

BETWEEN:

Southern Han Breakfast Point Pty Ltd (in liq)  
ACN 155 283 239  
Appellant

and

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Lewence Construction Pty Ltd  
ACN 155 305 507  
First Respondent

Ian Hillman  
Second Respondent

Australian Solutions Centre  
Third Respondent



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## APPELLANT'S SUBMISSIONS

### PART I: CERTIFICATION

1. It is certified that this submission is in a form suitable for publication on the internet.

### PART II: STATEMENT OF ISSUES

2. This appeal concerns the meaning and operation of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act). The Act operates where there is a construction contract. It confers on a person who has undertaken to carry out construction work under such a contract a statutory entitlement to progress payments "on and from each reference date" under the contract. The Act then creates a scheme by which disputes regarding progress payments can be determined by extra-judicial adjudicators. That dispute resolution process commences with the service of a "payment claim".
3. The issues this appeal presents, and the answers the Court should give, are as follows.
4. **Ground 1. Is the existence of a reference date a jurisdictional precondition for the service of a valid payment claim or the making of a valid**

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**determination by an adjudicator?** Yes. The text and structure of the Act compel the conclusion that the existence of a reference date is a jurisdictional fact. An erroneous determination by an adjudicator that there is a reference date does not give the adjudicator power he or she otherwise does not have. Under the statutory scheme, matters of valuation of a progress payment are for the adjudicator; but matters going to the existence of the entitlement to a progress payment in the first place are not for the adjudicator's conclusive determination.

- 10       5. **Ground 2. Was there a reference date in this case?** No. Either the construction contract had been terminated or the contract remained afoot but payments under it were suspended. In the former case, the contract ceased to operate; and reference dates accordingly ceased to accrue under it. In the latter case, both the primary judge and the Court of Appeal were correct to hold that the contractual provision for suspension of payments necessarily entailed that reference dates ceased to accrue.
- 20       6. **Ground 3. Did the respondent unlawfully serve two payment claims with respect to the same reference date such that the adjudicator had no jurisdiction to determine the later claim?** Yes. No reference date accrued after the appellant took over the whole of the work. The only reference date which the appellant's claim could have been in respect of was 8 October 2014. But the respondent had already served a claim in respect of that date. The Act prohibits a multiplicity of claims in respect of the one date. A claim served in breach of that prohibition is invalid. An adjudicator has no jurisdiction to determine an invalid claim.

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### PART III: SECTION 78B

7. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). The appellant does not consider that any such notice should be given.

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### PART IV: CITATIONS OF DECISIONS BELOW

8. The citations of the decisions below are as follows.
- 30       (a) *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 (CA).
- (b) *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 (Primary Judge).

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### PART V: BACKGROUND

#### The statutory scheme

9. It is useful at the outset to set out the general parameters of the statutory scheme. The key provisions are set out in Annexure A.
10. The object of the 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": s 3(1).

11. Section 8(1) confers the entitlement referred to in s 8. It provides:

*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.*

10 12. It can immediately be noted that there are three aspects to the entitlement. There is to be a "construction contract", which connects the entitlement to the **subject matter** of the Act, namely, building and construction. There is to be a "reference date", which determines **when** the entitlement arises and gives the entitlement its periodic and progressive nature. And there is to be a person who has undertaken to carry out various kinds of work, which determines **who** has the entitlement.

13. The concept of the "reference date" is defined by s 8(2), which provides:

*In this section, "reference date", in relation to a construction contract, means:*

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- (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 supplied) under the contract and the last day of each subsequent named month.*

14. This provision creates a binary approach to the existence of reference dates. Either the contract expressly provides for the arising of reference dates (sub-s (2)(a)) or the contract makes no provision for reference dates (sub-s (2)(b)). Where it is sub-s (2)(a) which applies, the date is "determined by or in accordance with the terms of the contract"; it is not determined by the Act. In this sense, the Act provides only a statutory overlay on existing contractual rights.

30 15. Section 9 of the Act identifies how "the amount" of a progress payment is to be calculated, and s 10 addresses how construction work is to be valued. The amount is to be calculated and valued by the adjudicator. This is the

fundamental role of the adjudicator, and ties in with the adjudicator's duty to determine "the amount" of the progress payment: s. 22(1)(a) (discussed below).

16. Part 3 of the Act prescribes the procedure for recovering progress payments.
17. The start of that process is the service of what the Act calls a "payment claim". Payment claims are regulated by s 13.
18. Under s 13(1), "[a] person referred to in section 8(1) who is or who claims to be entitled to a progress payment ... may serve a payment claim on the person who, under the construction concerned, is or may be liable to make the payment."
19. Section 13(5) prevents a multiplicity of payment claims being served. It provides "[a] claimant cannot serve more than one payment claim in respect of each reference date under the construction contract".
- 10 20. Section 14 provides for a recipient of a payment claim to serve a form of "defence" to the claim, which the Act calls a "payment schedule". If the recipient does not serve a payment schedule within time, then 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 14(4). In other words, the mere service of a payment claim can, by operation of the Act, cause a significant liability to accrue. That liability, if not satisfied within time, can be recovered as a debt in a court: s 15(2).
21. If the parties disagree as to the amount of the progress payment, (and the recipient of the payment claim has served a payment schedule) then the dispute resolution process moves to its next stage. The person who served the payment claim is entitled to "apply for adjudication of a payment claim" by making what the Act calls an "adjudication application" to a person authorised to appoint adjudicators: s 17(1). That person is then obliged to "refer the application to an adjudicator": s 17(6).
22. Section 18(1) prescribes the positive eligibility requirements for adjudicators. It provides:

*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.*
- 30 23. The regulations have not made provision for the purposes of s 18(1)(b). The only current regulatory requirement for appointment as an adjudicator is therefore that the adjudicator be a natural person.
24. Section 22(1) of the Act confers power (and a duty) on the adjudicator to determine the adjudication application. It provides:

*An adjudicator is to determine:*

- (a) *the amount of the progress payment (if any) to be paid by the respondent to the claimant ..., and*
- (b) *the date on which any such amount became or becomes payable, and*
- (c) *the rate of interest payable on any such amount.*

25. Section 22(2) of the Act prescribes the considerations to which the adjudicator may and must have regard. Those matters include “the provisions of [the] Act” and “the provisions of the construction contract from which the application arose”: s 22(2)(a) and (b).
- 10 26. If the amount determined by the adjudicator is not paid within time, then the adjudicator may issue what the Act calls an “adjudication certificate”: see ss 23, 24.
27. “An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly”: s 25(1). There are only limited grounds of challenging such a judgment. Section 25(4) provides:
- 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 ...*
28. Section 32 of the Act confirms that payments may be reversed in final proceedings, whether judicial or arbitral. Final proceedings might of course be years in the future. In practice, progress payments will be final and irreversible in the not uncommon event that the contractor becomes insolvent. The effect of the Act is thus to allocate the risk of insolvency to the principal: see *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at [40] (Keane JA); *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* [2009] QCA 329 at [19] (Keane JA).
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- Factual background**
- The contract**
29. On or about 18 January 2013, the appellant and the first respondent entered into a contract for the construction, by the first respondent, of a 5-storey, 60 unit apartment block in Breakfast Point: Primary Judge at [2].
30. A copy of the contract appears in the Appeal Book at Tab 6 (**the Contract**).

31. Clause 37.1 of the contract provided that “[t]he Contractor shall claim payment progressively in accordance with Item 28”. The “Contractor” was the first respondent: see Contract, Pt A, Annexure, item 2.

32. Item 28 of the Contract provided:

*Times for progress claims*      *8<sup>th</sup> ... day of each month for WUC<sup>1</sup>*  
*done to the 7<sup>th</sup> ... day of that month*

33. The primary judge accepted, and it has not been disputed, that, when read with cl 37.1, “[i]tem 28 provided in effect that progress claims were to be made on the 8<sup>th</sup> day of each month for work done to the 7<sup>th</sup> day of that month”: Primary Judge at [3].

10      34. Clause 39.2 of the Contract provided that “[i]f the Contractor commits a substantial breach of the Contract, the Principal may, by hand or by certified post, give the Contractor a written notice to show cause”. The “Principal” was the appellant: see Contract, Pt A, Annexure, item 1.

35. Clause 39.4 of the Contract provided:

*If the Contractor fails to show reasonable cause by the stated dated and time, the Principal may by written notice to the Contractor:*

- (a) *take out of the Contractor's hands the whole or part of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6; or*
- (b) *terminate the Contract.*

20      36. Clause 39.5 obliged the Principal to complete work taken out of the Contractor’s hands.

37. Clause 39.6 relevantly provided:

*When work taken out of the Contractor's hands has been completed, the Superintendent shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the difference between that cost (showing the calculations therefor) and the amount which would otherwise have been paid to the Contractor if the work had been completed by the Contractor.*

#### The construction work and the process before the adjudicator

30      38. On 10 October 2014, the appellant issued the first respondent with a show cause for the purposes of cl 39.2. The first respondent replied to the notice on 20 October 2014: Primary Judge at [6].

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<sup>1</sup> “WUC” is “work under the contract”: see cl 1.

39. On 27 October 2014, the appellant purported to exercise its rights under cl 39.4 of the Contract and took the whole of the work remaining to be completed out of the first respondent's hands: Primary Judge at [7].
40. The first respondent treated that conduct as a repudiation of the Contract and, on 28 October 2014, purported to accept the repudiation and terminate the Contract: CA at [13]. The appellant did not accept that termination: Primary Judge at [7].
41. On 4 December 2014, the first respondent purported to serve a payment claim on the appellant for \$3,229,202.5: Primary Judge at [8]. A copy of the payment claim appears at Tab 11 of the Appeal Book.
- 10 42. On its face, the payment claim referred to work carried out to 7 October 2014 with additional undated items. The parties have agreed that the payment claim related to work done up to 27 October 2014: Primary Judge at [8].
43. Given s 13(5) of the Act, the claim could not lawfully be in respect of the reference date which had arisen on 8 October 2014. The primary judge made an unchallenged finding that the right to make a claim in respect of the reference date which arose on 8 October 2014 "had already been exercised": Primary Judge at [50].
44. Various procedural steps followed service of the purported payment claim. Ultimately, on 17 February 2015, the first respondent lodged an adjudication application with the third respondent, who nominated the second respondent as the adjudicator and referred the adjudication application to him for consideration.
- 20 45. The adjudicator's determination appears at Tab 15 of the Appeal Book. The critical reasoning appears at paragraphs [13]-[21]. The appellant submitted that after termination of the contract, reference dates ceased to accrue. The adjudicator rejected that contention. At [21], he said: "as the Contract fails to include express conditions that provide for the cessation of reference dates after termination I am satisfied reference dates do continue pursuant to Section 13(4)(b) of the Act."

30 The proceedings below

46. The appellant sought judicial review of the adjudicator's determination in the Supreme Court.
47. Neither the trial judge nor the Court of Appeal determined whether the contract had in fact been validly terminated. Both considered the issue of whether there was an available reference date on both the hypothesis that the Contract had been validly terminated and the hypothesis that it had not been.
48. On the hypothesis that the Contract had been terminated, the primary judge held that the parties intended the right to make cl 37.1 progress claims to cease after termination: Primary Judge at [50].

49. The Court of Appeal ultimately considered that it was unnecessary to decide this issue: in the Court of Appeal's opinion, the existence of a reference date was not jurisdictionally necessary, and so (according to the Court of Appeal) it did not matter whether one had arisen. See CA at [73], [82], [122], [124].

50. However, the Court of Appeal nevertheless proceeded to consider whether reference dates continued to accrue after termination. In reasoning with which Sackville AJA agreed (see CA at [124]), Ward JA said the following at [82].

*Had it been necessary to determine, I would have concluded that once the contract was terminated the contractual right to make further progressive payment claims under cl 37.1 came to an end. However, the impugned payment claim is made pursuant to a statutory entitlement to do so “[o]n and from each reference date”. Termination of the contract does not alter the fact that under the contract a reference date arises on the 8<sup>th</sup> of each month for work done under the contract up to the 7<sup>th</sup> of that month. Therefore, I consider that 8 November 2014 was an available reference date to support the making of the impugned payment claim. There not being a contractual provision to preclude the exercise of the statutory right to make a progress payment claim on that date, I would have held that ground 2 of the appeal is made out on that basis.*

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20 51. On the hypothesis that the Contract had not been terminated, the question was whether cl 39.4 and 39.6 had the effect that the parties intended reference dates to cease to accrue. The primary judge addressed this issue at [44]-[46], and held that the parties so intended. The Court of Appeal agreed with this conclusion: see CA at [83]-[92] (Ward JA), [124] (Emmett AJA), [152] (Sackville AJA).

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52. A further issue before the Court of Appeal was whether the first respondent's payment claim was served in breach of s 13(5) of the Act because it was a second payment claim "in respect of" the reference date of 8 October 2014. Ward JA, with whom Emmett JA relevantly agreed (CA at [122]) held that s 13(5) did not apply because "on its face the impugned payment claim includes a claim for work done after 8 October 2014 and hence logically once would expect it to be in respect of a reference date after that time": CA at [71]. Sackville AJA relied on two further grounds for deciding the s 13(5) issue against the appellant. First, his Honour held that in determining whether a claimant had contravened s 13(5), it is for the adjudicator and not the court to determine the existence of reference dates: CA at [148]. Secondly, his Honour said that "[s]ection 13(5) does not say that a payment claim is deemed to be in respect of a past reference date if the payment claim is lodged after the last reference date but before another reference date has in fact arisen": CA at [149].

## PART VI: ARGUMENT

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### Ground 1: an adjudicator has no power to make a determination absent an available reference date

53. It is an essential precondition to the making of a valid adjudication determination under s 22(1) that there be a reference date under s 8 of the Act. It is not for an adjudicator to determine conclusively whether there is a reference date; a court is to do so, *de novo*, on review.
- 10 54. The appellant puts this points in two, alternative, ways. First, absent a reference date, there is no progress payment which an adjudicator can determine the “amount of” for the purposes of s 22(1)(a) and, accordingly, no power in the adjudicator to make a s 22(1) determination. Secondly, absent a reference date, there is no entitlement to serve a payment claim under s 13(1) of the Act, any resulting payment claim is invalid, and there is no power in an adjudicator to determine any such claim. In either case, the existence of an available reference date is a jurisdictional fact.
55. Whether a matter is a jurisdictional fact is a question of statutory construction: see *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [58].
- 20 56. The text and structure of the Act compels the proposition advanced by the appellant. That is so for the following reasons.
57. *First*, Parliament must have intended *some* of the statutory integers to be jurisdictional. For example, it must be uncontroversial that the existence of a “construction contract” is a jurisdictional precondition to an adjudicator’s jurisdiction.<sup>2</sup> Were it otherwise, an adjudicator could bring the Act to bear on matters wholly outside its subject matter. The real question is which of the various statutory integers are jurisdictional and which are not.
- 30 58. *Secondly*, there is good reason for some matters to be jurisdictional. An adjudication has significant legal consequences. An adjudication gives rise to a legal duty to pay the determined amount: s 23(2). If the amount is not paid, and an adjudication certificate obtained, the certificate can be filed in a court as a judgment on a debt and enforced accordingly: s 25(1). The grounds of challenge to such a judgment are limited: s 25(4). Such judgments are often practically irreversible in the case of the contractor’s insolvency. Given those matters, it would be surprising if Parliament intended it to be for adjudicators to determine all of the statutory integers.
59. *Thirdly*, the line which Parliament has relevantly drawn is between questions of **entitlement** to a progress payment and questions of the **amount** which that

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<sup>2</sup> And it has been so held: see e.g. *IWD No.2 Pty Ltd v Level Orange Pty Ltd* [2012] NSWSC 1439 at [21].

payment ought to be. The former is jurisdictional; the latter is for the adjudicator.

60. **Fourthly**, as to the first of the questions: whether there is an *entitlement* to a progress payment. That question is determined by s 8(1), read with s 8(2). The text and context of those provisions suggest that the integers of the entitlement are jurisdictional.

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61. Section 8(1) is the central provision of the Act: it identifies whether there is an entitlement to a progress payment and who holds that entitlement. That entitlement is expressed to exist whether or not there has been a determination by an adjudicator and before any such determination: “on and from each reference date ... a person ... *is entitled to a progress payment*” (emphasis added).

62. Section 3(2) of the Act confirms that the Act is intended to “gran[t] a statutory entitlement to such a payment”. That is, the Act itself grants the entitlement. The entitlement does not depend on a determination by an adjudicator.

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63. Whether there is such an entitlement turns on matters which are largely legal and which courts are typically apt to determine. It turns on whether there is a valid construction contract, whether a person has undertaken under that contract to carry out various activities and whether there is a reference date. Further, whether there is a reference date depends on either the construction of the contract (s 8(2)(a)) or the construction of the Act (s 8(2)(b)). Those are matters of law. They are not evaluative matters. That the issues are non-evaluative and are ones which courts are apt to determine is a significant factor in assessing whether Parliament intended the matter to be jurisdictional.

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64. The language in s 8(2) is also expressed objectively; it is not expressed by reference to the “opinion” of the adjudicator.

65. **Fifthly**, in contrast, the *amount* of a progress payment is determined by s 9. It is, in practice, essentially a question of calculation and of valuation of building and construction work. It is a matter in which, again in practice, non-judicial adjudicators are typically apt to determine. It involves issues of fact and degree, and value judgments.

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66. **Sixthly**, s 22(1) of the Act identifies the matters which the adjudicator may determine. They are: (a) the amount of the payment, (b) the date on which it becomes payable, and (c) the rate of interest. Strikingly, there is a textual allocation of power to determine *amount*, but no textual allocation of power to determine whether there is an entitlement in the first place. Nor is there a textual allocation of power to determine the existence of a reference date.

67. **Seventhly**, the language of s 22(1) confirms that there is a denial of power in adjudicators to determine whether there is an entitlement to a progress payment in the first place.

68. That section gives adjudicators power “to determine ... the amount of the progress payment (if any) to be paid” (emphasis added). Put another way, the provision is to the effect that *if* there is an entitlement to a progress payment, then the adjudicator has power to determine its amount. The use of “if” supports the characterisation as jurisdictional that which follows the “if”: see, eg, *Mills v Commissioner of Taxation* (2012) 250 CLR 171 at [59]-[60] (the text of the relevant statute is at [20]). See also *Crump v State of New South Wales* (2012) 247 CLR 1 at [60] (“if and only if”).
- 10 69. *Eighthly*, that the existence of a reference date is jurisdictional is supported by s 13(5) of the Act. That provision proscribes service of “more than one payment claim in respect of each reference date”. It is well established in New South Wales that a payment claim served in breach of s 13(5) is invalid and does not enliven an adjudicator’s jurisdiction: see *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at [14] (Allsop P). See also paragraphs 99 to 104 below.
- 20 70. Section 13(5) could not operate sensibly if reference dates were not objective jurisdictional facts and were instead for each adjudicator. Further, it would give rise to a risk of inconsistent determinations between adjudicators. A party unhappy with one adjudicator’s determination could serve a new payment claim which is objectively in respect of the same reference date as the initial determination, and could then seek to convince the new adjudicator that it is in respect of a different reference date.
71. *Ninthly*, the Court of Appeal misunderstood the legislative purpose behind the relevant words, “or who claims to be”, in s 13(1).
- 30 72. Those words were inserted to achieve two purposes. The first purpose was to ensure that a person who had no contractual entitlement to a progress payment could nevertheless serve a payment claim. That purpose had nothing to say as to whether a person who had no statutory entitlement under s 8(1) to a progress payment could serve such a claim. The second purpose was to ensure that a person could serve a valid claim even if the amount of the progress payment to which the person was entitled was zero. This purpose had nothing to say as to whether a person could serve a valid payment claim even if the jurisdictional preconditions to a potential entitlement—a construction contract, an undertaking to carry out work and a reference date—were absent.
- 40 73. These purposes appear from the extrinsic materials to the *Building and Construction Security of Payment Amendment Act 2002* (NSW). In the Second Reading Speech to the Bill which became that Act, the Minister observed that the changes in the Act had been “foreshadowed in a detailed discussion paper ... released on 5 September”.<sup>3</sup> That discussion paper was a paper prepared by the NSW Department of Public Works and Services, entitled “Review Discussion

<sup>3</sup> Second Reading Speech to the *Building and Construction Industry Security of Payment Bill 2002*. (New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002 (Mr Iemma), page 6541 at 6542).

Paper: Options for Enhancing the Building and Construction Industry Security of Payment Act 1999". Potential amendments to s 13(1) of the Act were addressed at 18-19 of that paper, where the following was said.

### The Issue

There have been arguments that the right to serve a payment claim under the Act is dependent on an entitlement to a progress payment under the contract.

### Discussion

This matter is linked to the discussion under Issue 4 on the entitlement of a claimant to receive progress payments.

10 s8(1) provides that a person who undertakes construction work or who supplies related goods and services, is entitled to a progress payment under the Act.

However, s13(1) states:

*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.*

20 On the basis of s13(1), it has been argued that a payment claim under the Act can only be made if there is an entitlement at that time to a progress payment under the contract. Where there is no such entitlement, the argument is the claim cannot be validly made under the Act, and there is therefore no need to serve a payment schedule in response.

30 There is a second aspect. It is the question of whether, if there is no entitlement to an amount (either under the Act or the contract), a claim can be made. Is the entitlement to make a claim dependant on the existence of an entitlement to a progress payment of some amount, no matter how small? For example, if, because work is defective, there is no amount due to the claimant, can the claimant make a valid payment claim? Just as a claimant can validly institute legal proceedings claiming a payment, even though it may ultimately be proved that the claim was not justified, so too a claimant should be able to make a valid payment claim under the Act even though it may ultimately be proved that no payment is due. If a valid claim could only be made if an amount was due, then the purpose of adjudication would be defeated. An adjudicator would have no jurisdiction unless an amount was due.

40 74. The "first aspect" identified by the discussion paper was expressly concerned with addressing whether a person who had no contractual entitlement to a progress payment could serve a payment claim. It was not concerned with addressing any issue as to statutory entitlement. This aspect is consistent with the statutory context. The discussion paper was prepared at the time that the case of *Beckhaus Civil Pty Ltd v Brewarrina Shire Council* [2002] NSWSC 960 was being argued before Macready AJ. One of the defendant's arguments in that

matter was that “the plaintiff could only serve a payment claim … if, at the time of serving the payment claim, the plaintiff was entitled to a contractual progress payment”: at [10]. It can be noted that the argument was concerned with contractual entitlement, not statutory entitlement. There was no contention in that case that a plaintiff could (or could not) serve a payment claim despite the absence of a jurisdictional precondition to a s 8(1) entitlement. In *Beckhaus*, his Honour ultimately decided that issue against the defendant in October 2002; however, that was after the discussion paper was published in September 2002. The question addressed by the discussion paper was therefore live at the time of its publication. As it was, his Honour’s judgment on this issue was ultimately overturned by the Court of Appeal in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576. However, by then, the amendments to s 13(1) had been made, so the *Brewarrina* issue would never again arise.

- 10 75. The “second aspect” identified by the discussion paper had a broader sweep: it extended to the issue of both contractual and statutory entitlement. However, the example given by the drafter of the discussion paper identifies the concern. The example given is where, because of defective work, no amount is due. That is not a case where there can be no s 8(1) entitlement because there is an absence of jurisdictional precondition. It is instead a case where, properly calculated, the amount of any entitlement is zero. Nothing in this aspect of the discussion paper suggests that there was any intention to permit a person who could, in law, have no entitlement to a progress payment to serve a payment claim under the Act and thus invoke the compulsory processes of the Act and potentially create a significant liability by operation of the Act.
- 20 76. Nothing in these extrinsic materials suggests that it was any part of Parliament’s purpose to change the existence of a reference date from being a jurisdictional fact to being non-jurisdictional.
- 30 77. In this case, Ward JA directed some attention to the statutory history of the words “or who claims to be”. However, her Honour erred in doing so. Her Honour suggested that the words were inserted into s 13(1) to overcome the contrary effect of the decision of the Court in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576.<sup>4</sup> That cannot have been so: that case was heard after the enactment of the amendments. In the present proceedings, the Court of Appeal did not address the statutory context described in paragraphs 73 to 75 above. Had the Court of Appeal done so, it ought to have held that the true purpose of the amendments was to permit a person to serve a payment claim even though the person had no contractual entitlement to a progress payment or the person had an entitlement of zero value.
- 40 78. For these reasons, this Court should hold that the existence of a “reference date” is a jurisdictional fact and the Court of Appeal erred in holding to the contrary at [60], [119] and [142].

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<sup>4</sup> Ward JA cited *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801 at [22] in support of this proposition.

79. This matter is brought to bear on the Act in either or both of two ways. The appellant would be successful on ground 1 even if only one of those two ways is accepted.
80. The **first** way is that the existence of a reference date is an essential precondition to the making of a valid determination under s 22(1).
81. On this analysis, absent a reference date, an adjudicator may have power to *consider* whether to make a determination, but has no power in fact to make such a determination. Put another way, while the adjudicator has power to consider what the reference date is, he or she has no power to get that question wrong: see *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398 at [31] (French CJ).
- 10 82. The **second** way is that the existence of a reference date is an essential precondition to the service of a valid payment claim under s 13(1).
83. The point here is that the Act should not be construed as permitting a payment claim to be valid even though (a) there is no entitlement under s 8(1), and (b) an adjudicator would ultimately have no power to make a valid determination that a progress payment is payable. It should not be forgotten that service of a (valid) payment claim can give rise to significant legal liabilities, which are ultimately enforceable as debts: see paragraph 20. The mere service of a valid payment claim carries with it a substantial contingent right, in the sense that if (through oversight or ignorance) a recipient does not provide a payment schedule disputing the claimed amount within the strict time limits in s 14, the full amount of the claim becomes due and payable (without there being an adjudication of the merits of the claim): ss 14(4) and 15(2)(a)(i). If there is no objective requirement for a valid available reference date – i.e. if the Court has no power to determine that question – the results would be extraordinary, and cannot have been within the legislative purposes.
- 20

**Ground 2: the adjudicator's determination was made without an available reference date**

- 30 84. By its second ground, the appellant contends that there was no available reference date. If the first ground gives the appellant its major premise, the second ground gives it its minor premise. The conjunction of the two premises is sufficient for the relief sought.
85. It is convenient to start with the Court of Appeal's error. The relevant reasoning of the Court of Appeal is set out in paragraph 49 above. The Court erred by asking the wrong question. It started from the assumption that the Act gave an *entitlement* to reference dates, such that it was then appropriate to ask whether the Contract “preclude[d]” that entitlement. This was an error.
86. Whether there was a reference date was to be determined in accordance with s 8(2). Under s 8(2), a reference date is:
- 40

- (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 supplies 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 first supplied) under the contract and the last day of each subsequent named month.

- 10 87. The parties have conducted this case on the basis that s 8(2)(b) has no application.<sup>5</sup> The only source of reference dates is therefore s 8(2)(a).
88. Under s 8(2)(a), whether there is a reference date depends on “the terms of the contract”. There is no statutory right to reference dates existing independently of the contract; there is nothing more than the contractual rights. All the Act does in this respect is to give effect to the underlying contractual provisions. The Court of Appeal’s error was to discern some statutory right existing independently of the Contract, and then to ask whether the Contract precluded that right. That misconceives the inquiry.
89. The true position is that no reference dates arose after 8 October 2014.
- 20 90. Putting aside the notice of contention, the only question is whether reference dates continued to accrue under the Contract after its termination.
91. This question falls to be determined by reference to well-understood principles of contract law. Those principles were stated in *McDonald v Dennys Lascelles* (1933) 48 CLR 457 at 467-9 (Dixon J) (*McDonald*) and *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379-80 (Dixon and Evatt JJ) (*Westralian Farmers*).
92. Those cases establish the following principles.
- (a) When a contract is terminated, “[b]oth parties are discharged from the further performance of the contract”: *McDonald* at 476-477.
- 30 (b) However, “rights are not divested or discharged which have already been unconditionally acquired”: *McDonald* at 466.
- (c) These two presumptive principles are subject to contrary contractual intention, particularly express stipulation. So, “it is open to the parties to provide in advance for such an event and by a stipulation to the contrary to produce some other effect”: *Westralian Farmers* at 379.
93. The present hypothesis is that the Contract was terminated on 28 October 2014. The Contract then came to an end. Consistently with the principles stated in

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<sup>5</sup> And they have been correct to do so. The Contract plainly makes express provision for reference dates. See *Thiess Pty Ltd v Lane Cove Tunnel Nominee Co Pty Ltd* [2009] NSWCA 53 at [42]-[44]. Further, there has never been any contention that the payment claim was served in respect of an end-of-month reference date.

paragraph 91, subject to the contrary intention, the only rights which survived termination were those which had already been unconditionally acquired.

94. The Contract manifests no intention that reference dates continue to accrue after termination.

95. Nor is there anything in the Contract to suggest that the first respondent had unconditionally acquired a right to an 8 November 2014 reference date as at the date of termination. Indeed, the date of termination, 28 October 2014 was *before* 8 November 2014.

96. It should be noted that there is a very good reason why parties to a construction contract would generally (and subject to contrary provision) not intend reference dates to continue to accrue after termination. The Act does not deprive parties to a construction contract of their general law rights. After the termination of a construction contract, the parties can bring all their asserted rights to account in judicial proceedings. Where that is done, *all* the rights between the parties can be authoritatively and conclusively determined. In contrast, an adjudicator is entitled to determine *only* those matters under s 22(1). Leaving the parties to their general law rights after termination, subject of course to contrary intention, will, in the ordinary course, be both convenient and just.

97. What, then, of the alternative hypothesis—that the Contract was not validly terminated? All of the judges below who considered this issue found in the appellant's favour. The first respondent now challenges the Court of Appeal's finding on this issue by notice of contention. The appellant will address this argument in more detail in reply. For now, the appellant makes the following submissions.

(a) The question is one of contractual interpretation: does the Contract provide for the continued accrual of reference dates even after the Principal has taken the work out of the hands of the Contractor?

(b) Under cl 39.4, after the appellant took the work out of the first respondent's hands, it was entitled to "suspend payment until it becomes due and payable pursuant to subclause 39.6".

(c) Under cl 39.6, payment was not due and payable unless and until the work taken out of the first respondent's hands "has been completed".

(d) There is no qualification on the payments which may be suspended under cl 39.4. For instance, the Contract does not say that "payments, save for those pursuant to payment claims under the Act, may be suspended". On the face of the Contract, the payments which may be suspended are *all* payments. That includes progress payments for the purposes of the Act.

(e) Further, if cl 39.4 did not cover progress payments for the purposes of the Act, it is difficult to see what work the clause would have to do: see Primary Judge at [44].

- (f) The means of rendering the object of cl 39.4 effective is to find that it expresses an intention that reference dates not accrue after work is taken out of the Contractor's hands.
- (g) Again, this does not cause injustice. Clause 39.6 provides for a means of reconciling all payments following completion of the work. The parties retain their rights at general law.

**Ground 3: contrary to s 13(5), the payment claim was the second payment claim in respect of the one reference date**

98. Section 13(5) provides that a claimant "cannot serve more than one payment claim in respect of each reference date under the construction contract".
99. The New South Wales Court of Appeal has held that s 13(5) is jurisdictional in the sense 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": *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at [14] (Allsop P). It follows from that proposition that, for the purposes of s 13(5), reference dates are jurisdictional facts: an adjudicator obtains no jurisdiction from an invalid payment claim, and so obtains no jurisdiction to form an opinion on what reference date the claim is in respect of. The first respondent has not disputed these propositions in this litigation. This Court should, for the following reasons, also adopt those propositions.
100. *First*, the underlying issue is a *Project Blue Sky* one: was it a purpose of Parliament that breach of s 13(5) should render the claim or any subsequent adjudication of the claim invalid? See *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389.
101. *Secondly*, Parliament's intent is best discerned from the text of s 13(5). The text is in mandatory terms: "cannot".
102. *Thirdly*, s 13(6) creates an express carve-out from s 13(5). It provides: "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". This indicates that Parliament turned its mind to whether there should be some qualification on the otherwise strict effect of s 13(5), and Parliament determined to provide only for the qualification in s 13(6).
103. *Fourthly*, the object of s 13(5) is readily discerned from its terms. Its object is to prevent a multiplicity of claims in respect of the one period and, by that means, to maintain the integrity of adjudication processes already set in motion and to ensure that the dispute resolution system remains quick and cheap.
104. It would subvert that object if successive payment claims could enliven an adjudicator's jurisdiction. Successive payment claims are apt to proliferate adjudication processes. They are also apt to proliferate litigation in respect of

such processes. Further, successive payment in respect of the one period give rise to a risk of inconsistent determinations as between adjudicators.

105. The issue then becomes: was the payment claim relied on to support the adjudicator's jurisdiction "in respect of" a reference date which had already been used?

106. The statutory criterion, "in respect of", is a relational concept: see *R v Khazaal* (2012) 246 CLR 601 at [31]. It calls for a characterisation of the claim.

107. Here, there is only one answer to the question of characterisation: the payment claim was in respect of the 8 October 2014 reference date.

- 10 (a) The impugned payment claim was served on 4 December 2014.
- (b) On its face, the impugned claim was said to be for work "carried out to 7 October 2014", with additional items that may have been carried out up to 27 October.
- (c) For the reasons advanced in connection with ground 2, the claim could not validly have been in respect of a reference date on 8 November 2014: no reference date accrued on that date.
- (d) The next most proximate potential reference date was 8 October 2014, and that is the date in respect of which the claim should be held to have been made.

20 108. However, if the claim was in respect of the 8 October 2014 reference date, there is a difficulty. There is an unchallenged finding of fact that the 8 October 2014 reference date had already been used: Primary Judge at [50]. It follows that the claim was served in breach of s 13(5). It was invalid. So too was the resulting adjudication.

109. The Court of Appeal erred in holding to the contrary.

30 110. Ward JA's point was that the claim should not be held to be in respect of 8 October 2014 because it includes work done after that date. That point proceeds from the error that there was a later reference date. However, for the reasons advanced under ground 2, there was no later date. Further, it should not be fatal to a contention that a claim is in respect of a reference date that the claim includes work done after that date. Were it otherwise, s 13(5) could be easily avoided by simply including work done after a date which cannot validly be used.

40 111. Sackville AJA's first point was that it was for the adjudicator, not the court, to determine reference dates. That point was in error for the reasons advanced in paragraphs 99 to 104. Sackville AJA's second point was that identified in paragraph 52. The point appears to have been that a payment claim can be in respect of a *future* reference date. That point cannot be correct. A payment claim is an assertion of an entitlement to a progress payment. The statutory text assumes a *present* entitlement or claimed entitlement: only a person who "is

who claims to be" entitled to a progress payment may serve a payment claim: s 13(1). An entitlement to a progress payment arises only "on and from" each reference date. The Act does not admit of prospective claims.

## **PART VII: RELEVANT STATUTORY PROVISIONS**

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112. The relevant statutory provisions are set out in Annexure A.

## **PART VIII ORDERS SOUGHT**

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113. The appellant seeks the following orders.

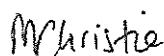
1. The appeal be allowed.
2. The orders of the Court of Appeal made on 25 September 2015 be set aside.
3. The First Respondent to pay the Appellant's costs of this appeal and the costs of the appeal before the Court of Appeal.
4. The First Respondent to repay the Appellant the sum of \$1,276,090 paid to the First Respondent on 7 October 2015, including interest since that date.

## **PART IX: TIME FOR ARGUMENT**

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114. The appellant estimates that it will need 2.5 hours to present its argument.

20 Dated: 1 September 2016



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## ANNEXURE A RELEVANT STATUTORY PROVISIONS

### Building and Construction Industry Security of Payment Act 1999 No 46



New South Wales

#### Status Information

##### Currency of version

Historical version for 30 January 2012 to 31 December 2013

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#### 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.
- (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.

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#### 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.
- (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.

10 **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**

- 20 (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.
- (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.

### **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.
- (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 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.
- (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.
- (5) A claimant cannot serve more than one 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 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.
- (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.

## **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.
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.
- 10 (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.

## 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.

## **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.
- (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 (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.
- (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).

- (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.
- (3) 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 such a response.
- 10 (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
  - 20 (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.
- (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.

## 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,
  - 40 (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 the 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 any construction work carried out under a construction contract, or
  - (b) the value of any related goods and services supplied under a construction contract,
- 10 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.
- (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,
- 20 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,
- 30 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 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.
- 40 (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.

## **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.

## **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.