HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

PROBUILD CONSTRUCTIONS (AUST) PTY LTD APPELLANT

AND

SHADE SYSTEMS PTY LTD & ANOR RESPONDENTS

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd
[2018] HCA 4
14 February 2018
S145/2017

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with S Robertson and M R L Forgacs for the appellant (instructed by Maddocks Lawyers)

M Christie SC with D P Hume for the first respondent (instructed by Moray & Agnew)

Submitting appearance for the second respondent

CATCHWORDS

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd

Administrative law – Judicial review – Availability of certiorari – Error of law on face of record – Non-jurisdictional error – *Building and Construction Industry Security of Payment Act* 1999 (NSW) – Where Act confers entitlement to "progress payment" on persons who undertake to carry out construction work under construction contracts and provides scheme for determining disputed claims – Where first respondent made claim for progress payment – Where claim referred to adjudicator for determination – Where adjudicator made error of law in reasons for determination – Where reasons form part of record – Whether Act ousts jurisdiction of Supreme Court of New South Wales to make order in nature of certiorari to quash determination for non-jurisdictional error of law on face of record.

Words and phrases – "clear legislative intention", "error of law on the face of the record", "interim entitlement", "jurisdictional error", "non-jurisdictional error", "order in the nature of certiorari".

Building and Construction Industry Security of Payment Act 1999 (NSW), Pts 2, 3.
Supreme Court Act 1970 (NSW), ss 22, 69.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND GORDON JJ. The *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Security of Payment Act") establishes a scheme of rights and procedures relating to the receipt and recovery by contractors of progress payments for construction work. Under the scheme, disputed payment claims may be referred for determination by an adjudicator.

2 The only question in this appeal is whether the scheme established by the Security of Payment Act for claims for, and payment of, progress payments ousts the jurisdiction of the Supreme Court of New South Wales to make an order in the nature of certiorari to quash a determination by an adjudicator for error of law on the face of the record that is not a jurisdictional error. The answer is yes: the Security of Payment Act does oust that jurisdiction.

The Security of Payment Act

3 Enacted in 1999, the Security of Payment Act was followed by closely equivalent statutes in Victoria, Queensland, the Australian Capital Territory, South Australia and Tasmania[1].

4 The object of the Security of Payment 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].

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1 *Building and Construction Industry Security of Payment Act* 2002 (Vic); *Building and Construction Industry Payments Act* 2004 (Q); *Building and Construction Industry (Security of Payment) Act* 2009 (ACT); *Building and Construction Industry Security of Payment Act* 2009 (SA); *Building and Construction Industry Security of Payment Act* 2009 (Tas).

2 s 3(1) of the Security of Payment Act. That wording was inserted into the Security of Payment Act as part of extensive amendments effected by the *Building and Construction Industry Security of Payment Amendment Act* 2002 (NSW). Similar language was later adopted in the equivalent Acts in the other jurisdictions: s 3(1) of the *Building and Construction Industry Security of Payment Act* 2002 (Vic); s 7 of the *Building and Construction Industry Payments Act* 2004 (Q); s 6(1) of the *Building and Construction Industry (Security of Payment) Act* 2009 (ACT); s 3(1)

(Footnote continues on next page)

5 The means by which the Security of Payment Act ensures that a person is entitled to 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].

6 The statutory entitlement to progress payments is provided for in s 8. "[P]rogress payment" is defined in s 4(1) to include the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, a single or one-off payment for such work or supplies, and a "milestone payment" (a payment that is based on an event or date).

7 As explained in s 3(3), the procedure for recovering such a payment requires:

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

That procedure is set out in Pt 3 ("Procedure for recovering progress payments"). Section 13(1) provides that a person 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 a payment. The payment claim must identify the relevant construction work (or related goods and services) and the amount of the progress payment that the claimant claims to be due (the "claimed amount")[4].

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of the *Building and Construction Industry Security of Payment Act* 2009 (SA); s 3 of the *Building and Construction Industry Security of Payment Act* 2009 (Tas).

3 s 3(2) of the Security of Payment Act.

4 s 13(2)(a) and (b) of the Security of Payment Act.

8 Section 14(1) provides that a person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant. The payment schedule must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount")[5]. If the scheduled amount is less than the claimed amount, the payment schedule must indicate why that is so and, if the respondent is withholding payment, the respondent's reasons for withholding payment[6].

9 If a claimant serves a payment claim on a respondent and the respondent does not provide a payment schedule within 10 business days (or earlier, if required by the construction contract), s 14(4) makes the respondent liable to pay the claimed amount on the due date[7] for the progress payment. Any outstanding amount not paid on or before the due date is recoverable as a debt in a court of competent jurisdiction[8]. The position is the same if the respondent provides a payment schedule but does not pay the scheduled amount by the due date[9]. Alternatively, the claimant may apply in either case for adjudication of the payment claim[10].

10 Division 2 of Pt 3 deals with the adjudication of disputes. Section 17(1) provides:

> "A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if:
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> (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

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5 s 14(2)(b) of the Security of Payment Act.

6 s 14(3) of the Security of Payment Act.

7 See ss 4(1) and 11 of the Security of Payment Act.

8 s 15(2)(a)(i) of the Security of Payment Act.

9 s 16(2)(a)(i) of the Security of Payment Act.

10 ss 15(2)(a)(ii) and 16(2)(a)(ii) of the Security of Payment Act.

(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."

An adjudication application is to be made to an authorised nominating authority[11], which must refer the application to an adjudicator as soon as practicable[12]. Where the respondent has failed to provide a payment schedule, an adjudication application cannot be made unless the claimant notifies the respondent, within 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim and the respondent has been given an opportunity to provide a payment schedule to the claimant within five business days after receiving the claimant's notice[13].

11 The respondent may lodge with the adjudicator a response to the claimant's adjudication application only if the respondent provided a payment schedule within the time specified in s 14(4) or s 17(2)(b)[14]. That response must be lodged within five business days after receiving a copy of the application or two business days after receiving notice of the adjudicator's acceptance of the application, whichever is the later date[15]. The response may contain

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11 s 17(3)(b) of the Security of Payment Act.

12 s 17(6) of the Security of Payment Act. The eligibility criteria for adjudicators are set out in s 18 of the Security of Payment Act.

13 s 17(2) of the Security of Payment Act. See also s 17(3)(c)-(e) for the other prescribed time limits.

14 s 20(2A) of the Security of Payment Act.

15 s 20(1) of the Security of Payment Act.

submissions[16] but it cannot include reasons for withholding payment that were not included in the payment schedule provided to the claimant[17].

12 Section 21(3) requires the adjudicator to determine an application "as expeditiously as possible" and, in any case, within 10 business days after the date on which the adjudicator notified the claimant and the respondent of acceptance of the application or within such further time as agreed by the parties.

13 Any proceedings to determine an adjudication application are conducted informally. They may be conducted by a conference and the parties are not entitled to legal representation at any such conference[18].

14 The task of the adjudicator is set out in s 22. Sub-sections (1) and (2) provide as follows:

> "(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:
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> (a) the provisions of this Act,
>
> (b) the provisions of the construction contract from which the application arose,

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16 s 20(2)(c) of the Security of Payment Act.

17 s 20(2B) of the Security of Payment Act.

18 s 21(4)(c) and (4A) of the Security of Payment Act.

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

15 Under s 23(2), if the adjudicator determines that the respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the "relevant date" as defined in s 23(1). The "relevant date" is the date occurring five business days after the adjudicator's determination is served on the respondent, unless the adjudicator determines a later date[19].

16 If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant, the claimant may, under s 24, request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate, and 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 contract[20].

17 Under s 25(1), the adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly. However, s 25(4) also provides that, if the respondent commences proceedings to have the judgment set aside, the respondent:

"(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

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19 See s 22(1)(b) of the Security of Payment Act.

20 See also s 27 of the Security of Payment Act.

(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."

18 Parties may not contract out of the scheme[21]. But the rights, duties and remedies arising under a construction contract are acknowledged and preserved by ss 3(4) and 32. In particular, s 32 clarifies that nothing in Pt 3 affects any right that a party to a construction contract may have under that contract. Moreover, nothing done under Pt 3 affects any civil proceedings arising under a construction contract except as provided in s 32(3), which provides that, in any such proceedings, a 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."

Facts

19 Probuild Constructions (Aust) Pty Ltd ("Probuild") and Shade Systems Pty Ltd ("Shade Systems") were parties to a subcontract under which Shade Systems agreed to supply and install external louvres for an apartment development.

20 On 23 December 2015, Shade Systems served on Probuild a payment claim pursuant to s 13 of the Security of Payment Act stating that a progress payment of $294,849.33 (excluding GST) was due.

21 On 11 January 2016, Probuild provided a payment schedule pursuant to s 14 of the Security of Payment Act indicating that it did not propose to pay any of the amount claimed. Probuild relevantly contended that it was entitled to set off, against the amount in the payment claim, a considerably higher amount for liquidated damages ($1,089,900.00) which it asserted was owing because works

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21 s 34 of the Security of Payment Act.

were not completed before the "Date for Practical Completion" in the subcontract.

22 Pursuant to s 17 of the Security of Payment Act, Shade Systems applied for adjudication of its payment claim. The adjudicator rejected Probuild's liquidated damages claim on the basis that liquidated damages could not be calculated until either "practical completion" (being actual completion of the works) or termination of the subcontract. The adjudicator determined that the amount of the progress payment payable by Probuild to Shade Systems was $277,755.03 (including GST).

Proceedings for certiorari

23 Probuild sought, under s 69 of the *Supreme Court Act* 1970 (NSW), an order in the nature of certiorari quashing the determination of the adjudicator. The primary judge (Emmett AJA) did not consider that the Security of Payment Act excluded the jurisdiction of the Supreme Court to make an order in the nature of certiorari for error of law on the face of the record[22]. Emmett AJA made the order sought by Probuild on two bases: first, the adjudicator erroneously considered that no entitlement to liquidated damages arose until practical completion or termination of the subcontract; and second, the adjudicator erroneously considered that Probuild needed to demonstrate that Shade Systems was at fault for the delay for which it claimed liquidated damages.

24 Shade Systems appealed to the Court of Appeal of the Supreme Court of New South Wales. The only issue pressed at the hearing of the appeal was the jurisdictional issue: whether the Security of Payment Act excluded the jurisdiction of the Supreme Court to make an order in the nature of certiorari for error of law on the face of the record. Basten JA (with whom Bathurst CJ, Beazley P, Macfarlan and Leeming JJA agreed) held that the Supreme Court did not have jurisdiction to quash an adjudicator's determination for error of law on the face of the record[23].

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22 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770 at [74].

23 *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 344 ALR 355 at 375 [85]-[86].

25 In its appeal by special leave to this Court, Probuild contended that the jurisdiction of the Supreme Court to make an order in the nature of certiorari to quash an adjudicator's determination for error of law on the face of the record that is not a jurisdictional error had not been ousted. Although it accepted that the jurisdiction could be ousted, it submitted that "clear words" to that effect were necessary. During the course of oral argument, Probuild accepted that if, as a matter of statutory construction, there was a clear legislative intention to oust the jurisdiction, that would be sufficient in the absence of an express statement to that effect. However, Probuild contended that, in the absence of express words, the Security of Payment Act otherwise revealed no clear legislative intention that the jurisdiction to quash an exercise or purported exercise of power for error of law on the face of the record was ousted in relation to an adjudicator's determination under that Act.

26 Probuild's appeal to this Court was heard together with another appeal[24], from a decision of the Full Court of the Supreme Court of South Australia, in which the same issue arose in relation to the equivalent statute in South Australia. There, the Full Court expressed support for the view that the South Australian legislation did not exclude the jurisdiction to make an order in the nature of certiorari for error of law on the face of the record[25], but ultimately followed the reasoning of the Court of Appeal of the Supreme Court of New South Wales in the decision presently under appeal.

Availability of certiorari

27 The jurisdiction of the Supreme Court of New South Wales to make an order in the nature of certiorari is an aspect of its jurisdiction as "the superior court of record" in that State[26]. The jurisdiction is exercised by judgment or order, not by writ[27].

28 The function of an order in the nature of certiorari is to remove the legal consequences, or purported legal consequences, of an exercise or purported

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24 *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5.

25 *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 127 SASR 193 at 247-254 [187]-[209], 272 [286].

26 ss 22 and 69 of the Supreme Court Act.

27 s 69(1) of the Supreme Court Act.

exercise of power which has, at the date of the order, a discernible or apparent legal effect upon rights[28].

29 The principal basis for making such an order is jurisdictional error, thus enforcing the limits of a decision-maker's functions and powers. The jurisdiction of a State Supreme Court to review an exercise or purported exercise of power for jurisdictional error, and to grant relief in the nature of certiorari (and prohibition and mandamus) where jurisdictional error is found, serves to enforce the limits of State executive and judicial power. In that sense, it may aptly be described as a "supervisory jurisdiction"[29]. As was explained in *Kirk v Industrial Court (NSW)*, that supervisory jurisdiction was and is a defining characteristic of the State Supreme Courts[30].

30 Unlike the supervisory jurisdiction enforcing the limits of executive and judicial power, the jurisdiction of a Supreme Court to review, and to make an order in the nature of certiorari, for error of law on the face of the record is not part of the defining characteristics of the State Supreme Courts. This jurisdiction may be ousted by statute[31].

31 In *Craig v South Australia*, this Court rejected what was described as an "expansive" approach to certiorari which conceived of the "record" of an inferior court as including both the reasons for decision and the transcript of proceedings, holding that, in the absence of statutory provision to the contrary, the record did not ordinarily include the reasons for decision[32]. After the decision in *Craig*, the Supreme Court Act was amended[33] to declare in s 69(3) that the jurisdiction

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28 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580; [1992] HCA 10; *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 492 [25]; [2013] HCA 43 citing *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159; [1996] HCA 44.

29 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98]; [2010] HCA 1.

30 (2010) 239 CLR 531 at 580-581 [98].

31 See *Kirk* (2010) 239 CLR 531 at 581 [100].

32 (1995) 184 CLR 163 at 180-183; [1995] HCA 58.

33 See Item 8 of Sched 1.8 to the *Courts Legislation Amendment Act* 1996 (NSW).

of the Supreme Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings. The Supreme Court Act was also amended to provide in s 69(4) that "the face of the record" includes the reasons expressed by the court or tribunal for its ultimate determination.

32 Section 69(5) of the Supreme Court Act recognises that the declaration in s 69(3) that the Supreme Court has jurisdiction to make an order in the nature of certiorari for error of law on the face of the record does not affect the operation of any legislative provision to the extent that that provision is, "according to common law principles and disregarding [s 69(3) and (4)], effective to prevent the Court from exercising its powers to quash or otherwise review a decision".

33 It is a noteworthy feature of our legal history that it has long been taken as axiomatic[34] that inferior courts or tribunals exercise their powers under the supervision of the superior courts in accordance with the law as expounded and applied by those courts[35]. As Brennan J said in *Attorney-General (NSW) v Quin*, "the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise"[36].

34 An intention to alter the settled and familiar role of the superior courts must be clearly expressed[37]. But the question is a matter of statutory construction; and in the resolution of such a question, context is, as always,

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34 *Groenvelt v Burwell* (1700) 1 Ld Raym 454 at 469 [91 ER 1202 at 1212]; *R v The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Str 557 at 564-565 [93 ER 698 at 702-703]; *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 [143 ER 414].

35 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; [1990] HCA 21; *Craig* (1995) 184 CLR 163 at 175-176; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 196-197 [17]; [2007] HCA 35.

36 (1990) 170 CLR 1 at 36.

37 *Hockey v Yelland* (1984) 157 CLR 124 at 130-131, 142; [1984] HCA 72; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160; [1991] HCA 33; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492-493 [32], 505 [72], 516 [111]; [2003] HCA 2.

important[38]. The Security of Payment Act contains no privative clause providing in terms that an adjudicator's determination is not to be quashed by way of certiorari on the basis of error of law on the face of the record. But that is not the end of the inquiry. There remains for consideration the question whether, absent an express statement but read as a whole, the Security of Payment Act has that effect. Whether it does depends on examination of the text, context and purpose of the Security of Payment Act. In undertaking that process, "[w]hether and when the decision of an inferior court or other decision-maker should be treated as 'final' (in the sense of immune from review for error of law) cannot be determined without regard to a wider statutory and constitutional context"[39].

Certiorari for error of law on the face of the record ousted

35 The Security of Payment Act evinces a clear legislative intention to exclude the jurisdiction of the Supreme Court to make an order in the nature of certiorari to quash an adjudicator's determination for non-jurisdictional error of law on the face of the record.

36 First, it is to be recalled that the Security of Payment Act was enacted "to reform payment behaviour in the construction industry"[40] by seeking to ensure that a person who undertakes to carry out construction work under a construction contract is entitled to receive, and is able to recover, progress payments promptly in relation to the carrying out of that work[41]. In particular, it was designed to "stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers"[42]. And it achieves that objective by

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38 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388-389 [23]-[24]; [2012] HCA 56.

39 *Kirk* (2010) 239 CLR 531 at 577-578 [86].

40 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 September 1999 at 104. See also *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd* (2016) 91 ALJR 233 at 235 [3]; 340 ALR 193 at 194; [2016] HCA 52.

41 s 3(1) of the Security of Payment Act.

42 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2002 at 6542. See also *Southern Han* (2016) 91 ALJR 233 at 235 [4]; 340 ALR 193 at 195.

setting up a scheme, including a "unique form of adjudication of disputes over the amount due for payment"[43], which is, as Basten JA observed in the Court of Appeal, "coherent, expeditious and self-contained"[44]. The intended result is that "each party knows precisely where they stand at any point of time"[45].

37 Second, it is important to appreciate the subject matter of the Security of Payment Act. The Security of Payment Act is not concerned with finally and conclusively determining the entitlements of parties to a construction contract. Section 8 confers an entitlement to a progress payment, which may be the final payment, a single or one-off payment or what is described as a "milestone payment". Part 3 of the Security of Payment Act creates a distinct procedure for enforcing that statutory entitlement, which includes the making of a payment claim, the provision of a payment schedule in response and the determination of a payment claim by an adjudicator (at the option of the claimant).

38 The statutory entitlement to a progress payment and the procedure for recovery of a progress payment are separate from, and in addition to, a contractor's entitlement under a construction contract to receive payment for completed work[46]. The statutory entitlement is predicated upon the existence of a construction contract, but the entitlement and the means available for its enforcement stand apart from the parties' rights under that contract. Indeed, the Security of Payment Act has effect despite any contractual provision to the contrary: any purported derogation is void[47]. Moreover, the Security of Payment Act acknowledges and preserves parties' contractual entitlements[48]. Importantly, the Security of Payment Act provides that in any proceedings before a court or

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43 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2002 at 6542.

44 *Shade Systems* (2016) 344 ALR 355 at 369 [59]. See also *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at 400-401 [39]-[40]; *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385 at 389 [22].

45 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 406 [47].

46 See ss 8 and 13 of the Security of Payment Act.

47 s 34 of the Security of Payment Act.

48 s 32 of the Security of Payment Act.

tribunal in relation to any matter arising under a contract, the court or tribunal must allow for, and may make such orders as it considers appropriate for the restitution of, any amount paid under or for the purposes of Pt 3[49].

39 As was described in *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd*[50], the Security of Payment Act was the subject of substantial amendments in 2002. Introducing the Bill for the *Building and Construction Industry Security of Payment Amendment Act* 2002 (NSW), the responsible Minister stated[51]:

> "[The Security of Payment Act] was designed to ensure prompt payment and, for that purpose, [the Security of Payment Act] set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid."

The Security of Payment Act does not speak of "interim" entitlements and payments, but the label aptly reflects how the statutory entitlement interacts with any underlying contractual liability. In that respect, the statutory entitlement established by the Security of Payment Act stands in marked contrast to the sort of final determination provided for in the legislative scheme considered in *Hockey v Yelland*[52], the effect of which was permanent.

40 Third, underpinning the "interim" statutory entitlement is an understanding that "[c]ash flow is the lifeblood of the construction industry"[53].

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49 s 32(3) of the Security of Payment Act.

50 (2016) 91 ALJR 233 at 235-236 [3]-[4]; 340 ALR 193 at 194-195.

51 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2002 at 6542.

52 (1984) 157 CLR 124 at 130, 142.

53 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2002 at 6542.

Put another way, any interruption to the cash flow of a person carrying out construction work is apt to create the risk of financial failure[54]. Consistent with that understanding, the procedure in Pt 3 is designed to operate quickly. So much is apparent from the detailed time limits that apply at each stage and have been described earlier in these reasons[55]. These time limits are "carefully calibrated"[56]. The time limits have been rightly described as imposing "brutally fast"[57] deadlines on the claimant, the respondent and the adjudicator to ensure the prompt resolution of payment disputes.

41 Moreover, the time frames are not conducive to lengthy consideration by an adjudicator of detailed submissions on all questions of law. Indeed, as a result of the combined operation of ss 20(1) and 21(3) of the Security of Payment Act, an adjudicator can have as few as five business days after receiving the respondent's response to the adjudication application to determine the amount of the progress payment to be paid by the respondent and the date on which it becomes payable. In that limited time, the adjudicator must consider the provisions of the Security of Payment Act, the provisions of the construction contract from which the application arose, the payment claim (and any accompanying submissions and documentation), the payment schedule (and any accompanying submissions and documentation) and the results of any inspection carried out by the adjudicator[58].

42 Fourth, the Security of Payment Act permits informal procedures in the conduct of any proceedings to determine an adjudication application. An adjudicator may, for example, call a conference of the parties, which is to be conducted informally and without any entitlement to legal representation[59].

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54 *Neller* [2009] 1 Qd R 390 at 400-401 [39]-[40].

55 See, eg, ss 14(4)(b), 17(2), (3)(c)-(e), 20(1), 21(3), 23 of the Security of Payment Act.

56 *Chase Oyster Bar* (2010) 78 NSWLR 393 at 406 [47].

57 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 1070 [18.200].

58 s 22(2) of the Security of Payment Act.

59 s 21(4)(c) and (4A) of the Security of Payment Act.

43 Fifth, consistent with the objective of providing a "speedy and effective means of ensuring cash flow to builders from the parties with whom they contract"[60], there are other aspects of the scheme which reinforce the conclusion that an adjudicator's determination is not subject to judicial review for non-jurisdictional error of law. There is no right of appeal from the determination of an adjudicator under the Security of Payment Act. And that omission was deliberate[61]. Next, the Security of Payment Act provides that an adjudication certificate may be filed by the claimant as a judgment for a debt in a court of competent jurisdiction[62]. If the respondent commences proceedings to have the judgment set aside, the respondent is not entitled to bring any cross-claim against the claimant, to raise any defence in relation to matters arising under the construction contract or to challenge the adjudicator's determination[63]. In addition, the respondent must pay into court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings[64].

44 Having regard to the above matters, it is right to say that the Security of Payment Act creates an entitlement that is "determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in the normal manner"[65].

45 That operation of the Security of Payment Act gives rise to two further propositions which together point to the exclusion of the jurisdiction of the Supreme Court to review and to quash an adjudicator's determination for non-jurisdictional error of law on the face of the record.

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60 See *Neller* [2009] 1 Qd R 390 at 400-401 [39].

61 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 September 1999 at 107; cf Div 2A of Pt 3 of the *Building and Construction Industry Security of Payment Act* 2002 (Vic).

62 s 25(1) of the Security of Payment Act.

63 s 25(4)(a) of the Security of Payment Act.

64 s 25(4)(b) of the Security of Payment Act.

65 *Falgat* (2005) 62 NSWLR 385 at 389 [22].

46 First, the absence of judicial review for error of law on the face of the record does not entrench for all time the consequences of a non-jurisdictional error of law. To speak of an adjudicator's determination as being final obscures the fact that a party is not left without recourse where an adjudicator errs within jurisdiction in determining the amount of a progress payment. A determination does not of itself give rise to any issue estoppel for the purposes of civil proceedings arising under a construction contract. As ss 3(4) and 32 make plain, the ability of a party to enforce contractual rights, including where an adjudicator has erred in determining the amount of a progress payment, is undiminished.

47 Second, the operation of the statutory scheme, including its preservation of parties' contractual entitlements, affirmatively supports the conclusion that review for non-jurisdictional error of law on the face of the record is excluded. The clear legislative intention is to ensure that the statutory entitlement can be determined and enforced with minimal delay. The Security of Payment Act defers the final determination of contractual rights to a different forum, in which the consequences of any erroneous determination can and must be taken into account.

48 By contrast, it would not be consistent with the terms, structure or purposes of the statutory scheme to read the Security of Payment Act as not interfering with the bases upon which an adjudicator's determination may be judicially reviewed and quashed. To permit potentially costly and time-consuming judicial review proceedings to be brought on the basis of error of law on the face of the record, regardless of whether an adjudicator had exceeded the limits of their statutory functions and powers, would frustrate the operation and evident purposes of the statutory scheme[66]. The jurisdiction to make an order in the nature of certiorari to quash an adjudicator's determination for error of law on the face of the record has been excluded.

49 It is not necessary in these circumstances to examine any wider question which might arise in relation to the jurisdiction of a State Supreme Court, in other kinds of cases, to grant relief in the nature of certiorari for error of law on the face of the record. As was explained in *Re McBain; Ex parte Australian Catholic Bishops Conference*[67], the jurisdiction is long-established. There may

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66 See *Shade Systems* (2016) 344 ALR 355 at 375 [85].

67 (2002) 209 CLR 372 at 403 [56], 412-414 [86]-[91], 415-422 [95]-[110], 462-472 [253]-[280]; [2002] HCA 16.

or may not be difficulties and anomalies arising from or in connection with the jurisdiction, where it survives. If there are issues of those kinds, they were not raised or debated in the argument of this appeal (or the related appeal in *Maxcon Constructions Pty Ltd v Vadasz*[68]). They need not be, and are not, considered here.

50 In this Court, Probuild relied on the fact that the Security of Payment Act does not exclude review for jurisdictional error, a matter of significance to the Full Court of the Supreme Court of South Australia in *Maxcon Constructions Pty Ltd v Vadasz (No 2)*[69]. It was said that this reduced the force of the argument that review for non-jurisdictional error of law on the face of the record would undermine the statutory purposes. That contention should be rejected. No inference can be drawn from the fact that the Security of Payment Act does not purport to exclude review for jurisdictional error. As *Kirk* shows, exclusion of that jurisdiction would be beyond the power of the Parliament of New South Wales[70]. That the Parliament has not attempted to legislate beyond power says nothing about whether the Security of Payment Act evinces a clear intention to exclude the review jurisdiction of the Supreme Court to the extent that the Parliament had power to do so: relevantly, to prevent an order in the nature of certiorari being made on the basis of non-jurisdictional error of law.

51 Finally, it takes the matter no further to say, as Probuild submitted, that it is "absurd" that a "manifestly" erroneous determination, in the sense that it is affected by non-jurisdictional error of law, may stand. A non-jurisdictional error of law may have serious consequences. But those consequences are dealt with by s 32 of the Security of Payment Act. The limited exclusion of review does not irrevocably entrench the consequences of an erroneous determination. Where it is contended that an adjudicator has made an error of law within jurisdiction, resulting in a progress payment that is inadequate or excessive, the dispute may be resolved through civil proceedings under the construction contract. If necessary, a restitutionary order can be sought[71]. The risk that the party placed at an advantage by an underpayment or overpayment may later become incapable

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68 [2018] HCA 5.

69 (2017) 127 SASR 193 at 246 [180]-[181].

70 (2010) 239 CLR 531 at 580-581 [96]-[98].

71 s 32(3)(b) of the Security of Payment Act.

of meeting such an order is a risk that is assigned to the other party[72]. What Probuild characterised as an "absurd" outcome is more aptly seen as the coherent application of a statutory choice of forum rule. And private law proceedings in relation to a progress payment under a construction contract can hardly be expected to be less convenient than judicial review proceedings.

52 This understanding of the scheme of the Security of Payment Act accords with the earlier decision of the Court of Appeal of the Supreme Court of New South Wales in *Brodyn Pty Ltd v Davenport*[73]. In the present case, the Court of Appeal followed *Brodyn* in this respect[74]. It was right to do so. It would have been a strong thing for that Court, as indeed it would be for this Court, to have taken any other course. Since the decision in *Brodyn*, the Parliament of New South Wales has twice had occasion to revisit the Security of Payment Act to make substantial amendments to its provisions[75]. No amendment was made to alter the effect of the decision in *Brodyn*. That circumstance is a powerful reason for rejecting any suggestion that the understanding of the legislation adopted in *Brodyn*, and given effect in the decision of the Court of Appeal in this case, was other than a faithful reflection of the intention of the legislature.

53 For these reasons, the Court of Appeal was correct to conclude that the Security of Payment Act has the effect that the Supreme Court does not have jurisdiction enabling it to quash an adjudicator's determination for error of law on the face of the record. This being so, it is neither necessary nor appropriate to consider how an order in the nature of certiorari might be framed in such a way as to recognise that the time limits fixed by the Security of Payment Act do not easily accommodate the intervention of judicial review proceedings which lead to a determination being quashed[76].

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72 *Neller* [2009] 1 Qd R 390 at 401 [40].

73 (2004) 61 NSWLR 421.

74 *Shade Systems* (2016) 344 ALR 355 at 375 [84]-[85].

75 See *Building and Construction Industry Security of Payment Amendment Act* 2010 (NSW); *Building and Construction Industry Security of Payment Amendment Act* 2013 (NSW).

76 cf *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716 at 738-739 [101]-[102], 741 [116]-[117].

Kiefel CJ
Bell J
Keane J
Nettle J
Gordon J

Order

54 The appeal should be dismissed. It was a condition of the grant of special leave to appeal that Probuild would pay Shade Systems' costs of the appeal to this Court. It is therefore unnecessary to make an order as to costs.

55 GAGELER J. The sole question in this appeal is whether the Supreme Court of New South Wales has jurisdiction to make an order in the nature of certiorari to quash a determination made by an adjudicator under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Security of Payment Act") on the basis of a non-jurisdictional error of law in the reasons for the determination. I agree with the conclusion of the Court of Appeal that the Supreme Court lacks that jurisdiction and, accordingly, I agree that the appeal to this Court must be dismissed. I prefer to express my own reasons.

56 Departing from the approach of the Court of Appeal[77], I cannot see that answering the question has anything to do with reconciling conflicting enactments of the same legislature[78]. That is not because I overlook that the Supreme Court is continued by s 22 of the *Supreme Court Act* 1970 (NSW) as "the superior court of record in New South Wales" or that the jurisdiction that the Supreme Court has as "may be necessary for the administration of justice" in that State is now conferred by s 23 of that Act. Rather, it is because I recognise the Supreme Court's specific jurisdiction under s 69(1) now to grant by judgment or order the relief that the Supreme Court formerly had jurisdiction to grant by writs of prohibition, mandamus and certiorari as a continuation of its former supervisory jurisdiction, which until 1970 was expressed in terms of having and exercising in New South Wales like jurisdiction to that exercised by the Court of King's Bench in England[79]. The scope and incidents of that historical, inherited, supervisory jurisdiction were defined by the common law. The statutory perpetuation of that former jurisdiction does not alter its common law character.

57 The conferral on the Supreme Court by s 69(1) of specific jurisdiction to grant by judgment or order the relief that the Supreme Court formerly had jurisdiction to grant by writs of prohibition, mandamus and certiorari is subject to an implicit qualification. The qualification is that, within limits imposed on legislative power by the status afforded to the Supreme Court under Ch III of the Commonwealth Constitution, the jurisdiction yields to legislation which common law principles of interpretation indicate to manifest an intention that a decision or category of decisions is not to be quashed or otherwise reviewed. In respect of the confirmation by s 69(3) of inclusion within that jurisdiction of jurisdiction to make orders in the nature of certiorari quashing the ultimate determination of a court or tribunal on the basis of error of law on the face of the record, and the expansion for that purpose of the record effected by s 69(4), that qualification is made explicit by s 69(5).

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77 *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 344 ALR 355 at 363 [37], 366 [48].

78 Cf *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [33]-[35]; [2002] HCA 19.

79 *Australian Courts Act* 1828 (Imp) (9 Geo IV c 83), s 3.

58 The common law principles of interpretation applicable to determining whether legislation manifests an intention that a decision or category of decisions not be quashed or otherwise reviewed are not static. As with other common law principles or so-called "canons" of statutory construction, they have contemporary interpretative utility to the extent that they are reflective and protective of stable and enduring structural principles or systemic values which can be taken to be respected by all arms of government. And as with other common law principles of statutory construction, they are not immune from curial reassessment and revision[80].

59 The applicable principles, in my opinion, are no longer adequately captured in the all-encompassing aphorism that "recourse to the courts is not to be taken away except by clear words"[81] or in some variation of that aphorism[82]. In relation to review of a purported exercise of decision-making authority on the basis of jurisdictional error, there is now no doubt that recourse to the Supreme Court cannot be taken away by statute even by the clearest of words[83]. In relation to review of an exercise or purported exercise of decision-making authority on the basis of error of law on the face of the record, which unquestionably can be taken away by statute[84], our contemporary understanding of the nature and scope of judicial review demands some further revision.

60 The approach most consonant with our contemporary understanding of the nature and scope of judicial review, in my opinion, is that the question whether recourse to the Supreme Court to obtain an order in the nature of certiorari on the basis of error of law on the face of the record of a decision or category of decisions has been taken away by statute should now be answered through the application of ordinary statutory and common law principles of interpretation unencumbered by any presumption that it has not.

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80 *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; [1990] HCA 24.

81 *Hockey v Yelland* (1984) 157 CLR 124 at 130; [1984] HCA 72.

82 Eg *Clancy v Butchers' Shop Employés Union* (1904) 1 CLR 181 at 204; [1904] HCA 9; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160; [1991] HCA 33.

83 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [100]; [2010] HCA 1; *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398 at 413 [30], 422-423 [62]-[63], 426-427 [73]-[74]; [2012] HCA 25.

84 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [100]; *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 492 [26]; [2013] HCA 43.

61 Explaining why that should be so necessitates some reference to the expansion and decline of the writ of certiorari at common law during the course of the twentieth century. The forest of detail does not need to be traversed. Noticing the highs and the lows is enough.

62 Historically, and until well into the twentieth century, certiorari was conceived of primarily as a writ issued by a superior court of general jurisdiction to an inferior court of record of special and limited jurisdiction. The writ "called up", or "removed", into the superior court the record of a proceeding in the inferior court. If the proceeding had not been concluded by judgment in the inferior court, the proceeding could be continued to judgment in the superior court. If the proceeding had been concluded by judgment or order in the inferior court, the judgment or order could be "quashed" by the superior court. The jurisdiction of the superior court so to quash the judgment or order of the inferior court the record of which the superior court had called up was capable of being exercised on either of two bases, which were distinct in concept but which were capable of overlapping in practice: one was jurisdictional error on the part of the inferior court, which could be established to the satisfaction of the superior court by evidence led in the superior court; the other was error of law on the part of the inferior court, which could only be established to the satisfaction of the superior court by the superior court's examination of the removed record[85].

63 Quashing the judgment or order of the inferior court expunged that judgment or order from the public record, so as to "remove [it] out of the way, as one which should not be used to the detriment of any [citizen]"[86]. In the case of a judgment or order affected by jurisdictional error, the expunging was of that which had in law always been "invalid", "void" or a "nullity"[87]. In the case of a judgment or order affected by a non-jurisdictional error of law on the face of the record, the expunging itself rendered void that which had previously been "voidable only"[88]. The inferior court in the latter case lacked jurisdiction to

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85 See generally *Ex parte Mullen; Re Hood* (1935) 35 SR (NSW) 289 at 295-296; *Halsbury's Laws of England*, 2nd ed, vol 9 at 838-845 [1420]-[1432].

86 *Overseers of the Poor of Walsall v London and North Western Railway Co* (1878) 4 App Cas 30 at 39.

87 Eg *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114 at 157; [1909] HCA 90. See now *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11.

88 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391-392; [1938] HCA 7.

remake the quashed order: its jurisdiction had been duly exercised and, having been duly exercised, its jurisdiction was spent[89].

64 During the nineteenth century[90] and increasingly during the first half of the twentieth century[91], certiorari came to be recognised as available at common law to enable a superior court to call up and to quash the public record of a purported exercise of statutory decision-making authority by a person or body that was not a court of record where it could be shown that the person or body had acted in excess of their statutory authority. That can be seen, at least with hindsight, to have accorded with the practice of the Court of King's Bench established at the beginning of the eighteenth century when it was said[92]:

> "[T]his Court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to incroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here; to the end that this Court may see, that they keep themselves within their jurisdiction: and if they exceed it, to restrain them."

65 Of course, any repository of statutory decision-making authority might be shown to have committed a legal error which had the effect of causing the repository to act in excess of, or alternatively to fail to exercise, that authority. For example, an erroneous view of the law might have led the repository to consider and determine a question different from the question which the repository was statutorily authorised to consider and determine, to fail to take into account some statutorily mandated consideration or to take into account some statutorily impermissible consideration. Where an error of law could be shown to have led the repository of statutory decision-making authority into a jurisdictional error of that or some other kind, a purported decision made outside

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89 *Platz v Osborne* (1943) 68 CLR 133 at 148; [1943] HCA 39. See also *Overseers of the Poor of Walsall v London and North Western Railway Co* (1878) 4 App Cas 30 at 44.

90 See *Evans v Donaldson* (1909) 9 CLR 140 at 150-151, 156-157; [1909] HCA 46. See generally Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England*, (2006) at 254-258.

91 See *R v Commissioner of Patents; Ex parte Weiss* (1939) 61 CLR 240 at 251-252, 258; [1939] HCA 7.

92 *R v Inhabitants in Glamorganshire* (1700) 1 Ld Raym 580 at 580 [91 ER 1287 at 1288]. See generally Jaffe and Henderson, "Judicial Review and the Rule of Law: Historical Origins", (1956) 72 *Law Quarterly Review* 345 at 358-359, 362-364.

of the decision-making authority could be quashed by a writ of certiorari[93], enforcement of that purported decision could in any event be restrained by a writ of prohibition[94], and performance of any statutory duty on the part of the repository to exercise the decision-making authority which in law remained unperformed could be compelled by a writ of mandamus[95].

66 Before 1950, however, no one (or at least no judge deciding any reported case for some centuries) appears to have thought that the writ of certiorari was available at common law to be used by a superior court to quash, for non-jurisdictional error on its face, the public record of a decision of a person or body that was not an inferior court of record. Even in a case of an inferior court of record, the availability of the writ in a case of non-jurisdictional error on the face of the record was conceived of in very limited terms. That was in part, but only in part, because statutory reforms a century before had reduced the size of the writ's target by cutting back on much of what an inferior court had previously been required to write down with the result that there was little opportunity for the record of the inferior court to disclose legal error[96]. The inferior court also needed to be one the record of which the superior court was not disentitled from calling up; with the result that certiorari would not be available to quash for non-jurisdictional error a decision of an inferior court of record where a statutory provision was expressed to prevent removal of the record of that inferior court[97]. Much more significantly, the jurisdiction which the inferior court had exercised in making the decision needed to be one which the superior court was itself capable of exercising on the merits; with the result that certiorari would not be available to quash for non-jurisdictional error on the face of the record a decision

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93 Eg *Boulus v Broken Hill Theatres Pty Ltd* (1949) 78 CLR 177 at 191-192, 196; [1949] HCA 8; *Potter v Melbourne and Metropolitan Tramways Board* (1957) 98 CLR 337 at 343-344; [1957] HCA 43.

94 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 606; [1945] HCA 53.

95 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; [1933] HCA 30; *Ex parte Belling; Re Woollahra Council* (1946) 47 SR (NSW) 166 at 169-170; *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.

96 See generally *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153 at 166-170.

97 *Ex parte Blackwell; Re Hateley* [1965] NSWR 1061 at 1063-1065; *Spanos v Lazaris* [2008] NSWCA 74 at [15].

made by an inferior court in the exercise of a special jurisdiction statutorily conferred exclusively on that court[98].

67 What occurred in 1950 can be seen in retrospect to have been an early and, on the whole, unsuccessful judicial attempt to adapt the ancient writ to grapple with the rise of the administrative state. What then occurred was that a Divisional Court of the King's Bench Division of the English High Court of Justice held for the first time (or at least for the first time in several centuries) that certiorari was available to remove a "speaking order" made by a statutory tribunal into the High Court of Justice, there to be quashed for error of law on the face of the record irrespective of whether the error was one which had resulted in the tribunal having exceeded or failed to exercise its statutory jurisdiction[99]. The holding of the Divisional Court was upheld by the English Court of Appeal[100].

68 Coming at a time when it was still thought generally to be "better that this Court should conform to English decisions which we think have settled the general law in that jurisdiction than that we should be insistent on adhering to reasoning which we believe to be right but which will create diversity in the development of legal principle"[101], the holding of the Court of Appeal that certiorari was available to quash a decision of a statutory tribunal affected by non-jurisdictional error of law was uncritically accepted in this Court[102]. That

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98 *Ex parte Mullen; Re Hood* (1935) 35 SR (NSW) 289 at 295-296, 301-302, affirmed in *Mullen v Hood* (1935) 54 CLR 35; [1935] HCA 67. See also *Halsbury's Laws of England*, 2nd ed, vol 9 at 854 [1446].

99 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1951] 1 KB 711.

100 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338.

101 *Wright v Wright* (1948) 77 CLR 191 at 210; [1948] HCA 33.

102 *R v The District Court; Ex parte White* (1966) 116 CLR 644 at 655-656; [1966] HCA 69; *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 284; [1967] HCA 18; *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Ltd* (1968) 118 CLR 58 at 76-77; [1968] HCA 3; *Benggong v Bougainville Copper Pty Ltd* (1971) 124 CLR 47 at 55, 56, 58-59; [1971] HCA 31; *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 91-92; [1982] HCA 2; *Hockey v Yelland* (1984) 157 CLR 124 at 130, 139, 142-143, 147.

acceptance heralded a belated and somewhat tentative expansion by intermediate courts of appeal of the availability of certiorari at common law in Australia[103].

69 The expanded view of the availability of certiorari for non-jurisdictional error of law on the face of the record gave rise to a number of interrelated difficulties. Practical difficulties lay in identifying a satisfactory criterion by reference to which the record (or "quasi-record") of a repository of power not constituted as a court of record was to be identified, and in working out what more could or should be done by a repository whose valid decision had been quashed. Conceptual difficulties lay in explaining just how the common law could operate to invalidate an exercise of power that fell within the scope of an authority conferred by statute other than perhaps as an implied exception to the scope of that authority[104], and in coming up with a rational justification for distinguishing between the consequences of those non-jurisdictional errors of law which happened to find reflection in some document which could be accepted to form part of the record and those non-jurisdictional errors of law which did not[105]. The last of those difficulties was exacerbated by the acknowledged absence of any common law duty to give reasons for making an administrative decision, let alone to make and keep some sort of record of the process of reasoning which led to the making of such a decision[106].

70 None of those difficulties had been resolved in the case law in England before the availability of certiorari for error of law on the face of an administrative record was for most, if not all, practical purposes seen to be superseded there by a decision of the House of Lords in 1968 which expanded the notion of jurisdictional error to include most, if not all, errors of law committed by an administrator[107]. Coming at a time when decisions of the House of Lords had ceased to attract uncritical acceptance in Australia[108], this Court

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103 See generally *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368 at 388-393; *Kriticos v New South Wales* (1996) 40 NSWLR 297 at 299-301.

104 Cf *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 284.

105 Sawer, "Error of Law on the Face of an Administrative Record", (1954-1956) 3 *University of Western Australia Annual Law Review* 24 at 33-35.

106 See *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; [1986] HCA 7.

107 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. See *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 701-702; *Boddington v British Transport Police* [1999] 2 AC 143 at 154.

108 *Parker v The Queen* (1963) 111 CLR 610 at 632-633; [1963] HCA 14; *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 at 238; [1969] 1 AC 590 at 641.

continued afterwards steadfastly to refuse to accept that all errors of law were jurisdictional[109]. This Court nevertheless itself embraced a significant expansion of the notion of jurisdictional error some 20 years later.

71 The turning-point was *Attorney-General (NSW) v Quin*[110]. In the course of giving reasons for allowing an appeal against an order of the Court of Appeal of the Supreme Court of New South Wales, which order had been sought to be justified as an exercise of the Supreme Court's supervisory jurisdiction, Brennan J there formulated the principle that "[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power"[111]. His Honour added that "[i]n Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power"[112]. His Honour went on to explain both reasonableness[113] and procedural fairness[114] as within the category of limitations on the exercise of a statutory power that are ordinarily implied.

72 Ten years after *Quin*, in *Enfield City Corporation v Development Assessment Commission*[115], Gleeson CJ, Gummow, Kirby and Hayne JJ explained the principle formulated by Brennan J as encapsulating "[t]he fundamental consideration in this field of discourse"[116]. That fundamental consideration, their Honours noted, had been expressed in terms that "there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures" and that, although "there has never been a pervasive notion that limited government mandated an all-encompassing judicial

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109 Eg *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 92-95; *Hockey v Yelland* (1984) 157 CLR 124 at 130.

110 (1990) 170 CLR 1; [1990] HCA 21.

111 (1990) 170 CLR 1 at 35-36.

112 (1990) 170 CLR 1 at 36.

113 (1990) 170 CLR 1 at 36.

114 (1990) 170 CLR 1 at 39-40.

115 (2000) 199 CLR 135; [2000] HCA 5.

116 (2000) 199 CLR 135 at 152 [43].

duty to supply all of the relevant meaning of statutes", "the judicial duty is to ensure that [an] administrative agency stays within the zone of discretion committed to it by its organic act"[117]. To similar effect, Gaudron J referred in *Enfield* to the imperative for courts "within the limits of their jurisdiction and consistent with their obligation to act judicially" to "provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise"[118].

73 In the meantime, in *Craig v South Australia*[119], in the course of examining the contemporary scope of certiorari at common law for error of law on the part of an inferior court of record, Brennan, Deane, Toohey, Gaudron and McHugh JJ drew a critical distinction between a statutory conferral of decision-making authority on a court and a statutory conferral of decision-making authority on a person or body other than a court. The distinction then drawn was that "the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine" whereas "[a]t least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law"[120].

74 Their Honours adopted as expressive of the position in Australia the following statement of Lord Diplock in *In re Racal Communications Ltd*[121]:

> "Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so."

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117 (2000) 199 CLR 135 at 153 [43], quoting Monaghan, "*Marbury* and the Administrative State", (1983) 83 *Columbia Law Review* 1 at 32-33.

118 (2000) 199 CLR 135 at 157 [56].

119 (1995) 184 CLR 163; [1995] HCA 58.

120 (1995) 184 CLR 163 at 179. See also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82]; [2001] HCA 30; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 572-573 [68]-[70].

121 [1981] AC 374 at 383, quoted in *Craig v South Australia* (1995) 184 CLR 163 at 179.

75 The common law presumption of statutory interpretation that has come to be adopted in Australia can therefore be stated as being that a statutory conferral of decision-making authority on a person or body other than a court is conditioned by an implied statutory requirement that the person or body can validly exercise that authority only on a correct understanding of the law applicable to the decision to be made. The presumption is similar in concept and in operation to the common law presumptions of statutory interpretation which support statutory implication of conditions of reasonableness[122] and procedural fairness[123].

76 Absent "exclusion by plain words of necessary intendment", the repository of a statutorily conferred decision-making authority "must proceed by reference to correct legal principles, correctly applied"[124]. To proceed otherwise is for the repository to proceed in contravention of a limitation on the decision-making authority impliedly imposed by the legislature – to commit a jurisdictional error.

77 In light of the *Quin* explanation of the foundation and extent of the jurisdiction exercised by a court engaged in judicial review of non-judicial action, preservation of a discrete jurisdiction on the part of a superior court to issue certiorari to quash for non-jurisdictional error of law has fairly been referred to as "anomalous"[125]. The continuing concurrent existence of such a jurisdiction to quash for non-jurisdictional error of law on the face of the record the decision of a person or body that is not a court of record might be described, in the same terms used to describe the lingering existence of a not dissimilar jurisdiction at common law to quash an arbitral award for error of law on the face of the award, as an "accident of legal history"[126]. Perhaps more accurately, it

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122 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 349 [24], 351 [29], 362 [63], 370-371 [88]-[90]; [2013] HCA 18.

123 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 353-354 [77]; [2010] HCA 41; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 658-659 [66], 666 [97]; [2012] HCA 31; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 205 [75]; [2016] HCA 29.

124 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 354 [78].

125 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 470 [276]; [2002] HCA 16.

126 *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257 at 262. See also *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 556-557 [36]-[39]; [2013] HCA 5. Cf *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1951]

(Footnote continues on next page)

might be described as the aftermath of a failed mid-twentieth century experiment of the common law. If it is not yet to be buried, it is certainly not now to be exalted.

78 To persist in light of the common law presumption of statutory interpretation that a statutory conferral of decision-making authority on a person or body other than a court does not encompass authority to decide a question of law, or to make a decision otherwise than on a correct understanding of the applicable law, with another common law presumption of statutory interpretation that certiorari for error of law on the face of the record is available to quash the decisions of that person or body would at best be supererogation and at worst be conducive of incoherence. It is one thing to accept, where there is an affirmative statutory indication that the decision of a particular repository of statutory power is susceptible of being quashed for error of law on the face of the record, that an order in the nature of certiorari can issue to quash the decision where a material error of law is found on the face of the record without need to consider whether or not that error of law also amounts to a jurisdictional error[127]. It is quite another thing to assert, where there is an affirmative statutory indication that the decision-making authority conferred on a particular repository of statutory power encompasses authority to decide a question of law, or to make a decision otherwise than on a correct understanding of the applicable law, that the resultant decision is nevertheless susceptible of being quashed by certiorari for error of law on the face of the record unless there is some further affirmative statutory indication that certiorari is not available to be issued on that basis. In the case of a statutory conferral of decision-making authority on a person or body other than a court, no further affirmative indication of an intention to exclude certiorari is required.

79 The present case is an illustration of that point. Probuild conceded before the Court of Appeal and in its appeal to this Court that the error of law made by the adjudicator in the interpretation of the construction contract was a non-jurisdictional error.

80 Probuild's concession was undoubtedly correct. The authority that s 22(1) of the Security of Payment Act confers on an adjudicator to determine the amount and timing of a progress payment is an authority to determine (in the event of the recovery procedure prescribed in Pt 3 being regularly invoked) the amount and timing of a progress payment a statutory entitlement to which exists

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1 KB 711 at 721-722; *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338 at 351.

127 See *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 491-494 [24]-[30].

by operation of s 8 separately and in parallel to such common law or other statutory rights as the parties to the construction contract may have under or in respect of that contract. The adjudicator's making of the determination is explicitly conditioned by the requirement of s 22(2) which is expressed in terms no higher than that the adjudicator "is to consider" enumerated "matters", one of which is "the provisions of the construction contract". The adjudicator's authority to make the determination is required by s 21 to be exercised "as expeditiously as possible", and in any event within no more than ten business days of the adjudicator notifying the parties of his or her acceptance of the application, and without the parties having an entitlement to legal representation in any conference which the adjudicator might choose to call. If the adjudicated amount is not promptly paid, a certificate of the determination is then permitted by s 25 to be filed as a judgment for a debt in any court of competent jurisdiction and to be enforced accordingly without the adjudicator's determination being able to be challenged in any proceeding to have the judgment set aside. The principal statutory object stated in s 3(1), to ensure that a person undertaking to carry out construction work under a construction contract "is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work", would be thwarted were mere error of law made by the adjudicator in the interpretation of the contract to vitiate the determination and thereby to render it liable to be quashed or declared invalid by the Supreme Court.

81 But it is important to be clear about exactly what Probuild's concession necessarily involved. The concession involved acceptance that, despite the common law presumption that a statutory conferral of decision-making authority on a person or body other than a court is impliedly conditioned by a requirement that the authority be exercised only on a correct understanding of the applicable law, the textual and contextual indications are sufficiently strong to compel the conclusion that s 22(1) is properly interpreted within the totality of the statutory scheme of which it forms part as conferring authority on an adjudicator to make a determination based on the adjudicator's own interpretation of the construction contract irrespective of whether that interpretation be right or wrong in law. The concession also involved acceptance that s 22(1) confers that authority even though s 22(3) requires the determination made in the exercise of that authority to be in writing, and to include the adjudicator's reasons for the determination unless both parties have requested the contrary.

82 The statutory scheme would be internally contradictory, and the authority granted to the adjudicator to go wrong in law would be illusory, were the determination made by the adjudicator validly in the exercise of the authority conferred by s 22(1) susceptible of being quashed by an order in the nature of certiorari in every case where the adjudicator in fact went wrong in law on the basis of an error of law appearing in the reasons for the determination on the face of a record which the adjudicator is statutorily obliged to create under s 22(3).

83 That s 22(1) is properly interpreted as conferring authority on an adjudicator to make a determination notwithstanding that the determination is based on a legally erroneous interpretation of a construction contract, in my opinion, necessarily entails that s 22(1) is properly interpreted as ensuring that the adjudicator's misinterpretation provides no basis on which the determination is susceptible of being quashed or otherwise reviewed. The general supervisory jurisdiction of the Supreme Court to make an order in the nature of certiorari for error of law on the face of the record is displaced by the affirmative conferral of decision-making authority to err in law.

EDELMAN J.

Summary of the history and principles underlying this appeal

84 For centuries, common law courts engaged in a power struggle with Parliaments over the meaning to be given to clauses that purported to restrict judicial review for errors made by a decision maker. Privative clauses that purported to exclude or to restrict judicial review were construed narrowly by the courts, even when doing so would deprive the clause of any effect[128], and even when it could be said that there was no doubt that the legislative intention was to impose serious restrictions upon judicial review[129]. A détente emerged whereby that narrow approach to construction of privative clauses became a "working hypothesis ... known both to Parliament and the courts"[130].

85 A narrow approach to construction of privative clauses has always been applied whether or not the errors that the clauses purported to exclude were "jurisdictional" errors[131] or, as in many cases, "non-jurisdictional" errors of law on the face of the record[132]. In other words, a narrow approach to construction was taken whether or not the errors concerned the decision maker's authority to make the decision. For hundreds of years the rationale for the narrow approach

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128 *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 589.

129 Wade, "Constitutional and Administrative Aspects of the Anisminic Case", (1969) 85 *Law Quarterly Review* 198 at 199-200.

130 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; [2004] HCA 40; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 264 [171] per Kiefel J, 310 [312] per Gageler and Keane JJ; [2013] HCA 39.

131 *R v Justices of Somersetshire* (1826) 5 B & C 816 [108 ER 303]; *R v Cheltenham Commissioners* (1841) 1 QB 467 [113 ER 1211]; *R v Wood* (1855) 5 El & Bl 49 [119 ER 400]; *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442; *Ex parte Bradlaugh* (1878) 3 QBD 509.

132 See *R v Plowright* (1685) 3 Mod 94 [87 ER 60]; *Taylor (formerly Kraupl) v National Assistance Board* [1957] 2 WLR 189 at 193; [1957] 1 All ER 183 at 185; *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 588-589. See also Rubinstein, *Jurisdiction and Illegality: A Study in Public Law*, (1965) at 85.

has been said[133], in terms reiterated by this Court[134], to be the protection of a person's freedom of access to the courts to correct legal errors.

86 The rationale for the narrow approach has great force when applied to jurisdictional errors. An exclusion entirely of review on the basis of jurisdictional error could, in effect, allow the decision maker to assert unrestrained power[135], which would almost never be the intention of the legislature. Indeed, the potential for the creation of "islands of power immune from supervision and restraint" was one reason why this Court, in 2010, said that it would be beyond State legislative power wholly to exclude judicial review for jurisdictional error[136].

87 In contrast with privative clauses that purport to exclude review for jurisdictional error, those clauses that purport to exclude review for non-jurisdictional error do not create islands of unreviewable power. Instead, they preclude an assessment of whether a decision, made with authority, is "regular and according to law"[137]. In these cases the privative clause excludes review of the legality of the process of exercising power rather than the authority for the exercise of power. The rationale for a narrow approach to construction therefore applies with less force. The narrow approach was also, historically, an approach that was sometimes contrary to the intention of Parliament. Nevertheless, the narrow approach became an accepted approach and is today one of the working hypotheses upon which legislation is drafted. It is sometimes described as part of the principle of legality in the construction of legislation. The concept of "legality", in the principle of legality, must embrace the determination of whether decisions made with authority are legal – that is, whether they are made by a process that accords with the law: "[t]he rule of law and the ability to have

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133 *R v Jukes* (1800) 8 TR 542 at 544-545 per Lord Kenyon CJ [101 ER 1536 at 1538]; *Shaftesbury v Russell* (1823) 3 Dow & Ry KB 84 at 91-92 per Bayley J; *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868 at [19] per Sales LJ (Flaux and Floyd LJJ agreeing).

134 *Hockey v Yelland* (1984) 157 CLR 124 at 130 per Gibbs CJ (Brennan and Dawson JJ agreeing), 142 per Wilson J (Dawson J agreeing); [1984] HCA 72; *Jamieson v The Queen* (1993) 177 CLR 574 at 596 per Gaudron J; [1993] HCA 48; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633 per Gaudron and Gummow JJ; [1997] HCA 11.

135 *Ex parte Bradlaugh* (1878) 3 QBD 509 at 513 per Mellor J.

136 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99]-[100]; [2010] HCA 1.

137 *R v Bolton* (1841) 1 QB 66 at 72 per Lord Denman CJ [113 ER 1054 at 1057].

access to a court or tribunal to rule upon legal claims constitute principles of this fundamental character"[138]. Therefore, absent irresistible clarity, a construction will not be adopted which departs from the "general system of law" permitting review of authorised decisions for legal errors[139].

88 The appellant relied heavily upon the narrow approach to construction based upon the principle of legality. There was no dispute about the existence of the narrow approach to construction, which has supported the access of people to the courts to correct legal error for nearly four centuries. The principal issue in submissions was whether the narrow approach permits a construction of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Security of Payment Act") that excludes judicial review for non-jurisdictional error of law.

89 The appellant submitted that, since the Security of Payment Act contains no express privative clause excluding review for any error of law, the power of the court to review a decision under that Act for error of law could only be excluded by implication. The appellant then submitted, correctly, that an application of the narrow approach to construction of an express privative clause requires, at least, the same approach where a statute is said to contain a privative clause by implication.

90 If the narrow approach to construction were to apply with its usual force to the Security of Payment Act then it must be concluded that the Security of Payment Act had not excluded review for non-jurisdictional error of law. Even assuming, contrary to some older authorities, that the narrow approach permits legislation to abolish review for non-jurisdictional error of law merely by implication based upon a background assumption of the legislation, the narrow approach would not permit that implication in this case. This is particularly because the rules concerning the discretion to issue a writ of certiorari to quash a decision mean that the Security of Payment Act can operate without the exclusion of review for non-jurisdictional error of law. However, for the reasons below, I consider that the narrow approach to construction applies with very little force to legislation in the nature of the Security of Payment Act, which requires an adjudicator to determine parties' rights but, in effect, only on an interim basis.

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138 *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868 at [21] per Sales LJ (Flaux and Floyd LJJ agreeing).

139 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 264 [171] per Kiefel J, 307-308 [307]-[308] per Gageler and Keane JJ.

For that reason, there should be little constraint on the ordinary rules of construction, with the effect that the appeal should be dismissed.

Non-jurisdictional error and the narrow construction principle

91 From the use of modern certiorari for errors of law in the 17th century[140], and through the 18th and 19th centuries, courts rarely drew any clear or logical distinction between an error of law that was jurisdictional and one that was not[141] although, confusingly to modern eyes, the phrase "excess of jurisdiction" was sometimes used in contrast with "want of jurisdiction" to describe errors that were made within jurisdiction[142]. Further, although certiorari initially only issued to a court of record, by the beginning of the tribunal movement in the early 19th century that requirement was transformed into one only for the existence of a record[143]. No distinction was drawn between the review of a decision that would today be recognised as being "administrative" and one that would today be regarded as "judicial"[144]. Justices of the peace, numbering in the thousands, commonly made both types of decision[145]. Indeed, Maitland described local government as "government by justices of the peace"[146] and Jaffe and Henderson described them as the "administrators of England"[147]. As Vaughan Williams LJ

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140 Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963) at 109.

141 Sawer, "Error of Law on the Face of an Administrative Record", (1954-1956) 3 *University of Western Australia Annual Law Review* 24 at 34-35. See also *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at 683 [40] per Baroness Hale of Richmond JSC.

142 Rubinstein, *Jurisdiction and Illegality: A Study in Public Law*, (1965) at 66-69, explaining *Groenvelt v Burwell* (1700) 1 Ld Raym 454 [91 ER 1202] (also reported as *Grenville v The College of Physicians* (1700) 12 Mod 386 [88 ER 1398]).

143 Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England*, (2006) at 255.

144 Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England*, (2006) at 255-256.

145 Dawson, *A History of Lay Judges*, (1960) at 142-145.

146 Maitland, "The Shallows and Silences of Real Life", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 1, 467 at 468.

147 Jaffe and Henderson, "Judicial Review and the Rule of Law: Historical Origins", (1956) 72 *Law Quarterly Review* 345 at 363.

explained, "in practice a certiorari ... issued in cases in which it is impossible to say that there was a Court and a 'lis.'"[148] Nor was any distinction drawn between whether the decision in respect of which certiorari was sought was made by a justice or whether it was made by members of a statutory tribunal. Examples of tribunals to which certiorari was issued were the Commissioners of Sewers[149], the College of Physicians and the Commissioners for the repair of Cardiff Bridge[150], the General Commissioners for Income Tax[151], and there was also an analogous jurisdiction over arbitral tribunals where the concept of error of law on the face of the award also had a "long history"[152].

92 Nevertheless, there were some consequences arising from the weaker force with which the rationale for the narrow construction principle applied to non-jurisdictional errors. In England, those consequences have now reduced to vanishing point since the vast expansion of the concept of jurisdictional error to include all material errors of law[153]. In contrast, in Australia the distinctions have been magnified by the sharp difference in effect between jurisdictional and non-jurisdictional error.

93 The first consequence of a difference between jurisdictional and non-jurisdictional errors, as those concepts were then applied, arose in the middle of the 18th century when courts began to allow affidavit evidence to show an error

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148 *R v Woodhouse* [1906] 2 KB 501 at 513.

149 Although, exceptionally, a court of record, it was also "a full-scale 'administrative' organ": Jaffe and Henderson, "Judicial Review and the Rule of Law: Historical Origins", (1956) 72 *Law Quarterly Review* 345 at 349.

150 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338 at 350 per Denning LJ.

151 *R v Commissioners of Income Tax for City of London; Ex parte Commissioners of Inland Revenue* (1904) 91 LT 94 at 97 per Lord Alverstone CJ; Stebbings, "The origins of the application of certiorari to the General Commissioners of Income Tax", (1997) *British Tax Review* 119.

152 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 264 [32] per French CJ, Gummow, Crennan and Bell JJ; [2011] HCA 37. See *Kent v Elstob* (1802) 3 East 18 [102 ER 502]; *Hodgkinson v Fernie* (1857) 3 CB (NS) 189 [140 ER 712]; *In re Jones and Carter's Arbitration* [1922] 2 Ch 599.

153 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, as explained in *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 701-702 per Lord Browne-Wilkinson. See also *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at 683 [39] per Baroness Hale of Richmond JSC, 702 [110] per Lord Dyson JSC.

of law in the proceedings. Probably for pragmatic reasons, affidavit evidence came to be permitted only to show jurisdictional errors[154], leaving non-jurisdictional errors of law to be shown by reference only to the record. However, the classification of an error as jurisdictional was often functional based upon whether the judge wished to admit the affidavit evidence[155]. Further, as the leading 19th century decision in *R v Bolton*[156] shows, the classification of errors as jurisdictional proceeded by a different approach from that which is taken in Australia today[157].

94 A second consequence of the distinction between jurisdictional and non-jurisdictional error was the weaker force of the narrow construction principle in cases of non-jurisdictional error. A carefully drafted privative clause could prevent review for non-jurisdictional error even if it could not do so for jurisdictional error. Hence, a "no certiorari" clause could be effective to exclude non-jurisdictional errors[158] even if it was ineffective to exclude jurisdictional errors[159]. Although its force was weaker, a narrow approach was nevertheless still taken to the construction of clauses that purported to exclude non-jurisdictional errors. For instance, a "finality" clause was not effective to exclude

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154 *R v Wakefield* (1758) 1 Burr 485 [97 ER 417]; Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard Law Review* 953 at 958.

155 Murray, "Process, Substance and the History of Error of Law Review", in Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance*, (2016) 87 at 95.

156 (1841) 1 QB 66 [113 ER 1054].

157 *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 at 916 [113]; 347 ALR 350 at 380; [2017] HCA 33. See also Rubinstein, *Jurisdiction and Illegality: A Study in Public Law*, (1965) at 69.

158 *Ex parte Hopwood* (1850) 15 QB 121 [117 ER 404]; *R v Badger* (1856) 6 El & Bl 137 at 154, 162-163, 167 [119 ER 816 at 822, 825, 827]; *R v The Board of Works for the District of St Olave's, Southwark* (1857) 8 El & Bl 529 [120 ER 198].

159 *R v Justices of Somersetshire* (1826) 5 B & C 816 [108 ER 303]; *R v Cheltenham Commissioners* (1841) 1 QB 467 [113 ER 1211]; *R v Wood* (1855) 5 El & Bl 49 [119 ER 400]; *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442; *Ex parte Bradlaugh* (1878) 3 QBD 509; *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 at 702 per Salmond J; *R v Foster; Ex parte Isaacs* [1941] VLR 77 at 82; *R v Industrial Appeals Court; Ex parte Henry Berry & Co (Australasia) Ltd* [1955] VLR 156 at 162-163; *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 588.

review for any error of law[160] and many courts insisted that their power to grant a writ of certiorari for any error of law, jurisdictional or non-jurisdictional, could not be removed merely by inference from words used, however plain the inference might have been[161]. Exclusion was said to require express words[162].

95 The use of a writ of certiorari to quash a non-jurisdictional error of law almost declined into desuetude by the 20th century. One reason for this was that the inability to rely upon affidavit evidence meant that non-jurisdictional error was entirely dependent upon the court record[163] but legislative restraints, exemplified by the *Summary Jurisdiction Act* 1848[164], had removed much of the record from the purview of review[165]. By 1943, nearly a century after the *Summary Jurisdiction Act*, Lord Greene MR said that he could find "no trace of any exercise" of the jurisdiction to order certiorari for an error of law within jurisdiction[166]. However, this decision was overturned as per incuriam, and the previously long-established judicial review for non-jurisdictional error of law

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160 *R v Plowright* (1685) 3 Mod 94 [87 ER 60]; *R v Reeve* (1760) 1 Black W 231 [96 ER 127]; *R v Moreley* (1760) 2 Burr 1040 [97 ER 696]; *R v Jukes* (1800) 8 TR 542 [101 ER 1536]; *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 159-160.

161 Tyrwhitt, *Dickinson's Guide to the Quarter Sessions*, 6th ed (1845) at 948-949, 950; Hawkins, *A Treatise of the Pleas of the Crown: Or a System of the Principal Matters relating to that Subject, digested under their proper Heads*, (1721), bk 2 at 211.

162 See, eg, *Smith's Case* (1670) 1 Mod 44 at 45 [86 ER 719 at 720]; *R v Reeve* (1760) 1 Black W 231 at 233 [96 ER 127 at 128]; *R v Moreley* (1760) 2 Burr 1040 at 1042 [97 ER 696 at 697]; *R v Jukes* (1800) 8 TR 542 at 544-545 [101 ER 1536 at 1538]; *R v Hanson* (1821) 4 B & Ald 519 at 521 [106 ER 1027 at 1028]; *R v The Trustees of the Norwich and Watton Road* (1836) 5 Ad & E 563 at 579-580 [111 ER 1278 at 1284]; *Symonds v Dimsdale* (1848) 2 Ex 533 at 537 [154 ER 603 at 604-605]; *R v Brier* (1850) 14 QB 568 at 571 [117 ER 219 at 220]; *R v The Inhabitants of Sandon* (1854) 3 El & Bl 547 at 548 [118 ER 1247 at 1247]; *R v Hunt* (1856) 6 El & Bl 408 at 411, 414 [119 ER 918 at 919-920]; *Furtado v City of London Brewery Co* [1914] 1 KB 709 at 712; *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 162.

163 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338; *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58.

164 11 & 12 Vict c 43.

165 But cf *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890; 347 ALR 350.

166 *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 120.

was revived, in *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*[167]. Importantly, the decision in "*Northumberland Compensation Appeal Tribunal* no more changed the general law of certiorari than [*R v Bolton*] did"[168].

96 After the decision in *Northumberland Compensation Appeal Tribunal* the courts re-applied the same, long-standing, narrow approach to construction of privative clauses that purported to exclude review of non-jurisdictional errors. In 1957, in *R v Medical Appeal Tribunal; Ex parte Gilmore*[169] Denning LJ reiterated the approach taken by the courts for nearly 350 years where the courts refused to treat a "finality" clause as excluding certiorari for any error of law because "the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words"[170]. As Professor Wade expressed the point after that decision, in the first edition of his text, the approach was based upon the natural hostility to any attempt to "legalize illegalities and exempt them from judicial control"[171].

97 Following the decision in *Northumberland Compensation Appeal Tribunal*, this Court continued to treat "finality" clauses for non-jurisdictional error in the same way as they had been treated for all errors of law for hundreds of years[172]. This Court reiterated that it was necessary for "clear words"[173] to oust the authority of the Court to review non-jurisdictional errors of law. Although the narrow construction approach applied with less force to non-jurisdictional errors, the general approach remained the same for jurisdictional and non-jurisdictional errors of law.

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167 [1951] 1 KB 711 (Divisional Court); [1952] 1 KB 338 (Court of Appeal).

168 *R v West Sussex Quarter Sessions; Ex parte Albert and Maud Johnson Trust Ltd* [1974] QB 24 at 42 per Lawton LJ.

169 [1957] 1 QB 574 at 583-585.

170 *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 583.

171 Wade, *Administrative Law*, (1961) at 115.

172 *R v The District Court; Ex parte White* (1966) 116 CLR 644 at 655 per Windeyer J; [1966] HCA 69; *Hockey v Yelland* (1984) 157 CLR 124 at 130 per Gibbs CJ (Brennan and Dawson JJ agreeing), 142 per Wilson J (Dawson J agreeing).

173 *Hockey v Yelland* (1984) 157 CLR 124 at 130 per Gibbs CJ (Brennan and Dawson JJ agreeing); *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 252; [1992] HCA 24; *Jamieson v The Queen* (1993) 177 CLR 574 at 596 per Gaudron J; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633 per Gaudron and Gummow JJ.

98 There are modern decisions which, on one reading, might provide support for the older view according to which the narrow approach to construction apparently required express words and did not permit exclusion of judicial review for any error of law merely by implication, assuming that such a distinction between expression and implication could be sharply drawn. In *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[174], this Court said that "[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words". In one passage cited in support of that proposition, Gaudron J said that it was "contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant"[175]. However, it was common ground on this appeal that the narrow approach did not preclude legislation from excluding judicial review for non-jurisdictional error of law without express words but, assuming a clear distinction could be drawn, by necessary implication[176]. I proceed on that basis.

The narrow construction principle and the Security of Payment Act

99 The narrow construction principle was preserved in the *Supreme Court Act* 1970 (NSW). After the scope of the record was narrowed by the decision of this Court in *Craig v South Australia*[177], the *Supreme Court Act* was amended to confirm that a writ of certiorari could issue to quash the ultimate determination of a court or tribunal on the basis of an error of law that appears on the face of the record[178] and to provide that the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination[179]. The *Supreme Court Act*

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174 (1994) 181 CLR 404 at 421 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1994] HCA 54.

175 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205; [1992] HCA 28.

176 *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34] per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ, with the qualifier "at least"; [2002] HCA 19. See also *Hockey v Yelland* (1984) 157 CLR 124 at 142 per Wilson J; *Jamieson v The Queen* (1993) 177 CLR 574 at 596 per Gaudron J; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633 per Gaudron and Gummow JJ.

177 (1995) 184 CLR 163.

178 *Supreme Court Act* 1970 (NSW), s 69(3).

179 *Supreme Court Act* 1970 (NSW), s 69(4). With possible origins in the *Tribunals and Inquiries Act* 1958 (UK), s 12.

expressly preserved "common law principles ... effective to prevent the Court from exercising its powers to quash or otherwise review a decision"[180].

100 I accept the submission of the appellant that if this Court were to apply, with its usual strength, the traditional, narrow approach to construction of legislation that purports to exclude review for non-jurisdictional errors of law then this appeal should be allowed. Although the objects of the Security of Payment Act would be impaired by permitting review of non-jurisdictional errors, the Security of Payment Act does not contain clear or express words excluding judicial review for non-jurisdictional error of law. And if express words that are slightly ambiguous are ineffective to oust judicial review for non-jurisdictional error of law then, a fortiori, an implication derived from a background assumption must also be ineffective despite some impairment of the statutory objects of certainty of cash flow, speed, and efficiency, falling short of rendering the Security of Payment Act inutile.

101 There is a significant reason why the impairment of the objects of the Security of Payment Act by allowing review for non-jurisdictional error falls well short of rendering the Act inutile. The existence of a power of review for non-jurisdictional error does not mean that the power must always be exercised to quash a decision when error is found. The policy of the Security of Payment Act would be a powerful consideration in favour of the discretionary refusal of certiorari in many cases, including where the error is trivial or where the same result would occur without the error. These discretionary grounds for refusal of certiorari have "been in existence for centuries"[181]. To those well-known grounds could be added the circumstance where there is no real injustice likely to arise from an error of law due to an imminent determination of final rights with no substantial prejudice to the payer in the interim, and no likelihood of insolvency of the recipient of the payment.

102 However, I consider that the narrow construction principle applies with little force to the Security of Payment Act. Put another way, the principle of legality has "variable impact"[182] and, in this case, it applies only weakly. The reason for this weak application is that the adjudicator's determination is not, in a practical sense, concerned with a final adjudication of rights. Section 32 of the Security of Payment Act ensures that the courts retain the power to correct any errors in an adjudicator's determination. In that sense, the adjudicator's

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180 *Supreme Court Act* 1970 (NSW), s 69(5).

181 Shaw and Gwynne, "Certiorari and Error on the Face of the Record", (1997) 71 *Australian Law Journal* 356 at 365.

182 *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868 at [25] per Sales LJ (Flaux and Floyd LJJ agreeing).

determination can, loosely, be described as "interim". Indeed, the adjudicator's determination that was quashed by the primary judge has only an inchoate effect on interim rights because under s 25 of the Security of Payment Act the adjudication certificate, which can be requested by the claimant under s 24, cannot be enforced as a judgment for a debt until filed with an affidavit.

103 The variable application of the narrow construction principle is not novel. Indeed, in circumstances where a privative clause does not, in practice, affect a person's rights then the narrow construction principle might not apply at all. For instance, courts historically permitted the legislative ouster of jurisdiction by general implication if the restriction on jurisdiction was "for the benefit of the prosecuted" so that the matter could be heard by another court where costs were lower[183]. The less need there is for the rationale for the narrow approach to construction, the weaker will be the operation of the narrow approach to construction.

The Security of Payment Act construed with a weak application of the narrow construction principle

104 The principal issue is, therefore, whether, on ordinary principles of construction taking into account only a weak application of the narrow construction principle, the Security of Payment Act excludes judicial review for non-jurisdictional error of law. Such exclusion does not result from any express words. Nor does it result from a construction of the Security of Payment Act as though it contained any necessary "additional" words[184]. Nor does it result from a necessary implication from particular sections, words or phrases. Instead, it could only arise as a result of a necessary implication based upon a background legislative assumption. Implications with direct effect, that are based only on background legislative assumptions, are not commonly drawn. Nevertheless, the process of understanding all language requires the reasonable person to whom words are communicated to make background assumptions. The same is true of the understanding of language in, and therefore the process of construction of, contracts, wills, trusts, and statutes.

105 There are two reasons why the Security of Payment Act, on its proper construction, embodies a background assumption, with direct effect, that judicial review for non-jurisdictional error of law is excluded. First, in some, perhaps many, cases the beneficiary of a determination, who has obtained an adjudication certificate, will file the adjudication certificate in court as a judgment for the debt

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183 *Cates v Knight* (1789) 3 TR 442 at 444 [100 ER 667 at 668].

184 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38]; [2014] HCA 9.

found owing[185]. Restitution of a payment made as a result of the court judgment will be ordered if the judgment is set aside[186]. However, in a respondent's action to set aside the judgment, the respondent is not entitled to challenge the adjudicator's determination[187]. That would be effective to exclude certiorari for non-jurisdictional error of law[188]. Parliament cannot be taken to have intended to create a race to court between the beneficiary of an adjudicator's determination seeking a court judgment and the opposing party seeking that the determination be quashed so that a certificate cannot be issued or filed.

106 Secondly, the Security of Payment Act provides a strict timetable within which a decision must be made, without any right of appeal. The existence of a jurisdictional error, where the decision maker had no authority to decide, means that no real decision was made. But where a decision was made, with authority to do so, the strict timetable is premised upon the assumption that a decision will not be challenged for error of law. An adjudicator is to determine an adjudication application "as expeditiously as possible"[189] and, in any case, 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 adjudication application[190], or within such further time as the claimant and the respondent agree[191]. The adjudicator may, in certain circumstances, have only five business days after receiving the adjudication response from the respondent to determine the

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185 *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 25(1).

186 *The Commonwealth v McCormack* (1984) 155 CLR 273 at 276; [1984] HCA 57. See also *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 32(3)(b).

187 *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 25(4)(a)(iii).

188 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 at 370. See also *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 93; [1982] HCA 2; *Hockey v Yelland* (1984) 157 CLR 124 at 141-142.

189 *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 21(3).

190 *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 21(3)(a).

191 *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 21(3)(b).

adjudication application[192]. If the adjudicator determines that a respondent is required to pay an adjudicated amount then, subject to one exception[193], the respondent must pay that amount within five business days after the date on which the adjudicator's determination is served[194].

Conclusion

107 The basic question on this appeal concerned whether the Security of Payment Act had excluded judicial review for non-jurisdictional error of law. Where legislation, properly construed, has the effect that the error of law does not make the decision beyond power then the legislation has sometimes been described as creating authority to go wrong or, less elegantly, as conferring jurisdiction to decide a question wrongly[195]. As the appellant correctly submitted, these expressions conflate (i) a conclusion that a particular error is within jurisdiction but, due to a privative clause, possibly unreviewable, with (ii) a conclusion that the particular error is not merely unreviewable but that it is authorised. The second circumstance is almost non-existent. Parliament almost never authorises legal error. The unfortunate expression, "authority to go wrong", commonly refers only to the first circumstance, where a privative clause purports to preclude review of a legal error that does not take the decision beyond power[196]. The expression connotes only an error made by taking unlawful steps, revealed on the record, in the course of reaching lawful decisions in the exercise of public power. It does not mean that the decision maker was authorised to make the error, nor does it mean that the legislation, in Professor Wade's language described above, has purported to "legalize illegalities".

108 The Security of Payment Act did not authorise adjudicators to take unlawful steps by making errors of law. What it did do, by implication based upon a background legislative assumption, was to immunise from judicial review any non-jurisdictional error of law on the face of the record. The conclusion that

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192 *Building and Construction Industry Security of Payment Act* 1999 (NSW), ss 20(1) and 21(3).

193 *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 23(1)(b).

194 *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 23(1)(a).

195 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171 per Lord Reid.

196 Leeming, "The riddle of jurisdictional error", (2014) 38 *Australian Bar Review* 139 at 149.

judicial review of a non-jurisdictional error of law could be excluded merely by a background implication despite the narrow approach to construction is unusual. The reason for the unusual result is that the narrow approach applies only weakly to the construction of the provisions excluding judicial review of non-jurisdictional errors of law on the face of the record. The rationale for the narrow approach to construction is protective of the reason for judicial review, namely access to the courts to correct legal errors relating to a person's rights. Where, as here, that access is generally preserved without much practical effect on rights then the rationale is not sufficiently engaged to overcome the inference that arises from ordinary principles of construction.

109 The appeal should be dismissed.