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AN OVERVIEW OF THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT

INTRODUCTION

Although the Building and Construction Industry Security of Payment Act (“the Act”) commenced on 26 March 2000, it was the subsequent amendments to that Act which came into effect on 3 March 2003 which has had an enormous impact on the building and construction industry as it has had the effect of changing the ‘balance of power’ between the parties. By this I mean that whereas a builder previously struggled to be paid for the work that it had done, the builder is now being paid on an interim basis for that work and it is the owner, rather than the builder, who generally has to engage the dispute processes.

During the second reading speech on 12 November 2002, the then Minister for Public Works and Services stated that:

“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 effect of the Act was that it created a dual system whereby a claimant had a statutory right which operated in addition to, and not in derogation of, any contractual right to be paid for the work that a claimant had undertaken.

Since the amended Act came into effect has caused a “tsunami” of litigation in New South Wales in that since 2003 there have been about 200 Supreme Court decisions and about 30 Court of Appeal decisions. The Courts have consistently spoken of the scheme of the Act to be “*pay now, argue later*”¹.

It should be noted that although all of the other States have also enacted similar legislation it is beyond the scope of this paper to refer to either that other legislation or any authorities arising from that legislation. This is because the legislation in those other States generally differs quite significantly from the New South Wales Act.

THE ACT

The Act lays down an adjudication procedure which provides a relatively quick means for determining on an interim basis the amounts owed to a claimant for the work that it has undertaken. The Act is divided into four parts:

Part 1 - preliminary issues

Section 3 provides a description of the object of the Act and makes it clear that the Act applies to “*any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract...*”

Section 4 of the Act provides a number of definitions including relevantly, a definition that a “construction contract” means “*a contract **or other arrangement** under which one party undertakes to carry out construction work ...*” (emphasis added). In *Okaroo Pty Limited v Vos Construction and Joinery Pty Limited* [2005] NSWSC 45 Nicholas J held at [41] that the term “arrangement” in the definition is a wide one, and encompasses transactions or relationships which are not legally enforceable agreements².

¹ *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [96], *John Holland Pty Ltd v Roads and Traffic Authority* [2007] NSWCA 140 at [44]

² See also *Olborne v Excell Building Corporation* [2009] NSWSC 349 at [26]

Section 7 of the Act provides that the Act applies to any construction contract whether written or oral but does not apply to:

- (a) A construction contract that forms part of a loan agreement – A construction contract will not form part of a loan agreement unless, in some way, the former is included in, or incorporated into, the latter. It is not enough to say that the two things are in some way connected³. There are some circumstances in which a contract of insurance might contain a construction contract if not a recognised financial institution⁴;
- (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 – However, if a party proposes to reside in part of a complex of residential units, then such a construction contract is not excluded from the operation of the Act by this provision either in whole or in part⁵; and
- (c) A construction contract under which it is agreed that the consideration payable for construction work is to be calculated otherwise than by reference to the value of work carried out - Examples where this situation could apply include buildings constructed at no cost to the owner of the land in return in exchange for a long term lease.

Part 2 - rights to progress payments

Section 8 of the Act provides that on and from each reference date a person who has undertaken construction work is entitled to a progress payment. A reference date is either the date determined in accordance with the contract or if the contract makes no express provision the last day of the named month in which the work was carried out.

Section 11 provides that interest is payable on the unpaid amount of a progress payment that has become due and payable at either Supreme Court rates or the rates specified in the construction contract whichever is the greater.

³ *Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd* [2004] NSWSC 110 at [14] – [16] and [21]

⁴ *Thiess Pty Ltd v Zurich Specialties London & anor* [2009] NSWSC 47 at [7]

⁵ *Shorten v David Hurst Constructions Pty Ltd* [2008] NSWCA 134 at [53] – [54]

Section 12 of the Act provides that a “pay when paid” provision in a construction contract is of no effect.

Part 3 - procedure for recovering progress payments

Section 13 of the Act, in particular, s.13(2) of the Act sets out the minimum requirements for a payment claim to be served under the Act. These requirements are satisfied by a relatively undemanding test⁶. Determining whether the claim complies with s.13(2) of the Act is a matter for adjudication under s.17 of the Act⁷. In particular, the Act requires that a payment claim:

- a) Must identify the construction work to which the progress payment relates;
- b) Must indicate the amount of the progress payment that the claimant claims to be due; and
- c) Must state that it is made under the Act.

In Clarence Street Pty Ltd v Isis Projects Pty Ltd [2005] NSWCA 391 the Court of Appeal upheld an earlier decision by McDougall J who had said at [37]:

- “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 amounts claimed.”*

⁶ Nepean Engineering v Total Process Services [2005] NSWCA 409 at [48]

⁷ Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229 at [43] – [46]

In *Hawkins Construction v Mac's Industrial Pipework* [2001] NSWSC 815 at [8] Windeyer J held that an abbreviation of the name of the Act on the payment claim did not affect the validity of a payment claim.

Section 13(4)(b) of the Act relevantly provides that a payment claim may be served for a period of 12 months after the construction work to which the claim relates was last carried out.

In *Estate Property Holdings Pty Ltd v Barclay Mowlem Construction* [2004] NSWCA393, it was held that this section only required that “*some work for which payment was claimed in the payment claim had been performed in the twelve month period*”. This section did **not** require in respect of each item for which payment was claimed, that some work had been performed in the twelve month period.

Although it was initially held by the Court of Appeal that the only non-contractual limit on the submission of a Payment Claim was the expiry of the 12 month period in s.13(4) of the Act⁸, the Court of Appeal more recently held that it would be contrary to the scheme of the Act to permit claimants to resubmit the already adjudicated claims if they were dissatisfied with the adjudication⁹. While section 13(6) of the Act permits a claimant to include in a payment claim an amount that has been the subject of a previous claim, this does not include a payment claim for an amount that has been previously claimed and which has been adjudicated upon and rejected¹⁰.

Section 14 of the Act gives a person who receives a payment claim the opportunity to reply to the payment claim by serving a payment schedule on the claimant. Section 14(2) and (3) of the Act sets out the minimum requirements for a valid payment schedule which must include:

- (a) Identifying the payment claim to which it relates;
- (b) Indicating the amount of the payment (if any) that the respondent proposes to make; and
- (c) If the proposed amount is less than the claimed amount the payment schedule must indicate why the amount is less and the respondent's reasons for withholding payment.

⁸ *Brodyn Pty Limited (trading as Time Cost and Quality) v Davenport* 61 NSWLR 421

⁹ *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [60]

¹⁰ *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635 at [54]

A payment schedule served after the time prescribed in section 14(4) of the Act is not a valid payment schedule¹¹.

A payment schedule which simply states that a claim is rejected does not satisfy s 14(3) of the Act as it does not disclose the reasons for arriving at that result and does not enable the claimant to understand the issue between it and the respondent. However, the use of the word “indicate” rather than “state”, “specify” or “set out”, conveys an impression that some want of precision and particularity is permissible as long as the essence of the reason is made known sufficiently to the claimant. Sometimes the issue is so straightforward or has been so expansively agitated that the briefest reference in the payment schedule will suffice¹². If the adjudicator makes an error in identifying the reasons for the schedule amount being less than the claimed amount and for withholding payment that does not invalidate the determination¹³.

Section 14(4) of the Act relevantly provides that if a respondent fails to respond to the payment claim by serving a payment schedule within the lesser of either 10 business days or within the time required by the construction contract for the provision of a statutory payment schedule then the respondent becomes liable to pay the claimed amount¹⁴.

In that event, the claimant has to make an election between two separate and distinct alternatives under s.15(2) of the Act in that it may either seek to 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, it may make an adjudication application under s.17(1)(b) of the Act¹⁵. If the claimant commences proceedings to recover the claimed amount as a debt, the respondent is not entitled to bring any cross-claim against the claimant nor is it entitled to raise any defence in relation to matters arising under the construction contract (s.15(4)). However, a respondent is entitled to raise a defence relying on the Trade Practices

¹¹ *Amflo Constructions Pty Ltd v Anthony Jeffries* [2003] NSWSC 856

¹² *Multiplex Constructions Pty Ltd v Luikens & anor* [2003] NSWSC 1140 at [70], [76] – [78]

¹³ *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [67]

¹⁴ *Thiess Pty Ltd & anor v Lane Cove Tunnel Nominee Company Pty Ltd & anor* [2009] NSWCA 53 at [46]

¹⁵ *Schokman v Xception Construction Pty Ltd* [2005] NSWSC 297

Act (Cth)¹⁶. A claimant may also be denied judgment to the extent that what it seeks is inconsistent with the findings of a previous adjudicator¹⁷.

If the respondent provides a payment schedule or the claimant elects to make an adjudication application notwithstanding the absence of a payment schedule, any such application must be made to an authorised nominating authority in writing within the times prescribed in section 17(3)(c)-(e) of the Act. Where a payment schedule is provided by the respondent, the adjudication application must be made within 10 business days after the claimant receives the payment schedule. The adjudication application may contain such submissions that are relevant to the application as the claimant chooses to include.

Determining whether or not there has been compliance with these time requirements is a matter for the adjudicator¹⁸.

The authorised nominating authority must then refer the application to an adjudicator who, on accepting the adjudication application is taken to have been appointed to determine the application.

Once a copy of the adjudication application is received by the respondent it has the opportunity of lodging an adjudication response providing this is lodged with the adjudicator either within 5 business days after receiving a copy of the adjudication application, or 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever is the later (s.20(1)). However, the respondent may only lodge an adjudication response if the respondent has provided a payment schedule within the time specified in the Act and cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule to the claimant (s.20(2A) and (2B)). Determining whether or not the adjudication response contains reasons which are not included in the payment schedule is a matter for the adjudicator alone to determine¹⁹.

¹⁶ *Bitannia Pty Ltd & anor v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9

¹⁷ *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [67]

¹⁸ *JAR Developments Pty Ltd v Castleplex Pty Ltd* [2007] NSWSC 737 at [40] and [49]

¹⁹ *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19

Under section 21(2) and (3) of the Act, the adjudicator is not entitled to consider an adjudication response unless it was made within the permitted time and must determine an adjudication application within 10 business days after notifying the parties of his or her acceptance of the application unless the parties agree otherwise.

Section 21(4) of the Act entitles an adjudicator to request further written submissions, call a conference or carry out an inspection of the site. It is a matter for the discretion of the adjudicator whether or not to take any of these steps²⁰. It is the writer's experience that because of the very limited time available to an adjudicator to complete his or her determination, most of these options are rarely utilised by an adjudicator.

Section 22 of the Act deals with the Adjudicator's determination and it is that determination which many a dissatisfied respondent has sought to challenge (usually without success) before the Courts.

It should be noted that as section 22(1) of the Act requires an adjudicator to determine "*the amount of the progress payment (if any) to be paid by the respondent to the claimant*", the best outcome that can be achieved by a respondent in an adjudication application is a nil payment to a claimant. Thus if a claimant is overpaid pursuant to an adjudication application at a time when it has completed its work, the only mechanism by which a respondent can recover any such overpayment is by either following the dispute procedures in the construction contract and/or by litigation.

Section 22(2) of the Act provides that in determining an adjudication application, the adjudicator is only entitled to consider the following matters:

- (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,*

²⁰ *Multiplex Constructions Pty Ltd v Luikens & anor* [2003] NSWSC 1140 at [88]

- (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.*

Since the decision in *Brodyn Pty Limited (trading as Time Cost and Quality) v Davenport* 61 NSWLR 421, the Courts have consistently ruled that the procedure in the Act contemplates a minimum of opportunity for court involvement and that so long as the adjudication determination satisfied the conditions that were essential for there to be such a determination then it would not interfere in that determination.

In *Brodyn*, it was held by the Court of Appeal at [53] that there were five “*basic and essential requirements*” that were essential pre-conditions for the existence of a valid adjudicator’s determination:

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 (ss19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes due and the rate of interest payable (ss22(1)) and the issue of a determination in writing (ss 22(3)(a)).

It was also held in *Brodyn* at [55] – [57] and [60] that the other grounds on which the adjudication determination might be impugned was: if there was not a bona fide attempt to exercise the power; or if

there was a substantial denial of the measure of natural justice that the Act required to be given; or if there is a fraud in which the adjudicator is complicit. 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 by the adjudicator to understand and deal with issues in the discharge of the statutory function²¹. An allegation of bad faith is a serious matter involving personal fault on the part of the decision maker²².

A denial of natural justice occurs if there is a failure by the adjudicator to receive and consider submissions in breach of ss.17(1) & (2), 20, 21(1) and 22(2)(d) of the Act unless the denial of natural justice could not possibly have made a difference to the outcome²³.

It should be noted that even if the Adjudicator makes an error of fact or law in the interpretation of the Act or the contract or as to what are the valid and operative terms of the contract this does not prevent a determination from being an adjudicator's determination within the meaning of the Act. So long as the adjudicator does consider the provisions of the Act and the provisions of the contract and 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 invalid²⁴.

It is a matter for the adjudicator to determine whether a submission has or has not been duly made in accordance with s.20(2B) of the Act and even if an adjudicator errs in this regard and the correct view is that the submission was duly made, there would still be no denial of natural justice²⁵.

Section 22(4) of the Act precludes reargitation of the same issues and if questions of entitlement have been resolved by an adjudication determination, then those findings may not be reopened upon a subsequent adjudication. This includes not only claims which were adjudicated on their merits, but also claims which were rejected for want of evidence²⁶.

²¹ *Timwin Construction Pty Ltd v Façade Innovations Pty Ltd* [2005] NSWSC 548 at [38]

²² *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [107]

²³ *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428 at [44] and [53]

²⁴ *The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [49]

²⁵ *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19

²⁶ *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [67], [70] and [71]

In circumstances where an application is made to an adjudicator pursuant to s.22(5) of the Act to correct a determination, the Adjudicator is required to consider the submissions made by the parties and to decide whether the application to correct falls within s.22(5)(a) – (d) and to provide reasons for that decision²⁷.

Section 23 of the Act requires the respondent to pay the adjudicated amount within 5 business days after the determination is served on the parties. If the respondent fails to pay the whole or part of the adjudicated amount within that time, the claimant may request the authorised nominating authority to issue an adjudication certificate (s.24). Once issued, that certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

Section 24 of the Act provides that if the respondent commences proceedings to have the judgment set aside, the respondent is not entitled to bring any cross-claim against the claimant nor is it entitled to raise any defence in relation to matters arising under the construction contract nor is it entitled to challenge the adjudicator's determination and it is required to pay into the court as security the unpaid portion of the adjudicated amount pending final determination of those proceedings. Although some respondents have sought to commence proceedings before judgment has been obtained in order to avoid having to pay the adjudicated amount into Court, it is the writer's experience that the court often exercises its discretion and orders the respondent to pay the whole or a substantial part of the unpaid portion into the Court in any event.

One of the significant weaknesses of the Act insofar as a claimant is concerned is the enforcement of that judgment, particularly in circumstances where the claimant is no longer working on site and therefore, its most potent "weapon" of suspending the work pursuant to s.27 of the Act is no longer available to it. Although this aspect of the Act is beyond the scope of this paper, it should be noted that a statutory demand for that judgment debt will be set aside if a respondent can prove that there is a genuine offsetting claim pursuant to s.459H of the Corporations Act²⁸.

²⁷ *Holdmark (Aust) Pty Ltd v Melhemcorp Pty Ltd & anor* [2009] NSWSC 305

²⁸ *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186

Section 31 of the Act deals with the service of notices. Under s.31(2) of the Act, service is taken to be effected when the notice has been received. The word “receive” does not necessarily require that the document come to the notice of a person authorised to deal with the document²⁹. In the absence of a specific limitation in the service provision, such as in s.31(1)(b), service may otherwise be effected at any time of the day whether within or without business hours³⁰. A payment claim sent by fax was taken to have been received under the Act once it had been received into the memory of the respondent’s fax machine and that it was not necessary for the document to be printed out³¹.

Section 31(3) of the Act also allows service to be effected by other means. This would include s.109X of the Corporations Act which allows service to be effected by leaving it at, or posting it to, the company’s registered office. It is unclear whether or not service may be effected by e-mail unless it is permitted under the construction contract³².

If delivery is not disproved the fact of non-receipt does not displace the result that delivery is deemed to be effected at the time at which it would have taken place in the ordinary course of business³³.

Section 32 of the Act makes it clear that any such payments are interim payments which do not affect any civil proceedings arising under the construction contract. A judgment entered under s.25 of the Act on an adjudication certificate is provisional both in what it grants and in what it refuses. Although the common law does not permit inconsistent judgments, this may be sanctioned by statute and this is an example of such a statute. The power under s.32(3)(b) of the Act to make such orders as it considers appropriate would probably allow the court to set aside or vary any judgment entered under s.25 of the Act³⁴.

²⁹ *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259

³⁰ *Taylor Projects Group Pty Limited v Brick Dept Pty Ltd* [2005] NSWSC 439

³¹ *Zebicon Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 1408

³² s.8 Electronic Transactions Act (2000) and *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [138]

³³ *Kittu Randhawa v Minoca Benavides Serrato* [2009] NSWSC 170 at [17]

³⁴ *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* [2005] NSWCA 49 at [21] and [22]

Part 4 - miscellaneous provisions

Section 34 of the Act relevantly provides that a provision of any agreement which purports to exclude, modify or restrict the operation of the Act is void. Again, it should be noted that even if the adjudicator wrongly determined that certain clauses of the construction contract were void in that they offended s.34 of the Act that would not affect the validity of the adjudication determination³⁵.

CHALLENGES TO AN ADJUDICATION DETERMINATION

Since the decision in *Brodyn*, there have been few successful challenges to the validity of an adjudication determination. However, where such a challenge has been successful the effect is that the adjudication determination is void and not merely voidable³⁶. A few examples of such challenges are identified briefly below:

In *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 248 Brereton J held that the adjudication determination was void because he found that as there was no construction contract, a basic and essential requirement was not satisfied. It was also found to be void on the grounds that there had been a denial of natural justice because of a failure by the adjudicator to give a party the opportunity to comment on additional submissions from the other party.

In *Richard Shorten & anor v David Hurst Constructions Pty Ltd & anor* [2008] NSWSC 546 Einstein J held that the failure to serve a complete copy of the adjudication application on the respondent pursuant to s.17(5) of the Act amounted to a denial of natural justice.

In *Firedam Civil Engineering v KJP Construction* [2007] NSWSC 1162 Austin J held that the adjudication determination was void because the adjudicator denied the respondent natural justice by excluding all submissions contained in the payment schedule and the adjudication response because of an erroneous finding that the payment schedule had not been provided within the specified time.

³⁵ *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [49] and [50]

³⁶ *Brodyn* at [52]

In *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 the Court of Appeal held that the adjudication determination was void because the adjudicator arrived at an adjudicated amount by a process which was wholly unrelated to a consideration of the matters that he was required to consider and therefore, he had not performed the task required by the Act.

In *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707 McDougall J held that where an adjudicator was minded to decide a dispute on a basis for which neither party had contended, then natural justice required the adjudicator to notify the parties of that intention, so that they could put submissions on it, especially where it was germane to his or her decision. The adjudicator's failure to do so in this instance rendered the adjudication determination void.

In *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* [2006] NSWSC 13 Brereton J applied the obiter comments made by Hodgson JA at [50] – [52] in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* 63 NSWLR 385 finding that even if no relevant material was advanced by the respondent, the adjudicator was not entitled to simply award the amount of the claim without addressing its merits. As the adjudicator in this instance simply allowed the claim in full in default of any valid submissions against it, that was not an adjudication determination within the meaning of the Act. As a minimum, the adjudicator should have determined whether the construction work identified in the payment claim had been carried out and its value.

Finally it should be noted that although there are no High Court decisions on the Act, the High Court has refused to grant special leave on the basis that there was insufficient reason to doubt the correctness of the decision of the Court of Appeal³⁷.

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³⁷ *Coordinated Construction Co Pty Ltd v J. M. Hargreaves (NSW) Pty Ltd* [2006] HCA Trans 009