) in the case of a claim by the contractor – itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim.

It is therefore doubted whether the New South Wales decisions on the sufficiency of the detail in a payment claim would be valid in the Western Australian courts. Specific emphasis is placed on the far more vaguely drawn provisions of s 13(2) of the New South Wales Act claims.

17 Responding to claims for payment

The provisions in Schedule 1 Division 5 about when and how a party is to respond to a claim for payment made by another party are implied in a construction contract that does not have a written provision about that matter.

SECTION 17 COMMENTARY

[SOPWA17.10] Responding to claims

Section 17 of the Western Australian Act picks up Sch 1 Div 5 of that Act where there is a detailed provision as to how a party is to respond to a claim for payment made by another party. Unlike all the other Acts in the other States, this provision is done by way of a statutorily implied term in the construction contract. Of significance, is the provision in cl 7(1) that a party who receives a payment claim must, within 14 days after its receipt, give the claimant a notice of dispute which must, under cl 7(2) of the Schedule, contain the matter and comply with the provisions of cl 7(2)(a) – (h). This provision goes much further than that which is required to be contained in a payment schedule under the New South Wales Act and, consequently, all of the New South Wales cases dealing with the sufficiency of the contents of a payment schedule, will probably be of no or little validity in the Western Australian courts.

18 Time for payment

The provisions in Schedule 1 Division 5 about the time by when a payment must be made are implied in a construction contract that does not have a written provision about that matter.

19 Interest on overdue payments

The provisions in Schedule 1 Division 6 are implied in a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract.

20 Ownership of goods

The provisions in Schedule 1 Division 7 are implied in a construction contract that does not have a written provision about when the ownership of goods that are—

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations,

passes from the contractor.

21 Duties as to unfixed goods on insolvency

The provisions in Schedule 1 Division 8 are implied in a construction contract that does not have a written provision about what is to happen to unfixed goods of a kind referred to in section 20 if either of the following persons becomes insolvent—

(a) the principal; or

(b) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work.

22 Retention money

The provisions in Schedule 1 Division 9 are implied in a construction contract that does not have a written provision about the status of money retained by the principal for the performance by the contractor of its obligations.

23 Implied provisions: interpretation etc.

The *Interpretation Act 1984* and sections 3 to 6 of this Act apply to the interpretation and construction of a provision that is implied in a construction contract under this Part despite any provision in a construction contract to the contrary.

PART 3 – ADJUDICATION OF DISPUTES

DIVISION 1 – PRELIMINARY

24 Interpretation of construction contract

Without affecting the operation of section 9, 11 or 53, a reference in this Part to a construction contract is a reference to the contract including any provision that is modified under section 10 or implied in the contract under Part 2 Division 2.

DIVISION 2 – COMMENCING ADJUDICATION

25 Who can apply for adjudication

If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless—

(a) an application for adjudication has already been made by a party, whether or not a determination has been made, but subject to section 37(2); or

(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.

26 Applying for adjudication

(1) To apply to have a payment dispute adjudicated, a party to the contract, within 28 days after the dispute arises or, if applicable, within the period provided for by section 37(2)(b), must—

(a) prepare a written application for adjudication; and

(b) serve it on each other party to the contract; and

(c) serve it—

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on the adjudicator;

(ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;

(iii) otherwise, on a prescribed appointor chosen by the party; and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or the prescribed appointor requires under section 44(8) or (9).

(2) The application—

(a) must be prepared in accordance with, and contain the information prescribed by, the regulations; and

(b) must set out the details of, or have attached to it—

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute; and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

(3) A prescribed appointor that is served with an application for adjudication made under subsection (1) must comply with section 28.

[**Cross-reference:** *Construction Contracts Regulations 2004*:

- reg 5 prescribes information to be contained in an application to have a payment dispute adjudicated including the name and contact details of appointed adjudicator, appointor, applicant and respondent for the purposes of s 26(2)(a); and
- reg 4 provides that contact details include a person's address, phone and fax numbers and ABN.]

SECTION 26 COMMENTARY

[SOPWA26.10] Valid adjudication application

The prerequisites for a valid adjudication application under the Western Australian Act are set out in s 26(2).

27 Responding to an application for adjudication

(1) Within 14 days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on—

(a) the applicant and on any other party that has been served with the application; and

(b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointor on which the application was served under section 26(1)(c).

(2) The response—

(a) must be prepared in accordance with, and contain the information prescribed by, the regulations; and

(b) must set out the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

[**Cross-reference:** *Construction Contracts Regulations 2004*:

- reg 6 prescribes information to be contained in a response to an application for adjudication including the name and contact details of appointed adjudicator, appointor, applicant and respondent for the purposes of s 27(2)(a); and
- reg 4 provides that contact details include a person's address, phone and fax numbers and ABN.]

WA

SECTION 27 COMMENTARY

[SOPWA27.10] Details of response

Under s 27(2)(a) of the Western Australian Act, the response must be prepared in accordance with, and contain all the information prescribed by the regulations, viz reg 6.

More significantly, s 27(2)(b) and (c) state:

(b) must set out the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

Again, it is to be doubted whether the New South Wales case law on the sufficiency of the adjudication response would apply to a construction of this section.

28 Appointment of adjudicator in absence of agreed appointment

(1) If an application for adjudication is served on a prescribed appointor the appointor, within 5 days after being served, must—

(a) appoint a registered adjudicator to adjudicate the payment dispute concerned; and

(b) send the application and any response received by it to the adjudicator; and

(c) notify the parties in writing accordingly; and

(d) notify the Building Commissioner in writing accordingly.

[Subs (1) am Act 16 of 2011, s 128(6)]

(2) If a prescribed appointor does not make an appointment under subsection (1) the Building Commissioner may appoint a registered adjudicator to adjudicate the payment dispute concerned.

[Subs (2) am Act 16 of 2011, s 128(6)]

(3) If the Building Commissioner makes an appointment under subsection (2), the Building Commissioner must—

(a) notify the prescribed appointor in writing accordingly and require the appointor to serve the application and any response received by it on the adjudicator appointed by the Building Commissioner; and

(b) notify the parties in writing accordingly.

[Subs (3) am Act 16 of 2011, s 128(6)]

[S 28 am Act 16 of 2011]

29 Adjudicators: conflicts of interest

(1) An appointed adjudicator who has a material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract is disqualified from adjudicating the dispute.

(2) If an appointed adjudicator is disqualified—

(a) the adjudicator must notify the parties in writing of the disqualification and the reasons for it; and

(b) unless, within 5 days after the date of the adjudicator's notice, all of the parties in writing authorise the adjudicator to continue as the appointed adjudicator, the adjudicator's appointment ceases; and

(c) the applicant may again apply for adjudication in accordance with section 26(1); and

(d) the period commencing on the date when the adjudicator was served with the application for adjudication and ending on and including the date when the adjudicator notifies the parties under paragraph (a) does not count for the purposes of section 26(1).

(3) A party to a payment dispute may apply to the State Administrative Tribunal for a declaration that an appointed adjudicator is disqualified under subsection (1).

(4) The application must be made before the person is notified of a decision or determination made under section 31(2).

SECTION 29 COMMENTARY

[SOPWA29.10] Conflict of interest

Unlike any other provision in any of the legislation of the States, under s 29 of the Western Australian Act, there is a specific injunction against the adjudicator having a conflict of interest and the consequences thereof to the adjudication process.

DIVISION 3 – THE ADJUDICATION PROCESS

DIVISION 3 COMMENTARY

[SOPWA30.10] Adjudication process

The adjudication process in Western Australia is set out in ss 30, 31 and 32.

Section 30 stresses that the object is to determine the dispute fairly and as quickly, informally and inexpensively as possible.

It is to be noted that under s 32(1)(b), an adjudicator in Western Australia is not bound by the rules of evidence, any may inform himself or herself in any way which he or she thinks fit. Presumably, natural justice must at all times be complied with.

Under s 32(6), it is provided that where the regulations and the Act are silent, the adjudicator can determine his or her own procedure.

30 Object of the adjudication process

The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.

31 Adjudicator's functions

(1) In this section—

prescribed time means—

(a) if the appointed adjudicator is served with a response under section 27(1) – 14 days after the date of the service of the response;

(b) if the appointed adjudicator is not served with a response under section 27(1) – 14 days after the last date on which a response is required to be served under section 27(1).

(2) An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a)—

(a) dismiss the application without making a determination of its merits if—

(i) the contract concerned is not a construction contract; or

(ii) the application has not been prepared and served in accordance with section 26; or

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;

(b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so, determine—

(i) the amount to be paid or returned and any interest payable on it under section 33; and

(ii) the date on or before which the amount is to be paid, or the security is to be returned, as the case requires.

(3) If an application is not dismissed or determined under subsection (2) within the

prescribed time, or any extension of it made under section 32(3)(a), the application is to be taken to have been dismissed when the time has elapsed.

SECTION 31 COMMENTARY

[SOPWA31.10] Return of retention moneys

Under s 31(2)(b), the adjudicator is empowered to determine whether or not any security (retention moneys) should be returned. An adjudicator in any other jurisdiction but the Northern Territory does not have such a power.

[SOPWA31.30] Adjudicator obliged to dismiss

Under s 31(2) of the Western Australian Act, an adjudicator must, within the prescribed time, or any extension of it made under s 32(1)(a), dismiss the application without making a determination of its merits if:

(i) the contract concerned is not a construction contract;

(ii) the application has not been prepared and served in accordance with section 26;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason.

Under s 31(2)(a)(iii), it is provided that the adjudicator must dismiss the application if "an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application". The question that arises is whether this sub-section means that even if an adjudication has commenced, once there is any determination by any other body, as provided for in the sub-section, the adjudication application must, in Western Australia, be dismissed.

Of particular significance is s 31(2)(b) which requires the adjudicator, if the adjudication application proceeds, to make a determination "on the balance of probabilities". This is a very sensible provision which is not found in any of the other comparative legislation. Obviously, a failure to decide on the balance of probabilities will strike at the very heart of a Western Australian adjudication determination.

[SOPWA31.50] Determination as to payment claim

One of the earliest decisions in Western Australia on the legislative provisions above, is in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [2005] WASAT 269 (4 October 2005).

The major matters decided in that case are as follows:

(a) The determination as to whether or not a payment claim under the Western Australian Act was made is a matter for the adjudicator without there being any right to review that issue in the State Administrative Tribunal. Accordingly, under s 46(2) of the *Construction Contracts Act 2004* (WA), the tribunal reversed the adjudicator's decision and referred the matter back to the adjudicator to make a determination under s 31(2)(b) of the *Construction Contracts Act 2004* within 14 days.

(b) The proceedings before the tribunal, in accordance with the principle of open administration of justice, should be held in public.

(c) The whole scheme of the *Construction Contracts Act 2004* was inconsistent with the concept of a hearing *de novo* within the ordinary meaning of s 27(1) of the *State Administrative Tribunal Act 2004* (WA). It was accordingly necessary to read s 27(1) down to the extent necessary to remove that inconsistency. Accordingly, any material provided to the tribunal that was not before the adjudicator would be disregarded, see [69]–[71].

32 Adjudication procedure

(1) For the purposes of making a determination, an appointed adjudicator—

(a) must act informally and if possible make the determination on the basis of—

(i) the application and its attachments; and

(ii) if a response has been prepared and served in accordance with section 27, the response and its attachments; and

(b) is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.

(2) In order to obtain sufficient information to make a determination, an appointed adjudicator may—

(a) request a party to make a, or a further, written submission or to provide information or documentation, and may set a deadline for doing so;

(b) request the parties to attend a conference with the adjudicator;

(c) unless all the parties object—

(i) inspect any work or thing to which the payment dispute relates, provided the occupier of any place concerned consents to the entry and inspection;

(ii) arrange for any thing to which the payment dispute relates to be tested, provided the owner of the thing consents to the testing;

(iii) engage an expert to investigate and report on any matter relevant to the payment dispute.

(3) An appointed adjudicator may—

(a) with the consent of the parties, extend the time prescribed by section 31(2) for making a determination;

(b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties;

(c) with the consent of all the parties concerned, adjudicate the payment dispute simultaneously with another payment dispute.

(4) If an appointed adjudicator adjudicates simultaneously 2 or more payment disputes, the adjudicator may, in adjudicating one, take into account information the adjudicator receives in relation to the other, and vice versa.

(5) An adjudicator's power to make a determination is not affected by the failure of either or both of the parties to make a submission or provide information within time or to comply with the adjudicator's request to attend a conference with the adjudicator.

(6) To the extent that the practice and procedure in relation to adjudications is not regulated by this Part or the regulations, an appointed adjudicator may determine his or her own procedure.

SECTION 32 COMMENTARY

[SOPWA32.10] Adjudication procedure

Section 32(1)(b) of the Western Australian Act and s 34(1)(b) of the Northern Territory Act, record that an adjudicator is not bound by the rules of evidence, and may inform himself or herself, in any way the adjudicator considers appropriate.

What is not spelt out is whether or not this entitles the adjudicator to speak to either one of the parties separately and, if that does take place, what the constraints are and what the consequences may be if the result is that of procedural unfairness. Is the adjudication void in the Northern Territory, and may an application under s 45 for the adjudication determination to be enforced as a judgment be resisted on that ground, notwithstanding the provisions of s 48(3) of that Act? These are matters that the relevant legislatures do not seem to have applied their minds to.

Section 32(2)(c)(iii) of the Western Australian Act and s 34(2)(c)(iii) of the Northern Territory Act provide that, unless all the parties object, the adjudicator can engage an expert to investigate and report on any matters relevant to the payment dispute. The adjudicator informing himself or herself is, it is submitted, akin to the adjudicator taking evidence in Western Australia and the Northern Territory. This is a radical departure from the thinking behind the Acts covering this subject in the other States.

[SOPWA32.30] Extension of time

Under s 32(3)(a) of the Western Australian Act, an adjudicator can extend the time, with the consent of the parties, for the making of a determination, but in the Northern Territory, under its Act as set out in s 34(3)(a), the Registrar's consent is required.

33 Interest up to determination

(1) If an appointed adjudicator determines that a party to a payment dispute is liable to make a payment, he or she may also determine that interest is to be paid—

(a) if the payment is overdue under the construction contract, on the payment in accordance with the contract; or

(b) otherwise, on the whole or a part of the payment from the date the payment dispute arose at a rate not greater than the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a),

until and including the date of the determination.

[Subs (1) am Act 8 of 2009, s 38]

(2) Subsection (1) does not authorise the awarding of interest upon interest.

[S 33 am Act 8 of 2009]

34 Costs of parties to payment disputes

(1) Subject to subsection (2), parties to a payment dispute bear their own costs in relation to an adjudication of the dispute.

(2) If an appointed adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.

(3) If an appointed adjudicator makes a decision under subsection (2) the adjudicator must—

(a) decide the amount of the costs and the date on which the amount is payable;

(b) give reasons for the decisions; and

(c) communicate the decisions and the reasons in writing to the parties.

(4) Divisions 4 and 5, with any necessary changes, apply to a decision made under subsection (2) as if it were a determination of an appointed adjudicator.

35 Certificates of completion etc., effect of

(1) This section applies if—

(a) the construction contract to which a payment dispute relates provides for a person to certify—

(i) that obligations under the contract have been performed; or

(ii) the amount of a payment that is to be made by a party; and

(b) such a certificate is provided by a party to an adjudicator in the course of an adjudication.

(2) For the purposes of the adjudication—

(a) if the certificate relates to the final amount payable under the contract and has the effect of finalising the contract, the certificate is to be taken to be conclusive evidence of its contents;

(b) in any other case the certificate is to have such evidentiary weight as the appointed adjudicator thinks fit.

SECTION 35 COMMENTARY

[SOPWA35.10] Effect of certificate

Under s 35(1), it is provided that s 35 applies if the construction contract provides for a certifier of the contractor's obligations, or the amount payable to the contractor, and such a certificate is provided by a party to an adjudicator in the course of the adjudication.

Under s 35(2)(a), it is provided that if the certificate relates to the final payment under the contract and has the effect of finalising the contract, that certificate is taken to be conclusive evidence of its contents. Under s 35(2)(b), it is provided that otherwise the certificate has evidentiary weight which the adjudicator considers appropriate.

The difficulty, however, is to correlate the provisions of s 35 with the provisions of cl 5(3)(a) of the Schedule to the Western Australian Act, which states:

> In the case of a claim by the contractor, the amount claimed in a payment claim:
>
> (a) must be calculated in accordance with this contract …

The deficiency in the Western Australian provision above, which at least attempts, unlike that in the other jurisdictions (but for the Northern Territory) to address the problem, is that nothing is spelt out as to the consequences of an adjudicator ignoring a final certificate or giving insufficient weight to any other certificate. One can see that s 35, which as stated above, at least attempts to address the situation, is going to give rise to considerable litigation.

36 Determination, content of

An appointed adjudicator's decision made under section 31(2)(b) must—

(a) be in writing; and

(b) be prepared in accordance with, and contain the information prescribed by, the regulations; and

(c) state—

(i) the amount to be paid and the date on or before which it is to be paid; or

(ii) the security to be returned and the date on or before which it is to be returned,

as the case requires; and

(d) give reasons for the determination; and

(e) identify any information in it that, because of its confidential nature, is not suitable for publication by the Building Commissioner under section 50; and

[Para (e) am Act 16 of 2011, s 128(6)]

(f) be given to the parties to the adjudication; and

(g) be given to the Building Commissioner.

[Para (g) am Act 16 of 2011, s 128(6)]

[S 36 am Act 16 of 2011

Cross-reference: *Construction Contracts Regulations 2004*:

- reg 7 prescribes information to be contained in an adjudicator's determination including the name of adjudicator, applicant and respondent's name and contact details, and date and identification number of determination for the purposes of s 36(b); and
- reg 4 provides that contact details include a person's address, phone and fax numbers and ABN.]

SECTION 36 COMMENTARY

[SOPWA36.10] Determination

Under s 36(b) of the Western Australian Act, the determination is to be prepared in accordance with, and contain the information prescribed by, the regulations. Section 36(a) – (g) prescribe, in addition to the regulations, the contents of the adjudication determination and certain procedural matters. Under s 36(e), a provision which is also not contained in any other similar Act states that the adjudicator, in his determination, must "identify any information in it that, because of its confidential nature, is not suitable for publication by the Registrar under section 50".

37 Dismissed applications

(1) If under section 31(2)(a) an appointed adjudicator dismisses an application for adjudication, he or she must—

(a) give reasons for doing so; and

(b) communicate the decision and the reasons in writing to the parties.

(2) If under section 31(3) an application for an adjudication of a payment dispute is taken to be dismissed—

(a) nothing in this Part prevents a further application being made under this Part for an adjudication of the dispute; and

(b) any further application must be made within 28 days after the previous application is taken to be dismissed under section 31(3).

DIVISION 4 – EFFECT OF DETERMINATIONS

38 Determinations have effect despite other proceedings

An appointed adjudicator's determination is binding on the parties to the construction contract under which the payment dispute concerned arose even though other proceedings relating to the payment dispute have been commenced before an arbitrator or other person or a court or other body.

39 Payment of amount determined and interest

(1) A party that is liable to pay an amount under a determination must do so on or before the date specified in the determination.

(2) Unless the determination provides otherwise, interest at the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a) is to be paid on such of the amount as is unpaid after the date specified in the determination.

[Subs (2) am Act 8 of 2009, s 38]

(3) The interest to be paid under subsection (2) forms part of the determination.

(4) If under section 43(2) a judgment is entered in the terms of a determination, interest under subsection (2) ceases to accrue.

[S 39 am Act 8 of 2009]

SECTION 39 COMMENTARY

[SOPWA39.10] Time for payment

Under s 39(1) of the Western Australian Act and under s 41(1) of the Northern Territory Act, a party that is liable to pay an amount under a determination, must do so on, or before, the date stated in the determination. There is no provision for the giving of security.

40 Progress payments under determinations to be on account

If—

(a) an appointed adjudicator—

(i) determines a payment dispute concerning a claim by a contractor for payment for part performance of its obligations but not for a final payment by the principal; and

(ii) determines that the principal is to pay the contractor an amount in respect of the claim; and

(b) the principal, in accordance with the determination, pays the amount,

the payment is to be taken to be an advance towards the total amount payable under the contract by the principal to the contractor.

41 Determinations are final

(1) If on the adjudication of a payment dispute the appointed adjudicator makes a determination—

(a) the adjudicator cannot subsequently amend or cancel the determination except with the consent of the parties; and

(b) a party to the dispute may not apply subsequently for an adjudication of the dispute.

(2) Despite subsection (1)(a), if an adjudicator's determination contains—

(a) an accidental slip or omission; or

(b) a material arithmetic error; or

(c) a material mistake in the description of any person, thing or matter,

the adjudicator, on the application of a party or, after notifying the parties, on the adjudicator's own initiative, may correct the determination.

DIVISION 5 – ENFORCING DETERMINATIONS

42 Non-compliance by principal, contractor may suspend its obligations

(1) If a determination requires the principal to pay the contractor an amount and the principal does not pay in accordance with the determination, the contractor may give the principal notice of the contractor's intention to suspend the performance of its obligations.

(2) The notice must—

(a) be in writing; and

(b) be prepared in accordance with, and contain the information prescribed by, the regulations; and

(c) state the date on which the contractor intends to suspend the performance of its obligations; and

(d) be given to the principal at least 3 days before that date.

(3) If on the date stated under subsection (2)(c) in the notice the principal has not paid the contractor the amount in accordance with the determination, the contractor may suspend the performance of its obligations until no longer than 3 days after the date on which the amount is paid.

(4) Subsection (3) does not prevent the contractor from at any time resuming the performance of its obligations.

(5) A contractor that suspends the performance of its obligations in accordance with this section—

(a) is not liable for any loss or damage suffered by the principal or by any person claiming through the principal; and

(b) retains its rights under the contract, including any right to terminate the contract.

[**Cross-reference:** *Construction Contracts Regulations 2004*:

- reg 8 prescribes information to be contained in a notice of intention to suspend performance of obligations including the name of adjudicator, principal and contractor's name and contact details, date and identification number of adjudicator's determination, amount to be paid by principal to contractor under determination and due date for amount payable under determination for the purposes of s 42(2)(b); and
- reg 4 provides that contact details include a person's address, phone and fax numbers and ABN.]

43 Determinations may be enforced as judgments

(1) In this section—

court of competent jurisdiction, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

(2) A determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.

(3) For the purposes of subsection (2), a determination signed by an adjudicator and certified by the Building Commissioner as having been made by a registered adjudicator under this Part is to be taken as having been made under this Part.

[Subs (3) am Act 16 of 2011, s 128(6)]

[S 43 am Act 16 of 2011]

SECTION 43 COMMENTARY

[SOPWA43.10] Enforcement

The enforcement of an adjudication determination in Western Australia takes place under s 43. Section 43(2) provides that a determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect. Nothing is stated as to the grounds upon which such leave may be opposed. Presumably, as cross-claims are not excluded, they may be raised in opposition to an application to have the determination enforced.

DIVISION 6 – GENERAL

44 Costs of adjudications

(1) For the purposes of this section the costs of an adjudication are—

(a) the entitlements of the appointed adjudicator under subsection (2); and

(b) the costs of any testing done, or of any expert engaged, under section 32(2)(c).

(2) If an appointed adjudicator, within the prescribed time in section 31(2), dismisses an application for adjudication or makes a determination of the dispute, he or she is entitled—

(a) to be paid for his or her work—

(i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate, if any, prescribed by the regulations; or

(ii) if a rate was not agreed, at the rate published under section 51 in respect of the adjudicator; and

(b) to be reimbursed any expenses reasonably incurred in connection with that work.

(3) An appointed adjudicator who is disqualified under section 29 has the entitlements in subsection (2) in respect of any adjudication work done before the disqualification is notified to the parties.

(4) Despite subsection (2), an appointed adjudicator may refuse to communicate his or her decision or determination under section 31(2) or 34(2) or subsection (10) until he or she has been paid and reimbursed in accordance with subsection (2).

(5) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.

(6) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

(7) Subsections (5) and (6) do not prevent a decision being made under section 34(2).

(8) An appointed adjudicator may at any time require one or more parties to provide a reasonable deposit, or reasonable security, for the, or any anticipated costs of the adjudication.

(9) A prescribed appointor, before appointing an adjudicator, may require the applicant for adjudication to provide a deposit, or reasonable security, for the, or any anticipated costs of the adjudication.

(10) If a party involved in a dispute has paid more than the party's share of the costs of an adjudication of the dispute, having regard to subsection (6), the appointed adjudicator may decide that another party must pay to the first-mentioned party such amount of the costs as would result in all the parties paying an equal amount of the costs.

(11) If an appointed adjudicator makes a decision under subsection (10)—

(a) the adjudicator must include in the decision the date on which the amount is payable; and

(b) Divisions 4 and 5, with any necessary changes, apply to the decision as if it were a determination of an appointed adjudicator.

(12) An appointed adjudicator may recover the costs of an adjudication from a person liable to pay the costs in a court of competent jurisdiction as if the costs were a debt due to the adjudicator.

45 Effect of this Part on civil proceedings

(1) This Part does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.

(2) If other such proceedings are instituted in relation to a payment dispute that is being adjudicated under this Part, the adjudication is to proceed despite those proceedings unless all of the parties, in writing, require the appointed adjudicator to discontinue the adjudication.

(3) Evidence of anything said or done in an adjudication is not admissible before an arbitrator or other person or a court or other body, except for the purposes of an application made under section 29(3) or an appeal made under section 46.

(4) An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract—

(a) must, in making any award, judgment or order, allow for any amount that has been or is to be paid to a party under a determination of a payment dispute arising under the contract; and

(b) may make orders for the restitution of any amount so paid, and any other appropriate orders as to such a determination.

46 Review, limited right of

(1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.

(2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

(3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

SECTION 46 COMMENTARY

[SOPWA46.10] Matter referred back to adjudicator

One of the earliest decisions in Western Australia on the legislative provisions above, is in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [2005] WASAT 269 (4 October 2005).

The major matters decided in that case are as follows:

(a) The determination as to whether or not a payment claim under the Western Australian Act was made is a matter for the adjudicator without there being any right to review that issue in the State Administrative Tribunal. Accordingly, under s 46(2) of the *Construction Contracts Act 2004* (WA) (the *CC Act*), the

tribunal reversed the adjudicator's decision and referred the matter back to the adjudicator to make a determination under s 31(2)(6) of the CC Act within 14 days.

(b) The proceedings before the tribunal, in accordance with the principle of open administration of justice, should be held in public.

(c) The whole scheme of the CC Act was inconsistent with the concept of a hearing *de novo* within the ordinary meaning of s 27(1) of the SAT Act. It was accordingly necessary to read s 27(1) down to the extent necessary to remove that inconsistency. Accordingly, any material provided to the tribunal that was not before the adjudicator would be disregarded, see [69]–[71].

PART 4 – ADMINISTRATION

47 Registrar, appointment and functions [Repealed]

[S 47 rep Act 16 of 2011, s 128(5)]

48 Registering adjudicators

(1) An individual is eligible to be a registered adjudicator if he or she has the qualifications and experience prescribed by the regulations.

(2) The Building Commissioner may register an individual as a registered adjudicator—

(a) on the application of an individual; or

(b) on the nomination of a prescribed appointor.

[Subs (2) am Act 16 of 2011, s 128(6)]

(3) The regulations may prescribe a fee to be paid on making such an application or nomination.

(4) The Building Commissioner must not register an individual as a registered adjudicator unless satisfied that the individual is eligible to be registered.

[Subs (4) am Act 16 of 2011, s 128(6)]

(5) The Building Commissioner may cancel the registration of an individual as a registered adjudicator if satisfied that the individual—

(a) has ceased to be eligible to be registered;

(b) has misconducted, or is incompetent or unsuitable to conduct, adjudications under Part 3.

[Subs (5) am Act 16 of 2011, s 128(6)]

(6) The Building Commissioner must keep a register of registered adjudicators and make it available for public inspection at no charge.

[Subs (6) am Act 16 of 2011, s 128(6)]

(7) A certificate by the Building Commissioner stating that an individual was or was not at a time or in a period, or is or is not, a registered adjudicator is proof of the content of the certificate in the absence of evidence to the contrary.

[Subs (7) am Act 16 of 2011, s 128(6)]

[S 48 am Act 16 of 2011

Cross-reference: *Construction Contracts Regulations 2004*:

- reg 9 provides that for the purposes of s 48(1), in order to be eligible to be a registered adjudicator, an individual must: have successfully completed a relevant tertiary qualification and adjudicator training course; be eligible for membership of a prescribed professional institution; and have at least 5 years experience in administering construction contracts or dispute resolution relating to construction contracts; and
- reg 10 prescribes a $53 application fee payable for registration as a registered adjudicator for the purposes of s 48(3).]

49 Review of registration decisions

A person who is aggrieved by a decision of the Building Commissioner made under section 48 may apply to the State Administrative Tribunal for a review of the decision.

[S 49 am Act 16 of 2011, s 128(6)]

50 Publication of adjudicators' decisions

(1) The Building Commissioner may make available for public inspection the result, or a report, of the decisions of registered adjudicators.

[Subs (1) am Act 16 of 2011, s 128(6)]

(2) The Building Commissioner is to ensure that there is not included in the result, or a report, of the determination made available under subsection (1)—

(a) the identities of the parties to the adjudication;

(b) any information in the determination that is identified under section 36(e) as being not suitable for publication because of its confidential nature.

[Subs (2) am Act 16 of 2011, s 128(6)]

(3) No charge is payable for inspecting the result, or a report, of a determination made available under subsection (1).

[S 50 am Act 16 of 2011]

51 Appointors' and adjudicators' rates to be published

(1) A registered adjudicator is to ensure that the rate at which the adjudicator charges for his or her work under this Act is published in a manner approved by the Building Commissioner.

[Subs (1) am Act 16 of 2011, s 128(6)]

(2) A prescribed appointor is to ensure that the rate at which the appointor charges for its work under this Act is published in a manner approved by the Building Commissioner.

[Subs (2) am Act 16 of 2011, s 128(6)]

(3) Nothing in subsection (1) or (2) prevents any of the parties from agreeing the rate to be charged by a registered adjudicator or a prescribed appointor for work under this Act.

(4) A published or agreed rate as referred to in this section is not to be more than the maximum rate, if any, prescribed by the regulations.

[S 51 am Act 16 of 2011]

52 Annual report

Before 1 November in each year, the Building Commissioner must give the Minister a written report about the operation and effectiveness of this Act in the financial year that ended in that year.

[S 52 am Act 16 of 2011, s 128(6)]

PART 5 – MISCELLANEOUS

53 No contracting out

(1) A provision in an agreement or arrangement, whether a construction contract or not and whether in writing or not, that purports to exclude, modify or restrict the operation of this Act has no effect.

(2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.

(3) Any purported waiver, whether in a construction contract or not and whether in writing or not, of an entitlement under this Act has no effect.

54 Immunity from tortious liability

(1) In this section—

protected person means an appointed adjudicator, a prescribed appointor or the Building Commissioner.

[Def am Act 16 of 2011, s 128(6)]

(2) In this section, a reference to the doing of anything includes a reference to an omission to do anything.

(3) An action in tort does not lie against a protected person for anything that the person has done, in good faith, in the performance or purported performance of a function under this Act.

(4) The protection given by subsection (3) applies even though the thing done as described in that subsection may have been capable of being done whether or not this Act has been enacted.

(5) Despite subsection (3), the State is not relieved of any liability that it might have for the Building Commissioner having done anything as described in that subsection.

[Subs (5) am Act 16 of 2011, s 128(6)]

[S 54 am Act 16 of 2011]

55 Regulations

(1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

(2) Without limiting subsection (1), the regulations may regulate the practice and procedure in adjudications.

56 Review of Act

(1) As soon as practicable after the fifth anniversary of its commencement, the Minister must review the operation and effectiveness of this Act and prepare a report about the review.

(2) As soon as practicable after preparing the report, the Minister must cause it to be laid before each House of Parliament.

Schedule 1 – Implied provisions

DIVISION 1 – VARIATIONS

1 Variations must be agreed

The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on—

(a) the nature and extent of the variation of those obligations; and

(b) the amount, or a means of calculating the amount, that the principal is to pay the contractor in relation to the variation of those obligations.

DIVISION 2 – CONTRACTOR'S ENTITLEMENT TO BE PAID

2 Contractor entitled to be paid

(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.

(2) Subclause (1) applies whether or not the contractor performs all of its obligations.

CLAUSE 2 COMMENTARY

[SOPWASCH1.200] Defective work

There is no reference to defective work in the Act. Presumably, the provision in the Western Australian Act in Sch 1, Div 2, cl 2, entitling the contractor to be paid a reasonable amount for the performance of his obligations, compels the adjudicator to take into account the question as to whether or not the work is defective and the cost of rectification. A similar provision is to be found in Div 1, cl 2 of the Schedule to the Northern Territory Act.

DIVISION 3 – CLAIMS FOR PROGRESS PAYMENTS

3 Entitlement to claim progress payments

The contractor is entitled to make one or more claims for a progress payment in relation to those of the contractor's obligations that the contractor has performed and for which it has not been paid by the principal.

4 When claims for progress payments can be made

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making any other claim for moneys payable to the contractor under or in connection with this contract.

CLAUSE 4 COMMENTARY

[SOPWASCH1.300] Contractor's entitlement to a progress payment

The contractor's entitlement to a progress payment is set out in Sch 1 Div 3, the provisions of which are implied in the construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed.

It is to be noted that in Western Australia the draftsperson of a construction contract should make careful provision for progress payments, unless the parties wish to adopt the

provisions of Sch 1 Div 3. Clause 4(1) of Sch 1 Div 3 provides that a claim by a contractor for a progress payment can be made at any time after the contractor has performed any of its obligations. This provision in Sch 1 is to be read with that which is provided in Div 2 that the contractor is entitled to be paid a reasonable amount for performing its obligations whether or not all of its obligations are performed.

DIVISION 4 – MAKING CLAIMS FOR PAYMENT

5 Claim for payment, content

(1) In this clause—

payment claim means a claim—

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under this contract; or

(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under this contract.

(2) A payment claim must—

(a) be in writing; and

(b) be addressed to the party to which the claim is made; and

(c) state the name of the claimant; and

(d) state the date of the claim; and

(e) state the amount claimed; and

(f) in the case of a claim by the contractor—itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and

(g) in the case of a claim by the principal—describe the basis for the claim in sufficient detail for the contractor to assess the claim; and

(h) be signed by the claimant; and

(i) be given to the party to which the claim is made.

(3) In the case of a claim by the contractor, the amount claimed in a payment claim—

(a) must be calculated in accordance with this contract; or

(b) if this contract does not provide a means of calculating the amount, must be—

(i) if this contract says that the principal is to pay the contractor one amount (the ***contract sum***) for the performance by the contractor of all of its obligations under this contract (the ***total obligations***)—the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or

(ii) if this contract says that the principal is to pay the contractor in accordance with rates specified in this contract—the value of the obligations performed and detailed in the claim calculated by reference to those rates; or

(iii) in any other case—a reasonable amount for the obligations performed and detailed in the claim.

(4) Paragraph (b) of subclause (3) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subparagraphs (i), (ii) and (iii) of that paragraph.

DIVISION 5 – RESPONDING TO CLAIMS FOR PAYMENT

6 Term used: payment claim

In this Division—

payment claim means a claim—

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under this contract; or

(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under this contract.

7 Responding to a payment claim

(1) If a party that receives a payment claim—

(a) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(b) disputes the whole or part of the claim,

the party must, within 14 days after receiving the claim, give the claimant a notice of dispute.

(2) A notice of dispute must—

(a) be in writing; and

(b) be addressed to the claimant; and

(c) state the name of the party giving the notice; and

(d) state the date of the notice; and

(e) identify the claim to which the notice relates; and

(f) if the claim is being rejected under subclause (1)(a)—state the reasons for the belief that the claim has not been made in accordance with this contract; and

(g) if the claim is being disputed under subclause (1)(b)—identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(3) Within 28 days after a party receives a payment claim, the party must do one of the following, unless the claim has been rejected or wholly disputed in accordance with subclause (1)—

(a) pay the part of the amount of the claim that is not disputed;

(b) pay the whole of the amount of the claim.

(4) If under this contract the principal is entitled to retain a portion of any amount payable by the principal to the contractor—

(a) subclause (3) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of any amount retained under the entitlement.

DIVISION 6 – INTEREST ON OVERDUE PAYMENTS

8 Interest payable on overdue payments

(1) Interest is payable on so much of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.

(2) The interest is to be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.

(3) The rate of interest at any time is equal to that prescribed for that time under the *Civil Judgments Enforcement Act 2004* section 8(1)(a).

[Cl 8 am Act 8 of 2009, s 38]

DIVISION 7 – OWNERSHIP OF GOODS

9 When ownership of goods supplied by contractor passes

The ownership of goods that are—

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations under this contract,

passes from the contractor when whichever of the following happens first—

(c) when the contractor is paid for the goods; or

(d) when the goods become fixtures.

DIVISION 8 – DUTIES AS TO UNFIXED GOODS ON INSOLVENCY

10 Duties of principal or landowner etc as to unfixed goods on insolvency

(1) In this clause—

insolvent means—

(a) in relation to a natural person, an insolvent under administration as that term is defined in the *Corporations Act 2001* of the Commonwealth;

(b) in relation to a body corporate, an externally-administered body corporate as that term is defined in the *Corporations Act 2001* of the Commonwealth.

(2) If—

(a) goods that are related to construction work have been supplied to the site of the construction work by the contractor under its obligations under this contract; and

(b) the contractor has not been paid for the goods; and

(c) the goods have not become fixtures; and

(d) ownership of the goods has not passed from the contractor; and

(e) the goods are in the possession of or under the control of—

(i) the principal; or

(ii) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work; and

(f) the principal or that person becomes an insolvent,

the principal and that person—

(g) must not, during the insolvency, allow the goods to become fixtures or to fall into the possession of or under the control of any other person, other than the contractor, except with the prior written consent of the contractor; and

(h) must allow the contractor a reasonable opportunity to repossess the goods.

WA

DIVISION 9 – RETENTION MONEY

11 Retention money to be held on trust

If the principal retains from an amount payable by the principal to the contractor for the performance by the contractor of its obligations a portion of that amount (the ***retention money***), the principal holds the retention money on trust for the contractor until whichever of the following happens first—

(a) the money is paid to the contractor; or

(b) the contractor, in writing, agrees to give up any claim to the money; or

(c) the money ceases to be payable to the contractor by virtue of the operation of this contract; or

(d) an adjudicator, arbitrator, or other person, or a court, tribunal or other body, determines that the money ceases to be payable to the contractor.

CONSTRUCTION CONTRACTS REGULATIONS (WA)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Construction Contracts Regulations 2004	**216 of 2004**	**14 Dec 2004**	**1 Jan 2005**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Construction Contracts Amendment Regulations 2005	51 of 2005	1 Apr 2005	1 Apr 2005
Construction Contracts Amendment Regulations (No 2) 2005	153 of 2005	12 Aug 2005	12 Aug 2005
Construction Contracts Amendment Regulations 2014	87 of 2014	17 Jun 2014	Reg 4: 1 Jul 2014
Construction Contracts Amendment Regulations 2015	Gaz 89 of 2015	23 Jun 2015	Reg 4: 1 Jul 2015
Commerce Regulations Amendment (Fees and Charges) Regulations 2016	Gaz 91 of 2016	3 Jun 2016	Reg 12: 1 Jul 2016

1 Citation

These are the *Construction Contracts Regulations 2004*.

2 Commencement

These regulations come into operation on the day on which section 55 of the Act comes into operation.

[**Editor's Note:** The *Construction Contracts Regulations 2004* commenced on 1 Jan 2005.]

3 Terms used in these regulations

In these regulations, unless the contrary intention appears —

ABN means Australian Business Number as defined in section 41 of the *A New Tax System (Australian Business Number) Act 1999* of the Commonwealth;

ACN means Australian Company Number as defined in section 9 of the *Corporations Act 2000* of the Commonwealth;

contact details has the meaning given in regulation 4.

4 Giving a person's contact details

If a person is required by these regulations to give the contact details of a person, the person required to give the details must give the address, telephone and facsimile numbers and ABN of the person or the person's business (or ACN of the person if there is no ABN) to the extent to which the person required to give the details knows those details.

5 Prescribed information in application for adjudication

For the purposes of section 26(2)(a) of the Act, an application to have a payment dispute adjudicated must, in addition to the other information required by section 26(2) of the Act, contain —

(a) the name of the appointed adjudicator or prescribed appointor and the adjudicator's or appointor's contact details;

(b) the applicant's name and contact details; and

(c) the respondent's name and contact details.

6 Prescribed information in response to an application for adjudication

For the purposes of section 27(2)(a) of the Act, a response to an application for adjudication must, in addition to the other information required by section 27(2) of the Act, contain —

(a) the name of the appointed adjudicator or prescribed appointor and the adjudicator's or appointor's contact details;

(b) the applicant's name and contact details; and

(c) the respondent's name and contact details.

7 Prescribed information in adjudicator's determination

For the purposes of section 36(b) of the Act, an appointed adjudicator's decision must, in addition to the other information required by section 36 of the Act, contain —

(a) the name of the appointed adjudicator;

(b) the applicant's name and contact details;

(c) the respondent's name and contact details; and

(d) the date and identification number (if any) of the adjudicator's determination.

8 Prescribed information in notice of intention to suspend performance of obligations

For the purposes of section 42(2)(b) of the Act, a contractor's notice of intention to suspend the performance of its obligations must, in addition to the other information required by section 42(2) of the Act, contain —

(a) the name of the appointed adjudicator;

(b) the principal's name and contact details;

(c) the contractor's name and contact details;

(d) the date and identification number (if any) of the adjudicator's determination;

(e) the amount to be paid by the principal to the contractor under the determination; and

(f) the date by which the principal is to pay the amount to the contractor under the determination.

9 Qualifications of registered adjudicators

(1) For the purposes of section 48(1) of the Act, an individual must have the qualifications and experience set out in subregulations (2), (3) and (4) to be eligible to be a registered adjudicator.

(2) The individual must —

(a) have a degree, from a university or other tertiary institution in Australia, in a course listed in the Table to this paragraph, or an equivalent qualification from an overseas university or tertiary institution;

Table

Architecture	Building
Engineering	Construction
Quantity surveying	Law
Building surveying	Project management

(b) be eligible for membership of a professional institution listed in the Table to this paragraph;

Table

The Royal Australian Institute of Architects

Institution of Engineers Australia

Australian Institute of Quantity Surveyors

Australian Institute of Building Surveyors

The Australian Institute of Building

The Institute of Arbitrators and Mediators of Australia

Australian Institute of Project Management

or

(c) be a builder registered under the *Builders' Registration Act 1939*.

(3) The individual must have had at least 5 years experience in —

(a) administering construction contracts; or

(b) dispute resolution relating to construction contracts.

(4) The individual must have successfully completed an appropriate training course which qualifies the person for the performance of the functions of an adjudicator under the Act.

(5) For the purposes of subregulation (2)(a), a qualification is equivalent to another if the course of study for the first qualification covers approximately the same matters as does the course of study for the second.

10 Adjudicator application fee

For the purposes of section 48(3) of the Act, a fee of $53.00 is payable on the application of an individual for registration as a registered adjudicator.

[Reg 10 am Gov Gaz 91, 3 Jun 2016, p 1756, reg 12; Gov Gaz 89, 23 Jun 2015, p 2170, reg 4; Gov Gaz 87, 17 Jun 2014, p 1961, reg 4]

11 Prescribed appointors

For the purposes of the definition of "prescribed appointor" in section 3 of the Act, the persons listed in the Table to this regulation are prescribed.

Table

The Australian Institute of Building

Australian Institute of Project Management

The Australian Institute of Quantity Surveyors

Electrical and Communications Association of Western Australia (Union of Employers)

The Institute of Arbitrators and Mediators Australia

Master Builders Association of Western Australia (Union of Employers)

RICS Australasia Pty Ltd

The Royal Australian Institute of Architects

[Reg 11 am Gov Gaz 153, 12 Aug 2005, p 3653; insrt Gov Gaz 51, 1 Apr 2005, p 1064]

[**Editor's Note:** The *Construction Contracts Regulations 2004* as gazetted on 14 Dec 2004 did not contain a list of prescribed appointors. The *Construction Contracts Amendment Regulations 2005* inserted reg 11 into the principal regs on 1 Apr 2005, thereby prescribing six industry bodies to be ***prescribed appointers***, including: (1) The Australian Institute of Building; (2) The Australian Institute of Quantity Surveyors; (3) Electrical and Communications Association of Western Australia (Union of Employers); (4) The Institute of Arbitrators and Mediators; (5) Australia Master Builders Association of Western Australia (Union of Employers); and (6) The Royal Australian Institute of Architects. The *Construction Contracts Amendment Regulations (No 2) 2005*, which were gazetted on 12 Aug 2005 and commenced on that date, added a further two additional organisations (the Australian Institute of Project Management and RICS Australasia Pty Ltd) to the Table of ***prescribed appointers*** in reg 11.]

SA LEGISLATION

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL 2009 (SA) — SECOND READING SPEECH

House of Assembly, 5 March 2009

Mr KENYON (Newland) (10:36): I move:

That this bill be now read a second time.

This bill seeks to secure that a person who undertakes construction work or who supplies related goods and services under a construction contract is entitled to receive and is able to recover progress payments for the carrying out of that work or the supplying of those goods and services.

The bill addresses what is commonly known in the building and construction industry as the "security of payment problem". This problem arises when the subcontractors and suppliers in the building and construction industry are unable to secure in a timely fashion, or sometimes at all, payment for work performed or goods and services supplied, despite, in many cases, having a contractual right to such payments.

As much of the building and construction industry operates under a system of hierarchical contract chains (head contractor, subcontractors, suppliers and consultants), the industry is particularly vulnerable to security of payment problems, because the failure of any one party in the contractual chain to honour its obligations can have a flow-on effect on other parties by restricting cash flow and ultimately causing insolvencies.

There have been a number of inquiries into the security of payment problem in Australia. In general, these reviews have concluded that the security of payment problem was a matter that warranted government action. A consistent theme across the reviews was that traditional legal remedies provide inadequate protection to subcontractors and suppliers. These reviews initiated government action. New South Wales, Queensland, Victoria, Western Australia, the Northern Territory and New Zealand have all legislated to address the security of payment problem in their building and construction industries.

To date, there has been no formal detailed review of the extent of the security of payment problem in South Australia. However, I, along with a number of other members (particularly the members for Torrens and Hartley), have been approached by industry participants who have reported the existence of a problem in this state. I am convinced that action in the form of legislation is required.

The bill I put before the house today is based on the *Building and Construction Industry Security of Payment Act 1999* of New South Wales. The bill applies to most forms of construction contracts other than contracts involving "resident owners" under the *Building Work Contractors Act 1995*. The bill will, however, cover owner/builders who engage contractors and trades people in a building contractor role.

The bill provides that, irrespective of the terms of a construction contract, a person who performs work or supplies related to goods and services under the contract is entitled to a progress payment. The amount and timing of a progress payment is calculated either in accordance with the terms of the contract or, if the contract does not provide for this, in accordance with a formula set out in the legislation.

The notorious "pay when paid" and "pay if paid" provisions are rendered invalid. Under the bill:

- a person who has carried out construction work or provided related goods or services may make a claim for progress payments;
- upon receipt of a payment claim, the respondent will have 10 business days in which to serve a payment schedule on the claimant. If the respondent seeks to

withhold in whole or in part a claimed progress payment, he or she will be required to state the reason in the payment schedule;

- if the respondent fails to provide a payment schedule, he or she becomes liable to pay the whole amount of the payment claim on the due date;
- if the respondent serves a payment schedule that includes reasons for withholding payment, the claimant will have 10 business days to accept the response or submit the payment claim to adjudication. (A claimant will also be able to submit a claim to adjudication where no payment schedule is provided);
- adjudicators will be non-government individuals or companies offering specialist adjudication services to industry participants. Their fees will be payable by the parties to an adjudication. Adjudicators will be nominated by nominating authorities and nominating authorities will be authorised by the minister;
- after an adjudicator accepts an adjudication application, he or she will have 10 business days to make a determination. The parties may extend this;
- upon completing adjudication, an adjudicator will be required to determine the amount (if any) of progress payments due to the claimant, the due date for payment and interest. A successful claimant will have the right to suspend work under the contract and enforce the adjudication decision in court.

The rights and liabilities created under the bill do not affect any other entitlement a person may have under a construction contract or any other remedy a person may have for recovering any such entitlement. However, in court proceedings in relation to a matter arising under a construction contract, the court must allow for an amount paid to a party to the contract as a result of an adjudication under the legislation in any order or award it makes to those proceedings and may make orders for the restitution of any amount paid as a result of the adjudication.

The time frames set out by the bill for responding to payment claim and for the making of an adjudication are tight and aimed at ensuring that the disputes under legislation are resolved rapidly and at minimal expense to the parties. It is my intention for this bill to remain available for consultation for the next six weeks before proceeding with it, and I commend it to the house.

Debate adjourned on motion of Hon I F Evans.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2009 (SA)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Act 2009	77 of 2009	10 Dec 2009	10 Dec 2011

There have been no further amendments to this legislation.

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement

PART 1 – PRELIMINARY

1 Short title

This Act may be cited as the *Building and Construction Industry Security of Payment Act 2009*.

2 Commencement

This Act will come into operation on a day to be fixed by proclamation.

3 Object of Act

(1) The object of this Act is to ensure that a person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the progress payment so determined.

(4) It is intended that this Act does not limit—

(a) any other entitlement that a claimant may have under a construction contract; or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

4 Interpretation

In this Act, unless the contrary intention appears—

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable, as referred to in section 22;

adjudication application means an application referred to in section 17;

adjudication certificate means a certificate provided by an authorised nominating authority under section 24;

adjudication fees means fees or expenses charged by an authorised nominating authority, or by an adjudicator, under this Act;

adjudication response means a response referred to in section 20;

adjudicator, in relation to an adjudication application, means the person appointed in accordance with this Act to determine the application;

authorised nominating authority means a person authorised by the Minister under section 29 to nominate persons to determine adjudication applications;

business day means any day other than—

(a) a Saturday, Sunday or public holiday; or

(b) 27, 28, 29, 30 or 31 December; or

(c) any other day on which there is a Statewide shut-down of the operations of the building and construction industry;

claimant means person by whom a payment claim is served under section 13;

claimed amount means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 13;

construction contract means a contract or other arrangement under which 1 party undertakes to carry out construction work, or to supply related goods and services, for another party;

construction work—see section 5;

due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 11;

exercise a function includes perform a duty;

function includes a power, authority or duty;

payment claim means a claim referred to in section 13;

payment schedule means a schedule referred to in section 14;

progress payment means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement)—

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract; and

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract; and

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment");

recognised financial institution means a bank or any other person or body prescribed by the regulations for the purposes of this definition;

reference date, in relation to a construction contract, means—

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract; or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month;

related goods and services—see section 6;

respondent means a person on whom a payment claim is served under section 13;

scheduled amount means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 14.

SA

5 Definition of construction work

(1) In this Act—

construction work means any of the following work:

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not);

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection;

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

(d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;

(e) any operation that forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including—

(i) site clearance, earth-moving, excavation, tunnelling and boring; and

(ii) the laying of foundations; and

(iii) the erection, maintenance or dismantling of fences or scaffolding; and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of roadways and other access works;

(f) the painting or decorating of the internal or external surfaces of any building, structure or works;

(g) other work of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), ***construction work*** does not include the following work:

(a) the drilling for, or extraction of, oil or natural gas;

(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;

(c) other work of a kind prescribed by the regulations for the purposes of this subsection.

6 Definition of related goods and services

(1) In this Act—

related goods and services, in relation to construction work, means any of the following goods and services:

(a) goods of the following kind:

(i) materials and components to form part of any building, structure or work arising from construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind:

(i) the provision of labour to carry out construction work;
(ii) architectural, design, surveying or quantity surveying services in relation to construction work;
(iii) building, engineering, interior or exterior decoration or landscape advisory or technical services in relation to construction work;
(c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), ***related goods and services*** does not include goods or services of a kind prescribed by the regulations for the purposes of this subsection.

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

7 Application of Act

(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than South Australia.

(2) This Act does not apply to—

(a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes—
(i) to lend money or to repay money lent; or
(ii) to guarantee payment of money owing or repayment of money lent; or
(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract; or
(b) a construction contract for the carrying out of domestic building work (within the meaning of the *Building Work Contractors Act 1995*) on such part of any premises that the party for whom the work is carried out resides in or proposes to reside in; or
(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

(3) This Act does not apply to a construction contract to the extent to which it contains—

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee (within the meaning of the *Fair Work Act 1994*) of the party for whom the work is to be carried out or the related goods and services are to be supplied; or
(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution; or
(c) provisions under which a party undertakes—
(i) to lend money or to repay money lent; or
(ii) to guarantee payment of money owing or repayment of money lent; or
(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

(4) This Act does not apply to a construction contract to the extent to which it deals with—

(a) construction work carried out outside this State; and

(b) related goods and services supplied in respect of construction work carried out outside this State.

(5) This Act does not apply to a construction contract, or class of construction contracts, prescribed for the purposes of this section.

PART 2 – RIGHTS TO PROGRESS PAYMENTS

8 Rights to progress payments

On and from each reference date under a construction contract, a person—

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

9 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter—the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

10 Valuation of construction work and related goods and services

(1) Construction work carried out under a construction contract is to be valued—

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued—

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the goods and services; and

(ii) any other rates or prices set out in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and

(iv) if any of the goods are defective, the estimated cost of rectifying the defect,

and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

11 Due date for payment

(1) A progress payment under a construction contract becomes due and payable—

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter—on the date occurring 15 business days after a payment claim is made under Part 3 in relation to the payment.

(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate—

(a) prescribed under the *Supreme Court Act 1935* in respect of judgment debts of the Supreme Court; or

(b) specified under the construction contract,

whichever is the greater.

(3) If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of the construction work for the respondent.

(4) A lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).

(5) Subsection (3) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.

12 Effect of "pay when paid" provisions

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

(2) In this section—

money owing, in relation to a construction contract, means money owing for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract;

pay when paid provision of a construction contract means a provision of the contract—

(a) that makes the liability of 1 party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or a part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or a part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

PART 3 – PROCEDURE FOR RECOVERING PROGRESS PAYMENTS

DIVISION 1 – PAYMENT CLAIMS AND PAYMENT SCHEDULES

13 Payment claims

(1) A person referred to in section 8 who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the contract concerned, is or may be liable to make the payment.

(2) A payment claim—

(a) must identify the construction work (or related goods and services) to which the progress payment relates; and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***); and

(c) must state that it is made under this Act.

(3) The claimed amount may include an amount—

(a) that the respondent is liable to pay the claimant under section 28(3); or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract; or

(b) the period of 6 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

(5) A claimant cannot serve more than 1 payment claim in respect of each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

14 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not provide a payment schedule to the claimant—

(i) within the time required by the relevant construction contract; or

(ii) within 15 business days after the payment claim is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

15 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

(b) fails to pay the whole or a part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in a court of competent jurisdiction; or

(ii) make an adjudication application under section 17(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring a cross-claim against the claimant; or

(ii) to raise a defence in relation to matters arising under the construction contract.

16 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent provides a payment schedule to the claimant—

(i) within the time required by the relevant construction contract; or

(ii) within 15 business days after the payment claim is served,

whichever time expires earlier; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and

(d) the respondent fails to pay the whole or a part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in a court of competent jurisdiction; or

(ii) make an adjudication application under section 17(1)(a)(ii) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring a cross-claim against the claimant; or

(ii) to raise a defence in relation to matters arising under the construction contract.

DIVISION 2 – ADJUDICATION OF DISPUTES

17 Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if—

(a) the respondent provides a payment schedule under Division 1 but—

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

(ii) the respondent fails to pay the whole or a part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or a part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless—

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) An adjudication application—

(a) must be in writing; and

(b) must be made to an authorised nominating authority chosen by the claimant; and

(c) in the case of an application under subsection (1)(a)(i)—must be made within 15 business days after the claimant receives the payment schedule; and

(d) in the case of an application under subsection (1)(a)(ii)—must be made within 20 business days after the due date for payment; and

(e) in the case of an application under subsection (1)(b)—must be made within 15 business days after the end of the 5 day period referred to in subsection (2)(b); and

(f) must identify the payment claim and the payment schedule (if any) to which it relates; and

(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority; and

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(h) may contain such submissions relevant to the application that the claimant chooses to include.

(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

18 Eligibility criteria for adjudicators

(1) A person is eligible to be an adjudicator in relation to a construction contract—

(a) if the person is a natural person; and

(b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract—

(a) if the person is a party to the contract; or

(b) if either or both of the parties have nominated the person to be an adjudicator in relation to the contract; or

(c) in such circumstances as may be prescribed by regulation for the purposes of this section.

19 Appointment of adjudicator

(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of acceptance to be served on the claimant and the respondent.

(2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

20 Adjudication responses

(1) Subject to subsection (3), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within—

(a) 5 business days after receiving a copy of the application; or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

(2) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may contain any submissions relevant to the response that the respondent chooses to include.

(3) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14(4) or 17(2)(b).

(4) The respondent cannot include in the adjudication response reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

(5) A copy of the adjudication response must be served on the claimant.

21 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—

(a) within 10 business days after—

(i) the date on which an adjudication response is lodged with the adjudicator; or

(ii) if an adjudication response is not lodged with the adjudicator on or before the last date on which the response may be lodged with the adjudicator under section 20(1)—that date; or

(iii) if the respondent is not entitled under section 20 to lodge an adjudication response—the date on which the respondent receives a copy of the adjudication application; or

(b) within any further time that the claimant and the respondent may agree.

(4) For the purposes of proceedings conducted to determine an adjudication application, an adjudicator—

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(5) If any such conference is called, it is to be conducted informally and the parties are not entitled to legal representation.

(6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

22 Adjudicator's determination

(1) An adjudicator is to determine—

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which any such amount became or becomes payable; and

(c) the rate of interest payable on any such amount.

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

(a) the provisions of this Act;

(b) the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(3) The adjudicator's determination must—

(a) be in writing; and

(b) include the reasons for the determination (unless the claimant and respondent have both requested the adjudicator not to include those reasons in the determination).

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined—

(a) the value of construction work carried out under a construction contract; or

(b) the value of related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

(5) If the adjudicator's determination contains—

(a) a clerical mistake; or

(b) an error arising from an accidental slip or omission; or

(c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter referred to in the determination; or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

23 Respondent required to pay adjudicated amount

(1) In this section—

relevant date means—

(a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned; or

(b) if the adjudicator determines a later date under section 22(1)(b)—that later date.

(2) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

24 Consequences of not paying claimant adjudicated amount

(1) If the respondent fails to pay the whole or a part of the adjudicated amount to the claimant in accordance with section 23, the claimant may—

(a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section; and

(b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(2) A notice under subsection (1)(b) must state that it is made under this Act.

(3) An adjudication certificate must state that it is made under this Act and specify the following matters:

(a) the name of the claimant;

(b) the name of the respondent who is liable to pay the adjudicated amount;

(c) the adjudicated amount;

(d) the date on which payment of the adjudicated amount was due to be paid to the claimant.

(4) If an amount of interest that is due and payable on the adjudicated amount is not paid by the respondent—

(a) the claimant may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate; and

(b) the amount so specified is to be added to (and becomes part of) the adjudicated amount.

(5) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount (the ***unpaid share***)—

(a) the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate; and

(b) the amount so specified is to be added to (and becomes part of) the adjudicated amount.

25 Filing of adjudication certificate or costs certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt in a court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or a part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent—

(a) is not, in those proceedings, entitled—

(i) to bring a cross-claim against the claimant; or

(ii) to raise a defence in relation to matters arising under the construction contract; or

(iii) to challenge the adjudicator's determination; and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

26 Claimant may make new application in certain circumstances

(1) This section applies if—

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21(3); or

(c) an adjudicator who accepts an adjudication application notifies the claimant and the respondent that he or she has withdrawn from the adjudication.

(2) In either of the circumstances specified in subsection (1)(a) or (b), the claimant—

(a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 17.

(3) In the circumstances specified in subsection (1)(c), the application is discontinued and the claimant may make a new adjudication application under section 17.

(4) Despite section 17(3)(c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant—

(a) becomes entitled to withdraw the previous adjudication application under subsection (2); or

(b) is notified by the adjudicator that he or she has withdrawn from the adjudication.

(5) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17.

27 Claimant may discontinue adjudication

A claimant may withdraw an adjudication application at any time before the application is determined by notice in writing served on the respondent, the adjudicator and the authorised nominating authority to whom the application was made.

DIVISION 3 – CLAIMANT'S RIGHT TO SUSPEND CONSTRUCTION WORK

28 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused a notice of intention to do so to be given to the respondent under section 15, 16 or 24.

(2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15, 16 or 23(2).

(3) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs loss or expenses as a result of the removal by the respondent from the contract of a part of the work or supply, the respondent is liable to pay the claimant the amount of such loss or expenses.

(4) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for loss or damage suffered by the respondent, or by a person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension.

DIVISION 4 – GENERAL

29 Nominating authorities

(1) Subject to the regulations, the Minister—

(a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act; and

(b) may withdraw any authority so given.

(2) The Minister may—

(a) limit the number of persons who may, for the time being, be authorised under this section; and

(b) refuse an application under subsection (1) if authorising the applicant would result in any such number being exceeded.

(3) A person—

(a) whose application for authority to nominate adjudicators for the purposes of this Act is refused (otherwise than on the ground referred to in subsection (2)(b)); or

(b) whose authority to nominate adjudicators is withdrawn,

may apply to the Administrative and Disciplinary Division of the District Court for a review of the Minister's decision to take that action.

(4) An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application made to the authority.

(5) The amount that may be charged for such service must not exceed the amount (if any) determined by the Minister.

(6) The claimant and respondent are—

(a) jointly and severally liable to pay such fee; and

(b) each liable to contribute to the payment of such fee in equal proportions or in such proportions as the adjudicator to whom the adjudication application is referred may determine.

(7) An authorised nominating authority must provide the Minister with such information as may be requested by the Minister in relation to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).

30 Adjudicator's fees

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application—

(a) such amount, by way of fees and expenses, as is agreed between the adjudicator and the parties to the adjudication; or

(b) if no such amount is agreed—the hourly rate (if any) prescribed by regulation in addition to reasonable expenses; or

(c) if no such amount is agreed and no hourly rate has been prescribed—such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator.

(2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.

(4) An adjudicator is not entitled to be paid fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21(3).

(5) Subsection (4) does not apply—

(a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid; or

(b) in such other circumstances as may be prescribed for the purposes of this section.

31 Protection from liability for adjudicators and authorised nominating authorities

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith—

(a) in exercising the adjudicator's functions under this Act; or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.

(2) No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith—

(a) in exercising the nominating authority's functions under this Act; or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act.

32 Effect of Part on civil proceedings

(1) Subject to section 33, nothing in this Part affects any right that a party to a construction contract—

(a) may have under the contract; or

(b) may have under Part 2 in respect of the contract; or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In proceedings before a court or tribunal in relation to a matter arising under a construction contract, the court or tribunal—

(a) must allow for an amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings; and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

PART 4 – MISCELLANEOUS

33 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of an agreement, whether in writing or not—

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void.

34 Service of notices

(1) A notice that by or under this Act is authorised or required to be served on a person may be served on the person—

(a) by delivering it to the person personally; or

(b) by lodging it during normal office hours at the person's ordinary place of business; or

(c) by sending it by post or fax addressed to the person's ordinary place of business; or

(d) in such other manner as may be prescribed by the regulations for the purposes of this section; or

(e) in such other manner as may be provided under the construction contract concerned.

(2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected when the notice is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.

35 Regulations

(1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.

(2) The regulations may, either unconditionally or subject to conditions, exempt—

(a) a specified person or class of persons; or

(b) a specified matter or class of matters,

from the operation of this Act or of specified provisions of this Act.

(3) Regulations under this Act may—

(a) be of general application or limited application; or

(b) make different provision according to the matters or circumstances to which they are expressed to apply.

(4) The commencement of a regulation referred to in section 5, 6 or 7 does not affect the operation of this Act with respect to construction work carried out, or related goods and services supplied, under a construction contract entered into before that commencement.

36 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 3 years from the date on which this Act comes into operation.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 3 months after the end of the period of 3 years.

SCHEDULE 1 – RELATED AMENDMENTS AND TRANSITIONAL PROVISION

Part 1 – Preliminary

1 Amendment provisions

In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2 – Amendment of Building Work Contractors Act 1995

2 Amendment of section 30—Payments under or in relation to domestic building work contracts

(1) Section 30(1)—delete "the payment"

(2) Section 30(1)(a)—before "constitutes" insert:

"the payment"

(3) Section 30(1)—after paragraph (a) insert:

"(ab) the person is entitled to the payment under the *Building and Construction Industry Security of Payment Act 2009*; or"

(4) Section 30(1)(b)—before "is of a" insert:

"the payment"

(5) Section 30(2)—delete "paragraph (a) or (b)" and substitute:

"paragraph (a), (ab) or (b)"

(6) Section 30(3)—delete "unless the building work contractor has requested the payment by notice in writing given to the building owner or an agent authorised to act on behalf of the building owner." and substitute:

"unless—

(a) the building work contractor has requested the payment by notice in writing given to the building owner or an agent authorised to act on behalf of the building owner; or

(b) the domestic building work contract is a contract to which the *Building and Construction Industry Security of Payment Act 2009* applies (in which case the provisions of that Act relating to progress payments apply)."

Part 3 – Amendment of Commercial Arbitration and Industrial Referral Agreements Act 1986

3 Amendment of section 3—Application provisions

Section 3—after subsection (9) insert:

"(9a) Nothing in this Act affects the operation of Part 3 of the *Building and Construction Industry Security of Payment Act 2009*."

Part 4 – Transitional provision

4 Transitional provision

This Act does not apply to a construction contract entered into before the commencement of this Act.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT REGULATIONS 2011 (SA)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Regulations 2011	**251 of 2011**	**1 Dec 2011**	**R 2**: 10 Dec 2011

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement

1 Short title

These regulations may be cited as the *Building and Construction Industry Security of Payment Regulations 2011*.

2 Commencement

These regulations will come into operation on the day on which the *Building and Construction Industry Security of Payment Act 2009* comes into operation.

3 Interpretation

In these regulations—

Act means the *Building and Construction Industry Security of Payment Act 2009*.

4 Recognised financial institutions

Each person or body that is a body regulated by the Australian Prudential Regulation Authority under the *Australian Prudential Regulation Authority Act 1998* of the Commonwealth is prescribed for the purposes of the definition of ***recognised financial institution*** in section 4 of the Act.

5 Related goods and services

Services of the following kind are prescribed for the purposes of section 6(1) of the Act:

(a) project management services in relation to construction work;

(b) contract management services in relation to construction work;

(c) consultancy services in relation to construction work.

6 Eligibility criteria for adjudicators

Pursuant to section 18(1)(b) of the Act, a natural person is eligible to be an adjudicator in relation to a construction contract if—

(a) the person has successfully completed a formal course of training of at least 2 days duration in adjudication of payment disputes in the building and construction industry that required the person to pass a written examination; and

(b) the person—

(i) holds a degree, diploma or other qualification in—

(A) architecture; or

(B) building surveying; or

(C) building; or

(D) construction; or

(E) law; or

(F) project management; or

(G) quantity surveying,

from a university; or

(ii) is, or is eligible to be, a member (other than a student member) of any 1 or more of the following professional bodies:

(A) The Royal Australian Institute of Architects;

(B) Engineers Australia;

(C) Australian Institute of Building Surveyors;

(D) The Institute of Arbitrators and Mediators Australia;

(E) The Australian Institute of Building;

(F) Australian Institute of Project Management; or

(iii) holds registration as a building work supervisor under the *Building Work Contractors Act 1995* that authorises the person to supervise construction work of a kind carried out, or to be carried out, under the construction contract.

ACT LEGISLATION

BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2009 (ACT) – EXPLANATORY STATEMENT

Overview

Objectives of the Legislation

The objective of the legislation is to entitle certain persons who carry out construction work (or who supply related goods or services) to a timely payment for the work they carry out and the goods and services they supply.

This will be achieved through establishing a procedure for securing progress payments to which a person becomes entitled under this Bill.

Reasons for the objectives and how they will be achieved

Security of payment has been an issue in the building and construction industry over many decades. Several taskforces and the 2003 Cole Royal Commission into the Building and Construction Industry flagged security of payment as a significant industry matter and cited strong anecdotal evidence across all jurisdictions to support the notion that security of payment problems are widespread with the industry.

The building and construction industry is particularly vulnerable to security of payment issues because it typically operates under a hierarchical chain of contracts with inherent imbalances in bargaining power. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow, and in some cases, insolvency.

The Bill establishes a system of rapid adjudication for the interim resolution of payment on disputes involving building and construction work contracts.

Rapid adjudication will be conducted by an independent adjudicator with relevant expertise. If the decision of the adjudicator is in whole, or in part, in favour of the applicant, the respondent is required to pay a specified amount directed by the adjudicator to the applicant. Decisions by the adjudicator are enforceable as a judgement debt.

Rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final resolution of a payment dispute by a court or tribunal of competent jurisdiction.

The adjudication process will cover all forms of construction contracts other than contracts for the carrying out of domestic building work where an ordinary "resident owner" is a party to the contract.

Administrative arrangements

Private providers will conduct the adjudication on a user pays basis. The ACT Planning and Land Authority and will act as the Minister's delegate for authorising and monitoring adjudicators and authorised nominating authorities (the organisations that appoint adjudicators).

Consultation

Extensive consultation was undertaken with industry stakeholders over an 18 month period. This included a series of meetings with relevant stakeholders and the release of a discussion paper to key employee and employer groups from the industry so that all organisation were given the opportunity to comment on the development of the legislative model.

Detail on clauses

Part 1 — Preliminary

Clause 1 – Name of Act

This is a technical clause that names the Act. The name of the Act is the *Building and Construction Industry (Security of Payment) Act 2009*.

Clause 2 – Commencement

The Act commences on 1 July 2010.

Clause 3 – Dictionary

This clause establishes that the dictionary at the end of the Building and Construction Industry (Security of Payment) Bill 2009 (the Bill) is part of the Bill.

Clause 4 – Notes

This clause establishes that notes in the Bill are explanatory and not part of the Bill.

Clause 5 – Offences against Act – application of Criminal Code etc

This clause establishes that other legislation applies in relation to offences against this Bill.

Clause 6 – Objects of Act

This sets out the object of this Bill is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person:

(a) undertakes to carry out construction work under certain construction contracts; or

(b) undertakes to supply related goods and services under certain construction contracts.

In particular, this Bill:

(a) grants an entitlement to a progress payment for construction work, whether or not a construction contract provides for progress payments; and

(b) establishes a recovery procedure for construction work progress payments.

Part 2 — Important Concepts

Division 2.1 Meaning of terms

Clause 7 – Meaning of construction work

This clause defines the expression *construction work* for the purposes of the Bill. The definition of construction work also includes building work within the meaning of the *Building Act 2004*.

Clause 8 – Meaning of related goods and services

This clause defines the expression *related goods and services* for the purposes of the Bill.

Division 2.2 Application of Act

Clause 9 – Application of Act

This clause provides for the application of the Bill to all construction contracts, whether written or oral, or partly written and partly oral.

Certain classes of contract are excluded from the Bill, as are certain classes of contractual provisions.

Other classes of construction contract can be excluded from the Bill by regulations under the Bill.

Part 3 — Rights to Progress Payments

Clause 10 – Rights to progress payments

This clause provides that on and from each reference date, a person who has undertaken to carry out construction work, or to supply related goods and services, becomes entitled to a progress payment.

A *reference date* is a date ascertained in accordance with the terms of the construction contract as a date for making a claim for a progress payment or as a date by reference to which the amount of a progress payment is to be calculated or, if the contract contains no such terms, the last date of the named month in which the construction work commenced, or the related goods and services were first supplied, under the contract.

Clause 11 — Amount of progress payment

This clause provides for the amount of a progress payment to be ascertained in accordance with the terms of the construction contract or, if the contract contains no such terms, according to the value of construction work carried out, or related goods and services supplied, under the contract.

Clause 12 — Valuation of construction work and related goods and services

This clause provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract is to be valued.

Clause 13 — Due date for payment

This clause provides that a progress payment becomes due and payable in accordance with the terms of the construction contract or, if the contract contains no such terms, 10 business days after a progress claim is made in relation to that payment under Part 4 of the Bill.

Clause 14 — Effect of pay when paid provision

This clause provides that a "pay when paid" provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a construction contract. A "pay when paid" provision is a provision that makes one person's payment dependent on another person's payment or dependent on the operation of another contract.

Part 4 — Procedure for recovering progress payments

Division 4.1 — Payment claims and payment schedules

Clause 15 — Payment claims

This clause enables a person who is entitled to a progress payment under proposed section 10 (1) (the *claimant*) to serve a payment claim on the person who is liable to make the payment (the *respondent*). The claim will set out the amount to which the claimant claims entitlement.

Clause 16 — Payment schedules

This clause enables the respondent to reply to the claim by providing a payment schedule to the claimant. The schedule will set out how much the respondent proposes to pay the claimant and when.

Clause 17 — Consequences of not paying claimant — no payment schedule

This clause provides that a claimant will be able to recover the whole amount of his or her claim as a debt, and to suspend carrying out construction work, or supplying related goods and services, if the respondent fails to provide a payment schedule within the time allowed under clause 16 (4).

Clause 18 — Consequences of not paying claimant in accordance with payment schedule

This clause provides that a claimant will be able to recover the amount set out in the respondent's payment schedule, and to suspend carrying out construction work, or supplying related goods and services, where the respondent provides the payment schedule within the time allowed under clause 16 but fails to pay that amount by the due date referred to in clause 13.

Division 4.2 — Adjudication of disputes

Clause 19 — Adjudication applications

This clause enables a claimant to apply to an authorised nominating authority for adjudication of the amount of a progress payment payable in the event that the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim. The application will have to be made within 5 days after the claimant receives the payment schedule, and will be able to be made to an authority authorised to nominate adjudicators for the purposes of the Bill.

Clause 20 — Eligibility — adjudicators

This clause requires an adjudicator to be an individual and to have such qualifications, expertise and experience to perform adjudications and has successfully completed a relevant training course. It also prohibits a person from being an adjudicator in relation to a particular construction contract if the person is a party to the contract, or the person is employed or represents a building and construction industry organisation or in such circumstances as are prescribed by the regulations.

Clause 21 — Adjudicator for application

This clause provides that the appointment of an adjudicator is effected when the adjudicator gives notice of his or her acceptance of the adjudication application to the claimant and the respondent. The adjudicator must also at the same time, with the notice of acceptance, give the respondent a copy of the adjudication application.

Clause 22 — Adjudication responses

This clause enables the respondent to lodge, in writing, with an adjudicator the respondent's response to the claimant's adjudication application.

Clause 23 — Adjudication procedures

This clause sets out the manner in which, and the time within which, an adjudicator is to determine an adjudication application.

Clause 24 — Adjudicator's decision

This clause provides that the adjudicator is to determine an adjudication application by determining the amount of the progress payment to be paid and the date on or before which it must be paid and the rate of interest on the amount.

Clause 25 — Respondent must pay adjudicated amount

This clause provides that if the adjudicator determines an amount that the respondent must pay as a progress payment, the respondent must pay that amount to the claimant on or before the relevant date.

Clause 26 — Failure to pay adjudicated amount

This clause provides that if a respondent fails to pay the whole or any part of an adjudicated amount, the claimant may request an adjudication certificate from the authorised nominating authority and may serve a notice on the respondent of the claimant's intention to suspend carrying out construction work or supplying related goods and services. The clause also specifies the content requirements for an adjudication certificate and matters that may be included in the certificate at the request of the claimant.

Clause 27 — Filing of adjudication certifce as judgment debt

This clause enables an adjudication certificate to be filed as a judgment debt that may be enforced in any court of competent jurisdiction. If the respondent commences proceedings to have the judgment debt set aside, the respondent is not entitled to bring any counter-claim against the claimant, raise any defence or challenge the adjudicator's determination and is required to pay to the court as security the unpaid portion of the adjudicated amount.

Clause 28 — Claimant may make new application in certain cirumstances

This clause enables a claimant to make a new adjudication application in the event that a previous application is not accepted by an adjudicator within 4 business days after it is made or if an adjudicator fails to determine the application within the time allowed.

Division 4.3 — Claimant's right to suspend work

Clause 29 — Claimant may suspend work

This clause entitles a claimant to suspend the carrying out of construction work (or the supply of related goods and services) if at least 2 business days have passed since notice of intention to do so has been given as referred to in clause 17, 18 or 26. A claimant who suspends the carrying out of construction work (or the supply of related goods and services) under the proposed section will be immune from civil liability as during the period of suspension.

Division 4.4 Authorised nominating authorities and adjudicators

Clause 30 — Maximum number of nominating authorities

This clause allows the Minister to decide the maximum number of people that may be authorised as a nominating authority.

Clause 31 — Application for nominating authority

This clause enables the relevant Minister to authorise, or refuse to authorise, persons as nominating authorities (to nominate adjudicators for the purposes of the proposed Act) and to withdraw any authority so given. The Minister's decision to refuse an application is a reviewable decision.

Clause 32 — Nomination authority — suitability

This clause provides the factors the relevant Minister must consider in deciding whether an applicant is a suitable nominating authority under clause 31.

Clause 33 — Term of authorisation

This clause provides that an authorisation under this division is effective for 3 years starting on the day the Minister gives the authorisation and that an authorised nominating authority may apply for renewal of the authorisation.

Clause 34 — Costs and expenses — authorised nominating authority

This clause provides for the costs and expenses payable to an authorised nominating authority in relation to the adjudication of an adjudication application.

Clause 35 — Report — authorised nominating authority

This clause provides that an authorised nominating authority must provide a report to the relevant Minister, on request, about its activities under the Act, or costs and expenses charged by the authority for any service provided by the authority in relation to an adjudication application made to the authority.

Clause 36 — Costs and expenses — adjudicator

This clause provides for the costs and expenses payable to an adjudicator in relation to his or her adjudication of an adjudication application. In particular, an adjudicator will not be entitled to be paid any fees if he or she fails to determine such an application within the time allowed under clause 21 (3).

Clause 37 — Protection from liability — adjudicators and authorised nominating authorities

This clause ensures that no action will lie against an adjudicator or any other person for anything done or omitted to be done by the adjudicator honestly and without recklessness in the exercise of the adjudicator's functions under the Bill.

Division 4.5 — General

Clause 38 — Effect of part on civil proceedings

This clause ensures that nothing done under this part will affect any civil proceedings arising under a construction contract, except that a court will be required to make appropriate set-offs and any orders necessary to provide for the restitution of money paid as a consequence of its decision in the proceedings.

Part 5 — Notification and review of decisions

Clause 39 — Meaning of *reviewable decision* — pt 5

This clause provides the meaning of *reviewable decision* for the purposes of this part.

Clause 40 — Reviewable decision notice

This clause requires that if a person makes a reviewable decision, the person must give a reviewable decision notice to each entity mentioned in schedule 1, column 4 in relation to the decision, and under s 67A *of the ACT Civil and Administrative Tribunal Act 2008*, the person must also take reasonable steps to give a reviewable decision notice to any other person whose interests are affected by the decision.

Clause 41 — Applications for review

This clause provides that an entity mentioned in schedule 1, column 4 in relation to the reviewable decision, or any other person whose interests are affected by the decision, may apply to the ACT Civil and Administrative Tribunal for review of a reviewable decision.

Part 6 — Miscellaneous

Clause 42 — No contracting out

This clause avoids any provision of an agreement that purports to exclude, modify or restrict the operation of the Bill.

Clause 43 — Judicial review of adjudication decision

This clause provides for appeals on questions of law by parties to an adjudication decision to the Supreme Court. The provision is modelled closely on the appeal provision under section 38, part 5 of the *Commercial Arbitration Act 1986*, save for one respect, in that the period in which an adjudicator must make a new decision has been reduced to 10 business days after the decision has been remitted. This reduction is consistent with the subject matter of the Bill.

Clause 44 — Determination of question of law by Supreme Court

This clause provides that the Supreme Court has jurisdiction to determine any question of law arising in an application to the court made by any of the parties to adjudication. The provision is modelled closely on the appeal provisions under section 39, part 5 of the Commercial Arbitration Act 1986.

Clause 45 — Review of Act

This provision requires the Minister to review the operation of the Act as soon as possible after 1 July 2015 and report on the outcome of the review to the Legislative Assembly by 1 July 2016.

Clause 46 — Determination of fees

This clause provides that the Minister may, in writing, determine fees for this Bill.

Clause 47 — Approved forms

This clause provides that the chief executive may, in writing, approve forms for this Act and if approved, the forms must be used.

Clause 48 — Regulation-making power

This clause allows the Executive to make regulations for the purposes of this Bill.

Part 7 — Repeals and consequential amendments

Clause 49 — Legislation repealed

This clause repeals the *Contractors Debts Act 1897*.

Clause 50 — Legislation amended — sch 2

This clause provides that this Bill amends the legislation mentioned in schedule 2.

Schedule 1 — Reviewable decisions

This schedule lists the decisions and the respective provisions under the Bill that are able to be reviewed.

Schedule 2 — Consequential amendments

Part 2.1 — Legislation Act 2001

This part provides the amendments to other Acts as a consequence of this Bill.

Dictionary

The Dictionary defines terms used in the Bill.

BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2009 (ACT) – SECOND READING SPEECH

Legislative Assembly, 15 October 2009

MR HARGREAVES (Brindabella—Minister for Disability and Housing, Minister for Ageing, Minister for Multicultural Affairs, Minister for Industrial Relations and Minister for Corrections) (10.58): I move:

That this bill be agreed to in principle.

The Building and Construction Industry (Security of Payment) Bill 2009 establishes a statutory mechanism for operators in the building and construction industries to quickly resolve payment disputes through an adjudication process. It provides an alternative to costly and protracted court proceedings that often present a barrier to subcontractors and small business operators.

This proposal was first advanced in 2007. However, implementation was delayed after consultation with key industry stakeholders indicated a greater disparity of views on an appropriate model than initially anticipated. That said, I would like to offer my personal thanks to the exhaustive work of the Master Builders Association, its members and other significant industry participants in the successful resolution that we have before us today.

Mr Speaker, the New South Wales and Queensland security of payments acts have been operational since 1999 and 2004 respectively. They are now considered benchmark models for security of payment legislation. These acts together provide a blueprint for this scheme. However, because of the ACT's geo-economic position, the ACT scheme is more closely aligned with the New South Wales model, which is a tried and tested legislative framework.

In essence, this bill will facilitate for the ACT building and construction industry timely payments between parties to construction and related contracts, rapid resolution of disputes concerning such contracts, and mechanism for the rapid recovery of payments of such contracts.

Major studies into the building and construction industry have concluded that failure to pay subcontractors moneys due to them has a substantial impact on their capacity to operate as small to medium business enterprises. This in turn impacts on the security of their employees. Relatively low capital backing and a heavy reliance on cash flows to sustain business typify the industry.

The structure of the building and construction industry is a multi-tiered hierarchy of principals, agents, contractors, subcontractors and suppliers, with cascading payment obligations. The failure of any one party in the contractual chain to pass on moneys owed can cause a domino effect on other parties in the chain, with those at the bottom most at risk. The consequences to the affected parties include restricted cash flow and, in some cases, insolvency.

Difficulty in ensuring that subcontractors and others are paid fully, and on time, is not unique to the building and construction industry. The impact, however, is often worse than in other industries that generally do not depend to such an extent on subcontracting.

The building and construction industry plays an important role in the ACT economy. Throughout the 2007-08 financial year, there were over 15,000 people employed in the construction industry in the ACT, and the value of building, construction and engineering work done in the ACT exceeded $2 billion. Also, of all ACT building and construction businesses, 93 per cent employ five or less tradespeople.

Madam Deputy Speaker, it is difficult to quantify the impact that failure to meet payment obligations has had on the industry in the ACT. Where businesses do become insolvent, there does not appear to be any reliable measurement for the factors of that insolvency such as the timeliness of payments.

Several task forces, however, including the final report of the Cole royal commission into the building and construction industry in 2003, cite strong anecdotal evidence across jurisdictions, including the ACT, to support the notion that security of payment problems are widespread within the industry and have a harmful effect.

Improving payment outcomes for all parties operating in the building and construction industry is a key priority for this government. There are instances in the industry where a claim for payment by a subcontractor or supplier is disputed by his or her superior contractor resulting in payments being held up for lengthy periods while the dispute is being resolved.

There is potential in the industry for these payments to be withheld unfairly to the disadvantage of the claimant. The bill now establishes, in relation to construction contracts, a statutory-based system of rapid adjudication for the quick resolution of payment disputes on an interim basis by an appropriately qualified adjudicator. This will allow for payments to flow quickly down the contractual chain.

Rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final determination of a payment dispute by a court or a tribunal of competent jurisdiction. Significantly, decisions by an adjudicator are enforceable as a judgement debt if a contracting party fails to pay moneys to a contracted party as determined by the adjudicator.

This represents a significant shift from the current system where responsibility for enforcing payment has ordinarily been left to the contracted party who has performed the construction work or supplied the related goods or services for the benefit of the contracting party.

The application of the bill covers all forms of construction contracts other than contracts involving ″resident owners″. The bill does, however, cover a person who holds, or should hold, an owner-builder's licence under the Construction Occupations (Licensing) Act 2004. There is a default provision in the bill which will apply when parties have not in the formation of their contract included the intervals for making progress claims, times for making payments and how such payments are to be valued.

In the absence of a contractual provision, the bill provides that payment claims must be made at monthly intervals with payment becoming due 10 business days after the payment claim is made. If the construction contract is silent on how a payment is to be valued, the bill provides that the amount is calculated on the basis of the value of work carried out, including related goods and services provided.

As in other states, it is proposed that private adjudicators conduct the adjudication on a user-pays basis. The adjudicator has the power to call for further submissions, hold a conference and view the relevant construction site. An adjudicator must provide to both parties reasons for a decision including the adjudicated amount and the payment date. If payment of the adjudicated amount is not made, the claimant can request an adjudication certificate, which can be then lodged in a court of competent jurisdiction as a judgement debt.

The important benefits of the rapid adjudication process are that it allows for a prompt interim decision on disputed payments, encourages communication between the parties about disputed matters, and provides parties with a much faster and cheaper alternative to resolve the dispute without entering the court system. The adjudication process also allows unpaid parties to suspend work or the supply of goods until payment of the adjudicated amount is received.

New South Wales and Queensland differ on the administration and licensing of security of payment. The New South Wales model gives the relevant minister discretionary powers for

administering the scheme. The minister then transfers responsibility for the licensing and monitoring of adjudicators to the approved authorised nominated authorities (ANAs).

It is a minimalist, hands-off approach to regulating security of payment that requires less than one person for the whole of New South Wales. This is in contrast to the Queensland approach, which has required the establishment of a separate agency, comprising three full-time equivalent positions, consisting of one senior executive, an administrative officer and a customer service officer.

Consideration was also given to where the security of payment function will be located within government. The role involves establishing a panel of appropriately qualified adjudicators and referring cases to an adjudicator in a timely way. As this does not require the determination of issues between the parties, the role is more akin to that of a registrar than a tribunal or court.

In other jurisdictions, administration resides in specialist units in the public works and construction portfolios. In the ACT this means it could reside in the planning portfolio. This option would allow the scheme to operate in the context of other regulatory regimes that apply in the building industry.

The ACT Planning and Land Authority, ACTPLA, already administer building and construction industry regulatory and licensing functions. Further to this, the legislative framework for licensing pre-exists in the Construction Occupations (Licensing) Act, which is administered by ACTPLA.

Madam Deputy Speaker, with the preferred model for administering security of payment being that of New South Wales, it is fitting then that the best location for the scheme should be ACTPLA and I have every confidence in the minister responsible for that portfolio—the best planning minister we have had since self-government.

Mr Seselja: Slap Simon.

Mrs Dunne: Simon again.

Mr Seselja: Slap and slap again.

MR HARGREAVES: Yes, a slap from you lot. You have got a little bloke sitting next to you, mate.

Mr Seselja: A slap for Simon. What a slap! Another slap for Simon. You keep slapping Simon.

MR HARGREAVES: You know what happened when he was involved in responsible planning—and your mate; you booted him up to the Senate—

MADAM DEPUTY SPEAKER: Mr Seselja and Mr Hargreaves.

Mr Seselja: Keep slapping him, mate.

MR HARGREAVES: You gave him a good old-fashioned boot up to the Senate, didn't you.

Mr Seselja: You are doing a good job; Simon will be pleased.

MR HARGREAVES: Yes, the best thing that ever happened to this Assembly was Senator Humphries' elevation to the Senate, let me tell you. Yes, good on you. Yes, I thought I can make you bark. It did not take long.

Madam Deputy Speaker, earlier this year I wrote to the Minister for Planning seeking his consideration to this function being located within ACTPLA. I am pleased to say that the minister agreed that with its other statutory functions in the building and construction industry, ACTPLA would be the appropriate location for the administration and licensing for security of payment. The act's building and construction industry, and particularly subcontractors, will benefit substantially from the introduction of this legislation.

Finally, I would like to express my appreciation to the officers in the office of industrial relations for all of the work that they have done to bring this about and bring this before the Assembly but also, and most importantly, for all of the support they have given me in my time as Minister for Industrial Relations. Also, while I am at it, I thank every other officer that I have ever had anything to do with. They are a magic bunch of people.

Debate (on motion by **Mr Seselja**) adjourned to the next sitting.

BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) ACT 2009 (ACT)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry (Security of Payment) Act 2009	**50 of 2009**	**26 Nov 2009**	**Ss 1** and 2: 26 Nov 2009; Act (except ss 1 and 2): 1 Jul 2010

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Administrative (One ACT Public Service Miscellaneous Amendments) Act 2011	22 of 2011	30 Jun 2011	Pt 1.18 : 1 Jul 2011
Statute Law Amendment Act 2014 (No 2)	44 of 2014	5 Nov 2014	Pt 3.1: 19 Nov 2014
Planning, Building and Environment Legislation Amendment Act 2016 (No 2)	24 of 2016	11 May 2016	Pt 3: 12 May 2016
Building and Construction Legislation Amendment Act 2016	44 of 2016	19 Aug 2016	S 48: 20 Aug 2016

PART 1 – PRELIMINARY

1 Name of Act

This Act is the *Building and Construction Industry (Security of Payment) Act 2009*.

2 Commencement [Repealed]

[S 2 om Act 14 of 2001, s 89(4), Reprint 1]

3 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1: The dictionary at the end of this Act defines certain terms used in this Act, and includes references (signpost definitions) to other terms defined elsewhere in this Act. For example, the signpost definition "***adjudicated amount***—see section 24" means that the term ***adjudicated amount*** is defined in that section.

Note 2: A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156(1)).

4 Notes

A note included in this Act is explanatory and is not part of this Act.

Note: See the Legislation Act, s 127(1), (4) and (5) for the legal status of notes.

5 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1). The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg ***conduct***, ***intention***, ***recklessness*** and ***strict liability***).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

6 Object of Act

(1) The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person—

(a) undertakes to carry out construction work under certain construction contracts; or

(b) undertakes to supply related goods and services under certain construction contracts.

(2) In particular, this Act—

(a) grants an entitlement to a progress payment for construction work, whether or not a construction contract provides for progress payments; and

(b) establishes a recovery procedure for construction work progress payments.

PART 2 – IMPORTANT CONCEPTS

DIVISION 2.1 – MEANING OF TERMS

7 Meaning of *construction work*

(1) In this Act:

construction work—

(a) includes the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land; and

(b) includes the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection; and

(c) includes the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems; and

(d) includes the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension; and

(e) includes any operation which forms an integral part of, or is preparatory to or is for rendering complete, work mentioned in paragraph (a), (b) or (c); and

Examples

1 site clearance, earth-moving, excavation, tunnelling and boring
2 laying foundations
3 erecting, maintaining or dismantling scaffolding
4 prefabricating components to form part of any building, structure or works, whether carried out on-site or off-site
5 site restoration, landscaping and providing roadways and other access works

Note: An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(f) includes painting or decorating the internal or external surfaces of any building, structure or works; and

(g) includes building work within the meaning of the *Building Act 2004*; but

(h) does not include—

(i) drilling for, or extraction of, oil or natural gas; or

(ii) extracting (whether by underground or surface working) minerals, including tunnelling or boring, or constructing underground works, for that purpose.

ACT

(2) A regulation may provide that work is, or is not, construction work for this Act.

8 Meaning of *related goods and services*

(1) In this Act:

related goods and services for construction work—

(a) includes goods of the following kind:

(i) materials and components to form part of any building, structure or work arising from construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with carrying out construction work; and

(b) includes services of the following kind:

(i) the provision of labour to carry out construction work;

(ii) architectural, design, surveying or quantity surveying services in relation to construction work;

(iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work.

(2) A regulation may provide that goods and services are, or are not, related goods and services for this Act.

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

DIVISION 2.2 – APPLICATION OF ACT

9 Application of Act

(1) This Act applies to a construction contract—

(a) whether written or oral, or partly written and partly oral; and

(b) whether expressed to be governed by a law of the Territory or a law of another jurisdiction.

(2) This Act does not apply to any of the following:

(a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes—

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

(iii) to provide an indemnity in relation to construction work carried out, or related goods and services supplied, under the construction contract;

(b) a construction contract for carrying out residential building work if a resident owner is a party to the contract, to the extent that the contract relates to a building or part of a building where the resident owner lives or intends to live;

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be worked out otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

(3) This Act does not apply to a construction contract to the extent to which it contains—

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution; or

(c) provisions under which a party undertakes—

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

(4) This Act does not apply to a construction contract to the extent to which it deals with—

(a) construction work carried out outside the ACT; or

(b) related goods and services supplied in respect of construction work carried out outside the ACT.

(5) This Act does not apply to a construction contract prescribed by regulation.

(6) To remove any doubt, this Act does not apply to a construction contract entered into before the commencement of this part.

[Subs (6) am Act 44 of 2014, s 5 and Sch 3[3.1]]

(7) In this section:

recognised financial institution means a bank or any other person or body prescribed by regulation.

[Def insrt Act 44 of 2014, s 5 and Sch 3[3.2]]

residential building work—see the *Building Act 2004*, dictionary.

resident owner, in relation to a construction contract for carrying out residential building work, does not include a person who is or should be licensed as an owner-builder under the *Construction Occupations (Licensing) Act 2004*.

[S 9 am Act 44 of 2014]

PART 3 – RIGHT TO PROGRESS PAYMENTS

10 Right to progress payments

(1) On and from each reference date under a construction contract, a person is entitled to a payment (a ***progress payment***) if the person has undertaken, under the contract, to—

(a) carry out construction work; or

(b) supply related goods and services.

(2) A progress payment may include—

(a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or

(b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or

(c) a milestone payment.

(3) In this section—

milestone payment means a payment that is based on an event or date.

reference date, for a construction contract, means—

(a) a date stated in, or worked out under, the contract as the date when a claim for a progress payment is to be made in relation to work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or

(b) if the contract does not provide a date mentioned in paragraph (a)—

(i) the last day of the calendar month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and

(ii) the last day of each subsequent calendar month.

Note: ***Calendar month***—see the Legislation Act, dictionary, pt 1.

[Def am Act 44 of 2014, s 5 and Sch 3[3.3] and [3.4]]

[S 10 am Act 44 of 2014]

11 Amount of progress payment

The amount of a progress payment to which a person is entitled in relation to a construction contract is—

(a) the amount worked out under the contract; or

(b) if the contract does not provide for an amount, the amount worked out on the basis of the value of—

(i) construction work carried out or undertaken to be carried out by the person under the contract; or

(ii) related goods and services supplied or undertaken to be supplied by the person under the contract.

12 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract must be—

(a) valued under the contract; or

(b) if the contract does not provide for valuation—valued having regard to each of the following:

(i) the contract price for the work;

(ii) any other rates or prices set out in the contract;

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a stated amount;

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract must be—

(a) valued under the contract; or

(b) if the contract does not provide for valuation—valued having regard to each of the following:

(i) the contract price for the goods and services;

(ii) any other rates or prices set out in the contract;

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a stated amount;

(iv) if any of the goods are defective, the estimated cost of rectifying the defect.

(3) For subsection (2)(b), for materials and components that are to form part of any building, structure or work arising from construction work, the only materials and components to be included in the valuation are those that have become, or, on payment, will become the property of the party for whom the construction work is being carried out.

13 Due date for payment

(1) A progress payment under a construction contract is payable—

(a) on the day when the payment becomes payable under the contract; or

(b) if the contract does not set a day—10 business days after a payment claim is made under part 4 in relation to the payment.

(2) Interest is payable on the unpaid amount of a progress payment that is payable under subsection (1) at the greater of the following:

(a) the rate of interest applying from time to time under the *Court Procedures Rules 2006*, schedule 2, part 2.2 (Interest after judgment);

(b) the rate stated under the construction contract.

(3) If a progress payment is payable under subsection (1), the claimant is entitled to exercise a lien in relation to the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with carrying out construction work for the respondent.

Note 1: ***Claimant***—see s 15.

Note 2: ***Respondent***—see s 15.

(4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes payable takes priority over a lien under subsection (3).

(5) Subsection (3) does not create any right against a third party who is the owner of the unfixed plant or materials.

14 Effect of pay when paid provision

(1) A pay when paid provision of a construction contract has no effect in relation to any payment for—

(a) construction work carried out or undertaken to be carried out under the contract; or

(b) related goods and services supplied or undertaken to be supplied under the contract.

(2) In this section:

money owing, to a person under a construction contract, means money owing for—

(a) construction work carried out or undertaken to be carried out by the person under the contract; or

(b) related goods and services supplied or undertaken to be supplied by the person under the contract.

pay when paid provision, of a construction contract, means a provision of the contract—

(a) that makes the liability of 1 party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or any part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

PART 4 – PROCEDURE FOR RECOVERING PROGRESS PAYMENTS

DIVISION 4.1 – PAYMENT CLAIM AND PAYMENT SCHEDULES

15 Payment claim

(1) A person who is or who claims to be entitled to a progress payment under section 10(1) (the ***claimant***) may give a claim (a ***payment claim***) to the person who, under the construction contract concerned, is or may be liable to make the payment (the ***respondent***).

Note 1: If a form is approved under s 47 for a claim (a ***payment claim***), the form must be used.

Note 2: For how documents may be served, see the Legislation Act, pt 19.5.

[Subs (1) am Act 44 of 2014, s 5 and Sch 3[3.5]]

(2) A payment claim must—

(a) identify the construction work or related goods and services to which the progress payment relates; and

(b) state the amount of the progress payment that the claimant claims is payable (the ***claimed amount***); and

(c) state that it is made under this Act.

(3) The claimed amount may include any amount—

(a) that the respondent is liable to pay the claimant under section 29(3); or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be given only before the later of—

(a) the end of the period worked out under the construction contract; and

(b) the end of the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(5) A claimant must not give more than 1 payment claim for each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

[S 15 am Act 44 of 2014]

16 Payment schedule

(1) A respondent who is given a payment claim may reply to the claim by giving a schedule of proposed payment (a ***payment schedule***) to the claimant.

Note 1: If a form is approved under s 47 for a payment schedule, the form must be used.

Note 2: For how documents may be served, see the Legislation Act, pt 19.5.

[Subs (1) am Act 44 of 2014, s 5 and Sch 3[3.6]]

(2) A payment schedule must—

(a) identify the payment claim to which it relates; and

(b) state the amount of the payment, if any, that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate—

(a) why the scheduled amount is less; and

(b) if the scheduled amount is less because the respondent is withholding payment for any reason—the respondent's reasons for withholding payment.

(4) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates if—

(a) the claimant gives a payment claim to the respondent; and

(b) the respondent does not provide a payment schedule to the claimant within the earlier of—

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is given to the respondent.

[S 16 am Act 44 of 2014]

17 Consequences of not paying claimant—no payment schedule

(1) This section applies if a respondent—

(a) becomes liable to pay a claimed amount to a claimant because the respondent failed to provide a payment schedule to the claimant within the time allowed under section 16(4); and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) The claimant—

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 19(1)(b) in relation to the payment claim; and

(b) may give notice to the respondent of the claimant's intention, under section 29, to suspend;

(i) carrying out construction work under the construction contract; or

(ii) supplying related goods and services under the construction contract.

Note: If a form is approved under s 47 for a notice, the form must be used.

(3) If the claimant starts a proceeding under subsection (2)(a)(i)—

(a) the court must not enter judgment in favour of the claimant unless the court is satisfied the circumstances mentioned in subsection (1) exist; and

(b) the respondent is not entitled—

(i) to bring a cross-claim against the claimant; or

(ii) to raise a defence in relation to matters arising under the construction contract.

18 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if—

(a) a claimant gives a payment claim to a respondent; and

(b) the respondent provides a payment schedule to the claimant within the earlier of—

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is given to the respondent; and

(c) the payment schedule states a scheduled amount that the respondent proposes to pay to the claimant; and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) The claimant—

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 19(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention, under section 29, to suspend—

(i) carrying out construction work under the construction contract; or

(ii) supplying related goods and services under the construction contract.

Note: For how documents may be served, see the Legislation Act, pt 19.5.

[Subs (2) am Act 44 of 2014, s 5 and Sch 3[3.7]]

(3) The notice must state that it is made under this Act.

Note: If a form is approved under s 47 for a notice, the form must be used.

(4) If the claimant starts a proceeding under subsection (2)(a)(i)—

(a) the court must not enter judgment in favour of the claimant unless the court is satisfied the circumstances mentioned in subsection (1) exist; and

(b) the respondent is not entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

[S 18 am Act 44 of 2014]

DIVISION 4.2 – ADJUDICATION OF DISPUTES

19 Adjudication applications

(1) A claimant may apply to an authorised nominating authority, chosen by the claimant, for adjudication of a payment claim (an ***adjudication application***) if—

(a) the respondent provides a payment schedule under this part, but—

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails—

(i) to provide a payment schedule under this part within the time allowed by section 16(4); and

(ii) to pay the whole, or any part of, the claimed amount to the claimant by the due date.

Note: If a form is approved under s 47 for an adjudication application, the form must be used.

(2) An adjudication application to which subsection (1)(b) applies must not be made unless—

(a) the claimant has within 20 business days immediately following the due date for payment, notified the respondent of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent had an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) An adjudication application—

(a) must be in writing; and

(b) if the application is made under subsection (1)(a)(i)—must be made within 10 business days after the claimant receives the payment schedule; and

(c) if the application is made under subsection (1)(a)(ii)—must be made within 20 business days after the due date for payment; and

(d) if the application is made under subsection (1)(b)—must be made within 10 business days after the earlier of—

(i) the end of the 5-day period mentioned in subsection (2)(b); and

(ii) the day the claimant receives the payment schedule; and

(e) if the authorised nominating authority has set an application fee—must be accompanied by the application fee; and

(f) must identify the payment claim and any payment schedule to which it relates; and

(g) may contain the submissions relevant to the application that the claimant chooses to include.

(4) The authorised nominating authority must refer the application to an eligible adjudicator as soon as practicable.

Note: For eligibility for adjudicators, see s 20.

20 Eligibility—adjudicators

(1) A person is eligible to be an adjudicator for an adjudication application if the person—

(a) is an individual; and

(b) has the qualifications, expertise and experience to perform adjudications; and

(c) has successfully completed a relevant training course.

(2) A person is not eligible to be an adjudicator for a construction contract—

(a) if the person is a party to the contract; or

(b) if the person is employed by, or represents a building and construction industry organisation; or

(c) in circumstances prescribed by regulation.

Examples—building and construction industry organisation

1 Housing Industry Association Limited (ACN 004 631 752)

2 Master Builders Australia Incorporated (ABN 701 134 221 001)

Note: An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

21 Adjudicator for application

(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may give a notice of acceptance to the claimant and the respondent.

Note: If a form is approved under s 47 for a notice of acceptance, the form must be used.

(2) If an adjudicator gives a notice of acceptance under subsection (1), the adjudicator must give the respondent a copy of the adjudication application.

(3) If an adjudicator gives a notice of acceptance under subsection (1), the adjudicator is taken to be appointed as the adjudicator for the adjudication application from the later of—

(a) the day the claimant receives the notice of acceptance; and

(b) the day the respondent receives the notice of acceptance.

22 Adjudication responses

(1) A respondent may give an adjudicator a response to a claimant's adjudication application (the ***adjudication response***) at any time before the later of—

(a) 7 business days after the respondent receives a copy of the application; or

(b) 5 business days after receiving notice of the adjudicator's acceptance of the application.

Note: If a form is approved under s 47 for a response, the form must be used.

(2) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may contain submissions relevant to the response.

(3) The respondent may give an adjudication response only if the respondent has provided a payment schedule to the claimant within the time mentioned in section 16(4) or section 19(2)(b).

(4) The respondent must not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

(5) A copy of the adjudication response must be given to the claimant not later than 2 days after the response is given to the adjudicator.

Note: For how documents may be served, see the Legislation Act, pt 19.5.

23 Adjudication procedures

(1) The adjudicator for an adjudication application must not decide the application until after the end of the period within which the respondent may give an adjudication response.

(2) The adjudicator must not consider an adjudication response unless the respondent gives the response to the adjudicator within the time required by section 22.

(3) The adjudicator must decide an adjudication application as soon as possible but not later than—

(a) if the respondent is entitled to give an adjudication response under section 22—10 business days after the earlier of—

(i) the date on which the adjudicator receives the adjudication response; and

(ii) the date on which the adjudication response is required to be given to the adjudicator under section 22; or

(b) if the respondent is not entitled to give an adjudication response under section 22—10 business days after the respondent receives a copy of the adjudication application; or

(c) if a further time is agreed between the claimant and the respondent—the further time.

(4) In a proceeding to decide an adjudication application, an adjudicator—

(a) may ask for further written submissions from either party; and

(b) if a further submission is lodged by a party—must allow the other party to comment on the submission; and

(c) may set deadlines for further submissions and comments by the parties; and

(d) may call a conference of the parties; and

(e) may carry out an inspection of any matter related to the claim.

(5) If the adjudicator calls a conference—

(a) the conference must be conducted informally; and

(b) the parties are not entitled to legal representation at the conference.

(6) The adjudicator's power to decide an adjudication application is not affected by the failure of a party—

(a) to make a submission within time; or

(b) to comment on a submission within time; or

(c) to comply with the adjudicator's call for a conference.

24 Adjudicator's decision

(1) The adjudicator for an adjudication application must decide—

(a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the day on which the amount became or becomes payable; and

(c) the rate of interest payable on the amount.

(2) In deciding an adjudication application, the adjudicator must only consider the following:

(a) this Act;

(b) the construction contract to which the application relates;

(c) the payment claim to which the application relates, together with any submission, including relevant documentation, properly made by the claimant in support of the claim;

(d) the adjudication application;

(e) the payment schedule, if any, to which the application relates, together with any submission, including relevant documentation, properly made by the respondent in support of the schedule;

(f) the adjudication response, if any;

(g) the result of any inspection by the adjudicator of any matter related to the claim.

(3) The adjudicator's decision must—

(a) be in writing; and

(b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.

(4) If the adjudicator values construction work or related goods and services under section 12, the adjudicator and any other adjudicator must give the work, or the goods and services—

(a) in a later adjudication involving the valuation of the work or of the goods and services—the same value as the value decided by the adjudicator; or

(b) if the claimant or respondent satisfies the adjudicator that the value of the work, or the goods and services, has changed since the valuation—a different value to the value decided by the adjudicator.

(5) The adjudicator may, on his or her own initiative or on the application of the claimant or the respondent, correct a decision for—

(a) a clerical mistake or defect of form; or

(b) a material miscalculation of figures or a material mistake in the description of any person, thing or matter mentioned in the decision.

25 Respondent must pay adjudicated amount

If an adjudicator decides that a respondent must pay an adjudicated amount to a claimant, the respondent must pay the amount to the claimant on or before—

(a) the day 5 business days after the day the adjudicator's decision is given to the respondent; or

(b) if the adjudicator decides a later day under section 24(1)(b)—the later day.

26 Failure to pay adjudicated amount

(1) This section applies if—

(a) an adjudicator decides that a respondent must pay an adjudicated amount to a claimant; and

(b) a respondent fails to pay the whole, or any part of, an adjudicated amount to the claimant under section 25.

(2) The claimant may—

(a) ask the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate; and

(b) give the respondent notice of the claimant's intention to suspend carrying out construction work, or to suspend supplying related goods and services, under the construction contract.

Note: If a form is approved under s 47 for this provision, the form must be used.

(3) An adjudication certificate must state the following:

(a) the name of the claimant;

(b) the name of the respondent;

(c) the adjudicated amount;

(d) the day when payment of the adjudicated amount was required to be paid to the claimant;

(e) if part of an adjudicated amount has been paid—the amount of the part payment.

Note: If a form is approved under s 47 for this provision, the form must be used.

(4) If an amount of interest payable on the adjudicated amount is not paid by the respondent, the claimant may ask the authorised nominating authority to state the amount of interest payable in the adjudication certificate.

(5) An amount of interest stated in the adjudication certificate is added to, and becomes part of, the adjudicated amount.

(6) If the claimant has paid the respondent's share of the adjudication fees for the adjudication but has not been reimbursed by the respondent for that amount (the ***unpaid share***), the claimant may request the authorised nominating authority to state the unpaid share in the adjudication certificate.

(7) If an unpaid share is stated in the adjudication certificate, the unpaid share is added to, and becomes part of, the adjudicated amount.

27 Filing of adjudication certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt, and may be enforced, in any court of competent jurisdiction.

(2) The adjudication certificate must be accompanied by an affidavit by the claimant stating the amount of the adjudicated amount that has not been paid at the time the certificate is filed.

(3) If the affidavit states that part of the adjudicated amount has been paid, the amount to be recovered is the unpaid part of the adjudicated amount.

(4) If the respondent starts a proceeding to have the judgment set aside, the respondent—

(a) is not, in the proceeding, entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge the adjudicator's decision; and

(b) is required to pay into the court as security the unpaid part of the adjudicated amount pending the final decision of the proceeding.

28 Claimant may make new application in certain circumstances

(1) This section applies if—

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or

(b) an adjudicator who accepts an adjudication application fails to decide the application within the time allowed by section 23(3).

(2) The claimant may—

(a) withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made; and

(b) make a new adjudication application under section 19.

(3) Despite section 19(3)(c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the day the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

(4) This part applies to a new application mentioned in this section as if the application were an application under section 19.

DIVISION 4.3 – CLAIMANT'S RIGHT TO SUSPEND CONSTRUCTION WORK

29 Claimant may suspend work

(1) This section applies if a claimant gives notice to a respondent under section 17, section 18 or section 26.

(2) The claimant may suspend carrying out construction work or supplying related goods and services under a construction contract during the period—

(a) starting 2 business days after the day the claimant gives the notice to the respondent; and

(b) ending 3 business days after the day the claimant receives the amount payable by the respondent under section 17(1), section 18(1) or section 25(1).

(3) If the claimant, in exercising the right to suspend carrying out construction work or supplying related goods and services, incurs a loss or expense because the respondent removes any part of the work or supply from the contract, the respondent is liable to pay the claimant the amount of the loss or expense.

(4) A claimant who suspends construction work or the supply of related goods and services under this section is not liable for loss or damage suffered by the respondent, or by any person claiming through the respondent, because the claimant did not carry out that work or supply the goods and services, during the period of suspension.

DIVISION 4.4 – AUTHORISED NOMINATING AUTHORITIES AND ADJUDICATORS

30 Maximum number of nominating authorities

(1) The Minister may decide the maximum number of people that may be authorised as a nominating authority.

(2) A decision under subsection (1) is a notifiable instrument

Note: A notifiable instrument must be notified under the Legislation Act.

31 Application for nominating authority

(1) A person may apply to the Minister to be authorised as a nominating authority.

Note 1: If a form is approved under s 47 for an application, the form must be used.

Note 2: A fee may be determined under s 46 for this provision.

(2) On an application for authorisation the Minister must—

(a) authorise the applicant as a nominating authority if—

(i) the applicant is suitable under section 32; and

(ii) the maximum number of people have not been authorised; or

(b) refuse to authorise the applicant as a nominating authority if—

(i) the applicant is not suitable under section 32; or

(ii) the maximum number of people have been authorised.

Note: A decision to refuse an application under s 31(2)(b)(i) is a reviewable decision (see pt 5).

32 Nominating authority—suitability

(1) In deciding whether an applicant is suitable the Minister must have regard to the following:

(a) whether the applicant, or a person engaged or employed by the applicant, has been convicted, or found guilty, in the 5 years before the application is made, whether in the ACT or elsewhere, of an offence—

(i) involving fraud or dishonesty; or

(ii) punishable by imprisonment for at least 1 year;

(b) whether the applicant is bankrupt or personally insolvent;

(c) whether the applicant, or a person engaged or employed by the applicant, at any time in the 5 years before the application is made, was involved in the management of a corporation when—

(i) the corporation became the subject of a winding-up order; or

(ii) a controller or administrator was appointed;

(d) whether the applicant at any time in the 1 year before the application is made had—

(i) an authorisation to be a nominating authority cancelled, suspended or withdrawn under this Act or under a corresponding law; or

(ii) been refused authorisation to be a nominating authority under this Act or under a corresponding law;

(e) if the applicant represents the interests of a particular section of the building and construction industry—whether the applicant's representation makes the applicant unsuitable to appoint adjudicators.

(2) In this section:

corresponding law means a law of the Commonwealth or another State that provides for security of payments in the building and construction industry.

[Subs (2) insrt Act 44 of 2014, s 5 and Sch 3[3.8]]

[S 32 am Act 44 of 2014]

ACT

33 Term of authorisation

(1) An authorisation under this division is effective for 3 years starting on the day the Minister gives the authorisation.

(2) An authorised nominating authority may apply for renewal of the authorisation.

33A Suspension, cancellation or withdrawal of authorisation

(1) The Minister may suspend for up to 12 months, or cancel, a nominating authority's authorisation if the Minister is satisfied on reasonable grounds—

(a) the nominating authority has contravened this Act; or

Note 1: A reference to an Act includes a reference to statutory instruments made or in force under the Act, including a regulation and any law or instrument applied, adopted or incorporated by the Act (see Legislation Act, s 104).

Note 2: A reference to an entity includes a reference to a person exercising a function of the entity (see Legislation Act, s 184A and dict, pt 1, def ***entity***).

(b) the nominating authority is no longer suitable for authorisation, having regard to the matters listed in section 32(1) (Nominating authority—suitability).

(2) If the nominating authority has contravened this Act, before deciding to suspend or cancel a nominating authority's authorisation, the Minister must have regard to—

(a) the extent to which the nominating authority, or a person engaged or employed by the nominating authority, is responsible for the contravention; and

(b) the impact of the contravention on 1 or more of the following:

(i) the rights or entitlements of a person under this Act;

(ii) the integrity of the adjudication process under this Act;

(iii) any adjudication process undertaken by the nominating authority.

(3) If the Minister is satisfied the nominating authority's authorisation should be suspended or cancelled, the Minister must, in writing—

(a) tell the nominating authority that the Minister intends to suspend or cancel the authorisation; and

(b) give the nominating authority reasons for the suspension or cancellation; and

(c) give the nominating authority at least 14 days after the notice is given to the nominating authority to make representations to the Minister about the matter.

(4) The Minister must consider any representations made by the nominating authority within the time set out in the notice before making a decision to suspend or cancel the nominating authority's authorisation.

(5) The Minister may withdraw authorisation if the Minister is satisfied on reasonable grounds that information given to the Minister by the nominating authority in relation to the nominating authority's suitability for authorisation was false or misleading.

[S 33A insrt Act 24 of 2016, s 6]

34 Costs and expenses—authorised nominating authority

(1) The Minister may determine the maximum amount that an authorised nominating authority may charge for costs and expenses for any service provided by the authority in relation to an adjudication application.

(2) An authorised nominating authority may charge costs and expenses—

(a) if the Minister has made a determination under subsection (1)—up to the maximum amount for any service provided by the authority in relation to an adjudication application; or

(b) if the Minister has not made a determination under subsection (1)—up to a reasonable amount having regard to the work done and expenses incurred by the authorised nominating authority.

(3) The claimant and respondent are—

(a) each liable to pay any costs and expenses charged by an authorised nominating authority; and

(b) each liable to contribute to the payment of any such costs and expenses—

(i) in equal proportions; or

(ii) if the adjudicator decides a different proportion—the proportion decided.

35 Report—authorised nominating authority

(1) An authorised nominating authority must provide a report to the Minister on request.

(2) A report must include information about—

(a) the activities of the authorised nominating authority under the Act; and

(b) costs and expenses charged by the authority for any service provided by the authority in relation to an adjudication application made to the authority.

36 Costs and expenses—adjudicator

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application—

(a) if an amount of costs and expenses is agreed between the adjudicator and the parties to the adjudication—the agreed amount; or

(b) if an amount of costs and expenses is not agreed—a reasonable amount having regard to the work done and expenses incurred by the adjudicator.

(2) The claimant and respondent are each liable to pay the adjudicator's costs and expenses.

(3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's costs and expenses—

(a) in equal proportions; or

(b) if the adjudicator decides a different proportion—the proportion decided.

(4) An adjudicator is not entitled to be paid costs or expenses in relation to the adjudication of an adjudication application if he or she fails to make a decision on the application within the time allowed by section 23(3).

(5) However, subsection (4) does not apply—

(a) if the failure to make a decision is because the application is withdrawn or the dispute between the claimant and respondent is resolved; or

(b) if an adjudicator refuses to communicate the decision on an adjudication application until the fees and expenses are paid; or

(c) in circumstances prescribed by regulation.

37 Protection from liability—adjudicators and authorised nominating authorities

(1) An adjudicator is not personally liable for anything done or omitted to be done honestly and without recklessness—

(a) in exercising a function under this Act; or

(b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

(2) An authorised nominating authority, and a person exercising a function relating to

the business affairs of an authorised nominating authority under this Act, are not personally liable for anything done or omitted to be done honestly and without recklessness—

(a) in exercising a function under this Act; or

(b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

37A Approval of codes of practice

(1) The Minister may approve a code of practice for an authorised nominating authority.

Note: A power given under an Act to make a statutory instrument (including a code of practice) includes power to amend or repeal the instrument (see Legislation Act, s 46(1)).

(2) An approved code of practice is a disallowable instrument.

Note 1: A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Note 2: An amendment or repeal of a code of practice is also a disallowable instrument (see Legislation Act, s 46(2)).

[S 37A insrt Act 44 of 2016, s 48]

37B Breach of code of practice

A person commits an offence if the person—

(a) is an authorised nominating authority; and

(b) contravenes a code of practice applicable to the authorised nominating authority.

Maximum penalty: 50 penalty units.

[S 37B insrt Act 44 of 2016, s 48]

DIVISION 4.5 – GENERAL

38 Effect of part on civil proceedings

(1) Nothing in this part affects any right that a party to a construction contract—

(a) may have under the contract; or

(b) may have under part 3 (Right to progress payments) in relation to the contract; or

(c) may have apart from this Act for anything done or omitted to be done under the contract.

(2) Nothing done under this part affects any civil proceeding arising under a construction contract, whether under this part or otherwise, except as provided by subsection (3).

(3) In any proceeding before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—

(a) must in any order or award it makes in the proceeding, take into account any amount paid to a party to the contract under or for the purposes of this part; and

(b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceeding.

PART 5 — NOTIFICATION AND REVIEW OF DECISIONS

39 Meaning of *reviewable decision*—pt 5

In this part:

reviewable decision means a decision mentioned in schedule 1, column 3 under a provision of this Act mentioned in column 2 in relation to the decision.

40 Reviewable decision notices

If a person makes a reviewable decision, the person must give a reviewable decision notice to each entity mentioned in schedule 1, column 4 in relation to the decision.

Note 1: The person must also take reasonable steps to give a reviewable decision notice to any other person whose interests are affected by the decision (see *ACT Civil and Administrative Tribunal Act 2008*, s 67A).

Note 2: The requirements for reviewable decision notices are prescribed under the *ACT Civil and Administrative Tribunal Act 2008*.

41 Applications for review

The following may apply to the ACAT for review of a reviewable decision:

(a) an entity mentioned in schedule 1, column 4 in relation to the decision;

(b) any other person whose interests are affected by the decision.

Note: If a form is approved under the *ACT Civil and Administrative Tribunal Act 2008* for the application, the form must be used.

PART 6 — MISCELLANEOUS

42 No contracting out

(1) This Act has effect despite any provision in any contract, agreement or arrangement.

(2) A provision of any contract, agreement or arrangement, whether in writing or not, is void to the extent that it—

(a) is inconsistent with this Act; and

(b) purports to, or has the effect of excluding, modifying or restricting the operation of this Act; and

(c) may reasonably be construed as an attempt to deter a person from taking action under this Act.

43 Judicial review of adjudication decision

(1) Except as provided for in this part, a court does not have jurisdiction to set aside or remit an adjudication decision on the ground of error of fact or law on the face of the decision.

(2) An appeal may be made to the Supreme Court on any question of law arising out of an adjudication decision.

(3) An appeal under subsection (2) may be brought by any of the parties to an adjudication decision—

(a) with the consent of the parties to the decision; or

(b) with the leave of the Supreme Court.

(4) The Supreme Court must not grant leave under subsection (3)(b) unless it considers that—

(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more parties to the adjudication decision; and

(b) there is—

(i) a manifest error of law on the face of the adjudication decision; or

(ii) strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law.

(5) The Supreme Court may make any leave which it grants under subsection (3)(b) subject to the applicant complying with any conditions it considers appropriate.

(6) On the determination of an appeal under subsection (2) the Supreme Court may by order—

(a) confirm, amend or set aside the adjudication decision; or

(b) remit the adjudication decision, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to—

(i) the adjudicator for reconsideration; or

(ii) if a new adjudicator is appointed by the Supreme Court—to that adjudicator for consideration.

(7) If an adjudication decision is remitted under subsection (6)(b) the adjudicator must make the new adjudication decision—

(a) within 10 business days after the day the decision was remitted; or

(b) within the time directed by the Supreme Court.

(8) If the adjudication decision of an adjudicator is amended on an appeal under

subsection (2), the adjudication decision as amended has effect as if it were the adjudication decision of the adjudicator.

44 Determination of question of law by Supreme Court

(1) The Supreme Court has jurisdiction to determine any question of law arising in an application to the court made by any of the parties to an adjudication decision—

(a) with the consent of the adjudicator who made the decision; or

(b) with the consent of the parties to the decision.

(2) The Supreme Court must not consider a question of law under subsection (1)(a) unless it is satisfied that—

(a) the determination of the question might produce substantial savings in costs to the parties; and

(b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 43(4).

45 Review of Act

(1) The Minister must review the operation of this Act as soon as possible after 1 July 2012.

(2) A report on the outcome of the review must be presented to the Legislative Assembly by 1 July 2013.

46 Determination of fees

(1) The Minister may determine fees for this Act.

Note: The *Legislation Act* contains provisions about the making of determinations and regulations relating to fees (see pt 6.3).

[Subs (1) am Act 44 of 2014, s 5 and Sch 3[3.9]]

(2) A determination is a disallowable instrument.

Note: A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act*.

[S 46 am Act 44 of 2014]

47 Approved forms

(1) The director-general may approve forms for this Act.

[Subs (1) am Act 44 of 2014, s 5 and Sch 3[3.9]; Act 22 of 2011, s 3 and Sch 1[1.65]]

(2) If the director-general approves a form for a particular purpose, the approved form must be used for that purpose.

Note: For other provisions about forms, see the *Legislation Act*, s 255.

[Subs (2) am Act 22 of 2011, s 3 and Sch 1[1.65]]

(3) An approved form is a notifiable instrument.

Note: A notifiable instrument must be notified under the *Legislation Act*.

[S 47 am Act 44 of 2014; Act 22 of 2011]

48 Regulation-making power

(1) The Executive may make regulations for this Act.

Note: A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.

(2) A regulation may prescribe offences for contraventions of a regulation and prescribe maximum penalties of not more than 20 penalty units.

49 Legislation repealed [Repealed]

[S 49 om Act 14 of 2001, s 89(3), Reprint 1]

50 Legislation Act 2001, schedule 1, part 1.1, item 10 [Repealed]

[S 50 om Act 14 of 2001, s 89(3), Reprint 1]

SCHEDULE 1 – REVIEWABLE DECISIONS

(see pt 5)

column 1 item	column 2 section	column 3 decision	column 4 entity
1	31	refuse to authorise nominating authority	applicant for authorisation as nominating authority
2	33A(1)	suspension or cancellation of authorisation	nominating authority
3	33A(5)	withdrawal of authorisation	nominating authority

[Sch 1 am Act 24 of 2016, s 7]

DICTIONARY

(see s 3)

Note 1: The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2: For example, the Legislation Act, dict, pt 1, defines the following terms:

- business day
- director-general (see s 163)
- exercise
- found guilty
- function
- law, of the Territory.

[Dic note 2 am Act 44 of 2014, s 5 and Sch 3[3.10]; Act 22 of 2011, s 3 and Sch 1[1.66]]

adjudicated amount—see section 24.

adjudication application—see section 19(1).

adjudication certificate means a certificate provided by an authorised nominating authority under section 26.

adjudication response—see section 22(1).

authorised nominating authority means a nominating authority authorised by the Minister under section 31.

business day does not include 27, 28, 29, 30 or 31 December.

claimant—see section 15.

claimed amount—see section 15.

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

construction work—see section 7.

corresponding law [Repealed]

[Def rep Act 44 of 2014, s 5 and Sch 3[3.11]]

due date, for a progress payment, means the day the progress payment is payable under section 13.

payment claim—see section 15(1).

[Def subst Act 44 of 2014, s 5 and Sch 3[3.12]]

payment schedule—see section 16(1).

[Def subst Act 44 of 2014, s 5 and Sch 3[3.12]]

progress payment—see section 10(1).

recognised financial institution [Repealed]

[Def rep Act 44 of 2014, s 5 and Sch 3[3.13]]

related goods and services for construction work—see section 8(1).

[Def subst Act 44 of 2014, s 5 and Sch 3[3.14]]

respondent—see section 15.

reviewable decision, for part 5 (Notification and review of decisions)—see section 39.

scheduled amount—see section 16(2).

[Dic am Act 44 of 2014]

TASMANIAN LEGISLATION

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL 2009 (TAS) – FACT SHEET

Following an analysis of the extent of payment problems in the Tasmanian Building and Construction Industry the report "Security of Payment in the Tasmanian Building and Construction Industry" was released by consultants Stenning and Associates in October 2006.

This report determined that many participants in the contractual chain are poorly or thinly capitalised, resulting in a significant reliance on cash flow to sustain their business operations.

The range of activities undertaken as part of compiling this report confirmed that the Tasmanian building and construction industry experiences security of payment problems of a non-trivial nature.

A survey undertaken in conjunction with developing the report found that 43% of those surveyed reported experiencing security of payment problems over the previous financial year.

In the sample of businesses surveyed, security of payment problems affected over $37 million dollars of revenue flow in the previous financial year.

The main objective of this Bill is to reform payment behaviour in the building and construction industry. The bill creates fair and balanced payment standards for building and construction contracts.

The standards include use of progress payments and quick adjudication of disputes. The Bill will speed up payments by removing incentives to delay. Reforms include the power for an unpaid contractor or subcontractor to suspend work and a ban on pay-when-paid clauses.

All states and territories, except Tasmania, have legislated to address the security of payment problem in their building and construction industries. South Australia has tabled a Bill and the Australian Capital Territory is soon to debate their Bill.

The Bill is based on the *Building and Construction Industry Security of Payment Act 1999* of New South Wales.

A key departure from the policy outcomes contained in the New South Wales Act is the ability for builders to claim against residential home owners who potentially have no commercial background in the building and construction industry. This departure is seen as necessary to ensure that all participants in the building and construction industry are treated equally.

these parties are afforded special consideration for their lack of experience in the building and construction industry. These mechanisms include mandatory warnings on claims and 20 business days to consider the content of a progress payment claim, rather than the 10 days afforded building practitioners. This additional time is provided to allow these non-practitioners to consider their options and if necessary to seek assistance or advice concerning the claim process.

Adjudication provides the claimant with important benefits: a prompt interim decision on a disputed payment; impartial assessment of a disputed payment; and the opportunity to progress the matter as a judgement for a debt in court. Failure to pay will also allow the claimant to suspend work.

The adjudicator's decision is only an interim decision until the final financial payments or restitution is determined at the end of the contract under the provisions of the contract.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL 2009 (TAS) – SECOND READING SPEECH

House of Assembly, 4 November 2009

[8.36 p.m.] **Ms SINGH** (Denison – Minister for Workplace Relations – 2R) – Madam Deputy Speaker, I move –

That the bill be now read the second time.

This bill seeks to achieve one of a number of significant reforms the Government intends to introduce to the Tasmanian building and construction industry in order to align conditions in the Tasmanian industry with those elsewhere in Australia.

The main objective of this bill is to reform payment behaviour in the building and construction industry. The bill creates fair and balanced payment standards for all building and construction contracts. The standards include statutory rights to progress payments and quick adjudication of payment disputes. The bill will speed up payments by removing the ability to delay those payments. Reforms include the power for an unpaid contractor or subcontractor to suspend work. It also bans "pay-when-paid" clauses.

In tabling this bill, the Government seeks to improve cash flow throughout the entire building and construction industry. In particular, the bill seeks to address the dramatic effect that nonpayment has on small subcontractors, such as bricklayers, carpenters, electricians, plumbers and earthmoving subcontractors. Many businesses and subcontractors at this level cannot survive financially when they do not receive regular payment for the work they have done. This can have severe consequences to themselves, their businesses and most importantly, their families.

Madam Deputy Speaker, the Government is determined to rid the building and construction industry of unacceptable payment practices. In doing so, there is a clear recognition by this Government that any action taken does not add unnecessary cost to industry, its participants and its clients. A draft bill was issued for public comment in August this year. The draft bill has received widespread support and recognition from all sectors of the industry, including bodies representing contractors, subcontractors, suppliers, interstate adjudicators, nominating authorities, specialist legal practitioners and private businesses (both large and small). The representative bodies include the Building and Construction Industry Council, the Australian Institute of Architects, the Air Conditioning and Mechanical Contractors Association of Tasmania Limited and Master Plumbers Association of Tasmania.

Madam Deputy Speaker, this bill is based on that draft bill and public comments received from stakeholders.

The bill addresses what is commonly known in the building and construction industry as the "security of payment problem". This problem occurs when the contractors, subcontractors and suppliers in the building and construction industry are unable to secure just payment in a timely fashion or sometimes to get paid at all, for the work performed or goods and services supplied, despite in most cases, having the contractual right to that payment.

Because much of the building and construction industry operates under a system of hierarchical contract chains, the industry is particularly vulnerable to security of payment problems. The failure of any one party in the contractual chain to honour its obligations can have a flow-on effect on other parties further down the chain by restricting cash flow and ultimately causing their bankruptcy.

There have been a number of inquiries into the security of payment problem in Australia. In general, these reviews have concluded that the security of payment problem was a

matter that warranted government attention. A consistent theme of all the reviews was that traditional legal remedies do not provide adequate protection to subcontractors and suppliers. These reviews initiated government reforms in other States and New Zealand. All States and Territories, except Tasmania, have legislated to address the security of payment problem in their building and construction industries. South Australia has tabled a bill and the Australian Capital Territory is soon to debate their bill.

The Tasmanian security of payment bill implements many of the recommendations contained in the report *Security of Payment in the Tasmanian Building and Construction Industry* which was developed by consultants Stenning and Associates, released for public comment in October 2006. The report was commissioned in response to industry representations and supported by the Tasmanian Building and Construction Industry Council.

This report determined that many participants in the building and construction industry are under capitalised, resulting in a significant reliance on cash flow to sustain their business operations. The report confirmed that the Tasmanian building and construction industry often experiences serious security of payment problems. In developing the report a survey of small businesses found that 43 per cent of those surveyed reported problems with receiving payment owed during the previous financial year. In the sample of businesses surveyed, security of payment problems had affected over $37 million dollars of revenue flow in the previous financial year. The most common problem experienced by businesses was late payment (81 per cent). Around 48 per cent said they had experienced partial payments and an alarming 43 per cent said they had experienced non-payment.

The bill I put before the House today, Madam Deputy Speaker, is based on the Building and Construction Industry Security of Payment Act 1999 of New South Wales. A key departure from the policy outcomes contained in the New South Wales act is the ability for contractors to make a payment claim against the contract principal when that person is a residential home owner. This departure is seen as necessary to ensure that all participants in the building and construction industry are treated equally.

Additional mechanisms are introduced by the bill to ensure residential contract principals with no experience of building and construction contracts (for example, home owners) are afforded special consideration for their lack of experience. These mechanisms include mandatory warnings on claims and an increase to 20 business days to consider the content of a progress payment claim, rather than the 10 days afforded building practitioners. This additional time is provided to allow these non-practitioners to consider their options and if necessary to seek assistance or advice concerning the claim process. The additional mechanisms are not extended to "owner builders" registered under the Building Act 2000 because they are considered to be a building practitioner.

The parties who will be most affected by the legislation will be those who, for their improper financial benefit, delay making legitimate progress payments. This bill gives claimants a quicker and cheaper means of enforcing payment. It enforces interim payments to "keep money flowing" during the contract. Final financial adjustments are made at the end of the contract under the terms of the contract.

Madam Deputy Speaker, I shall now describe in more detail the major features of this bill. Some building or construction contracts do not explicitly provide for progress payments. A building or construction contract will now have to include provision for making progress payments and for determining the amount of each progress payment, otherwise these matters will be covered by the default provisions in the bill.

If the contract does not cover these matters, Part 3 of the bill provides that payment claims can be made for work carried out or goods and services supplied up to the last day of each month. For building practitioners, payment becomes due 10 business days after the claim is made. In the case of an owner of a residential building who is not a building practitioner, this claim period is extended to 20 business days.

If the construction contract is silent on how a payment is to be valued, the bill provides that the amount is calculated on the basis of the value of the work carried out and related goods and services provided.

Madam Deputy Speaker, some existing subcontracts provide that a subcontractor is not entitled to be paid until the principal pays the contractor, even though the principal is late in paying or withholds payment on account of something unrelated to the subcontractor's performance. The bill bans these "pay-when-paid" contractual clauses.

When a payment claim is made, and the other party, called the respondent, does not intend to pay the full amount of the payment claim, it must issue a payment schedule stating the amount, if any, of the payment claim which will be paid and the reasons for not paying the amount claimed.

The payment schedule alerts the claimant to the existence of a dispute over payment and allows the claimant to immediately commence an adjudication process available under the legislation. This is a critical component of the bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full.

Madam Deputy Speaker, to provide the incentive for early warning to be given, the respondent must pay the full amount of the payment claim when it becomes due for payment under the contract if a payment schedule is not given within time. The claimant can also seek payment of that debt by way of proceedings in a court.

The respondent cannot raise defences of defective work or cross-claims in order to delay judgment in these proceedings, therefore ensuring a prompt decision by the court.

The bill provides a much faster adjudication process by giving an interim decision on disputes over progress payments, and fixing the amount of the debt. In addition, if a payment schedule is not given within time, the party entitled to payment is given a right to suspend construction work. The right to suspend work also exists if a payment made is less than the amount which a payment schedule states will be paid.

The payment schedule is akin to the architect's progress certificate which is typically provided for in construction contracts. In adjudication under the bill, the respondent is unable to raise defences, set-offs or cross-claims which have not been identified in the payment schedule. This means that the respondent must treat payment schedules with the utmost care. The bill prevents parties from contracting out of the effects of either providing or not providing a payment schedule or the adjudication which can follow a dispute over a payment claim.

To ensure a claimant does not delay in initiating the adjudication process, the claimant has only 10 business days after receiving a payment schedule, and 20 days if the respondent lodges a payment schedule and does not pay, in which to give notice requiring adjudication under the legislation. If the claimant fails to make the adjudication application within time, the claimant forfeits the right to the adjudication available under the bill. The claimant also forfeits the right given by the bill to suspend work. However, other dispute resolution processes in the contract or provided by law are not affected.

The adjudication application is simply a notice in writing identifying the relevant payment claim and payment schedule and stating that the claimant requires adjudication under the act. The claimant can include reasons why the full amount of the payment claim should be paid and why the respondent's reasons in the payment schedule for not paying are not justified. The claimant sends the adjudication application to an authorised nominating authority. At the same time, a copy of the application must be served on the respondent.

The adjudicator must be a person acting independently. Clauses 35 and 36 provide for the disqualification of adjudicators if they have a material personal interest in a building or construction contract, dispute, or a party to the contract to which an application relates.

An authorised nominating authority is an individual or organisation approved by the Security of Payments Official. The Security of Payments Official is established under the

act to be the Director of Building Control or a person appointed by the minister. There are presently a significant number of nominating authorities established under interstate laws. It is expected that these organisations will apply to be approved as authorised nominating authorities in Tasmania. It is also expected that in future Tasmanian-based nominating authorities and adjudicators will be established. The Security of Payments Official may decide to withdraw approval of any authorised nominating authority or impose conditions if it is unable or unwilling to properly perform the role of a nominating authority.

An appeal is available to the Magistrates Court (Administrative Appeals Division) against the refusal of the Security of Payments Official to authorise a person as a nominating authority or to set a condition or withdraw authorisation.

The claimant is free to use any authorised nominating authority. If a claimant does not receive notice of acceptance of an adjudication application within four business days, the claimant can present their adjudication application to any other authorised nominating authority.

The respondent can make the response up to a maximum of 10 business days after receiving a copy of the claimant's submission to the adjudicator or five business days after receiving a copy of the notice of the adjudicator's acceptance of appointment, whichever is the later. The response must contain any submissions which the respondent wishes the adjudicator to consider when the adjudicator decides the claimant's adjudication application. If the respondent does not lodge the response in time, it cannot be considered by the adjudicator. The adjudicator will then proceed to make a determination only on the information provided by the claimant.

Madam Deputy Speaker, this date will be the date for payment prescribed by the building construction contract or, if no date is prescribed, either 10 days after the payment claim was made by a building practitioner or 20 days in the case of a residential building owner.

As the respondent's submission must be confined to reasons, amounts and grounds for withholding payment which were stated in the payment schedule and any related issues raised in the claimant's submission, the ambit of the dispute to be decided is fixed by two documents, namely, the payment claim and the payment schedule.

Normally payment of the adjudicator's fees is shared equally by the disputing parties. However, a party could ask the adjudicator to make a different apportionment. The adjudicator would have to give the other party an opportunity to make a submission on this point.

Neither party is entitled to recover from the other the costs of preparing or making its submissions to the adjudicator.

Usually, if payment is not provided within five business days after the adjudicator's decision, the claimant can suspend work but must give two business days notice of an intention to do so. The claimant can also register the adjudicator's decision in a court and obtain a court judgement.

In summary, Madam Deputy Speaker, the time frames set out by the bill for responding to a payment claim and for the making of adjudication are tight and aimed at ensuring that the disputes under this proposed legislation are resolved rapidly and at minimal expense to the parties.

The adjudication process for building practitioners should be completed within six weeks of the claimant receiving notice that a progress claim will not be paid in full. The process is slightly longer (eight weeks) if the claim is against an owner of a residential building.

If, without the consent of both parties, the adjudicator fails to make a decision within 10 business days, the adjudicator forfeits any right to payment and the claimant can proceed to have another adjudicator nominated.

Adjudication provides the claimant with important benefits: a prompt interim decision on a disputed payment, impartial assessment of a disputed payment, and the opportunity to progress the matter as a judgment for a debt in court. Failure to pay will also allow the claimant to suspend work.

The bill does not specifically provide for an appeal from an adjudicator's decision. The adjudicator's decision is only an interim decision until the final amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process.

The right to suspend work given by this bill is in addition to any other right to suspend work. Sometimes a building or construction contract contains an express right to suspend. Such a right will not be affected by this bill. Generally speaking, the common law does not allow a contractor to suspend work simply because the other party has failed to make a payment on time. This bill changes the common law by providing such a right.

There are limitations on the exercise of this right. Firstly, work can only be suspended on account of non-payment of an undisputed payment claim or adjudicator's decision. Secondly, time for payment must have passed and a notice of intention to suspend must have been given. Suspension cannot commence until two business days after such a notice is given. The suspension must be lifted if the respondent pays the debt.

Madam Deputy Speaker, this Government committed itself to the introduction of this important legislation during this sitting of the Parliament. In fulfilling this commitment on behalf of the Government, I am pleased to note that the building and construction industry, and particularly subcontractors, will benefit substantially from the implementation of this legislation. I commend this bill to the House.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2009 (TAS)

Table of Amending Legislation

Principal legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Building and Construction Industry Security of Payment Act 2009	**86 of 2009**	**17 Dec 2009**	**17 Dec 2009**

This legislation has been amended as follows:

Amending legislation	Number	Date of gazettal/assent/ registration	Date of commencement
Work Health and Safety (Transitional and Consequential Provisions) Act 2012	2 of 2012	4 May 2012	Pt 5: 1 Jan 2013
Justice and Related Legislation (Miscellaneous Amendments) Act 2012	13 of 2012	30 May 2012	Pt 4: 30 May 2012
Justice and Related Legislation (Miscellaneous Amendments) Act 2013	20 of 2013	20 Jun 2013	Pt 7: 20 Jun 2013
Justice and Related Legislation (Miscellaneous Amendments) Act 2015	38 of 2015	13 Oct 2015	Pt 7: 13 Oct 2015

PART 1 – PRELIMINARY

1 Short title

This Act may be cited as the *Building and Construction Industry Security of Payment Act 2009*.

2 Commencement

This Act commences on the day on which this Act receives the Royal Assent.

3 Object

The object of this Act is to ensure that any person who undertakes to carry out building work or construction work (or who undertakes to supply building or construction-related goods and services) under a building or construction contract, including such a contract that relates to a residential structure, is entitled to receive, and is able to recover, progress payments in relation to the work or goods and services.

4 Interpretation

In this Act, unless the contrary intention appears —

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable under section 25;

adjudication application means an application made under section 21;

adjudication certificate means an adjudication certificate issued under section 26(4);

adjudication fees means fees or expenses charged by a nominating authority under section 32 or by an adjudicator under section 37;

adjudication response means a response lodged with an adjudicator under section 23;

adjudicator, in relation to an adjudication application, means a person who has accepted under section 22(4) a referral of the adjudication application;

building includes a proposed building or part of a building and a building that is able to be relocated;

Building Code of Australia means the code produced by the Australian Building Codes Board relating to the design and construction of buildings;

[Def am Act 38 of 2015, s 22(a)]

building or construction contract means a contract, or other arrangement, under which one party undertakes to carry out building work or construction work for, or to supply building or construction-related goods and services to, another party;

building or construction-related goods and services has the meaning it has in section 6;

building work or construction work has the meaning it has in section 5;

business day [Repealed]

[Def rep Act 20 of 2013, s 22]

claimant means a person by whom a payment claim is served under section 17;

claimed amount means —

(a) an amount of a progress payment claimed, in accordance with section 17, in a payment claim, to be due for building work or construction work carried out or for building or construction-related goods and services supplied; or

(b) any other amount specified in the payment claim in accordance with section 17(3);

due date, in relation to a progress payment, means the due date for the progress payment as determined in accordance with section 15;

fire safety system includes any one or more of the following:

(a) booster assemblies;
(b) fire mains, hydrants and hose reels;
(c) sprinklers;
(d) fire and smoke alarms;
(e) fire control centres;
(f) structures or devices to mitigate the fire hazard in respect of special fire hazard buildings within the meaning of the *Building Regulations 2014*;
(g) stairwell pressurisation;
(h) air-handling systems;
(i) smoke and heat vents;

[Def am Act 38 of 2015, s 22(b)]

nominating authority means a person who is authorised to be a nominating authority under section 31(2);

payment claim means a claim made under section 17;

payment schedule means a payment schedule provided to a claimant under section 18;

plumbing installation means —

(a) a system of water supply; or
(b) a system of sewage or sullage drainage or disposal; or
(c) a system of stormwater drainage, roof drainage or trade waste; or
(d) an on-site waste water management system;

progress payment means a progress payment to which a person is entitled under section 12 and includes —

(a) the final payment for building work or construction work carried out, or for building or construction-related goods and services supplied, under a building or construction contract; and
(b) a single or one-off payment for carrying out building work or construction work, or supplying building or construction-related goods and services, under a building or construction contract; and
(c) a payment that is based on an event or date;

recognised financial institution means —

(a) an authorised deposit-taking institution; or
(b) a ***body regulated by APRA*** within the meaning of the *Australian Prudential Regulation Authority Act 1998* of the Commonwealth; or
(c) a prescribed person or body, or a member of a prescribed type of persons or bodies;

reference date, in relation to a building or construction contract, means —

(a) a date determined by, or in accordance with, the terms of the contract as the date on which a claim for a progress payment may be made in relation to —
  (i) work carried out, or undertaken to be carried out, under the contract; or
  (ii) building or construction-related goods and services supplied, or undertaken to be supplied, under the contract; or

(b) if the contract does not expressly provide for such a date, the last day of each month in which —

(i) building work or construction work is carried out under the contract; or

(ii) building or construction-related goods and services are supplied under the contract;

residential structure means a building or structure that is a class 1 or a class 10 building or structure within the meaning of the Building Code of Australia, as in force from time to time;

respondent means a person on whom a payment claim is served under section 17;

road infrastructure means —

(a) any land that is to be used as a road (whether public or private); or

(b) any land that is to be used as a footpath, bike path or public thoroughfare for pedestrians or vehicles; or

(c) any structures or works that are associated with, or co-located with, such a road, path or thoroughfare, including —

(i) kerbing, guttering, roundabouts, median strips and barriers; and

(ii) parking places or facilities; and

(iii) bridges, viaducts and tunnels; and

(iv) other works carried out in, on, under or over a road, path or thoroughfare;

scheduled amount means the amount of a progress payment that is proposed to be made under a payment schedule;

Security of Payments Official means the person who, in accordance with section 30, is the Security of Payments Official;

structure includes a proposed structure, part of a structure and a temporary structure;

temporary structure includes any —

(a) booth, tent or other temporary enclosure, whether or not a part of the booth, tent or enclosure is permanent; and

(b) temporary seating structure; and

(c) stage, platform, or tower, that is temporary; and

(d) temporary bridge; and

(e) structure that does not form part of the land and is temporary; and

(f) structure of a prescribed type.

[S 4 am Act 38 of 2015; Act 20 of 2013]

4A Interpretation of *business day*

(1) In this Act, unless the contrary intention appears —

business day means any day other than —

(a) a Saturday or Sunday; or

(b) a day specified in section 4 of the *Statutory Holidays Act 2000*; or

(c) a day specified in Part 1 of Schedule 1 to the *Statutory Holidays Act 2000*; or

(d) a day specified in Part 1 or 2 of Schedule 2 to the *Statutory Holidays Act 2000*; or

(e) the 27th, 28th, 29th, 30th or 31st of December.

(2) For the purposes of the definition of ***business day*** in subsection (1), a day referred to in that definition is a holiday for all of the day and in the whole of the State.

[S 4A insrt Act 13 of 2012, s 10]

5 Meaning of *building work or construction work*

(1) For the purposes of this Act, ***building work or construction work*** means any of the following:

(a) the construction, erection, re-erection, alteration, repair, restoration, maintenance, extension, adding to, underpinning, removal, demolition, or dismantling, of —

(i) buildings; or

(ii) structures that form, or are to form, part of land;

(b) the construction, alteration, repair, restoration, maintenance, extension, removal, demolition or dismantling of works that form, or are to form, part of land, including —

(i) walls; and

(ii) road infrastructure; and

(iii) energy infrastructure and telecommunications facilities; and

(iv) aviation landing facilities and railway infrastructure; and

(v) marine infrastructure, water and sewerage infrastructure, drainage infrastructure, dams and canals and installations for the purposes of irrigation, land drainage or coast or river protection; and

(vi) structures, such as poles, wires and netting, erected to support or protect agricultural, horticultural or forestry products; and

(vii) structures (other than underground structures constructed to enable access to minerals) to enable persons to gain access to places on which agricultural, horticultural, forestry, tourist or mining activities are being, or are to be, carried out;

(c) the installation or alteration in, or removal from, any building, structure or works, of systems, and services, that form, or are to form, part of land, including —

(i) heating, ventilation, air-conditioning and cooling systems; and

(ii) power supply, lighting and communication systems; and

(iii) passenger lifts and goods lifts; and

(iv) plumbing installations; and

(v) fire safety systems and security systems;

(d) any operation that forms an integral part of, is preparatory to, or completes, work referred to in paragraph (a), (b) or (c), including —

(i) site clearance, earth-moving, excavation, tunnelling, boring and filling; and

(ii) the preparation of foundations; and

(iii) the erection, maintenance or dismantling of plant and equipment; and

(iv) the prefabrication of components to form part of any building, structure or works, whether the prefabrication is carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of road infrastructure and other works to enable access to land or a part of land;

(e) the internal or external cleaning of buildings, structures, or works, that is carried out in the course of the construction, alteration, repair, restoration, maintenance, extension, removal, demolition or dismantling of the buildings, structure or works;

(f) the painting or decoration of the internal or external surfaces of any building, structure or works;

(g) other work of a type prescribed to be a type of building work or construction work for the purposes of this Act.

(2) Despite subsection (1), the following work is not building work or construction work for the purposes of this Act:

(a) the drilling for, or extraction of, oil or natural gas;

(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or the construction of underground works for the purpose of such extraction;

(c) other work of a type prescribed to not be building work or construction work for the purposes of this Act.

6 Meaning of *building or construction-related goods and services*

(1) For the purposes of this Act, ***building or construction-related goods and services***, in relation to building work or construction work, means any of the following:

(a) goods of the following kind:

(i) materials and components that are to form part of any building, structure or work arising from building work or construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of building work or construction work;

(b) services of the following kind:

(i) the provision of labour to carry out building work or construction work;

(ii) architectural, design, land surveying, quantity surveying, engineering, building surveying or project management services in relation to building work or construction work;

(iii) inspection, reporting, or advisory, services provided in respect of buildings, building systems and services, energy and sustainability systems and services, geotechnical, engineering, interior decoration, exterior decoration or landscape services provided in relation to building work or construction work;

(c) goods and services of a type prescribed to be a type of building or construction-related goods and services for the purposes of this Act.

(2) Despite subsection (1), ***building or construction-related goods and services*** does not include goods or services of a type that is prescribed to not be building or construction-related goods and services for the purposes of this Act.

(3) A reference in this Act to building or construction-related goods and services is to be taken to be a reference to building or construction-related goods, building or construction-related services, or both.

PART 2 – APPLICATION AND EFFECT OF ACT IN RELATION TO OTHER ACTS, CONTRACTS, & C.

7 Application of Act

(1) This Act applies to any building or construction contract, whether the contract —

(a) is written or oral; or

(b) is partly written and partly oral; or

(c) is expressed to be governed by the law of a jurisdiction other than Tasmania.

(2) This Act does not apply to a building or construction contract to the extent to which it relates to building work or construction work carried out outside this State.

(3) Despite subsection (2), this Act applies to any building or construction contract in so far as the contract relates to the supply by a person in this State of building or construction-related goods and services, even though the goods and services are supplied in respect of building work or construction work carried out outside this State.

(4) However, despite subsection (3), nothing in this Act is to be taken to entitle a person to a payment if a claim for the payment has been made under the law of another jurisdiction.

(5) Despite subsection (1), this Act does not apply to a building or construction contract —

(a) that forms part of a loan agreement, a contract of guarantee or a contract of insurance, if the agreement or contract is an agreement or contract under which a recognised financial institution undertakes—

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

(iii) to provide an indemnity in respect of building work or construction work carried out, or building or construction-related goods and services supplied, under the building or construction contract; or

(b) under which it is agreed that the consideration payable for building work or construction work carried out under the contract, or for building or construction-related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

(6) This Act does not apply to a building or construction contract to the extent to which it contains provisions under which a party —

(a) undertakes to carry out building work or construction work; or

(b) undertakes to supply building or construction-related goods and services —

as an employee of the party for whom the work is to be carried out or the goods and services are to be supplied, or as a condition of a loan agreement with a recognised financial institution.

(7) This Act does not apply to a building or construction contract to the extent to which it contains provisions under which a party undertakes —

(a) to lend money or to repay money lent; or

(b) to guarantee payment of money owing or repayment of money lent; or

(c) to provide an indemnity in respect of building work or construction work carried out, or building or construction-related goods and services supplied, under the building or construction contract.

(8) This Act does not apply to a building or construction contract, or a class of building or construction contracts, prescribed to be a contract or class of contracts to which this Act does not apply.

8 Act binds Crown

This Act binds the Crown in right of Tasmania and, so far as the legislative power of Parliament permits, in all its other capacities.

9 Act does not limit other entitlements or remedies

This Act does not limit —

(a) any other entitlement that a claimant may have under a building or construction contract; or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

10 Effect on civil proceedings

(1) Subject to section 11, nothing in Part 4, 5, 6 or 7 affects any right that a party to a building or construction contract —

(a) may have under the contract; or

(b) may have under Part 3 in respect of the contract; or

(c) may have, apart from this Act, in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of Part 4, 5, 6 or 7 affects any civil proceedings arising under a building or construction contract, whether under Part 4, 5, 6 or 7, except as provided by subsection (3).

(3) In proceedings before a court or tribunal in relation to a matter arising under a building or construction contract, the court or tribunal —

(a) must allow for an amount to be paid to a party to the contract, under or for the purposes of Part 4, 5, 6 or 7, or, in any award or order it makes in those proceedings; and

(b) may make the orders that it considers appropriate for the restitution of any amount so paid, and any other orders it thinks appropriate, having regard to its decision in those proceedings.

11 Parties cannot contract out of Act

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of a contract or other agreement, whether in writing or not, is void if it is a provision —

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting, the operation of this Act; or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act.

PART 3 – RIGHTS TO PROGRESS PAYMENTS

12 Rights to progress payments

(1) A person —

(a) who has undertaken to carry out building work or construction work under a building or construction contract; or

(b) who has undertaken to supply building or construction-related goods and services under a building or construction contract —

is entitled, on and from each reference date, to a progress payment.

(2) The amount of the progress payment is to be the amount calculated in accordance with the terms of the contract.

(3) However, if the contract does not expressly provide for the calculation of the amount of the progress payment, the amount of the progress payment is to be —

(a) the amount calculated on the basis of the value of the building work or construction work —

(i) carried out before the reference date by the person under the contract; or

(ii) undertaken to be carried out before the reference date by the person under the contract; or

(b) the amount calculated on the basis of the value of the building or construction-related goods and services —

(i) supplied by the person under the contract before the reference date; or

(ii) undertaken to be supplied by the person under the contract before the reference date.

13 How value of building work or construction work, &c., to be determined

(1) The value of building work or construction work carried out under a building or construction contract is to be determined in accordance with the terms of the contract.

(2) However, if a building or construction contract does not expressly determine the value of building work or construction work, or specify how the value of building work or construction work is to be determined, the value of the building work or construction work is to be determined having regard to —

(a) the contract price for the work, including any GST that may be payable in relation to the work; and

(b) any other rates or prices set out in the contract; and

(c) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and

(d) if any of the work is defective, the estimated cost of rectifying the defect.

(3) The value of building or construction-related goods and services supplied, or undertaken to be supplied, under a building or construction contract is to be determined in accordance with the terms of the contract.

(4) However, if a building or construction contract does not expressly determine the value of building or construction-related goods and services, or specify how the value of building or construction-related goods and services is to be determined, their value is to be determined having regard to —

(a) the contract price for the building or construction-related goods and services; and

(b) any other rates or prices set out in the contract; and

(c) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and

(d) if any of the goods are defective, the estimated cost of rectifying the defect.

(5) If building or construction-related goods and services consist of materials and components that are to form part of any building, structure, or work, arising from building work or construction work, the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom the building work or construction work is being carried out.

14 Liens over unpaid amounts

(1) If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of the building work or construction work for the respondent.

(2) A lien or charge —

(a) over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of the building work or construction work for the respondent; and

(b) that existed before the date on which the progress payment becomes due or payable —

takes priority over a lien under subsection (1).

(3) Subsection (1) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.

(4) A claimant is not entitled to exercise a lien under subsection (1) in respect of an unpaid amount if the claimant receives the progress payment in respect of the amount.

15 Due date for payment

(1) A progress payment under a building or construction contract becomes due and payable on the date on which the payment becomes due and payable in accordance with the terms of the contract.

(2) Despite subsection (1) —

(a) if a contract does not expressly provide for when a progress payment becomes due and payable; and

(b) a payment claim is made under section 17 in relation to the progress payment —

the progress payment becomes due and payable before the expiry of the applicable day, as determined under section 19(3), in relation to the claim.

(3) Interest is payable, on the unpaid amount of a progress payment that has become due and payable, at the rate —

(a) prescribed under the *Supreme Court Civil Procedure Act 1932* in respect of a judgment for money payable to a person; or

(b) specified in the building or construction contract —

whichever is greater.

16 *Pay-when-paid* provisions of no effect

(1) In this section — ***money owing***, in relation to a building or construction contract, means money owing for —

(a) building work or construction work carried out, or undertaken to be carried out, under the contract; or

(b) building or construction-related goods and services supplied, or undertaken to be supplied, under the contract;

pay-when-paid provision, of a building or construction contract, means a provision of the contract —

(a) that makes the liability of one party (***the first party***) to pay money owing to another party (***the second party***) contingent on payment to the first party by a further party (***the third party***) of the whole or a part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or a part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

(2) A pay-when-paid provision of a building or construction contract has no effect in relation to any payment for —

(a) building work or construction work carried out, or undertaken to be carried out, under the contract; or

(b) building or construction-related goods and services supplied, or undertaken to be supplied, under the contract.

PART 4 – PAYMENT CLAIMS AND PAYMENT SCHEDULES

17 Claims for payment may be made

(1) A person (in this Act referred to as a ***claimant***) who is, or who claims to be, entitled to a progress payment under section 12 in respect of a building or construction contract may serve a payment claim on the person who is, or may be, liable under the contract to make the payment.

(2) A payment claim must —

(a) be in writing; and

(b) be addressed to the person on whom it is served; and

(c) state the name of the claimant; and

(d) identify the building work or construction work, or building or construction-related goods and services, to which the progress payment relates, in sufficient detail to enable the person on whom it is served to assess the claim; and

(e) specify the amount of the progress payment that the claimant claims is due; and

(f) state that the claim is made under this Act; and

(g) include the prescribed details, if any.

(3) A payment claim may also include an amount —

(a) that the respondent is liable to pay the claimant under section 29(3); or

(b) that is held under the building or construction contract by the respondent, as security or otherwise, and that the claimant claims is due for release.

(4) A claimant must not serve more than one payment claim in respect of each reference date under the building or construction contract.

(5) However, subsection (4) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

(6) A payment claim may be served only within whichever of the following periods occurs later:

(a) the period determined by or in accordance with the terms of the building or construction contract;

(b) the period of 12 months after —

(i) the building work or construction work to which the claim relates was last carried out; or

(ii) the building or construction-related goods and services to which the claim relates were last supplied.

18 Schedules for payment may be provided to claimant

(1) A person (in this Act referred to as the ***respondent***) on whom a payment claim is served by a claimant may provide to the claimant a payment schedule in relation to the claim.

(2) A payment schedule —

(a) must identify the payment claim to which the schedule relates; and

(b) must indicate the amount of the payment, if any, that the respondent proposes to make (in this Act referred to as the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must specify why the amount is less.

(4) If the amount is less because the respondent is withholding payment of the claim for any reason, the schedule must specify the respondent's reasons for withholding the payment.

19 Consequences of failing to provide payment schedule within relevant period

(1) In this section —

building practitioner means any of the following persons:

(a) a building practitioner, or an owner builder, within the meaning of the *Building Act 2000*;

(b) a person who holds a practitioner's licence, or a contractor's licence, under the *Occupational Licensing Act 2005*, authorising the person to perform electrical work within the meaning of Part 1 of Schedule 2 to that Act;

(c) a person who holds a subsisting certificate of registration under the *Plumbers and Gas-fitters Registration Act 1951* to perform a class of plumbing work referred to in that Act;

(d) a person who holds a high risk work licence under the regulations under the *Work Health and Safety Act 2012*;

(e) a person who holds a subsisting certificate of registration under the *Plumbers and Gas-fitters Registration Act 1951* to perform a class of gas-fitting referred to in that Act;

(f) a person who is registered as an architect under the *Architects Act 1929*;

(g) a prescribed person;

[Def am Act 2 of 2012, s 29]

owner, in relation to land, means any one or more of the following:

(a) the person in whom is vested a fee simple in the land;

(b) if the land is not registered under the *Land Titles Act 1980* and is subject to a mortgage, the person for the time being holding the equity of redemption in that mortgage;

(c) if the land is held under a tenancy for life, the person who is the life tenant;

(d) if the land is held under a lease for a term of not less than 99 years or for a term of not less than another prescribed period, the person who is the lessee of the land;

(e) a person who has a prescribed interest in the land.

(2) If—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not provide to the claimant a payment schedule —

(i) before the end of the period in which the payment is required to be made under the building or construction contract under which the payment is to be made; or

(ii) before the expiry of the applicable day in relation to the payment claim made to the respondent —

whichever period expires earlier or, in a case to which subsection (3)(a) applies, later, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

[Subs (2) am Act 13 of 2012, s 11]

Tas

(3) In subsection (2)(b)(ii), the applicable day in relation to a payment claim made to the respondent —

(a) is the day 20 business days after the payment claim is served on the respondent, if —

(i) the claim relates to a residential structure to be built on land; and

(ii) the respondent is the owner of the land; and

(iii) the respondent is not a building practitioner; or

(b) is, in any other case, the day 10 business days after the payment claim is served on the respondent.

(4) Subsection (5) applies to a claimant if the respondent —

(a) becomes liable under subsection (2) to pay to the claimant the claimed amount; and

(b) does not pay all of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(5) If this subsection applies to a claimant, the claimant —

(a) may —

(i) apply to a court of competent jurisdiction to recover from the respondent the unpaid part of the claimed amount, as a debt due to the claimant; or

(ii) make an adjudication application under section 21 in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out building work or construction work, or supplying goods and services, under the building or construction contract.

(6) A notice served under subsection (5)(b) must specify that the notice is made under this Act.

(7) If an application is made by a claimant to a court in accordance with subsection (5)(a)(i) to recover from the respondent, as a debt, the unpaid part of the claimed amount specified in a payment claim, the court may give judgment entitling the claimant to recover the unpaid part as a debt due and payable, if the court is satisfied that the respondent —

(a) is liable under subsection (2) to pay to the claimant the claimed amount; and

(b) has not paid all of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(8) A respondent in proceedings under this section in a court of competent jurisdiction is not entitled in those proceedings —

(a) to bring a cross-claim against the claimant; or

(b) to raise a defence in relation to matters arising under, or relating to the subject matter of, the building or construction contract.

[S 19 am Act 13 of 2012; Act 2 of 2012]

20 Consequences of not paying claimant in accordance with payment schedule

(1) Subsection (2) applies to a claimant if —

(a) the claimant serves a payment claim on a respondent; and

(b) the respondent provides a payment schedule to the claimant —

(i) within the period in which the payment is required to be made under the building or construction contract under which the payment is to be made; or

(ii) within the period before the expiry of the applicable day determined under section 19 in relation to the payment claim —

whichever period expires earlier or, in a case to which section 19(3)(a) applies, later; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and

(d) the respondent does not pay to the claimant all of the scheduled amount on or before the due date for the progress payment to which the payment claim relates.

[Subs (1) am Act 13 of 2012, s 12]

(2) If this subsection applies to a claimant, the claimant —

(a) may —

(i) apply to a court of competent jurisdiction to recover from the respondent the unpaid part of the scheduled amount, as a debt due to the claimant; or

(ii) make an adjudication application under section 21 in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out building work or construction work, or supplying goods and services, under the building or construction contract.

(3) A notice served under subsection (2)(b) must specify that the notice is made under this Act.

(4) If an application is made by a claimant to a court in accordance with subsection (2)(a)(i) to recover from the respondent, as a debt, the unpaid part of the scheduled amount specified in a payment claim, the court may give judgment entitling the claimant to recover the unpaid part as a debt due and payable, if the court is satisfied that —

(a) subsection (2) applies to the claimant; and

(b) the respondent has not paid all of the scheduled amount on or before the due date for the progress payment to which the payment claim relates.

(5) A respondent in proceedings under this section in a court of competent jurisdiction is not entitled in those proceedings —

(a) to bring a cross-claim against the claimant; or

(b) to raise a defence in relation to matters arising under, or relating to the subject matter of, the building or construction contract.

[S 20 am Act 13 of 2012]

PART 5 — ADJUDICATION OF DISPUTES

21 Applications for adjudication

(1) A claimant may, in writing, apply to a nominating authority, chosen by the claimant, to have a payment claim adjudicated.

(2) A claimant may only make an application under subsection (1) if —

(a) the respondent provided a payment schedule under section 18 but the scheduled amount specified in the schedule is less than the claimed amount specified in the payment claim; or

(b) the respondent provided a payment schedule under section 18 but did not pay to the claimant all of the scheduled amount by the due date for payment of the amount; or

(c) the respondent failed to provide a payment schedule to the claimant under section 18 and did not pay all of the claimed amount by the due date for payment of the amount.

(3) An application made under subsection (1) pursuant to —

(a) subsection (2)(a) must be made within 10 business days after the claimant receives the payment schedule; or

(b) subsection (2)(b) must be made within 20 business days after the due date for payment.

(4) A claimant may only make an application under subsection (1) pursuant to subsection (2)(c) if —

(a) the claimant has notified the respondent, within 20 business days after the due date for payment, that —

(i) the claimant intends to make the application; and

(ii) the respondent may provide a payment schedule to the claimant within 5 business days after the notice is given; and

(b) the respondent has not provided a payment schedule within the period of 5 business days since the notice was given to the respondent; and

(c) the application is made within 10 business days after the end of the 5-day period referred to in paragraph (b).

(5) An application made under subsection (1) —

(a) must identify the payment claim and the payment schedule, if any, to which it relates; and

(b) must be accompanied by the application fee, if any, that the nominated authority may have determined; and

(c) may contain any submissions relating to the application that the applicant thinks fit.

(6) The application fee may not be greater than an amount, if any, determined by the Minister, by notice published in the *Gazette*, to be the maximum amount of the application fee.

(7) A copy of an application made under subsection (1) must be served on the respondent.

(8) A claimant may, at any time before an application made under subsection (1) has been determined by an adjudicator, withdraw the application by notice served on the adjudicator and the respondent.

(9) A claimant who withdraws an application under subsection (8) is liable to pay any fees and expenses to which an adjudicator is entitled under section 37(1) in relation to the application.

22 Appointment of adjudicator

(1) A nominating authority to which an adjudication application is made in relation to a building or construction contract is to refer the matter as soon as practicable to a person who is a qualified adjudicator.

(2) A person is a qualified adjudicator if the person is a natural person with the qualifications, expertise and experience, if any, determined by the Security of Payments Official to be required.

(3) A nominating authority to which an adjudication application is made in relation to a building or construction contract may not refer the matter to a qualified adjudicator —

(a) if the adjudicator is a party to the building or construction contract; or

(b) in circumstances prescribed for the purposes of this subsection.

(4) A qualified adjudicator may accept an adjudication application referred to the adjudicator under subsection (1) by serving notice of acceptance on the claimant and the respondent in relation to the application.

23 Response by respondent to adjudication application

(1) A respondent who has provided a payment schedule to the claimant within the period specified in section 19(2)(b) or section 21(4)(b) may lodge with the adjudicator a response to the claimant's adjudication application.

(2) An adjudication response may be lodged under subsection (1) within —

(a) 10 business days after receiving a copy of the adjudication application; or

(b) 5 business days after receiving notice of an adjudicator's acceptance of the application —

whichever period expires later.

(3) An adjudication response —

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may contain any submissions relevant to the response that the respondent thinks fit.

(4) A respondent must not include in an adjudication response reasons for withholding payment, unless those reasons have already been included in the payment schedule provided to the claimant.

(5) A copy of the adjudication response must be served on the claimant.

(6) An adjudicator may not consider an adjudication response if it was made after the end of the period under subsection (2) in which the respondent may lodge an adjudication response.

24 Adjudication proceedings

(1) An adjudicator is to determine an adjudication application as soon as practicable and, in any case —

(a) within —

(i) 10 business days after the date on which the adjudicator receives the adjudication response; or

(ii) if the respondent lodged a payment schedule in relation to the payment claim to which the application relates, 10 business days after the date by which the respondent may, under section 23, lodge with the adjudicator an adjudication response; or

(iii) if the respondent did not lodge a payment schedule in relation to the payment claim to which the application relates, 10 business days after the date on which the adjudicator accepted the application under section 22(4); or

(b) within a further period, if any, agreed to by the claimant and the respondent.

(2) In adjudication proceedings —

(a) an adjudicator may request further written submissions from a party to the proceedings; and

(b) if an adjudicator requests a party to make further written submissions, the adjudicator must give the other party an opportunity to comment on the submissions.

(3) An adjudicator may specify periods in which submissions and comments may be made by parties to the adjudication proceedings.

(4) An adjudicator may call a conference of the parties to adjudication proceedings and may invite to attend the conference those persons who, in the opinion of the adjudicator, have an interest in, or may assist in the consideration of, the matter to which the proceedings relate.

(5) A conference is to be conducted informally and may not be attended by a legal representative of any party.

(6) An adjudicator may carry out an inspection of any matter that relates to a payment claim to which the adjudication proceedings relate.

25 Determination of adjudication application

(1) An adjudicator is to determine an adjudication application —

(a) by determining whether or not all or part of a progress payment is to be paid by the respondent to the claimant; and

(b) if the adjudicator determines that all or part of a progress payment is to be paid by the respondent to the claimant, by determining —

(i) the amount of the payment; and

(ii) the date on which the payment became or becomes payable; and

(iii) the rate of interest payable on the amount.

(2) In determining an adjudication application, an adjudicator is to consider only the following matters:

(a) the provisions of this Act;

(b) the provisions of the building or construction contract to which the application relates;

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

(d) the payment schedule, if any, to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(3) An adjudicator may determine an adjudication application even if —

(a) a party fails to make a submission or comment within the period specified by the adjudicator; or

(b) a party fails to attend a conference called by the adjudicator.

(4) The adjudicator's determination —

(a) must be in writing; and

(b) must include the reasons for the determination, unless the claimant and the respondent have both requested the adjudicator not to include the reasons in the determination.

(5) If an adjudicator, in determining an adjudication application, has determined in accordance with section 13 the value of building work or construction work carried out, or of building or construction-related goods and services supplied, under a building or construction contract, the same value is to be determined for that work or those goods and services in any determination of a subsequent adjudication application in relation to the contract.

(6) Despite subsection (5), a different value may be determined if a party to the subsequent adjudication application satisfies the adjudicator of that application that the value of the works or goods and services has changed since the value was first determined.

(7) An adjudicator may determine that a party to an adjudication is required to pay to another party to the adjudication some or all of the costs that have been incurred by the other party because of frivolous or vexatious conduct, or the making of unfounded submissions, by the first-mentioned party.

(8) An adjudicator may, on his or her own initiative or on the application of a claimant or respondent, correct —

(a) a clerical mistake in a determination under this section; or

(b) an error arising from an accidental slip or omission in a determination under this section; or

(c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter referred to in a determination under this section; or

(d) a defect of form in a determination under this section.

26 Respondent must pay amount determined by adjudicator

(1) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant before—

(a) the end of the period of 5 business days immediately after the date on which the adjudicator's determination is served on the respondent; or

(b) a later date, if any, determined under section 25(1)(b)(ii).

(2) If a respondent does not pay to the claimant all of the adjudicated amount in accordance with subsection (1), the claimant may do either or both of the following:

(a) request the nominating authority to which the adjudication application was made to issue an adjudication certificate under this section;

(b) serve notice on the respondent of the claimant's intention to suspend carrying out building work or construction work, or supplying building or construction-related goods and services, under the building or construction contract.

(3) A notice under subsection (2)(b) must specify that it is made under this Act.

(4) A nominating authority that receives a request under subsection (2)(a) in relation to an adjudication application may issue an adjudication certificate in relation to the application.

(5) An adjudication certificate issued under this section must specify that it is made under this Act and specify the following matters:

(a) the name of the claimant;

(b) the name of the respondent who is liable to pay the adjudicated amount;

(c) the adjudicated amount;

(d) the date on which payment of the adjudicated amount was due to be paid to the claimant.

(6) If an amount of interest that is due and payable on the adjudicated amount is not paid by the respondent —

(a) the claimant may request the nominating authority to specify in the adjudication certificate the amount of interest payable; and

(b) the amount so specified is added to, and becomes part of, the adjudicated amount.

(7) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount —

(a) the claimant may request the nominating authority to specify in the adjudication certificate that amount; and

(b) the amount so specified is added to, and becomes part of, the adjudicated amount.

27 Adjudication certificate may be filed as judgment for debt

(1) An adjudication certificate may be filed as a judgment for a debt in a court of competent jurisdiction.

(2) An adjudication certificate that is filed as a judgment for a debt in a court of competent jurisdiction is enforceable as a judgment for a debt.

(3) An adjudication certificate may only be filed under this section if it is accompanied by an affidavit by the claimant stating that a part of the adjudicated amount has not been paid at the time the certificate is filed.

(4) If the affidavit specifies that part of the adjudicated amount has not been paid, the judgment is only for that part of that amount.

(5) If the respondent commences proceedings to have the judgment set aside, the respondent —

(a) is not, in those proceedings, entitled —

(i) to bring a cross-claim against the claimant; or

(ii) to raise a defence in relation to matters arising under, or relating to the subject matter of, the building or construction contract; or

(iii) to challenge the adjudicator's determination; and

(b) must pay into the court as security the unpaid part of the adjudicated amount, pending the final determination of those proceedings.

28 When claimant may make new adjudication application

(1) Subsection (2) applies to a claimant if —

(a) a claimant fails to receive, within 4 business days after the claimant makes an adjudication application, an adjudicator's notice of acceptance of the application under section 22(4); or

(b) an adjudicator in relation to an adjudication application fails to determine the application within the time allowed by section 24.

(2) If this subsection applies to a claimant, the claimant —

(a) may withdraw the adjudication application made to the adjudicator, by serving notice in writing on the adjudicator or the nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 21.

(3) Despite section 21(3), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous application under subsection (2).

PART 6 — CLAIMANT'S RIGHT TO SUSPEND BUILDING WORK OR CONSTRUCTION WORK OR SUPPLY

29 Claimant may suspend work or supply

(1) A claimant may suspend the carrying out of building work or construction work, or the supply of building or construction-related goods and services, under a building or construction contract, if at least 2 business days have passed since the claimant served notice on the respondent under section 19, 20 or 26 of the claimant's intention to do so.

(2) A claimant may not suspend the carrying out of building work or construction work, or the supply of building or construction-related goods and services, under a building or construction contract, after the end of the period of 3 business days immediately after the date on which the claimant receives payment for the amount payable by the respondent under section 19, 20 or 26.

(3) If a claimant —

(a) in accordance with this section, suspends the carrying out of building work or construction work, or the supply of building or construction-related goods and services, under a building or construction contract; and

(b) incurs loss or expenses as a result of the removal, by the respondent, from a contract, of a part of the work or supply —

the respondent is liable to pay the claimant the amount of the loss or expense.

(4) A claimant who, in accordance with this section, suspends the carrying out of building work or construction work, or the supply of building or construction-related goods and services, under a building or construction contract, is not liable for loss or damage suffered by the respondent, or a person claiming through a respondent, as a consequence of the claimant not carrying out the work, or supplying the services, during the period of suspension.

PART 7 — ADMINISTRATION

DIVISION 1 – SECURITY OF PAYMENTS OFFICIAL

30 Security of Payments Official

(1) The Security of Payments Official for the purposes of this Act is to be —

(a) the Director of Building Control within the meaning of the *Building Act 2000*; or

(b) if the Minister appoints another person under subsection (2), that person.

(2) Subject to and in accordance with the *State Service Act 2000*, the Minister may appoint a person to be the Security of Payments Official for the purposes of this Act.

DIVISION 2 — NOMINATING AUTHORITIES

31 Nominating authorities

(1) A person may apply to the Security of Payments Official to be authorised to be a nominating authority.

(2) The Security of Payments Official may, if he or she receives an application under subsection (1), authorise to be a nominating authority a person specified in the application.

(3) A person who is authorised to be a nominating authority is so authorised for a period of 3 years from the date of the authorisation, but may be reauthorised.

(4) The Security of Payments Official may, by notice in writing to a person authorised to be a nominating authority —

(a) impose a condition on the authorisation; or

(b) vary a condition imposed on the authorisation; or

(c) revoke a condition imposed on the authorisation.

(5) The Security of Payments Official may only —

(a) impose a condition on the authorisation of a person to be a nominating authority; or

(b) vary a condition imposed on the authorisation of a person to be a nominating authority —

if —

(c) at least 14 days before, a notice has been served on the person inviting the person to show cause why the condition ought not be imposed or so varied; and

(d) the person has, for a period of at least 14 days from the date on which the notice under paragraph (c) was given, been given the opportunity to show cause why the condition ought not be imposed or so varied; and

(e) the Security of Payments Official has considered any reasons provided to him or her by the person as to why the condition ought not be imposed or so varied.

(6) The Security of Payments Official may —

(a) specify a maximum number of persons who may be authorised to be nominating authorities; and

(b) refuse to authorise a person to be a nominating authority if the maximum number of persons have been authorised to be nominating authorities; and

(c) revoke the authorisation of a person to be a nominating authority if the Security of Payments Official is satisfied that the nominating authority —

(i) has failed to comply with a request made to the authority under section 33(1); or

(ii) has contravened a condition imposed on the authorisation of the person to be a nominating authority; or

(iii) has otherwise failed to comply with a requirement of this Act.

(7) A person may apply to the *Magistrates Court (Administrative Appeals Division) Act 2001* for a review of a decision by the Security of Payments Official to —

(a) refuse to authorise the person to be a nominating authority; or

(b) impose a condition on the authorisation of the person to be a nominating authority; or

(c) vary a condition imposed on the authorisation of the person to be a nominating authority.

32 Nominating authorities may charge fees

(1) A nominating authority may charge an amount for any service provided by the authority in connection with an adjudication application made to the authority.

(2) An amount that may be charged by a nominating authority for a service must not be more than the amount, if any, determined by the Minister by notice published in the *Gazette*.

(3) The claimant and respondent are —

(a) jointly and severally liable to pay an amount that is charged by a nominating authority in connection with an adjudication application made to the authority by the claimant; and

(b) each liable to contribute to the payment of the amount in equal proportions or, if the adjudicator in relation to the application determines different proportions, in the proportions so determined.

33 Nominating authorities to provide information

(1) The Security of Payments Official may request a nominating authority to provide to him or her information in relation to the activities of the authority under this Act, including information about any amounts charged by the authority under this Act.

(2) A nominating authority must comply with a request of the Security of Payments Official under subsection (1).

34 Nominating authority to advise Security of Payments Official if certain legal processes begin

A nominating authority must notify the Security of Payments Official if the authority becomes aware that an application has been made to a court in relation to a building or construction contract in relation to which an adjudication application has been made to the authority.

DIVISION 3 — ADJUDICATORS

35 Disqualification of adjudicator for interest

(1) An adjudicator in relation to an adjudication application is disqualified from adjudicating the application if he or she has a material personal interest in a building or construction contract, dispute, or party to the contract, to which the application relates.

(2) As soon as practicable after becoming aware that he or she is disqualified from adjudicating an application, an adjudicator must —

(a) cease to deal with the application; and

(b) serve notice in writing on the claimant and the respondent, specifying that the adjudicator is disqualified from adjudicating the application.

(3) An adjudicator who gives notice under subsection (2) in relation to an application must give notice in writing of the disqualification to the nominating authority that referred the application to him or her.

(4) Any decision of an adjudicator, in relation to an adjudication application, is void if the adjudicator is disqualified from adjudicating the application.

(5) Despite section 37(4), the adjudicator is entitled to any fees or charges to which he or she would, but for that subsection, be entitled, in relation to the adjudication application, in respect of the services provided by him or her before he or she ought to have been aware that he or she was disqualified under this section.

(6) As soon as practicable after a nominating authority becomes aware that an adjudicator has ceased to deal with an adjudication application because he or she is disqualified from adjudicating the application, the nominating authority must refer the application to another adjudicator under section 22.

(7) If a respondent receives notice under section 22(4) of the acceptance of an adjudication application by an adjudicator (the ***new adjudicator***) to whom the application has been referred under subsection (6), an adjudication response provided to the previous adjudicator under section 23 is of no effect unless it is provided under section 23 to the new adjudicator.

(8) The nominating authority is not entitled to charge any amount under section 32 in relation to the referral of an application to another adjudicator in accordance with subsection (6).

36 Request and review in relation to disqualification of adjudicator

(1) A party to an adjudication application may, before the adjudicator in relation to the application has determined the application, by notice in writing to the adjudicator, request the adjudicator to take the actions specified in section 35(2), because, in the party's opinion, the adjudicator is disqualified from adjudicating the application.

(2) A party to an adjudication application who makes a request to an adjudicator under subsection (1) must provide to the adjudicator particulars as to the grounds on which the party is of the opinion that the adjudicator is disqualified from adjudicating the application.

(3) Within 7 days after receiving a notice under subsection (1), an adjudicator in relation to an adjudication application must —

(a) take the actions specified in section 35(2); or

(b) refuse to take the actions specified in section 35(2).

(4) If, within 7 days after receiving a notice under subsection (1), an adjudicator fails to take the actions specified in section 35(2), a party to the adjudication application may apply to the Magistrates Court (Administrative Appeals Division) for a review of the decision of the adjudicator not to take those actions.

(5) If an application is made under subsection (4) in respect of an adjudicator, a party to the adjudication application is not required to take any action in respect of a determination of the adjudicator under section 25 in relation to the adjudication application —

(a) until after the review is determined; and

(b) unless the decision of the adjudicator is upheld on the review.

(6) A review of a decision by an adjudicator that is conducted by the Magistrates Court (Administrative Appeals Division) may only relate to the grounds provided to the adjudicator under subsection (2).

37 Adjudicator's fees

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application —

(a) the amount, by way of fees and expenses, that is agreed between the adjudicator and the parties to the adjudication; or

(b) if no amount is agreed between the adjudicator and the parties to the adjudication, the amount, by way of fees and expenses, that is reasonable having regard to the work done and the expenses incurred by the adjudicator.

(2) If a decision is made under the *Magistrates Court (Administrative Appeals Division) Act 2001* —

(a) to uphold a decision by an adjudicator under section 36 not to take the action specified in section 35(2), the adjudicator may charge the person who applied for the review the costs incurred by the adjudicator in relation to the review, unless the court has, under that Act, ordered those costs to be paid by a person other than the adjudicator; or

(b) not to uphold a decision by an adjudicator under section 36 not to take the action specified in section 35(2), the adjudicator may not pass on to the parties to the adjudication application any costs incurred by the adjudicator.

(3) The claimant and respondent are —

(a) jointly and severally liable to pay an amount that is charged by an adjudicator under subsection (1); and

(b) each liable to contribute to the payment of the amount in equal proportions or, if the adjudicator in relation to the application determines different proportions, in the proportions so determined.

(4) An adjudicator is not entitled to be paid fees or expenses in connection with the adjudication of an adjudication application if he or she fails, within the time allowed by section 24, to determine the application (other than because the application is withdrawn or the dispute between the claimant and respondent is otherwise resolved).

(5) Subsection (4) does not apply —

(a) if the adjudicator refuses to notify the parties of his or her determination until his or her fees or expenses are paid; or

(b) in other circumstances that are prescribed for the purposes of this paragraph.

38 Information in relation to determinations of adjudication applications

(1) An adjudicator is to provide a copy of his or her determination of an adjudication application under section 25 to the nominating authority that referred the application to the adjudicator.

(2) A nominating authority to which a determination is provided under subsection (1) must forward a copy of the determination to the Security of Payments Official in the manner and form required by the Official.

(3) The Security of Payments Official is, by 1 March in a year, to submit to the Building Regulation Advisory Committee established under the *Building Act 2000* an annual report consisting of —

(a) a report in respect of the operation of the Act in the previous calendar year; and

(b) details of the fees and expenses paid to adjudicators during the calendar year; and

(c) the recommendations, if any, of the Official, as to how this Act, or operations under this Act, could be improved.

DIVISION 4 – PROTECTION FROM LIABILITY

39 Protection from liability

(1) No action lies against the Security of Payments Official or any other person in relation to anything done or omitted to be done by a nominating authority in good faith —

(a) in performing the functions of the Security of Payments Official, or exercising the powers of the Security of Payments Official, under this Act; or

(b) in the reasonable belief that the thing was done or omitted to be done in the performance of the functions, or the exercise of the powers, of the Security of Payments Official under this Act.

(2) No action lies against a nominating authority or any other person in relation to anything done or omitted to be done by the nominating authority in good faith —

(a) in performing the functions of the authority, or exercising the powers of the authority, under this Act; or

(b) in the reasonable belief that the thing was done or omitted to be done in the performance of the functions, or the exercise of the powers, of the nominating authority under this Act.

(3) No action lies against an adjudicator in relation to anything done or omitted to be done by the adjudicator in good faith —

(a) in performing his or her functions, or exercising his or her powers, under this Act; or

(b) in the reasonable belief that the thing was done or omitted to be done in the performance of the adjudicator's functions, or the exercise of the adjudicator's powers, under this Act.

PART 8 — MISCELLANEOUS

40 Service of notices

A notice or other document is effectively served under this Act if —

(a) in the case of a natural person, it is —

(i) given to the person; or

(ii) left at, or sent by post to, the person's postal or residential address or place or address of business or employment last known to the server of the notice or other document; or

(iii) faxed to the person's fax number; or

(iv) emailed to the person's email address, if the person has agreed to service by email; or

(v) delivered to the person by another electronic method, if the person has agreed to service by the method; and

(b) in the case of any other person, it is —

(i) left at, or sent by post to, the person's principal or registered office or principal place of business; or

(ii) faxed to the person's fax number; or

(iii) emailed to the person's email address, if the person has agreed to service by email; or

(iv) delivered to the person by another electronic method, if the person has agreed to service by the method.

41 Regulations

(1) The Governor may make regulations for the purposes of this Act.

(2) The regulations may be made so as to apply differently according to the factors specified in the regulations.

(3) The regulations may —

(a) provide that a contravention of any of the regulations is an offence; and

(b) in respect of such an offence, provide for the imposition of a fine not exceeding 50 penalty units and, in the case of a continuing offence, a further fine not exceeding 10 penalty units for each day during which the offence continues.

42 Status of notices

A notice under this Act is not a statutory rule for the purposes of the *Rules Publication Act 1953*.

43 Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* —

(a) the administration of this Act is assigned to the Minister for Workplace Relations; and

(b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.

44 Transitional matters

(1) This Act does not apply to or in relation to a contract entered into before the commencement of this section.

(2) Despite the repeal of the *Contractors' Debts Act 1939* by this Act, that Act continues to apply in respect of any attachment notice that is issued by a court before the day on which this section commences and to any payment into court of money pursuant to such a notice.

PART 9 — CONSEQUENTIAL AMENDMENTS AND REPEAL

45 Consequential amendments

See Schedule 1.

46 Legislation repealed

The legislation specified in Schedule 2 is repealed.

SCHEDULE 1 – CONSEQUENTIAL AMENDMENTS

The amendments effected by Section 45 and this Schedule have been incorporated into the authorised version of the *Judicial Review Act 2000*.

SCHEDULE 2 – LEGISLATION REPEALED

Section 46

Contractors' Debts Act 1939 (No. 49 of 1939)

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Security of Payments Legislation

Key:

ACT	[SOPACT s] and [SOPACT SCH]	refers to *Building and Construction Industry (Security of Payment) Act 2009*
NSW	[SOP] and [SOPNSWSCH]	refers mainly to *Building and Construction Industry Security of Payment Act 1999* (NSW). Commentary for other jurisdictions is indicated by jurisdiction acronym, e.g., NT or (NT), Vic or (Vic) etc.
	[SOPNSW r]	refers to *Building and Construction Industry Security of Payment Regulation 2008*
NT	[SOPNT s] and [SOPNT SCH]	refers to *Construction Contracts (Security of Payments) Act 2004*
	[SOPNT r]	refers to *Construction Contracts (Security of Payments) Regulations 2005*
Qld	[SOPQld s] and [SOPQld SCH]	refers to *Building and Construction Industry Payments Amendment Act 2014*
	[SOPQld r]	refers to *Building and Construction Industry Payments Regulation 2004*
SA	[SOPSA s] and [SOPSA SCH]	refers to *Building and Construction Industry Security of Payment Act 2009*
	[SOPSA r]	refers to *Building and Construction Industry Security of Payment Regulations 2011*
Tas	[SOPTas s]	refers to *Building and Construction Industry Security of Payment Act 2009*
Vic	[SOPVic s]	refers to *Building and Construction Industry Security of Payment Act 2002*
	[SOPVic r]	refers to *Building and Construction Industry Security of Payment Regulations 2013*
WA	[SOPWA], [SOPWA s] and [SOPWASCH]	refers to *Construction Contracts Act 2004*
	[SOPWA r]	refers to *Construction Contracts Regulations 2004*

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