# Construction Law Update

November 2018

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# Legislative update

## NEW SOUTH WALES

### Revised SOP Amendment Act overhauls entitlement to recover progress payments

#### *Building and Construction Industry Security of Payment Amendment Act 2018* (NSW)

*Richard Crawford | Andrew Hales*

In response to significant stakeholder feedback, changes were made to the Amendment Bill (**bill**) to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**). The NSW Parliament has now passed the bill and the Amendment Act was assented on 28 November 2018. There is no current indication as to when the changes will come into effect.

The new amendments go further than some of the changes proposed in the earlier version of the bill released for consultation, primarily in relation to sections 8 and 13 of the SOP Act, together with further refinements to the adjudication process and offences. On the other hand, some of the initial proposed changes have been removed from the bill. See our *August 2018 edition of Construction Law Update* for our earlier analysis of the bill and other amendments which remain unchanged.

#### Key new amendments

##### Abolition of entitlement based on reference dates and simplification of the process for recovering a progress payment

Section 8 of the SOP Act has been amended so that the entitlement to receive a progress payment is no longer triggered by a 'reference date'. The entitlement is now activated by the performance of work or the supply of goods and services under a construction contract. Section 13 of the SOP Act has been amended to clarify how a party entitled to payment under the new section 8 can recover a progress payment.

A new section 13(1A) to the SOP Act provides that a payment claim may be served on and from the last day of the month in which work was first carried out (or related goods and services first supplied) under the contract and on and from the last day of each subsequent month. This ensures that claimants can make a monthly payment claim. Parties can also stipulate a different monthly date under the new section 13(1B). Parties may also agree that payment claims are to be made more frequently than monthly (section 13(5)).

A new subsection 13(1C) to the SOP Act entitles a subcontractor to serve a payment claim on and from the date of termination of a contract. This amendment closes the loophole identified by the High Court in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 (see our *Roundup of 2016 Security of Payment cases*).

A head contractor will be subject to the shorter 20-business day deadline for paying progress payments to its subcontractors (section 11(1B)(a) of the SOP Act). However, the revised bill omits the proposed reduction of the existing 15-business day deadline for payments from a principal to a head contractor.

##### Amendments to the adjudication process

As in the consultation bill, a new section 17A to the SOP Act confirms that a claimant may withdraw an adjudication application prior to the appointment of an adjudicator at any time with notice. However, section 17A(2) provides that, after the appointment, a withdrawal will be ineffective if the respondent objects and the adjudicator believes that it is in the 'interests of justice' to uphold the objection. This is a broad test, and the adjudicator must consider the objectives of the Act – prompt payment – against factors such as that it may be unjust to force a claimant to incur additional costs in proceedings that it no longer wishes to press.

Section 32A(2) explicitly empowers the NSW Supreme Court to sever part of an adjudicator's determination infected by a jurisdictional error whilst confirming that the balance is enforceable. This overcomes the

decision in *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, which invalidated the entirety of a determination where one part was affected by a jurisdictional error.

#### Refinement of penalties

The SOP Amendment Bill largely upholds the increased penalties contained in the consultation bill, in particular those relating to directors and other officers of a corporation. The statutory limitation period remains at two years after the date of an offence. However, there has been a watering down of the criminal sanctions attached to providing false or misleading information (section 32P). In particular, the maximum three-month imprisonment for offending individuals has been removed.

Under a new subsection 35(4), regulations may prescribe information that is required to be provided to a subcontractor when entering into a construction contract. The regulations may also create offences punishable by a penalty up to 100 penalty units in relation to these requirements. Further ministerial powers of delegation are provided in the new section 36A.

Although the investigative and enforcement powers proposed in the consultation bill remain largely unchanged, the SOP Amendment Bill has inserted a new section 32E which directs that notices given under Part 3A of the Act (investigation and enforcement powers) have extraterritorial application. As long as the matter affects or relates to construction work carried out in NSW, a notice may be given to a person in respect of a matter even though the person is outside NSW or the matter occurs outside NSW.

### Next Steps

It is proposed that regulations will be developed following further stakeholder engagement. It is expected that an exposure draft of the regulations will be released for public consultation early next year.

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## New South Wales follows the Commonwealth in enacting procurement legislation

### Public Works and Procurement Amendment (Enforcement) Bill 2018 (NSW)

*Richard Crawford | Nicholas Grewal | Sam Skinner*

### Summary

The *Public Works and Procurement Amendment (Enforcement) Bill 2018* (NSW) (**Bill**) passed through the Senate on 14 November 2018. The Bill establishes a mechanism allowing the Supreme Court to deal with disputes on procurement processes, recognises the right of businesses to legally enforce their access to government procurement markets in participating nations and prioritises the need for affected applicants to be treated fairly. The Bill passed through the House of Representatives and Senate unamended.

### Background

The Commonwealth recently established its own legislation, the *Government Procurement (Judicial Review) Act 2018* (Cth) (analysed in our *October 2018* edition). Under the Trans-Pacific Partnership (**TPP-11**), the Commonwealth and all States and Territories must establish an independent review mechanism for government procurements. This Bill ensures that New South Wales maintains its commitment to the Commonwealth and obligations under the TPP-11.

### How it all works – Key aspects of the Bill

#### Elements of the review framework

The Bill amends section 175 of the *Public Works and Procurement Act 1912* (NSW) to reinforce the NSW Procurement Board's power to specify provisions in its directions and policies that are enforceable by the Supreme Court (**enforceable procurement provision**). These provisions will include a set of requirements that will apply to procurements of a certain value, which is to be determined by the board and updated every two years. The enforceable procurement provisions may also apply to procurements covered by an international procurement agreement.

A person supplying, or who could supply, goods and services to a government agency who feels their interests are affected by a breach of an enforceable procurement provision may:

- lodge a complaint with the head of the government agency; then
- the government agency must suspend the procurement action and investigate the complaint (unless a public interest certificate is issued).

If a 'genuine attempt' to resolve the issue fails, the complainant may then seek an independent review from the Supreme Court. The Supreme Court may issue an interim injunction provided:

- the grant of an injunction would not result in a significant delay to the procurement; and/or
- a public interest certificate has not been issued or, if it has, it would be in the public interest to grant an injunction.

The contravention of an enforceable procurement provision will not affect the validity of a procurement contract that has already been entered into between a government agency and a supplier.

#### Compensation

An affected applicant can apply to the Supreme Court at any time for an order of compensation for expenditure incurred in the procurement process and costs incurred when attempting to resolve the complaint.

### Where to next?

The Bill is now awaiting assent by the Governor and will come into force on a day to be appointed by proclamation.

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# QUEENSLAND

## Pre-Christmas commencement of the new Queensland security of payment regime

### *Building Industry Fairness (Security of Payment) Act 2017* (Qld)

*Michael Creedon | Andrew Orford | Sarah Ferrett*

### Summary

On 9 November 2018, the Queensland Government proclaimed that Chapter 3 (and related provisions) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**Act**) will commence on 17 December 2018.

The Terms of Reference, Evaluation Plan and proposed timeframes for the Building Industry Fairness Reforms Implementation and Evaluation Panel have been released

### Chapter 3 of the Act

Chapter 3 of the Act replaces, and significantly amends, the statutory regime for the adjudication of payment claims in Queensland under the existing *Building & Construction Industry Payments Act 2004* (Qld) and will apply to all payment claims issued on or after 17 December 2018.

Associated provisions related to subcontractors' charges and the adjudication registry will commence concurrently with Chapter 3, as will the supporting regulations prescribed under the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2018* (Qld).

#### Commencement of second phase of Project Bank Accounts will commence later

The second phase of Project Bank Accounts contemplated under the Act is excluded from the automatic commencement provisions and will separately commence by proclamation at a later date.

## Building Industry Fairness Reforms Implementation

In addition to the commencement of Chapter 3, the Department of Housing and Public Works this week provided an update on the Terms of Reference, Evaluation Plan and proposed timeframes for the Building Industry Fairness Reforms Implementation and Evaluation Panel. This was established in June this year pursuant to the Act.

### Terms of Reference of the Evaluation Panel

As outlined on the *Department's website*, the Panel's Terms of Reference are to determine:

- the effectiveness of the government's implementation of the suite of building industry reforms
- the effectiveness of the legislative framework in achieving policy intent
- opportunities to realise improved security of payment outcomes for industry prior to the commencement of project bank accounts in the private sector
- the indicative economic impacts and outcomes of the building industry reforms.

The Panel is expected to deliver its report on those Terms of Reference by the end of May 2019.

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# Queensland Government likely to introduce Supplier Demerit Scheme next year

## Demerit points scheme process for suppliers

*Michael Creedon | Megan Sharkey | Emma Page*

### Summary

In a consultation session hosted by the Infrastructure Association of Queensland (**IAQ**) on 7 November 2018, representatives from the Department of Housing and Public Works (**Department**) discussed the likely introduction of a demerit points scheme process for suppliers (**Scheme**).

### Background

The Scheme is aimed at penalising the wilful non-compliance of contractual and legislative obligations relating to delivery of local benefits, employment of apprentices and trainees, employment of Indigenous businesses, workplace health and safety, industrial relations and the security of payment regime. The current draft model sets out a matrix of minor, moderate and major levels of infraction.

### Key aspects

The Scheme appears similar to, but more nuanced than, a scheme that was first introduced in Western Australia in October 2015 and then expanded in September 2017.

The Scheme involves a three-step process following the Queensland Procurement Policy (**QPP**) Compliance Unit being informed of or identifying an infraction. The QPP Compliance Unit investigates the alleged breach and if confirmed, issues a demerit scheme show cause and imposes demerit points. A case study, which was worked through using the current draft model, saw the imposition of demerit points where the supplier failed to provide an acceptable reason for the breach, despite the fact the supplier had rectified the breach in accordance with contractual remedies.

### Sanctions

#### Demerit point system

The draft model would work in a similar way to the demerit point system for drivers' licences. Sanctions for future work will be issued where:

- sufficient demerit points are accumulated (currently 20 points);
- a contractor's overall performance is poor (eg. a Department prequalification score of below 40%); or
- for unethical or illegal conduct.

### Prequalification affected

Proposed sanctions for future work may include suspended prequalification or cancelled prequalification making the supplier ineligible for Government tenders. Regulators will also be informed of sanctions (eg the Queensland Building and Construction Commission and the Department's Building and Asset Services unit).

### Interim measures pending outcome

Questions were raised about options for appeal processes and the suspension or deferral of demerit points pending the outcome of decision-making processes.

## Other Queensland government departments

The Department stated that it was intended a similar scheme would be rolled out across all Queensland government departments. While the Department did not provide detailed reasons as to why the Scheme is required, the Department stated that the Queensland government would like the ability to prohibit certain suppliers from being engaged in Queensland government work where a supplier caused serious infractions and contractual remedies were not considered sufficient.

## Feedback

The Department welcomed all comments and requested that the industry provide feedback by the end of 2018. The Department noted that if the Queensland government decides to go ahead with the Scheme (which is not anticipated until 2019), there will be further opportunity for industry to provide comments and feedback before implementation.

Feedback can be sent directly to the *Department*.

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# In the Australian courts

# COMMONWEALTH

## Arbitration first, court will have to wait

***First Solar (Australia) Pty Ltd, in the matter of Lyon Infrastructure Investments Pty Ltd v Lyon Infrastructure Investments Pty Ltd* [2018] FCA 1666**

*Richard Crawford | Jessica Nesbit | Jessica Dixon*

## Key Point

A stay of court proceedings may be granted when the relief sought is ancillary to, or dependent on, the outcome of an arbitration.

## Significance

This case demonstrates that even proceedings against third parties can be stayed if the nature of the dispute and relief sought is sufficiently linked to, or dependent on, the outcome of an arbitration.

If a construction contract contains an arbitration clause, and a dispute under the contract is referred for final and binding arbitration, this will affect:

- when any proceedings relating to the contract may be heard; and
- what issues will be open to determination in those proceedings.

## Facts

Lyon Infrastructure Investments 1 Pty Ltd (**Lyon 1**) and Lyon Solar Pty Ltd (**Lyon Solar**) are the second and third defendants in proceedings currently before the Federal Court of Australia (**FCA**). Both Lyon 1 and Lyon Solar are related parties of the first defendant, Lyon Infrastructure Investments Pty Ltd (**Lyon**).

The plaintiff, First Solar (Australia) Pty Ltd (**First Solar**), is seeking, in the FCA, to have Lyon wound up and enforce its rights against Lyon 1 and Lyon Solar in respect of security, the subject of a general security deed between First Solar and Lyon.

Shortly after proceedings were commenced, Lyon issued First Solar with a notice of dispute and referred a dispute for final and binding arbitration in accordance with a deed of variation entered into by First Solar and Lyon. First Solar agreed that proceedings between itself and Lyon be stayed pending arbitration but contended that the proceedings against Lyon 1 and Lyon Solar continue.

Lyon 1 and Lyon Solar brought an interlocutory application before the court seeking that the proceedings against them also be stayed pending the determination of an arbitration between First Solar and Lyon. Lyon 1 and Lyon Solar contended that the relief sought by First Solar against them was closely linked and dependent on the outcome of the arbitration.

## Decision

The court exercised its discretion and ordered that the proceedings against Lyon 1 and Lyon Solar be stayed pending the outcome of the arbitration. The court found that the nature of the dispute against Lyon 1 and Lyon Solar was ancillary to the matters to be arbitrated by First Solar and Lyon.

In coming to his decision, Markovic J followed the salient matters identified by Lyon J in *CPB Contractors Pty Limited v Celsus Pty Ltd (formerly known as SA Health Partnership Nominees Pty Ltd)* [2017] FCA 1620 in determining whether or not to stay a proceeding. Markovic J focused on:

- whether the non-arbitral matters are ancillary to the matters the subject of the stay;
- whether the arbitral matters will be determinative of the matters before the court; and
- the effect that granting, or not granting, a stay would have on the monetary cost of resolving the dispute.

### Ancillary and determinative

The court found that when considered in the context of the dealings between the parties, the relief that First Solar seeks from Lyon 1 and Lyon Solar is contingent on the determination of rights between itself and Lyon. Markovic J stated that ultimately First Solar's rights to enforce its security by taking possession of secured property, realising that property and retaining any proceeds will depend on an arbitral finding in its favour.

### Cost efficient dispute resolution

In giving reasons supporting the grant of the stay sought by Lyon 1 and Lyon Solar, Markovic J also discussed the overarching purpose of the civil practice and procedure provisions in the *Federal Court of Australia Act 1976* (Cth), being cost-efficient dispute resolution. His Honour found that the relief sought by First Solar against Lyon 1 and Lyon Solar is so closely intertwined with the outcome of the arbitration that to permit the proceeding to continue in parallel to the arbitration would not be an efficient use of court resources as there would inevitably be duplication for parties, experts, legal advisers and resulting costs.

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# AUSTRALIAN CAPITAL TERRITORY

## Putting in your payment claim - when and what can you include in your payment claim?

### *Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd* [2018] ACTSC 282

*Richard Crawford | Nicholas Grewal | Angela Li*

#### Key Point

As long as it can be demonstrated that a construction contract existed between the parties, the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (**SOP Act**) will apply and the entitlement to serve a payment claim will arise. The court does not need to determine whether or not the work was actually performed under the construction contract in every case; it is enough that one party 'claims to be' entitled to a progress payment and that the other party 'may be' liable to make the payment.

A payment claim may include unpaid amounts that were the subject of a previous payment claim and not all work claimed needs to be performed within the preceding 12 months of that payment claim. It is sufficient as long as some of the work was undertaken within the preceding 12 months of that payment claim.

#### Facts

Core Building Group (**Core**) contracted Canberra Drilling Rigs Pty Ltd (**Canberra Drilling**) to perform piling and anchoring works for a multi-story residential building development (**Mezzo project**). Canberra Drilling subcontracted Haides Pty Ltd (**Haides**) to perform hard ground drilling and anchoring works for the Mezzo Project.

Haides undertook anchoring and drilling work on the Mezzo project in April and May 2016. A payment claim was served for $165,000 of which Canberra Drilling paid $120,000. A year later, at the request of Core, Haides did two more days of work on 31 May 2017 and 1 June 2017 (**additional work**). Canberra Drilling claimed it was not aware of Core's request for the additional work.

Haides then served a second payment claim on Canberra Drilling for $287,068.50 dated 16 June 2017, which included the additional work and the outstanding amount for work performed in April and May of 2016. On 1 September 2017, Haides served a third payment claim which was identical to the second payment claim, save for a different 'claim date' of 31 August 2017. These two payment claims did not state a reference date.

Haides received no payment for the works and applied for adjudication of the third payment claim. The adjudicator issued a determination that Canberra Drilling pay Haides $284,057.50. Canberra Drilling commenced judicial review proceedings, challenging the adjudicator's decision on error of law.

The grounds of the challenge were:

- The additional work was not work carried out under the contract between Canberra Drilling and Haides.
- The second and third payment claims were made in respect of the same reference date, which Canberra Drilling contended is 30 June 2017, in contravention of section 15(5) of the SOP Act.
- The same work was claimed in both the first payment claim and the third payment claim, in further contravention of section 15(5) of the SOP Act.
- Because it was for works for which Haides was not entitled to claim payment, insofar as the third payment claim related to the additional work, the third payment claim was not a valid payment claim due to the time limit stipulated in section 15(4)(b) of the Act.

#### Decision

The court dismissed all four grounds of Canberra Drilling's application with costs.

McWilliam AsJ held that Canberra Drilling had failed to establish any error of law in the adjudicator's decision and found that the third payment claim was valid.

### Ground 1: Not necessary to determine whether or not work is actually performed under construction contract

In this case the construction contract was oral and the parties disputed the nature of work to be performed and the contract price.

The court noted that the SOP Act permits a person to make a claim if they 'are entitled' to a process payment and also if that person 'claims to be' entitled to a progress payment. Therefore the court held that a claim under the SOP Act is not the forum to resolve contractual terms in order to establish whether or not work was performed 'under the contract' since this would defeat the entire objective of the SOP Act.

His Honour held that a basic and essential requirement for an adjudicator to make a determination is the existence of a construction contract between the parties. However, this does not require determining whether or not the work was actually performed 'under the contract' in every case. It is sufficient that:

- there was a construction contract between Haides and Canberra Drilling;
- Haides claims the work was done under it; and
- it is at least arguable that the work was either expressly incorporated or necessarily part of the work to be performed under the contract.

### Ground 2: Not the same reference dates for second and third payment claims

Section 15(5) of the SOP Act prohibits a claimant giving more than one payment claim for each reference date. McWilliams AsJ noted that the SOP Act does not require work to have been carried out in a particular month in order for it to be a 'named month' to correlate with the definition of a reference date. His Honour preferred to construe the SOP Act as allowing a claimant to issue a payment claim any time up to 12 months (in the absence of any time stipulated in the contract) from the date the work was last carried out.

Applying this construction of the SOP Act:

- the additional work carried out on 1 June 2017 gave rise to a reference date of 30 June 2017, and subsequent reference dates of 31 July 2017 and 31 August 2017;
- the third payment claim's reference date was 31 August 2017 which is different from the second payment claim's reference date of 30 June 2017;
- with a reference date of 30 June 2017, the second payment claim which was served on 16 June 2017 would be invalid since Haides' entitlement to serve this payment claim arose only on and from 30 June 2017.

### Ground 3: Permissible to claim unpaid items in respect of the same work in subsequent payment claims

Section 15(6) of the SOP Act makes it clear that section 15(5) of the SOP Act does not prevent a claimant from including in a payment claim an amount that has been the subject of a previous payment claim. A claimant is entitled to make a claim for earlier work done and for which it has not been paid. Canberra Drilling did not make any payment of the second payment claim and it was therefore permissible for Haides to include those unpaid items in its third payment claim.

### Ground 4: Sufficient that some of the work covered in the third payment claim was in the preceding 12 months

McWilliam AsJ held that the third payment claim was within the time frames imposed by the SOP Act.

While acknowledging the essential compliance with the time limit in section 15(4) of the SOP Act, his Honour held that it was sufficient so long as some of the work in a payment claim was undertaken in the 12 months preceding the payment claim in question.

His Honour also observed that Canberra Drilling's argument depended on the court finding that the additional work was outside the scope of the contract between Canberra Drilling and Haides because it would have meant the work claimed in the third payment claim (served on 1 September 2017) was last carried out in May 2016. Since his Honour had already found under the first ground that Haides was entitled to claim for the additional work, the third payment claim was valid.

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# NEW SOUTH WALES

## Signatures, service, sums: the NSW Supreme Court further clarifies the requirements of a payment claim under the SOP Act

### *Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd* [2018] NSWSC 1578

*Richard Crawford | Kate Morrison | Will Ryan*

### Key Points

A payment claim will not be invalidated if the payment claim is served after the date of the supporting statement.

An adjudicator's determination will be invalidated on the grounds of jurisdictional error if the adjudicator incorrectly determines what is claimed in the payment claim. This is distinct from when an adjudicator incorrectly determines the legal or factual grounds of a dispute, which is a non-jurisdictional error that cannot be quashed.

### Significance

Contractors can rest assured that they do not need to rush to serve payment claims on the date that any supporting statement is signed. However, if a payment claim is adjudicated, a contractor will fail if it attempts to claim allowances which fall outside the scope of that payment claim.

### Facts

The dispute concerned both the validity and sum of a payment claim for $3.66 million by Icon Co (NSW) Pty Ltd (**contractor**). The superintendent, acting on behalf of Australia Avenue Developments Pty Ltd (**principal**), reviewed the claim and issued a combined progress certificate and payment schedule for the lower price of $1.16 million. The contractor lodged an adjudication application and the adjudicator determined that the amount to be paid was $2.64 million.

The principal challenged the adjudicator's determination on two grounds:

- The principal disputed the validity of the payment claim because the supporting statement predated service of the payment claim. The adjudicator had dismissed this contention because the reference date on the payment claim covered the same period as the supporting statement.
- The principal disputed the sum of the payment claim because, when issuing a combined progress certificate and payment schedule, the superintendent had allowed for previous deductions from the contract works price (**backcharges**). The adjudicator had made allowances in favour of the contractor on these items. The principal disputed this and argued that these allowances fell outside the scope of the payment claim and that the adjudicator had thereby exceeded her jurisdiction.

### Decision

The court allowed the appeal and ordered that the determination by the adjudicator be quashed.

#### Validity of the payment claim where signature of the claim and supporting statement predated service

The principal contended that the payment claim did not comply with the requirements of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) because the supporting statement did not include a declaration concerning payment of subcontractors in the appropriate form. Specifically, the principal argued that a payment claim is not 'made' until it is actually served, and hence the supporting statement was invalid as it predated service by 5 days.

Parker J disagreed. His Honour held that sections 13(7) and (9) of the SOP Act should not be construed so as to impose an obligation to ensure that the supporting statement is up to date at the point of service. Instead, the proper construction of section 13(9) of the SOP Act merely requires that the declaration must refer to the work the subject of the payment claim and state that all of the subcontractors have, at the date of

the declaration, been paid. Hence, where the payment claim and supporting statement have concurrent reference dates, it is inconsequential that service occurs later.

In arguing for this construction, Parker J emphasised that, otherwise, a one-day delay in service after signing a supporting statement would result in non-compliance with the SOP Act – a 'draconian consequence'. Further, as a contractor has twelve months after construction work is finished to lodge a payment claim for that work, it is unreasonable to expect that the claim may be non-compliant due to a one-day delay in signature and service.

Interestingly, his Honour acknowledged a 'lacuna in the legislation': where a subcontractor has undertaken work but is not contractually entitled to payment until a date after the contractor is entitled to payment for that work, it is permissible for the contractor to make a claim and enforce payment despite not having paid the subcontractor's amount.

### Inclusion of backcharges in sum of payment claim

Further, the principal argued that the adjudicator erred in entertaining a challenge to the backcharge items, as those items were not part of the payment claim and hence not part of the adjudication process. Parker J agreed, stating that the backcharge items should not have been raised in the payment schedule. Rather, where a payment claim is made up of a number of individual items for which an amount is claimed, the adjudication must be limited to those items and those amounts.

His Honour next considered whether this error was a jurisdictional one which invalidated the determination. Parker J determined that it was. This was based on a distinction his Honour drew between an adjudicator determining what is claimed in the payment claim, and an adjudicator determining the grounds, factual or legal, upon which the contractor's claim is based. Here was the former; determining whether the backcharges were to be included in the claim is an anterior point to the determination of the dispute and is not a matter which requires adjudicatory expertise. Essentially, the adjudicator had given a determination in favour of a contractor which went beyond what the contractor claimed in the payment claim. This was a jurisdictional error which invalidated the adjudicator's determination.

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## Is an out of time payment schedule a valid answer to a notice to adjudicate?

### *Forte Sydney Construction v Lin Betty Building Group* [2018] NSWSC 1429

*Richard Crawford | Jessica Nesbit | Caitlin Ford*

### Key Point

An out of time payment schedule will not be a valid payment schedule in response to a claimant's later notice of its intention to apply for adjudication under section 17(2)(a) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

### Significance

When a claimant serves a payment claim under section 13 of the Act, a respondent may reply by providing a payment schedule under section 14 of the Act. If the respondent fails to provide a payment schedule within the time required by the Act, a claimant may make an adjudication application under section 17(1)(b) of the Act in relation to the payment claim. However, the claimant cannot proceed to adjudication without first giving the respondent notice of its intention to apply for adjudication and a further opportunity to provide a payment schedule within five business days of receiving the claimant's notice.

A previous, out of time, payment schedule purportedly provided by a respondent under section 14 of the Act will not be a valid payment schedule for the purpose of responding to a claimant's notice of its intention to apply for adjudication. A respondent must provide a separate payment schedule in response to the claimant's notice of adjudication. Accordingly, the court held that the respondent lost its right to lodge an adjudication response under section 20(2A) of the Act.

The court also confirmed that an adjudicator is not discharged from considering the merits of a claim simply because no payment schedule has been provided or because no arguments have been validly put forward by a respondent.

## Facts

Forte Sydney Construction (**FSC**) was the head contractor for the construction of a residential apartment project at Ryde. By subcontract, FSC engaged Lin Betty Building Group (**LBBG**) to perform hebel block and gyprock works.

On 25 May 2018, LBBG served a payment claim on FSC. The time for providing a payment schedule in response to that payment claim expired on 8 June 2018. FSC did not provide a payment schedule within the time required by the Act but instead provided a later payment schedule on 15 June 2018 (**15 June payment schedule**).

On 17 July 2018, pursuant to section 17(2) of the Act, LBBG issued a notice to FSC of its intention to apply for adjudication of the payment claim(**section 17(2) notice**). Under section 17(2)(b) of the Act, FSC had five business days after service of that notice to respond with a payment schedule. FSC did not provide a payment schedule within this time. LBBG subsequently made an adjudication application and served its application on FSC.

Section 21(1) of the Act provides that an adjudicator must not determine an adjudication application until after the end of the period which the respondent may lodge an adjudication response. On 10 August 2018 (which was before the end of the period which FSC had to lodge an adjudication response pursuant to the timing under the Act), the adjudicator issued his determination in favour of LBBG. The adjudicator noted that:

- although a payment schedule had been issued by FSC on 15 June 2018, it was invalid because it had not been issued within ten business days after the service of LBBG's payment claim; and
- because FSC failed to provide a valid payment schedule under either sections 14 or 17(2)(a) of the Act in response to LBBG's section 17(2)(a) notice, FSC was not entitled to serve an adjudication response pursuant to section 20(2A) of the Act, an adjudication determination could be made without waiting out the prescribed period under section 21(1) of the Act.

FSC commenced proceedings in the Supreme Court seeking to quash the adjudicator's determination. FSC raised three grounds to support its case:

- The adjudicator denied FSC natural justice by failing to consider the 15 June payment schedule, arguing that the 15 June payment schedule (which was ineffective for the purposes of section 14(4) of the Act) nonetheless stood as a payment schedule that was to be taken as an answer to the claimant's subsequent section 17(2)(a) notice.
- The adjudicator had determined the application before he was entitled to do so, contrary to section 21(1) of the Act.
- The adjudicator failed to carry out his statutory functions under the Act.

## Decision

The court found that each of the grounds raised by FSC failed. The court dismissed the summons and ordered that LBBG be paid $314,463.49.

In relation to the first ground, the court held that on a proper construction of the language of section 17 of the Act, a respondent is required to provide a separate payment schedule expressly in response to the claimant's section 17(2)(a) notice. The court concluded that an out of time payment schedule, such as the 15 June payment schedule provided by FSC, cannot stand as an answer to a claimant's notice.

The court also held that since the first ground was decided against FSC, the second ground did not arise.

In regards to the third ground, the court concluded that the adjudicator had properly considered the material submitted in support of the payment claim, and that the material satisfied him that the claim had been validly made. Therefore, the court found that the third ground also failed.

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# Prepare to pay! The Supreme Court takes builder-friendly approach to owner's challenges to adjudication determination

## *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* [2018] NSWSC 1229

*Richard Crawford | Marie Schultz | Sophie Wallwork*

### Key Points

Three key points can be derived from this decision:

- a common sense approach to the construction of supporting statements is preferred,
- an adjudicator's requirement to *'have regard to'* something is effectively the same as the requirement to *'consider'* something; and
- risk of recovery alone is not enough to justify a stay to an adjudication determination.

### Facts

On 10 July 2017, Goodwin Street Developments Pty Ltd (**Goodwin**) entered into a construction contract (**contract**) with DSD Builders Pty Ltd (**DSD**) as head contractor. Goodwin purported to terminate the contract in March 2018. DSD served a payment claim on 30 April 2018. Goodwin then provided a payment schedule which denied liability, claimed that DSD owed it a substantial amount of money, and provided that the scheduled amount was nil.

Shortly after, DSD made an adjudication application to the Australian Building and Construction Dispute Resolution Service which was referred to, and accepted by, the adjudicator. Despite being notified that the adjudication application had been accepted by the adjudicator, Goodwin failed to lodge its adjudication response in time, and the adjudicator dealt with the matter *'on the basis that the relevant dispute was constituted by the payment claim and the payment schedule'*. The adjudicator ultimately determined that DSD was entitled to $265,000.

Goodwin commenced proceedings to quash that determination on the basis that:

- the payment claim was invalid because it did not include the supporting statement referred to in section 13(9) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Security of Payment Act**); and
- the adjudicator did not exercise her statutory function, or did not perform it in good faith, because she did not value the construction work and reach conclusions on the question of defects, as required by section 10(1)(b)(iv) of the Security of Payment Act.

The document put forward as the *'supporting statement'* for the purposes of the Security of Payment Act stated that DSD is the head contractor and had contracted with a subcontractor, BH Australia Constructions Pty Ltd. The document also included a statement that *'all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute)'* but did not include any attachment.

In the event that those challenges failed, Goodwin submitted that the court should, in any event, prevent DSD from *'enjoying the fruits of its success in the adjudication'* and stay the enforcement of the adjudication determination on the basis that Goodwin may suffer irreparable prejudice by reason of DSD's financial position.

### Decision

The court held that each of Goodwin's jurisdictional challenges failed and that there was not sufficient evidence, beyond the existence of the risk of recovery alone, to justify a stay of enforcement of the adjudication determination. As a result, the court dismissed the proceedings with costs and ordered the payment to DSD of the amount paid into the court by Goodwin.

### Validity of the supporting statement

Goodwin submitted that the subcontractor had to be identified in some form of supporting schedule and, in the absence of any attachment to the supporting statement, there was no identification of whether any amounts were owing.

The court did not agree with either submission, instead finding that the document put forward as the supporting statement, when looked at as a whole, clearly identified there was only one subcontract, listed the name of the subcontractor and specified that no money was owing. Further, if any amounts owing were to be identified by means of an attachment, then the absence of such an attachment would suggest that no amounts were said to be owing.

### Exercise of adjudicator's statutory function in good faith

The court held that the adjudicator was required to have regard to the matters set out in section 10(1)(b) of the Security of Payment Act. McDougall J, citing *Zhang v Canterbury City Council* [2001] NSWSC 167, provided that the obligation to *'have regard to something'* required that *'the specified considerations be given weight as fundamental elements in the determination; that they be considered as the focal points by reference to which the relevant decision is to be made'*. That is, the requirement to *'have regard to'* something is effectively the same as the requirement to *'consider'* something.

His Honour also reiterated his previous statements from *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering and Construction Pty Ltd* [2010] NSWSC 818 (***Laing O'Rourke***) that the obligation to exercise the statutory function in good faith *'requires at least that adjudicators should turn their minds to, grapple with and form a view on all matters that they are required to "consider" '*.

Further, and in keeping with the findings of *Vickery J in SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 (***SSC Plenty***), the critical findings to be made by the adjudicator should include whether the construction work had been performed and, if it had, the value of the same. That task, according to McDougall J, required the adjudicator to assess fairly and weigh the whole of the evidence, including by drawing necessary inferences from the absence of supporting material, to arrive at a rational conclusion.

While the judgment of Vickery J in *SSC Plenty* sets out the full analysis of what is required of an adjudicator when making determinations in NSW, McDougall J took the view that it is not necessary to *'serially and mechanically'* apply those requirements in every case, and that doing so may lead the court to base its review on the merits, as opposed to jurisdictional error and want of good faith as required. For that reason, McDougall J's simpler description of the fundamental requirement of good faith given in *Laing O'Rourke* is preferred.

His Honour highlighted that it is necessary to consider an adjudicator's reasoning in light of the compressed time constraints in which it is created.

The court opined that the fundamental problem with the adjudicator's reasons was that it showed she was well aware of Goodwin's claim for defective work, but made no precise finding on the topic. His Honour stated that *'it would have been helpful for the adjudicator to express a clear view in clear terms as to what she found and why'*.

However, despite these comments, McDougall J ultimately held that it was clear that the adjudicator proceeded on the basis that it was for Goodwin to satisfy the adjudicator of the amount of any offsetting claim and drew inferences from Goodwin's failure to adduce sufficient supporting evidence. The court stated that *'in circumstances where a party who raises an issue adduces no evidence on it, it is appropriate for the adjudicator to draw inferences from the absence of supporting material'* and found that this is what the adjudicator had tried to do in her reasons.

When reading the relevant part of the adjudicator's reasons as a whole and in context, and without any predisposition to find error in them, the court found that the adjudicator had:

- adequately dealt with the dispute before her;
- said that she was not satisfied that there was defective work; and
- given substantive reasons why.

### Irreparable prejudice

As each of Goodwin's jurisdictional challenges had failed, the court turned to the stay of the adjudication determination sought by Goodwin.

McDougall J applied the decisions in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2018] NSWCA 33 and *R J Neller Building Pty Ltd v Ainsworth* [2009] QCA 397, particularly the comments in the latter case of Keane JA that:

- the mere existence of the risk that a builder might ultimately be required to refund cash to an owner and be unable to do so due to financial failure is not enough, without something more, to justify a stay of enforcement of an adjudication; and
- pending final determination, the Security of Payment Act in effect transfers risk from the builder to the owner.

While his Honour did accept that there was, at least, a possibility that the builder would be unable to satisfy a verdict in favour of Goodwin, in the absence of any evidence that DSD had taken steps to arrange its affairs to defeat any claim that may be made against it or engaged in delaying tactics, McDougall J held that there was nothing more than the risk of recovery alone in this case and therefore there were no circumstances to justify the imposition of a stay.

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# QUEENSLAND

## No bias for the Aurizon

### *Aurizon Network Pty Ltd v Queensland Competition Authority & Ors* [2018] QSC 246

*Julie Whitehead | Luke Trimarchi | Emma Page*

#### Key Point:

The Queensland Supreme Court has dismissed Aurizon Network Pty Ltd's (**Aurizon**) claim that the Queensland Competition Authority (**Authority**) was affected by apprehended bias in its draft decision to limit Aurizon's draft access undertaking in respect of the Central Queensland Coal Network (**CQCN**).

#### Significance

To establish apprehended bias, two steps are required. First, the matter that might lead a decision-maker to make a decision other than on its legal and factual merits must be identified. Second, there must be a logical connection between the identified matter and the feared outcome of deviation. The logical connection(s) must not be tenuous or theoretical.

#### Facts

On 11 May 2016 the Authority (made up of three members), pursuant to its powers under the *Queensland Competition Authority Act 1997* (Qld) (**Act**), required Aurizon to give an updated draft access undertaking. After conducting an investigation, the Authority released its draft decision on 15 December 2017 which reduced the potential revenue of Aurizon by $1bn. Three days later, the Chairman of the Authority, Professor Green, was announced as the Chair of the Port of Newcastle.

Aurizon claimed that the Authority, by reason of Professor Green's new appointment, was affected by apprehended bias for the following reasons:

- coal is transported by way of the CQCN for sale in the seaborne coal market;
- coal is also transported through the Port of Newcastle for sale in the seaborne coal market;
- the Authority's draft decision may have an impact on the maintenance or expansion of the CQCN; and
- there is a real and sensible possibility that the Authority's views, if adopted in the final decision, might decrease sales transported on the CQCN and increase sales of coal using the Port of Newcastle.

Aurizon made a judicial review application to the Queensland Supreme Court on the basis of apprehended bias and contravention of section 219(5) of the Act due to non-disclosure of Professor Green's alleged conflict of interest.

### Decision

The court dismissed the application. The court held that the logical connection(s) required for apprehended bias were similar to those considerations required for a contravention of section 219(5) of the Act and, in the circumstances of this case, such connections were too tenuous and theoretical. The court concluded that no fair-minded observer would have reasonably apprehended that Professor Green would not have been impartial.

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## Cultural heritage management plan requirements clarified

### *Mirvac Queensland Pty Ltd v Chief Executive, Department of Aboriginal and Torres Strait Island Partnerships* [2018] QSC 248

*Michael Creedon | Amy Dunphy | Hugh Pegler*

### Key Point

The Queensland Supreme Court has confirmed that when negotiating a cultural heritage management plan (**CHMP**) under the *Aboriginal Cultural Heritage Act 2003* (Qld) (**Act**), an endorsed party must remain an 'Aboriginal party' under the Act until the CHMP is submitted for approval. The loss of Aboriginal party status after submission but prior to a decision being made on the CHMP application will not be cause for refusal.

### Significance

If an endorsed party loses its status as an Aboriginal party at any time before a CHMP is submitted for approval, it is likely that approval will be denied. However, the loss of Aboriginal party status for only part of a plan area will not preclude a party from remaining an endorsed party for the purposes of CHMP approval.

### Facts

Mirvac Queensland Pty Ltd (**Mirvac**) was undertaking a residential subdivision development and sought to comply with the cultural heritage duty of care under the Act by having a CHMP with a former native title applicant approved. Mirvac endorsed that applicant to take part in the CHMP development. Another native claim was subsequently registered over a small part of the plan area. The CHMP was agreed and submitted for approval (and under section 107(3) of the Act was required to be approved as there was an endorsed party for the CHMP).

Following submission but prior to the approval decision being made, another native title claim was registered over the balance of the plan area. The original endorsed applicant ceased to be an Aboriginal party for any of the plan area.

The Chief Executive's delegate (**Chief Executive**) refused to approve the CHMP for two reasons:

- mandatory approval was not required as the original applicant was no longer an Aboriginal party (and thereby not an endorsed party under the Act) for any part of the plan area; and
- it was not appropriate for it to exercise its discretion to approve the CHMP as key aspects of the CHMP required the involvement of the original applicant, who was no longer an Aboriginal party for the plan area.

Mirvac sought judicial review of the Chief Executive's decision to refuse approval of the CHMP on the basis that the party endorsed was no longer an Aboriginal party under the Act. This status was lost after the CHMP was submitted for approval but before the refusal was made.

### Decision

The court found that the decision of the Chief Executive was marred by jurisdictional error and ought to be set aside. The matter was referred back to the Chief Executive with a direction to approve the CHMP.

Bond J accepted that once a party loses its Aboriginal party status under the Act it ceases to be an endorsed party for the purposes of CHMP approval under the Act. His Honour also accepted that the Chief Executive was entitled to consider events which had occurred since endorsement (including the subsequent registration of new native title claims).

However, the time to consider the status of an Aboriginal party is when the CHMP is submitted for approval. In this case, approval was required by section 107(3) of the Act despite the endorsed party's loss of Aboriginal party status prior to a decision being made, as it was an Aboriginal party at the time the CHMP was submitted.

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