Security of Payment Legislation in Australia,

Differences between the States – *Vive la Différence*?

Hon. Justice Peter Vickery

Building Dispute Practitioners Society 12 October 2011

1 I will commence this discussion with some questions – First, why is it necessary to have this discussion at all? Why should there be differences between jurisdictions in Australia in relation to Security of Payment legislation, and why should there not be uniform legislation and a common body of case-law?

2 In a formal sense the matter was raised by Matthew Bell and Donna Vella in their penetrating article "From Motley Patchwork to Security Blanket: The Challenge of National Uniformity in Australian 'Security of Payment' Legislation".[1] They wrote in the abstract:

> *The modern form of legislation designed to achieve "security of payment" within the building and construction industry was introduced into New South Wales in 1999. The primary aim was to ensure that cash flow was maintained for all participants in the contractual chain. A decade later, legislation based upon the New South Wales model is in place in all States and Territories and there is a substantial body of case law governing how the Acts work in practice. At the same time, however, significant differences in approach across jurisdictions as to key planks of the legislative platform have the potential to defeat its original intent. This article proposes, therefore, that the Australian construction industry faces a moment of decision as to the future of such legislation.*

3 They have been joined by other eminent writers in a solid chorus. [2]

4 However, in the last quarter of 2011 the building and construction industry, and its professional advisers, continue to face the problems of lack of uniformity in this area. Upon the granting of Royal Assent to the *Building and Construction Industry Security of Payment Act 2009* (Tas) on 17 December 2009, every Australian State and Territory had in place "security of payment" legislation.[3] All were founded, to a greater or lesser

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1 Australian Law Journal, Volume 84, Issue 8, 2010.

2 For example: Davenport P, "*Security of payment now Australia wide*" (2010) 131 Australian Construction Law Newsletter 36; Zhang T, "*Why national legislation is required for the effective operation of the security of payment scheme*" (2009) 25 BCL 376; Coggins J, Elliott R, & Bell M, "*Towards Harmonisation of Construction Industry Payment Legislation*", Australian Journal of Construction Economics and Building Vol 10, Issue 3 (2010).

3 *Building and Construction Industry (Security of Payment) Act 2009* (ACT); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building and Construction Industry Payments Act 2004* (Qld); *Building and*

extent, upon the *Building and Construction Industry Security of Payment Act 1999* (NSW).[4]

5 Divergence in the development of the law in this area is best explained as an accident of recent history. Being not directly within Commonwealth power, the legislation quickly became accident prone to difference, as the States individually adopted and developed Security of Payment schemes throughout the country. This happened relatively quickly, and in the absence of any effective voice preaching the virtues of uniformity.

6 We now have a national scheme comprising 8 Acts. It is a scheme which has at least two common themes – the recognition of a common objective and a manifest divergence in approach to achieving it.

7 The common objective of the Security of Payment legislation and the purposes to be served require no introduction.[5] They were well stated by Teena Zhang in her article "Why national legislation is required for the effective operation of the security of payment scheme".[6] The learned author opened with the following observations:

> A typical construction project is made up of an outward branching tree of relationships with the principal at the very top, connected to the head contractor, with various chains of subcontractors below. Each contributor's role is important because contracted parties develop relationships of reliance through the need for each to deliver its works to enable others to proceed. It is therefore in the best interests of the project to ensure that each link in the chain is preserved.
>
> One of the most effective ways to facilitate this is by easing the flow of money throughout the construction chain. This preserves the liquidity of contributors to avoid costly replacement and delay. Cash flow is especially pertinent for smaller subcontractors who rely on it to meet debt obligations and keep their businesses solvent. Made vulnerable by their dependence on payment, these subcontractors can be taken advantage of by upstream debtors seeking to increase their margins by deliberately withholding payment in the hope that their creditor will become bankrupt. Recognising that these practices could not be allowed to prevail, governments took action to address the problem.

Construction Industry Security of Payment Act 2009 (SA)*; Building and Construction Industry Security of Payment Act 2002* (Vic)*; Construction Contracts Act 2004* (WA).

4 *Supra*, Bell and Vella at p.1.

5 See for example *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156 at [2].

6 (2009) 25 BCL 376.

8 We now have the luxury of more than a decade of experience derived from the "hard knocks" of litigation and the practice of adjudication. This is an excellent foundation to build upon. Most of the problems, both practical and legal, one way or another have been exposed. It is surely now time to capture the best from all jurisdictions and consolidate them into a coherent national framework.

9 In order to illustrate the principal differences between States in the legislation and the case-law Catherine Bell provides a mot useful summary in the attached Appendix A.[7] Time permits me to single out only three of the recent issues for a more detailed analysis.

Premature Payment Claim

10 I have selected the issue of the so-called "premature payment claim" as a first area of apparent divergence. This will serve to illustrate some of the detailed workings of the legislation and some differences of approach to it, while starting from a very logical stepping stone, the making of the initial payment claim. The issue is also of interest because it is now before the Victorian Court of Appeal for consideration, as one of the first cases before it on the Victorian Act.

11 The "premature payment claim" issue arose in two recent cases in the TEC List in Victoria, *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd*[8] and *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor*[9]. Seabay is presently on appeal on the point, so my analysis will be confined to being descriptive.

12 A common feature of the Security of Payment legislation in Australia is that an entitlement to payment of a statutory payment claim, arises only on a "reference date". In Victoria this is provided for in s 9(1) as follows:

> 9. Rights to progress payments
>
> (1) On and from each reference date under a construction contract, a person-

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7 Bell, C "*Security of payment – the Australian Experience*", ACL Newsletter September/October 2010.
8 [2010] VSC 199.
9 [2011] VSC 183.

(a) who has undertaken to carry out construction work under the contract;

or

(b) who has undertaken to supply related goods and services under the contract-

is entitled to a progress payment under this Act, calculated by reference to that date.

13 Section 14 of the Victorian Act then provides:

14. Payment claims

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

14 What is the position where a payment claim is served prior to a reference date? Challenges to the validity of the payment claim and all that followed from it, including the adjudication determination, were made on this basis in both *Metacorp and Seabay*.

15 In *Metacorp* the relevant facts were these:

- Metacorp submitted that in order for an Adjudication Determination to be valid, Andeco was required to comply with the "basic and essential requirements of the Act" so as to properly bestow jurisdiction upon the Adjudicator. It submitted that the service of the relevant Payment Claim was premature in that it failed to comply with the requirements of s 9 and s 14(1) of the Act;

- it was common ground that the reference date under the Contract was the 25th of each month, and for the month of October 2009, this fell on Sunday 25 October 2009;

- it was also common ground that the relevant Payment Claim was transmitted by email to the Superintendent the day before, on 24 October 2009;

- it was found that the payment claim was made by claimant in good faith. The payment claim was served on the day prior to the contractual date permitted for its service. It was served at a time when all of the work which was the subject of the claim had been completed;

- it was then submitted by Metacorp that, as there was no entitlement under the Contract to a progress claim as at 24 October 2009 in respect of the month of October, Andeco was not entitled to serve a payment claim purportedly

pursuant to s 14 of the Act. This was so, it was put, because service of a payment claim pursuant to s 14(1) is predicated on a claimant establishing a present entitlement to a progress payment under the construction contract, prior to service of a statutory payment claim. In other words, it was submitted that as a precondition to being entitled to serve a payment claim the claimant must, in the words of s 9(1) of the Act, be "entitled to a progress payment under a construction contract".

- it was said that as at 24 October 2009, under the Contract, Andeco was not entitled to payment of the relevant Payment Claim and Metacorp was not liable to pay it. Accordingly, the precondition for valid service under s 14(1) had not been met, and Payment Claim was therefore not a valid payment claim under the Act.

16 In *Seabay* a similar argument was put, founded on the following facts:

- the payment claim was served on 28 October 2010;
- the contractual service for a contractual payment claim was 29 October 2010;
- the reference date (both for the purposes of contractual claims and claims made under the Act) was specified as the 30th of each month.

17 However, as the Court held in *Metacorp*[10] service of a premature payment claim does not necessarily render the payment claim invalid. It will only have this consequence if early service is such as to justify a finding that the payment claim was not made bona fide under the Act. In arriving at this conclusion in *Metacorp*, some weight was attached to the text of s 14(1) of the Act which provides:

> (1) A person referred to in section 9(1) who is <u>or who claims to be</u> entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
>
> [Emphasis by underling added]

18 The reasoning in *Metacorp* proceeded as follows:[11]

> ... under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons 'who claim to be entitled' to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s 14(1) of the Victorian Act, and this is so,

10 Ibid at [109]–[114].
11 Ibid at [101]–[102].

whether or not there existed an actual entitlement to payment at the time when the payment claim was served.

A payment claim which is delivered shortly prior to its reference date, even a few days before, would not, in the usual case, evidence lack of bona fides on the part of the person making the claim because the work carried out in respect of which the claim is made in all likelihood would have been done, or substantially completed.

19 As further observed in *Metacorp*:[12]

> In my opinion, time does not begin to run against a respondent for the purposes of s 15(4) from the date when a payment claim is physically delivered to it, if this occurs prior to the relevant reference date. This is so because the entitlement to payment, which is conferred by s 9 upon a claimant, only arises 'on and from each reference date under a construction contract'. In the case of the premature delivery of a payment claim prior to the reference date to which the claim relates, rights under the Act only become enlivened upon the arrival of the relevant reference date. Until then, although delivery of the relevant document may have been undertaken in a physical sense, the service of the document is incapable of having any legal effect under the Act until the occurrence of the reference date. The payment claim at the time of service is not strictly a payment claim. It is a prospective claim for payment. It does not become a payment claim for the purposes of s 15(4) until the arrival of the reference date. On that date the earlier physical delivery of the document will result in the document becoming a valid payment [claim] on the reference date. In this event, time will commence to run under the Act from the reference date.

20 Further, in *Seabay*, which followed *Metacorp*, the following observations were added:[13]

> In further support of the approach I have taken to the issue of a payment claim served before the due reference date, it needs to be born in mind that the Act is designed to buttress the cash flow of all contractors who become entitled to make payment claims and receive progress payments under its provisions. Contractors working under construction contracts who may have recourse to the Act will range from the most sophisticated professionals with elaborate business infrastructures and ready access to legal advice, to the relatively inexperienced operator working with rudimentary day to day administrative support, if any. It would better promote the main purpose of the Act, 'to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts', to avoid any excessive degree of technicality in the operation of its provisions, unless it is clearly necessary to resort to such an approach in order to make the provisions work as a whole, as they were intended.

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12 Ibid at [107].

13 Ibid at [135].

21 However in New South Wales, a different approach was taken, first by Macready AJ in *Beckhaus v Brewarrina Council*,[14] and then by Nicholas J in *Walter Construction Group Pty Ltd v CPL (Surrey Hills) Pty Ltd*.[15]

22 In *Beckhaus*[16] Macready AJ considered a submission with reference to s 13(1) of the Act [the equivalent of s 14(1) of the Victorian Act] that unless a progress payment under a contract is due and payable in accordance with the terms of the contract there is no statutory entitlement under the Act. After detailing relevant provisions of the Act he expressed his conclusions as follows:

> The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words 'person who is entitled to a progress payment under a construction contract' in s 13(1) refers to a contractual entitlement.
>
> The trigger that commences the process that leads to the statutory rights in s 15(2) is the service of the claim under s 13. That can only be done by a person who 'is entitled to a progress payment under a construction contract'. The words 'progress payment' are a defined term in the Act. It means a payment to which a person is entitled under s 8. That section fixes the time of the 'entitlement' given by the section by reference to the contractual dates for making claims or, if there is no contractual provision, for making claims by reference to a four week period. Section 9 deals with the amount of such a statutory progress payment. Importantly, s 9 uses similar words to s 13 in that it refers to 'a progress payment to which a person is entitled in respect of a construction contract' and then directs determination of that amount by reference to both contractual amounts or if no contractual amount on the basis of the value of the work done.
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> Section 11 then deals with the due date for payment in respect of 'a progress payment under a construction contract'. It does [so] also by reference to contractual due dates and if [there is] no such provision then by reference to a two-week period. One thus has a series of sections which create a statutory right to a progress payment by fixing entitlement, the date for making claims,

14 [2002] NSWSC 960.

15 [2003] NSWSC 266 at [52]-[60].

16 Supra at [60]-[65].

> amount of claims and due date for payment of claims. The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.
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> Thus s 13 merely continues on the statutory procedure and the opening words must be a reference to the statutory entitlement created in the previous sections not the contractual entitlement submitted by the defendant. If the defendant's submission were correct it would mean that in respect of contracts which do not provide for progress payments there is no ability to recover the statutory right to progress claims in Division 3. This consequence makes otiose the earlier provisions of the Act and defeats its express object which is to:-
>
> > "ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services."
>
> In my view the submissions of the defendant are simply not arguable.
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> As under 42.1 the plaintiff is entitled to progress payments there is no reason why he cannot make the statutory claim at the same time as his contractual claim. The statutory claim must comply with Section 13(2). On its face the document appears to do this and there was no submission to the contrary.
>
> [Emphasis added by underlining]

(There was no challenge to this reasoning in the appeal from his Honour's order for summary judgment: *Brewarrina Shire Council v Beckhaus Civil Pty Ltd*[17]).

23 His Honour's analysis and conclusions in *Beckhaus* were consistent with the opinion of Heydon JA (as he then was) in *Fyntray Constructions Pty Ltd v Macind Drainage and Hydraulic Services Pty Ltd*:[18]

> Fourthly, the two limbs of that part of the definition of 'reference date' appearing in section 8(2)(a) reveal a legislative intention to permit payment claims to be made either by reference to a contractual date for making a claim (that is, under clause 42.1) or by reference to a contractual date by reference to which the amount of the progress payment is to be calculated (that is, taking into account clause 42.2). ... While clause 42.1 compels monthly claims, section 8 contemplates entitlements to progress payments arising not only by reason of the dates for making claims under cl 42.1, but by reason of a date by reference to which the amount of the progress payment is to be calculated under cl 42.2, and the latter date includes periods which may be greater than the preceding month.
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> [Emphasis added by underlining]

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17 (2003) NSWCA 4.

18 (2002) NSWCA 238 at [51].

(See also Hodgson JA paras 74, 75).

24 A similar approach was adopted by Lyons J in *F.K. Gardner & Sons Pty Ltd v Dimin Pty Ltd*.[19] In that case, his Honour considered the Queensland *Building and Construction Industry Payments Act 2004* (Qld) in the context of the service of a payment claim before the applicable reference date. His Honour accepted that the applicant's purported payment claim was not a valid claim pursuant to the Act. It was reasoned that there is no entitlement to make a payment claim prior to the contractual reference date which was 28 June 2006 and this view was supported by the decisions of *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* and *Beckhaus v Brewarrina Council*. Accordingly it was held that the machinery under the Act for the payment of the claim could not be engaged.

25 The relevant legislation was in the same form as it is in Victoria, however, his Honour came to a different conclusion to that in *Metacorp* and *Seabay*.

26 However, in *Metacorp* an important difference was noted between the text of s 13(1) *Building and Construction Industry Security of Payment Act 1999* (NSW) and its Victorian counterpart s 14(1). Unlike the New South Wales legislation, the Victorian Act included as a person entitled to serve a payment claim a person "who claims to be entitled to a progress payment" in addition to a person who <u>is</u> so entitled. On this basis, the observations made by Nicholas J in *Walter Construction Group* to the effect that a payment claim which is served before time is invalid, was able to be distinguished.

27 Whether the *Metacorp/Seabay* approach or the *Walter Construction/Beckhaus/F.K. Gardner* approach is to be preferred in Victoria must await the outcome of the appeal to the Court of Appeal in *Seabay*.

Severance of Invalid Parts of Payment Claims and Adjudication Determinations

19 [2007] 1 Qd. R 10.

28 The issue in Victoria first arose in *Gantley Pty Ltd v Phoenix International Group Pty Ltd*,[20] as it commonly does, in the context of considering invalidity arising from an allegation made pursuant to the judgment of Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd*. [21]

29 *Protectavale* teaches that the information required by s 14(1) and its counterparts is essential to a valid payment claim, including a sufficient description of the work to which the claim relates. His Honour observed in the now oft quoted passages:[22]

> It is necessary to decide whether the invoice meets the requirements of s 14. The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context: *Multiplex Constructions* [2003] NSWSC 1140 at [76].
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> The manner in which compliance with s 14 is tested is not overly demanding: *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 at [54] citing *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20] ("[T]he requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner"); *Multiplex Constructions* [2003] NSWSC 1140 at [76] ("[A] payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves"); *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [20] ("The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint").
>
> Nonetheless a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule: *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462, 477; *John Holland Pty*

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20 [2010] VSC 106.

21 [2008] FCA 1248.

22 Supra at {10}-[12].

> *Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 at [18]- [21]. That is not an unreasonable price to pay to obtain the benefits of the statute.
>
> [Emphasis added by underlining]

30 A serious question arises at this point as to whether the legislation is deficient in failing to prescribe a claim form which would, in effect, direct the claimant to provide a sufficiently detailed description of the work claimed for. Section 14(2) provides (inter alia) that a payment claim-

> (a) must be in the relevant prescribed form (if any); and
>
> (b) must contain the prescribed information (if any)….

31 In Victoria to date, these provisions have not been availed of. There is no prescribed form and no prescribed information required under the Act.

32 May I suggest that much of the difficulty occasioned by a failure (actual or arguable) to properly describe the 'work' in a payment claim could be averted if there was in place a facility of the type provided under sub-paragraphs (a) and (b) of s.14(2) of the Act.

33 The Civil Contractors Federation (CCF) has developed a payment claim form for use in Victoria. Attached as Appendix B is a "Payment Claim" form produced by the CCF for the benefit of its members.

34 New Zealand also has in operation *The Construction Contracts Act 2002*, which is similar to the Victorian Act. Section 20 of the New Zealand Act is the equivalent of s.14 of the Victorian Act. Section 20(2)(c) provides that a payment claim must, inter alia, "identify the construction work and the relevant period to which the progress claim relates".

35 The New Zealand Subcontractors Federation Inc has also developed a "Payment Claim" form which is said to comply with s.20 of the New Zealand Act. The form is in the public domain and is said to have received "general approval from all participants

in the building industry".[23] Attached as Appendix C is a "Payment Claim" form produced by the Federation, completed as a simulation to illustrate how the form is intended to be used.

36 The payment claim form produced by the CCF and the form in use in New Zealand have much to commend them. If one or other or a combination of these forms, or an appropriate adaptation thereof, were to be prescribed for use by claimants under s. 14(2)(a) and (b), it may well work to avert much of the cost and delay associated with the prosecution of allegations of the invalidity of payment claims and subsequent adjudications upon them, on the ground of inadequate description.

37 Nevertheless, under the present regime, a number of payment claims in Victoria are vulnerable to a charge of invalidity based on an alleged failure to properly describe the relevant work.

38 What then, if part of the work included in a payment claim is defined sufficiently for the purposes of s 14(1) but other parts of the work claimed for is not? Is the whole of the claim infected with invalidity and falls as a whole, or is the deficient part severable from the rest, leaving part of the claim valid? Finkelstein J in *Protectavale* was not called upon to determine the issue. His Honour reached the conclusion that, as a matter of law, the relevant invoice was neither a valid progress payment claim nor a valid final payment claim for purposes of the Act and he dismissed the application for summary judgment with costs.

39 The issue in question arose squarely in *Gantley Pty Ltd v Phoenix International Group Pty Ltd.*[24] Having found that the Gantley Payment Claim complied with s 14(3)(a) to the extent that it made a claim for the variations, it followed that, if this was the only ground of invalidity alleged, the Court should have made a declaration accordingly, with the result that the Gantley adjudication determination founded upon it would be declared valid. However, other parts of the claim were held to be invalid.

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[23] See: Hon. Robert Smellie QC, "*Progress Payments and Adjudication*", Wellington Lexis Nexis, 2003 at page 32

[24] [2010] VSC 106.

40 Counsel did not take the Court to any case in which severance had been applied to a payment claim which was in part non-compliant with s 14(3)(a) and in part compliant. The Court accepted that no such case has been reported in relation to the Victorian Act, or its counter parts in New South Wales, Western Australia, the Northern Territory, or Queensland. The Court therefore approached the question from first principles.

41 The Court reasoned that the common law as to severance was applicable, and had not been excluded by the Victorian Act.[25]

> It was submitted by Mr Robins, who appeared for the respondent, that severance should not be permitted because the Act did not permit this to occur. Either the progress claim was fully compliant in all of its facets, or it was not, it was argued. If one part of the progress claim did not satisfy the requirements of s 14(3)(a) the whole of the progress payment would therefore fail and should be set aside as being invalid.
>
> I do not accept this submission. The question should be whether the Act, either expressly or impliedly, operates to exclude the common law doctrine of severance. I find that it does not. Indeed, the purposes and objects of the Act earlier described are best served by processes which, so far as possible, ought to accommodate reasonable flexibility and avoid unnecessary technicality.
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> Severance in this case would operate to achieve the purpose and objects of the Act and would not operate to diminish the attainment of these goals. A respondent to a payment claim and an adjudicator, if appointed, should be able to assess the valid part of this progress claim which sufficiently describes the work for which payment is claimed, and provide a rational response or adjudication determination in respect of that part of the claim, and exclude from consideration that part of the claim which does not comply.

42 The issue was taken up again in *Seabay*.[26] The applicant for relief, Seabay, submitted that the relevant Payment Claim was void as a whole because it included "excluded amounts" which in turn included claims for variations which were not "claimable variations". Further, that the Adjudication Determination was void because the Adjudicator took these sums into account in arriving at his determination. Alternatively, it was put that the Adjudication Determination was void because it was founded upon a void payment claim, and hence the Adjudicator did not have any jurisdiction under the Act conferred upon him.

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25 Supra at [101-116, concluding with the quoted passages at 113-116].

26 Ibid at [67]-[74].

43 The regime established under the Victorian Act in relation to "excluded amounts" is unique to this State. Section 10B provides:

> 10B. Excluded amounts
>
> (1) This section sets out the classes of amounts (excluded amounts) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.
>
> (2) The excluded amounts are-
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> (a) any amount that relates to a variation of the construction contract that is not a claimable variation;
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> (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to-
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> (i) latent conditions; and
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> (ii) time-related costs; and
>
> (iii) changes in regulatory requirements;
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> (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;
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> (d) any amount in relation to a claim arising at law other than under the construction contract;
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> (e) any amount of a class prescribed by the regulations as an excluded amount.

44 Section 10B is supported by subsections 23(2A)(a) and (2B)(b) of the Victorian Act. The subsections read:

> (2A) In determining an adjudication application, the adjudicator must not take into account-
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> (a) any part of the claimed amount that is an excluded amount; or
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> (b) any other matter that is prohibited by this Act from being taken into account.
>
> (2B) An adjudicator's determination is void-
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> (a) <u>to the extent that</u> it has been made in contravention of subsection (2);

> (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

45 By use of the words emphasised "to the extent that", these subsections provide statutory recognition of the principle of severance in relation to both "excluded amounts" which may be included in a payment claim, but also "any other matter that is prohibited by this Act from being taken into account". A question arises as to precisely what may be swept up in the latter phrase, however, it would appear to support, rather than detract from, the general applicability of the common law of severance to the machinery of the Act in Victoria.

46 Accordingly, the principle of severance was applied in *Seabay* to the "excluded amount" included in the relevant Payment Claim. However, the principle was not applied without qualification. It was observed:[27]

> Non-compliance with an essential precondition for the existence of a valid adjudication determination renders the determination void. For example, affording natural justice, to the extent that the Act requires it to be given, is one of the essential conditions for the existence of a valid determination. In this area there can be little room for the concept of partial invalidity in relation to determinations arrived at in breach of its requirements. Indeed, it would be rarely safe to introduce such a concept. As McDougall J said in *Watpac Constructions v Austin Group* [2010] NSWSC 347 at [29]:
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> "... it may not always be obvious to see how a denial of natural justice has affected the outcome: for example, where the omitted or irrelevant matter had the capacity to assess an adjudicator's overall view of the 'credibility' or substance of a party's case." [footnote omitted]

47 On the other hand, in New South Wales and Queensland, a different approach has prevailed in relation to invalid parts of Payment Claims submitted by a claimant. In the recent Queensland case, *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors*,[28] Atkinson J determined that an invalidity as to part results in an invalidity as to the whole. Noting that "[t]his [was] not necessarily an attractive result",[29] his

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27 Ibid at [67].
28 [2011] QSC 145.
29 Ibid at [55].

Honour nevertheless reasoned that he was compelled to adopt the approach of Palmer J in *Multiplex Constructions Pty Ltd v Luikens and Anor* where it was observed:[30]

> It seems to me that because the Act requires a determination to produce only one amount for payment pursuant to a payment claim served under s 13(1), despite the fact that the payment claim might have comprised numerous claims for separate and distinct items of work, and because the Act does not provide for variation of the adjudicated amount, or the judgment debt, if the adjudicator's decision as to any component part of the adjudicated amount is shown to be liable to be set aside on judicial review, the consequence is that, subject to other discretionary considerations, the whole of the determination must be quashed if jurisdictional error infects any part of the process whereby the adjudication amount has been produced. This is, no doubt, a highly inconvenient result. However, I do not see any means of avoiding it, as the Act presently stands.

48 Noting that a different regime was provided for in Victoria by s 10B, s 23(2A) and (2B) and was therefore distinguishable, Atkinson J in *James Trowse* found that, in the absence of any such provision, it was not possible to sever the adjudication decision.[31] Following the reasoning of Palmer J in *Multiplex*, the Court said:[32]

> The statutory scheme in Queensland provides for an adjudication decision for one amount only. Pursuant to s 26 of BCIPA, an adjudicator is to decide the amount of the progress payment, if any, to be paid by the respondent to the claimant (the adjudicated amount), the date on which any amount became or becomes payable, and the rate of interest payable on any amount.
>
> The adjudicated amount is a statutorily created sum that once determined is final and binding upon the parties. Once determined, an adjudicated amount can be the subject of an Adjudication Certificate and thereafter a judgment registered with the Court and capable of enforcement against the respondent. The adjudicated amount founds the sum claimed in the judgment along with other sums for costs and interest.
>
> Save a slip rule, there is no mechanism available to sever any unlawful finding from an adjudicated amount, in particular a part of the adjudicated amount that is infected by jurisdictional error as found in this case.

Whether Certiorari Available to Challenge Adjudication Determinations

49 An divergence occurred between Victoria and New South Wales derived from an interesting source. This concerned the availability of relief in the nature of certiorari in respect of adjudication determinations.

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30 [2003] NSWSC 1140 at [92].
31 Ibid at [56].
32 Ibid at [57-59].

50 In Victoria, the obiter in *Hickory*,[33] was confirmed in *Grocon (No 2)*, [34] to the effect that – "relief in the nature of certiorari, on all of the grounds available under the writ, including error on the face of the record, is not excluded either expressly or by implication under the Act in Victoria".

51 In so doing, the New South Wales Court of Appeal decision in *Brodyn*[35] was not followed. What gave rise to a departure from an authority of such standing, particularly in the light of the desirable goal of achieving uniformity with similar interstate legislation?

52 In *Brodyn*, the Court of Appeal determined that *Musico v Davenport*[36] and cases which followed it, such as *Abacus Funds Management v Davenport*,[37] *Multiplex Constructions Pty Ltd v Luikens*,[38]and *Transgrid v Walter Construction Group*[39] were incorrectly decided, insofar as they held that relief in the nature of certiorari is available to quash an adjudicator's determination which is not void and merely voidable. It was held by the Court of Appeal in *Brodyn* that there is no occasion where relief in the nature of certiorari would be available and required. This was decided as a matter of construction by necessary implication from the terms of the NSW Act.

53 The reasoning of Hodgson JA in *Brodyn* (with whom Mason P and Giles JA agreed) is set out in eight key passages of his Honour's judgment.[40] The reasoning commences with the following proposition:[41]

> I agree with McDougall J [in *Musico v Davenport*] that the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay.

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33 *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156.
34 *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426.
35 *Brodyn Pty Ltd (t/as Time, Cost and Quality) v Davenport* (2004) 61 NSWLR 421.
36 [2003] NSWSC 977.
37 [2003] NSWSC 1027.
38 [2003] NSWSC 1140.
39 [2004] NSWSC 21.
40 Ibid at 440–443 [51]–[59].
41 Ibid at [51].

54 His Honour Hodgson JA in *Brodyn* then concludes with the following observations:

> The question then is whether there is available a remedy in the nature of certiorari, in circumstances where the determination is not void by reason of defects of the kind I have been discussing [matters going to jurisdictional error]. In my opinion it is not, because the availability of certiorari in such circumstances would not accord with the legislative intention disclosed in the Act that these provisional determinations be made and given effect to with minimum delay and minimum court involvement; and because it is by no means clear that an adjudicator is a tribunal exercising governmental powers, to which the remedy in the nature of certiorari lies.
>
> For these reasons, I disagree with the view expressed in *Musico* and the cases which followed it, to the extent that they hold that relief in the nature of certiorari is available to quash a determination which is not void.

55 The Court of Appeal in *Brodyn* held further that it was open to challenge an adjudicator's determination only if:

(a) the basic and essential requirements of the Act for a valid determination are not satisfied;

(b) the purported determination is not a bona fide attempt to exercise the power granted under the Act; or

(c) there is a substantial denial of the measure of natural justice required under the Act.

56 According to *Brodyn*, if any of these grounds is made out, then a purported determination will be void not merely voidable, and would therefore be amenable to relief by way of declaration or injunction. In approaching the matter in this way, it appears that the Court of Appeal did not favour the grant of certiorari, even for jurisdictional error which rendered the determination void.

57 Until a recent judgment of the High Court, *Brodyn* has continued to be followed in New South Wales. As Giles JA (with whom Santow and Tobias JJA agreed) said in *Downer Construction (Australia) Pty Ltd v Energy Australia & Ors*:[42]

> While *Brodyn Pty Ltd v Davenport* might bear elucidation, as has occurred in, for example *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* and

42 [2007] NSWCA 49 at [98]–[99].

> *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*, I am not moved ... to regard it as wrong in substance, and I am not persuaded that reconsideration would expand availability of judicial review to the review for error of law or fact ... [contended for in this case]. The Act's oft-recognised objective of speedy but interim resolution of claims, attendant with the possibility of error and confined curial intervention, in my view weighs heavily against substantive change in the current approach to challenges to determinations under the Act.
>
> The amounts often at stake in the challenges which come before the court make an application for special leave to appeal to the High Court likely, whatever be the approach to the challenges determined in this Court. For the reasons stated above, I consider that the circumstances of this case do not warrant the grant of leave to re-argue *Brodyn v Davenport*; and more widely, I favour maintaining *Brodyn Pty Ltd v Davenport* until the High Court says otherwise.

58 As was observed in the Victorian case of *Hickory*,[43] the statements of law enunciated in *Brodyn*, as applied to the NSW Act, are in substance persuasive. If the NSW Act and its Victorian counterpart are to achieve their objectives in providing for the speedy resolution of progress claims, displacing conventional curial intervention may be seen as a necessary sacrifice. The legislation should operate to reduce rather encourage litigation and judicial intervention in the course of its processes, if its objectives are to be met, by avoiding, as far as it is possible to do so, the twin adversaries of delay and cost. This is so, particularly bearing in mind that any payment made by a respondent under the Act is on account only and without prejudice to any subsequent civil proceeding which may result in making an allowance for any sum being paid under the Act, or restitution of any amount so paid. [44] Further, in the context of national building operations being conducted in this country, it is desirable that there be consistency in the regimes for payment under construction contracts in both jurisdictions, particularly where common legislative schemes are in place.

59 However, the Court in *Grocon (No 2)* found itself compelled to take a different course after undertaking a close examination of the Victorian Act and relevant provisions of the Victorian Constitution reflected in the *Constitution Act 1975*, insofar as it makes provision for the powers and jurisdiction of the Supreme Court. The Victorian Act expressly refers to s 85 of the *Constitution Act* in relation to two of its provisions.

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43 (2009) VSC 156.

44 See for example s. 47 of the Victorian Act

Section 51 of the Act provides for the required constitutional s 85(5)(a) references in two instances where the jurisdictional power of the Supreme Court has been qualified.

60 Critically, there is no reference in the Victorian Act to altering or varying s 85 of the *Constitution Act* in relation to any other matter, including the grant of relief by way of certiorari. It followed, in the opinion of the Court, that no implication could arise in construing the Act which had this effect.

61 Accordingly, it was determined in *Grocon (No 2)* that it was not the intention of the Legislature to limit the Court's jurisdiction by excluding or restricting judicial review by the Court, whether by certiorari or otherwise, of a determination of an adjudicator under the Act.

62 However, this was not the end of the story.

63 In February 2010, the High Court handed down its decision in *Kirk v Industrial Relations Commission*.[45] The Court was asked to consider whether the Supreme Court had the power to review a decision of the Industrial Relations Commission. The High Court reaffirmed the Supreme Court's power to review decisions of inferior Courts or bodies with judicial authority, such as authorised nominating authorities. The High Court found there were errors made by the Industrial Court which were errors of law on the face of the record. But for the privative provisions of s 179 of the *Industrial Relations Act 1996* (NSW), certiorari would lie on that ground, as well as for jurisdictional error.

64 The High Court held that legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. On the other hand, legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power. The Court reasoned as follows:[46]

> There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or

45 [2010] HCA 1.
46 Ibid at [99]-[100].

> orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of "distorted positions". And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.
>
> This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power.

65 Thus, and importantly, it was held that a State legislature could not take away a State Supreme Court's power to review errors of jurisdiction.

What effect did Kirk have on Brodyn?

66 On 24 September 2010, the New South Wales Court of Appeal handed down its decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*.[47] The Court was called upon to decide whether, in light of the decision of the High Court in *Kirk* the decision in *Brodyn* should not be followed or was incorrectly decided so far as it held that:

(a) the Supreme Court of New South Wales was not required to consider and determine the existence of jurisdictional error by an adjudicator in reaching a determination under the Act;

(b) an order in the nature of certiorari was not available to quash or set aside a decision of an adjudicator under the Act;

(c) the Act expressly or impliedly limited the Supreme Court of New South Wales's power to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the Act.

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47 [2010] NSWCA 190.

67 The importance of *Kirk* lies in the centrality afforded to the distinction between jurisdictional and non-jurisdictional error as identified by the High Court in *Craig v State of South Australia.*[48] As observed in *Chase Oyster Bar*:[49]

> [Kirk] has given this distinction a constitutional dimension in State law, to the same general effect as had earlier been established for Commonwealth law. That has placed this distinction at the centre of Australian administrative law jurisprudence, in a manner which is not consistent with the reasoning in *Brodyn*, on one view of that reasoning.

68 In *Chase Oyster Bar* the Court of Appeal returned to the position as it was before *Brodyn* (on one view of this case) in relation to setting aside an adjudicator's determination on the ground of jurisdictional error. It is now clear that Certiorari now runs in New South Wales to achieve this outcome. The challenge remains in that State to determine what in each case constitutes jurisdictional error?

69 On the other hand, in Victoria the position remains that Certiorari is available as a remedy for both jurisdictional error and error on the face of the record.

70 This is not to say that the result in Victoria is satisfactory. For the sake of uniformity and reducing the prospect of judicial intervention to a minimum, and thereby promoting the objects of the legislation, the Victorian Act may well be considered a candidate for amendment. In this respect, the approach which underpinned *Brodyn* is worthy of consideration for revival in Victoria.

71 The mechanism to achieve this outcome would not be onerous. In essence, it would involve introducing into the Supreme Court limitation of jurisdiction section [50] a further sub-section which expresses the intention to alter or vary s. 85 of the *Constitution Act 1975* by an accompanying new section in the Act which would be introduced to exclude judicial review for error on the face of the record.

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48 (1995) 184 CLR 163.
49 Ibid at [29].
50 See the Victorian Act s. 51

Conclusion as to Technical Requirements

72 This short analysis serves to illustrate two powerful currents which underpin the approach to the technical requirements of the Security of Payment legislation: one may be called the "strict observance" of the statutory requirements theme; the other may be called the "intended practical working" theme. The two themes are not incompatible - the latter operating to temper the rigours of the first where the legislation, on its proper construction, permits this to occur, taking into account the working of the legislation in its practical context and the statutory intent behind the provision in question and the Act overall.

73 McDougall J in *Chase Oyster Bar* well stated the powerful case for "strict observance", where appropriate:[51]

> The *Security of Payment Act* operates to alter, in a fundamental way, the incidence of the risk of insolvency during the life of a construction contract. As Keane JA said, of the not dissimilar Queensland statute, the *Building and Construction Industry Payments Act 2004* (Qld), in *RJ Neller Building P/L v Ainsworth* [2008] QCA 397 at [40], the statute "seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's ... inability to repay could be expected to eventuate". It followed, his Honour said, that the risk of inability to repay, in the event of successful action by the other party, must be regarded as one that the legislature has assigned to that other party. The same is true of the regime established by the *Security of Payment Act*.
>
> Further, the *Security of Payment Act* operates in a way that has been described as "rough and ready" or, less kindly, as "Draconian". It imposes a mandatory regime regardless of the parties' contract: s 34. It provides extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses. It provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents (see, for example, my decision in *Laing O'Rourke Australia Construction v H&M Engineering and Construction* [2010] NSWSC 818 at [8]).
>
> The *Security of Payment Act* gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payments, the *Security of Payment Act* lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.

51 Ibid at [207]-[209].

74 The "intended practical working" theme is best considered in relation to two elements: what the Security of Payment legislation is intended to achieve, and the practical context in which it must work.

> As to the first element, the objects of the Security of Payment legislation have already been fully canvassed in these paper.

75 As to the second element, the practical context in which the legislation must work, the "human" component of the equation cannot be ignored. In this respect, it was said in *Seabay*:[52]

> In further support of the approach I have taken to the issue of a payment claim served before the due reference date, it needs to be born in mind that the Act is designed to buttress the cash flow of all contractors who become entitled to make payment claims and receive progress payments under its provisions. Contractors working under construction contracts who may have recourse to the Act will range from the most sophisticated professionals with elaborate business infrastructures and ready access to legal advice, to the relatively inexperienced operator working with rudimentary day to day administrative support, if any. It would better promote the main purpose of the Act, "to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts", [s 1 of the Act] to avoid any excessive degree of technicality in the operation of its provisions, unless it is clearly necessary to resort to such an approach in order to make the provisions work as a whole, as they were intended.

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52 Ibid at [135].

APPENDIX A

SECURITY OF PAYMENT IN AUSTRALIA – KEY DIFFERENCES			
No	**Feature**	**Majority of jurisdictions [including references]**	**Outlier jurisdiction/s [including references]**
1	Payment claim–time for	Later of the end of period determined by contract or 12 months from date when construction work (under claim) was last carried out [NSW s 13(4); Qld s 17(4); ACT s 15(4); Tas s 17(6)]	**Vic** – Later of period determined by contract or 3 months after reference date [s 14(4)] **SA** – Later of end of period determined by contract or 6 months from date when construction work (under claim) was last carried out [s 13(4)] **WA** and **NT** – At any time after obligations performed [Schedule 1, para 4(1)]
2	Payment claim (and subsequent steps) – restrictions or exclusions	No express exclusions. Interpretation of Acts has been expansive[50]	**Vic** – Can claim only "claimable variations"[51] [s 10A] and cannot take into account in calculating the amount of a progress payment an "excluded amount"[52] [s 10B]
Payment schedules / notice of dispute			
3	Payment schedule/notice of dispute–time for	Earlier of the time required by contract or 10 business days after payment claim is served [NSW s 14(4); Vic s 15(4); Qld 18(4);ACT s 16(4)] Notice of dispute must be given within 14 days after receiving payment claim [WA Sch 1, para 7(1); NT Sch, para 6(2)]	**SA** – Earlier of the time required by contract or 15 business days after payment claim is served [s 14(4)] **Tas** – Earlier of the time required by contract or: 20 business days in the case of a "residential structure" and the respondent is the owner and is not a building practitioner, or 10 business days in other cases [s 19(2), (3)]
4	Payment schedule – how to express the scheduled amount	Must *indicate* the amount the respondent proposes to pay (if any).[53] [NSW s 14(2)(b); Vic s 15(2)(b); Tas s 18(2)(b); SA s 14(2)(b)] [Note: Not applicable to WA and NT Acts]	**Qld** and **ACT** – Must *state* the amount the respondent proposes to pay (if any). [Qld s 18(2)(b); ACT s 16(2)(b)] [Note: Not applicable to WA and NT Acts]
Suspension			
5	Suspension for non-payment	Right to suspend upon giving 2 business days' notice, until payment Limited protections for claimant against liability for loss or damage suffered by respondent as a consequence of suspension [NSW s 27; Vic s 29; Qld s 33; Tas s 29;ACT s 29; SA s 28]	**WA** – Right to suspend upon giving 3 days' notice, until payment, for non-payment of adjudicated amount [s 42] **NT** – Right to suspend upon giving 3 working days' notice, until payment, for non-payment of adjudicated amount [s 44] **WA** and **NT** – Limited protections for claimant against liability for loss or damage suffered by respondent as a consequence of suspension

Recovery from principal			
6	"Leapfrogging"– recovery from principal by means of garnishee (where applicable)	Different approaches and considerations apply by virtue of separate legislation:- NSW – *Contractors Debts Act 1997* Qld – *Subcontractors' Charges Act 1974* ACT – *Contractors Debts Act 1897* SA – *Worker's Liens Act 1893*	**Vic** – Recovery of adjudicated amount from principal (i.e. payer of respondent) possible where judgment and debt certificate obtained and amount outstanding between principal and respondent on same project.[54] [ss 29A-41]
Adjudication			
7	Adjudication– who can apply	Claimant. [NSW s 17; Vic s 18; Qld s 21; Tas s 21; ACT s 19; SA s 17]	**WA** and **NT** – Any party may apply to have a payment dispute adjudicated [WA s 25; NT s 27]
8	Adjudication application–time for	If scheduled amount is less than the claimed amount: *10* business days after receipt of payment schedule [NSW s 17(3)(c); Vic s 18(3)(c); Qld s 21(3)(c)(i); Tas s 21(3)(a); ACT s 19(3)(b)] If the scheduled amount is not paid in full by the due date for payment – *20* business days after the due date for payment [NSW s 17(3)(d); Qld s 21(3)(c)(ii); Tas s 21(3)(b); ACT s 19(3)(c); SA s 17(3)(d)] If no (timely) payment schedule and no payment in full by due date for payment (having provided *20* business days' notice after the due date for payment of the claimant's intention to adjudicate, and a further *5* business days after the respondent receives the claimant's notice): *10* business days after the end of the 5-business day period. [NSW s 17(3)(e); Qld s 21(3)(c)(iii); Tas s 21(4)(c)*; ACT s 19(3)(d)*] **BUT*** a superadded requirement applies in **Tasmania** where no payment schedule and no payment in full, namely: the claimant can apply for	**SA** – If scheduled amount is less than the claimed amount: *15* business days after receipt of payment schedule [s 17(3)(c)] **Vic** – If the scheduled amount is not paid in full by the due date for payment – *10* business days after the due date for payment [s 18(3)(d)] **Vic** – If no timely payment schedule and no payment in full by due date for payment (having provided *10* business days' notice after the due date for payment of the claimant's intention to adjudicate, and a further *2* business days after the respondent receives the claimant's notice): *5* business days after the end of the 2-business day period. [s 18(3)(e)] **SA** – If no timely payment schedule and no payment in full by due date for payment (having provided *20* business days' notice after the due date for payment of the claimant's intention to adjudicate, and a further *5* business days after the respondent receives the claimant's notice): *15* business days after the end of the 5-business day period. [s 17(3)(e)] **WA** – Within 28 days after a payment dispute arises.[57] [s 26] **NT** – Within 90 days after a payment dispute arises. [s 28]

		adjudication under this limb only if the respondent has *not* provided a payment schedule within the 5-business day period.[55] [Tas s 21(4)(b)] **AND*** a superadded requirement applies in the **ACT**, namely: the 10-business day timeframe for the adjudication application runs from the *earlier* of: (i) the end of the further 5-business day period; or (ii) the date of receipt of the payment schedule.[56] [ACT s 19(3)(d)]	**WA** and **NT** – A payment dispute arises when by the due date for payment the amount is not paid in full or the claim has been rejected or disputed. [WA s 6; NT s 8]
9	Adjudication response– time for	Later of 5 business days after receiving a copy of the adjudication application or 2 business days after receiving notice of adjudicator's acceptance of application. [NSW s 20(1); Vic s 21(1); Qld s 24(1); SA s 20(1)]	**WA** – Within 14 days after service of adjudication application. [s 27(1)] **NT** – Within 10 working days after service of adjudication application. [s 29(1)] **ACT** – Later of 7 business days after receiving a copy of the adjudication application or 5 business days after receiving notice of adjudicator's acceptance of application. [s 22(1)] **Tas** – Later of 10 business days after receiving a copy of the adjudication application or 5 business days after receiving notice of adjudicator's acceptance of application. [s 23(2)]
10	Adjudication determinations– registration or court proceedings	An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction. [NSW s 25; Qld s 31; Tas s 27; ACT s 27; SA s 27] With the leave of a court of competent jurisdiction, judgment may be entered in terms of the determination. [WA s 43] A determination signed by the adjudicator and certified by the Construction Contracts Registrar as having been made by a registered adjudicator may be enforced as a judgment for a debt in a court of competent jurisdiction. [NT s 45]	**Vic** – With an adjudication certificate, a claimant may recover the certified amount as a debt due in any court of competent jurisdiction.[58] [s 28R]

11	Adjudication review established by the Acts	No express legislative avenue for review of adjudication determination. [NSW; Qld; Tas, SA] Express prohibition on review:- A court does not have jurisdiction to set aside or remit an adjudication decision on the ground of error of fact or law on the face of the decision. [ACT s 43] but see judicial review (below)	Different approaches and considerations apply:- **Vic** – If an adjudicated amount exceeds $100,000.[59] a respondent may apply for an adjudication review: (2) if the respondent provided a timely payment schedule; (3) on the ground that the adjudicated amount included an excluded amount; (4) if the excluded amount was identified as such in the payment schedule or adjudication response; (5) if the respondent has paid the adjudicated amount save for the allegedly excluded amount; and (6) if the allegedly excluded amount has been paid into a designated trust account. [s 28B] **Vic** – If an adjudicated amount exceeds $100,000.[60] the claimant may apply for an adjudication review on the ground that the adjudicator wrongly determined an amount to be an excluded amount and failed to take it into account in making the adjudication determination. [s 28C] **Vic** – An adjudication review application must be made within 5 business days after receiving a copy of the adjudication determination to the ANA to which the adjudication application was made. The review adjudicator may substitute a review determination for the original determination or confirm the original determination. [ss 28D, 28I(5)[61]] **WA** and **NT** – A decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed except where the adjudicator has dismissed the application without making a determination of its merits.[62] [WA s 46; NT s 48] **WA** – The aggrieved person may apply to the State Administrative Tribunal for a review of the decision.[s 46] **NT** – The aggrieved person may apply to the Local Court for a review of the decision. [s 48]

12	Judicial review of adjudication determinations / appeals from adjudication determinations **Note**: The concept of outlier jurisdictions is less relevant to judicial review of adjudication determinations, such is the diversity of positions in the different jurisdictions. Note also a legislative trend towards simplification of the process of obtaining the old prerogative writs and concomitant increased use of the plain English "judicial review" and reduction of use of terms such as "writ of certiorari".	**No express legislative avenue for judicial review of adjudication determination under the Acts:** **NSW** – Judicial review is not available under the NSW Act for non-jurisdictional error of law. However, an adjudicator's determination may be void unless the basic and essential requirements of the Act are met, including that: there is a construction contract; a payment claim was served; there was an adjudication application; the application was referred to an eligible adjudicator who accepted the application; and there is a written determination by the adjudicator determining the adjudicated amount, the due date and the rate of interest payable. An adjudicator's determination may also be void if there was no bona fide attempt by the adjudicator to exercise the functions of adjudicator, or if there was a substantial denial of natural justice. *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 at [53] and [55]. **Qld** – *Brodyn* followed. *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd (In liq) & Anor* [2010] QCA 7. There are indications that to make out a failure to make a bona fide attempt to exercise the adjudicatorial function, the narrow test – requiring fraud – will apply. See obiter in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd (In liq) & Anor* [2010] QCA 7 at [51]. **NT** – Certiorari (judicial review to quash an original decision) does not lie to quash an adjudication determination on the ground that the adjudication application was not prepared and served within time. *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [50]. **WA** – As a matter of construction of the exclusion from the privative clause in the WA Act (and perhaps on a more general basis), the WA Act should be construed as excluding certiorari (judicial review to quash an original decision). *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 **CONTRAST** **Vic** – *Brodyn* followed to this extent: an adjudication determination may be void by virtue of failing the *Brodyn* 'basic and essential requirements' test, or void for absence of a bona fide attempt by the adjudicator to exercise the functions of adjudicator, or void for a substantial denial of natural justice. *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156 and *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [No 2]* [2009] VSC426 In addition, certiorari is available under Victorian law before judgment is entered to enforce an adjudicator's determination, on grounds including error on the face of the record and substantial denial of procedural fairness. *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [No 2]* [2009] VSC 426 at [102], [116], [144] **Express legislative avenue for appeals from adjudication determination:** **ACT** – With the leave of the Supreme Court or the consent of the parties, an appeal can be made to the Supreme Court on a question of law arising out of an adjudication decision. [s 43] There are narrow grounds for a grant of leave and a limited range of curial outcomes from such an appeal[63]

APPENDIX B

PAYMENT CLAIM (CCF)

PAYMENT CLAIM

TO: ***[Insert full name of CCF customer(the party responsible to make payment) as appears on the construction contract]***

[address of CCF Customer]

This payment claim relates to ***[insert description of construction contract]*** dated ***[insert date of construction contract]*** for ***[insert description of project]*** (the "Construction Contract")

The total amount claimed under this payment claim is $ ***[insert amount]***

The construction work or related goods and services in respect of which this payment claim is made and the amount claimed for the construction work or related goods and services are:

1. ***[insert a description of the construction work*** **Amount Claimed**

or related goods and services claimed under **$**

this Payment Claim]

2.

3.

[Note: Include attachments if required and list them here as attachments]

Signed:

For and on behalf of the ***[insert full name of CCF Member]***

Dated:

This is a payment claim made under the Building and Construction Industry Security of Payment Act 2002 (Vic)

APPENDIX C

PAYMENT CLAIM (NZ)

From: Payee Name	*HVAC Constructors Ltd*			Date	*20 February 2002*
Postal Address	*PO Box 12345, Penrose, Auckland*				
To: Payer	*A Builder Ltd*			Account Ref	*Job 123*
Postal Address	*PO Box 54321, Ellerslie, Auckland*				
Project Name & trade	*Kiwibank - Mechanical services*			Location	*50 Queen St, Auckland*
Project Claim No	*2*	Period from	*1 Feb 2002*	Period to	*28 Feb 2002*
Due Date for Payment					*20 March 2002*
THIS IS A PAYMENT CLAIM UNDER THE CONSTRUCTION CONTRACTS ACT 2002					

	Value	Claim to Date
Original Contract: As attached details	***$7,700.00***	***$5,300.00***
Approved Variations as attached details	*1,055.00*	
Submitted Variations as attached details	*500.00*	
TOTAL VARIATIONS	***$1,555.00***	***$200.00***
TOTAL	***$9,255.00***	***$5,500.00***
LESS PREVIOUSLY CLAIMED		***3,500.00***
THIS CLAIM (exc GST)		***$2,000.00***

DETAILS FOR PAYMENT CLAIM No 2

ORIGINAL CONTRACT

Item	Description	Qty	Rate	Amount	Claim to Date	
					%	$
1	*Plant & Equipment*			*5,000.00*	*100*	*5,000.00*
2	*Pipework*			*200.00*	*50*	*100.00*
3	*Fittings*			*2,000.00*	*10*	*200.00*
4	*Commissioning*			*500.00*		
TOTAL				***$7,700.00***		***$5,300.00***

VARIATIONS

Ref	Var. No.	Description	Submitted		Approved			Claim to Date	
			Date	$	Date	Ref	$	%	$
1	*VO 1*	*Extra Pipework*	*1/12/01*	*App*	*20/1/02*	*VO12*	*1,000.00*	*10*	*100.00*
2	*SI 10*	*Paint plant*	*10/1/02*	*200.00*				*50*	*100.00*

New Zealand Building Subcontractors Federation Inc, Form for payment claim