

***Review of the Construction  
Contracts (Security of  
Payments) Act (NT)***

**ISSUES PAPER**

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## **1 INTRODUCTION**

### **1.1 Statutory review**

Section 65 of the *Construction Contracts (Security of Payments) Act* (the NT Act) provides that the Minister responsible for the Act must, as soon as is practicable, conduct a review of the first 5 years of operation of the Act. The Attorney-General and Minister for Justice is the Minister who has ministerial responsibility for the administration of the Act.

By 1 August 2006, all of the provisions of the NT Act had commenced operation. Most of the provisions commenced on 1 July 2005. Accordingly, this Issues Paper deals with the period 1 July 2005 to 30 June 2010. However, issues that have arisen after 30 June 2010 will also be considered.

This issues paper has been prepared to seek contributions from the construction industry, construction industry professionals and other members of the community on the general operation of the NT Act in the Northern Territory context.

### **1.2 Purpose of issues paper**

The purpose of this paper is to give a direction to discussion about some issues raised by either stakeholders relating to the NT Act or recent court decisions concerning the operation of the NT Act - and to elicit public comment on these issues and any others that may be raised (including those raised in the discussion paper released regarding the Commonwealth review).

The issues raised are not intended to be exhaustive, and commentators are invited to identify other issues in their submissions.

### **1.3 Process**

Policy options and recommendations for change may be further developed by the Department of the Attorney-General and Justice from the submissions received. Further consultation (either broad or targeted) may be necessary, depending on the level of complexity or the scope of any proposed changes to the NT Act.

### **1.4 How to make a submission**

Anyone can make a submission. It can be as short and informal as a letter or email, or it can be a more substantial document. A submission does not have to address all of the issues identified in the paper, and it does not have to be confined to the issues identified in the paper. Electronic copies of submissions should also be sent whenever possible. Submissions will be publicly available unless clearly marked as "confidential".

**Submissions should be sent to:**

Director Policy Coordination  
Department of the Attorney-General and Justice  
GPO Box 1722  
DARWIN NT 0801

Or by email to [Policy.AGD@nt.gov.au](mailto:Policy.AGD@nt.gov.au)

**Closing date for submissions is 27 November 2017.**

Any submission, feedback or comment received by the Department of the Attorney-General and Justice will be treated as a public document unless clearly marked as 'confidential'. In the absence of a clear indication that a submission, feedback or comment is intended to be confidential, the Department of the Attorney-General and Justice will treat the submission, feedback or comment as non-confidential.

Non-confidential submissions, feedback or comments may be made publicly available and published on the Department of the Attorney-General and Justice website. The Department of the Attorney-General and Justice may draw upon the contents and quote from them or refer to them in reports, which may be made publicly available.

Any requests made to the Department of the Attorney-General and Justice for access to a confidential submission, feedback or comment will be determined in accordance with the *Information Act*.

Note: Although every care has been taken in the preparation of the Issues Paper to ensure accuracy, it has been produced for the general guidance only of persons wishing to make submissions to the review. The contents of the paper do not constitute legal advice or legal information and they do not constitute Government policy documents.

## 2. BACKGROUND

### 2.1 Review team

The review is being conducted by policy officers from the Department of the Attorney-General and Justice working with the Construction Contracts Registrar.

### 2.2 Western Australian review

The policy behind, and the drafting of, the Bill for the NT Act was heavily based on the policy and drafting of the Western Australian *Construction Contracts Act 2004*<sup>1</sup> (Current WA Act) with fairly minor modifications to suit Northern Territory conditions. This enactment following extensive consultation with the construction industry.

During 2014/2015, the WA Government completed its report as required by the WA Act. The process followed in WA comprised the release of a discussion paper (the WA discussion paper)<sup>2</sup>, the tabling in the WA Parliament of a report (the WA Report)<sup>3</sup> prepared by Professor Phil Evans for the Western Australian Building Commissioner) and the WA Government's response to the report. The process involved a high level of face to face consultation and written submissions from both local WA businesses and national professional and occupational groups.

Given the extremely high level of uniformity between the WA and NT Acts, this process was, in effect, a review of most of the NT's legislative provisions. Accordingly, this NT issues paper in identifying issues draws extensively on the Western Australian process and outcomes.

Of course a legislative review is not of itself sufficient. Acts may, regardless of uniformity of content, operate differently depending on local state or territory context. There is a need to seek from businesses that operate in the NT their views on the issues identified in the WA Report (and in other reports)

### 2.3 Commonwealth reviews

The Commonwealth Royal Commission into the Building and Construction Industry released a report in 2003 that amongst a range of other matters, recommended that the Commonwealth enact legislation called the Building and Construction Industry Security of Payments Bill.<sup>4</sup> A draft of the Bill was included with the report. The draft legislation was based on the view that it is constitutionally possible for the Commonwealth to enact legislation that has sufficient coverage.

In late 2016, the Commonwealth Government commissioned Mr John Murray AM to conduct a review of Australia's security of payments laws. Mr Murray's review is expected to focus on greater uniformity between the laws in place around Australia. Mr Murray is due to report to

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<sup>1</sup> *Construction Contracts Act 2004*

<sup>2</sup> Discussion Paper Statutory Review of the *Construction Contracts Act 2004 (WA)* Professor Phil Evans, October 2014

<sup>3</sup> Report on the Operation and Effectiveness of the *Construction Contracts Act 2004 (WA)*. Western Australian Parliament Table Paper 4339, 16 August 2016

<sup>4</sup> These other reports include Commonwealth of Australia, Royal Commission into the Building and Construction Industry, *Final report: Reform – National Issues Part 2 (2003) Security of Payment*, 229

the Commonwealth Government by 31 December 2017. In February 2017, Mr Murray released a discussion paper to stakeholders<sup>5</sup>.

## 2.4 Other reviews

Relatively recent reviews have been conducted as follows:

SA: Alan Moss (2015), *Review of the Building and Construction Security of Payments Act 2009*

Qld: Andrew Wallace (2013), *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry*, May 2013

NSW: Bruce Collins QC (2012), *Final Report: Independent Inquiry into Construction Industry Insolvency in NSW*, November 2012.

## 2.5 Purpose of the NT Act

The main purpose of the NT Act is to provide a process, described in court decisions as “rough and ready”<sup>6</sup>, for the speedy adjudication of payment disputes within the construction industry. The disputes are settled on an interim basis pending any formal court or arbitration based resolution of a dispute. Parties to a construction contract covered by the NT Act cannot contract out of the operation of the NT Act.

## 2.6 Administration of the NT Act

The NT Act is administered by the Attorney-General and Minister of Justice and the Department of the Attorney-General and Justice with a statutory appointee (the Construction Contracts Registrar) having specific (and quite limited) roles. The NT Act is, in the main, designed to be self-regulating in so far as it sets out fairly prescriptive rights, responsibilities and processes.

## 2.7 What contracts are subject to the operation of the NT Act?

The NT Act applies to construction contracts as defined in section 5 of the NT Act. In essence these are contracts for “construction work” (as defined in section 6) or contracts for the supply of goods related to the construction work to the site where the construction work is occurring, contracts relating to professional services for the construction work and contracts for on-site services relating to the contract work.

The term “construction work” is very broadly defined in section 6 but it excludes works relating to finding or extracting natural gas, oil, or minerals; constructing or removing artistic works; constructing watercraft; or such other works excluded by the regulations<sup>7</sup>.

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<sup>5</sup> *Review of Security of Payments laws: Issues Paper* J Murray AM. Mr Murray’s paper does not appear to be published on any Commonwealth Government website.

<sup>6</sup> *INPEX Operations Australia Pty Ltd v JKC Australia LNG Pty* [2017] NTSC 45 at paragraph 43

<sup>7</sup> No other types of contracts have been excluded by regulation.



Part 3 of the NT Act provides a process for the speedy adjudication of disputes on an interim basis. It provides for non-government adjudicators appointed, as a general rule, by the parties (by processes under the NT Act) to make speedy decisions regarding disputes about payments.

It does not prevent the parties going at any time to arbitration or a court for a formal legal determination of the rights and obligations under the contract. However, pending any such court decision, the decision of the adjudicator is binding on the parties. This, for successful claims for payments, means that if an adjudicator rules in favour of a subcontractor, monies can be ordered to be paid. Such a payment is then made on an interim basis subject to any subsequent decision of a court or an arbitration. This is considered to have beneficial effects on contractors further down the contractual chain. They are not, for example, affected by a dispute between the head contractor and the main subcontractor. The monies keep flowing.

It is important to note that the speedy resolution process is not designed to produce authoritative legal decisions (of the quality expected of Courts and Tribunals) on the issues in dispute. Rather it seeks to produce a reasonable decision having regard to the fact that is probable that, in short periods of assembling facts and making decisions, it is not possible to marshal all of the facts, all of the expert evidence, and all of the legal issues.

Parties to a contract cannot contract out of the operation of the NT Act (section 10). It applies regardless of what the contract might say.

The NT Act applies to all “construction contracts” (as defined in section 5 of the NT Act). The monetary amount is irrelevant.

The NT Act applies to all construction contracts entered into after 1 July 2005.

## **2.8 What kinds of disputes are dealt with under the NT Act?**

The NT Act only applies to a “payment dispute” in respect of a contract for “construction work”. A “payment dispute” arises in the following circumstances:

- the amount claimed in a payment dispute is due to be paid but the amount has not been paid in full or the claim has been rejected or has been wholly or partly disputed (section 8(a));
- any money retained by a party has not been paid when due to be released (section 8(b));  
or
- any security held by a party has not been returned by the due date for return (section 8(c)).

If a contract does not have a specific clause setting out when a payment is due to be paid, section 20 of the NT Act, along with Division 5 of the Schedule to the NT Act, operates so that the period is 28 days from the time of receiving the payment claim.

## 2.9 What kinds of contractual provisions are prohibited by the NT Act?

The NT Act in section 12 prohibits “pay if paid” and “pay when paid” provisions – that is an obligation to make a payment cannot be made contingent on another party having made a payment in some other part of the contractual chain. This is the same as in the WA Act.

The NT Act, in section 13, prohibits a provision in a construction contract that requires a payment to be made more than 50 days after the payment is claimed. Such provision is read down so the required period is 28 days after the payment is claimed. This provision differed from the original WA section which provided that the period was deemed to be 50 days. However, the WA Act has now been amended so that the period is 42 days<sup>8</sup>.

The NT Act also permits regulations to be made that prohibit other provisions. No such regulations have been made.

## 2.10 What are the implied provisions?

If a construction contract does not have a provision that deals with the matters set out in sections 16-25 of the NT Act, the matter set out in the relevant section applies. This means that the NT Act will imply contractual obligations concerning matters such as:

- variations – see section 16 and clause 1 of the Schedule;
- determinations about entitlements to be paid (including progress payments) – see sections 17-19 and clauses 3-5 of the Schedule;
- responses to payment claims – see section 20 and clause 6 of the Schedule;
- interest on overdue payment – see section 21 and clause 7 of the Schedule<sup>9</sup>;
- ownership of goods – see section 22 and clause 1 of the Schedule;
- duties as to unfixated goods when there is an insolvency – see section 23 and clause 1 of the Schedule;
- retention money – see section 24 and clause 1 of the Schedule;
- application to contracts of definitions of general terms contained in either sections 4-6 of the Act or in the *Interpretation Act* – see section 25.

## 2.11 What are the adjudication processes under the NT Act?

The processes of a payment dispute under the NT Act involve:

- within 90 calendar days after a payment dispute arises, a party to the dispute can apply for an adjudication under the NT Act of the dispute (section 28);

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<sup>8</sup> *Construction Contracts Amendment Act*, section 7

<sup>9</sup> The interest rate is prescribed in the Construction Contracts (Security of Payment) Regulations as being the amount fixed from time to time for the purposes of section 85 of the *Supreme Court Act*. That rate is specified as being the rate per annum fixed for section 52(2)(a) of the *Federal Court of Australia Act 1976* (Cth)

- serving the application on the other party to the contract and either an adjudicator already appointed by the parties or (if that has not occurred) a person (a “prescribed appointer”) whose role it is to determine who is to be the adjudicator. The prescribed appointer must make an appointment within 5 working days but if that does not occur, the Construction Contracts Registrar can make an appointment (sections 28 and 30);
- the other party must respond to the application within 10 working days of being served with the application (section 29); and
- the appointed adjudicator must make a decision of some kind within 10 working days (subject to limited grounds of extension) after the response to the claim (or within 10 working days of when the response should have been made) (section 33).

The decisions that an adjudicator may make are:

- approve the claim; or
- reject the claim (either on the merits or for technical or jurisdictional reasons); or
- dismiss the claim if satisfied that it is not possible to fairly make a determination because of the complexity of the matter or if there is not enough time in which to make the determination.

## **2.12 What reviews can be conducted regarding decisions made by adjudicators?**

Section 48(3) of the NT Act provides that a decision or determination of an adjudicator cannot be appealed or reviewed except as provided for in section 48(1) of the NT Act.

Section 48(1) provides that a person who is aggrieved by a decision under section 33(1) (a) of the NT Act may apply to the Local Court for a review of such a decision.

Section 33(1) (a) deals with the following decisions of an adjudicator regarding dismissal of an application without making a determination regarding the merit:

- where the contract is not a “construction contract”;
- where the application has not been prepared and served in accordance with section 28;
- where a court or an arbitrator or other person or body has made an order, judgment or other finding about the matter that is the subject of the application;
- where the adjudicator has stated that it is not possible to fairly make a determination because of the complexity of the matter because the prescribed time (or any extension of it) is not sufficient “for another reason”.

These matters relate to technical issues. There is no appeal or review on the merits.

However, section 48(3) has not precluded the Supreme Court dealing with matters that arise in respect of applications - most of the cases have involved jurisdictional review. For recent example see *INPEX Operations Australia and Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45. Other cases are summarised in Appendix A.

It is considered that the court will not set aside an adjudicator's decision where the adjudicator has made a non-jurisdictional error in applying the law or in interpreting the contract. The court may set aside an adjudicator's decision if the adjudicator has not acted honestly or has breached the rules of natural justice (unbiased decision maker and each party having an opportunity to prepare and present its case and to respond to any allegations).<sup>10</sup>

### **2.13 What are the requirements for the registration of adjudicators?**

A natural person is eligible for registration as an adjudicator if the person has the prescribed qualifications and experience<sup>11</sup>. The registration decision is made by the Construction Contracts Registrar<sup>12</sup>. If an application is not successful, the applicant can appeal to the Local Court for a review of the decision<sup>13</sup>.

### **2.14 Are there exemptions regarding the operation of the NT Act?**

Section 9(4) of the NT Act provides for the making of exemptions. The NT Act, or a provision in the NT Act, does not apply to a construction contract or class of contracts prescribed in the regulations as being a contract or class of contracts that is not subject to either the NT Act as a whole or to a provision of the NT Act. Additionally, section 64(3) states that regulations can be made that provide differentially for different persons or matters or classes of persons or matters.

No such regulations currently exist.

### **2.15 How has the NT Act operated?**

#### **Information collected in respect of the operation of the NT Act**

Section 53A of the NT Act provides that registered adjudicators must provide the Registrar with information as prescribed in the regulations. The prescribed information is set out in regulation 14 of the Construction Contracts (Security of Payments) Regulations. Aside from identifying information, the required information for each dispute includes:

- the nature of the work that is the subject of the payment claim;
- the location of the construction work;
- the amount of the payment in dispute;
- the date of the appointment of the adjudicator;
- the date of any dismissal under section 33(1)(a);
- details of any determination under section 33(1)(b) (e.g. amount to be paid, amount of interest, how the interest was calculated);

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<sup>10</sup> See page 29, WA Discussion Paper

<sup>11</sup> Section 52(1) of the NT Act

<sup>12</sup> Section 52(2) of the NT Act

<sup>13</sup> Section 53 of the NT Act

- the date of any deemed dismissal under section 33(2);
- costs details (e.g. costs for the adjudicator, costs for tests, costs of engaging experts);
- the amount that each party pays for the costs of adjudication; and
- for a disqualified adjudicator (under section 33(1)), the appointment details, the date of the disqualification and the amount of costs due to the adjudicator.

## Case law

The case law on the NT Act is set out in Appendix A. The NT Act has been the subject of some significantly complex litigation.

### 2.16 CEOs annual reports concerning the operation of the NT Act

Under section 63 of the NT Act, the Chief Executive Officer of the Agency administering the NT Act must include in the Agency's annual report for each financial year a report about the operation and effectiveness of the NT Act. The last such report that is available is the report for the year ending 30 June 2016<sup>14</sup>. In summary:

- the total number of registered adjudicators is 55, have risen gradually from the 15 adjudicators registered during the first year of operation of the NT Act (2006);
- the number of applications for adjudication has ranged between 1 (2005-06) and 34 (2014-1015). Excluding the first year, the average per year is approximately 15;
- the number of determinations has ranged between 1 (2005-2006) and 20 (2015-2016). Excluding the first year, the average per year is approximately 11;
- the number of withdrawals/rejections of application on technical grounds have ranged between 0 (2005-2006 and 2011-2012)) and 14 (2014-2015) with the average, excluding the first year, of approximately 5; and
- the number of court actions resulting from determinations is usually between 1 and 3 per year.

### 2.17 Costs involved with adjudications

The scheme may be a lot cheaper than court action but it is still not free. Ignoring the rarely used small claims scheme, the lowest fee charged to date for a determination has been \$2,200 on 2 occasions. One of those claims was for just under \$10,000 and the other was for just over \$11,000. There has been one dismissal on jurisdictional grounds for \$1,540. The most expensive charge was more than \$95,000 for a \$19 million claim.

That is just the adjudicators' fees. If the matter is complex or one or both of the parties doesn't feel competent to put their own application or response together, it is likely that they will need to engage a lawyer to do it for them.

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<sup>14</sup> Annual Report 2015-2016 Report of the Department of Attorney-General and Justice, September 2016

## 2.18 Small claims scheme

Part 4 of the *Community Justice Centre Act* provides for a small claims scheme. Part 4 permits, for disputes up to \$10,000, the Director of the Community Justice Scheme to appoint a person to adjudicate the dispute. There is a fixed fee (currently \$500) for the adjudicator's service. The fee is paid to the Director. The Director (i.e. the NT) is liable to pay the adjudicator's actual costs.

The small claims scheme is rarely used.

## 2.19 West Coast model v East Coast model

The NT Act and the WA Act comprise what is often referred to as the "West Coast model". The West Coast model was, in turn, loosely formulated on the British security of payments legislation which has been adapted in other countries, including Malaysia, Singapore, New Zealand, Ireland and Canada. There are only minor differences in scope and detail between the WA and NT Acts.

The rest of Australia has legislation known as the "East Coast model". Again there are differences between each of the East Coast Acts.<sup>15</sup>

The main differences between the East and West Coast models are:

- the East Coast model prescribes a statutory payment scheme that overrides any inconsistent contractual provisions. In contrast, the West Coast model only provides legislative assistance when the construction contract does not have agreed payment provisions;
- under the East Coast model, a claimant must (except in NSW) endorse its payment claim as being made under the relevant Act before the adjudication process commences. Payment claims under the West Coast model are made according to the procedure set out in the construction contract and the right to adjudication only arises when a dispute occurs through the payment claim procedures set out in the contract;
- the East Coast model only provides for recovery of progress payments up the contractual chain, restricting applications for adjudication to contractors and subcontractors. Under the West Coast model, any party to a construction contract can seek adjudication of any payment dispute. For example, the head contractor can commence proceedings under the Act; and
- the East Coast model uses Authorised Nominating Authorities to refer disputes to a nominated adjudicator selected by the authority (except in Queensland where the Regulatory body appoints adjudicators). The West Coast model allows the parties to agree an adjudicator.

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<sup>15</sup> For a more detailed outline of the differences see WA Discussion Paper, page 16 and WA Report page 56

### 3. CONSULTATION ISSUES

#### 3.1 What should be the scope of the NT Act?

The purpose of the NT Act is to make speedy decisions regarding disputes about payments.

The NT Act does not prevent the parties going to arbitration or a court for a formal legal determination of the rights and obligations under the contract, however, pending any such arbitration or court decision, the decision of the adjudicator is binding on the parties.

This, for successful claims for payments, means that if an adjudicator rules in favour of a subcontractor, monies can be ordered to be paid. Such a payment is then made on an interim basis subject to any subsequent decision of a court or an arbitration.

This is considered to have beneficial effects on contractors further down the contractual chain as it keeps the money flowing.

However, there have been a number of Northern Territory judicial decisions<sup>16</sup> where the court has, for various reasons, overturned the decision of the adjudicator. For example by decision dated 15 June 2017, the Supreme Court, in *INPEX Operations Australia and Anor v JKC Australia LNG Pty Ltd & Anor [2017] NTSC 45*, found that the adjudicator did, in a way that was “plainly wrong” incorrectly interpret the payment clause in the contract. The Court also found that there had been a substantial denial of natural justice for the head contractor regarding the process by which the issues were identified – so as to adversely affect the capacity of the head contractor concerning the submissions it may have put to the adjudicator before the adjudicator made a decision. The Court decided that the decision of the adjudicator was a nullity.

Nonetheless, it needs to be noted that it will be relatively rare for the Court to make this kind of decision regarding the merits of the adjudicator’s decision. This apparent overriding by the Court of the core principles of the NT Act was only possible because of the egregious process followed by the adjudicator and the apparent patent error in his decision.

The Court also noted, at paragraph 46, that “*there may be some question as to whether this is the kind of dispute, or the kind of process, which was in contemplation of the legislature when the Act was passed*”.

The Department has limited knowledge of how well the NT Act is working regarding payment decisions that do not end up in litigation in the Supreme Court<sup>17</sup>. The decision in the INPEX case (and others) might suggest that the decisions being made are somewhat too rough and ready. It would be useful to have factual information or qualitative comment from persons in the construction industry as to the level of satisfaction with the decision making processes.

1. Generally, do the policy objectives of the NT Act remain valid and its terms remain appropriate for securing its objectives?
2. Are you satisfied with the decisions made by adjudicators?
3. If you have not been satisfied with a decision, did you live with it (i.e. do nothing) or did you commence legal proceedings to formally resolve the dispute or did you take action in the Supreme Court on technical grounds?

<sup>16</sup> See Appendix A for a summary of the NT case law

<sup>17</sup> The same point was made by the author of the South Australian report

### 3.2 Should the name (short title) of the NT Act be changed?

The name of the *Construction Contracts (Security of Payments) Act* does not necessarily reflect the function of the NT Act, which is to facilitate quick resolution of disputes between contracting parties within the construction industry. The NT Act does not provide guarantees of solvency, nor does it secure payment of monies owed on its own.

Where a party refuses to pay the other party following an adjudicator's determination, the party seeking payment will need to have the determination certified by the Construction Contracts Registrar and pursue the outstanding amount as a judgment for a debt in the courts under section 45. In the case of insolvent debtors, a party would have to seek redress through the *Bankruptcy Act 1966* (Cth), or the *Corporations Act 2001* (Cth).

The use of the phrase 'security of payments' in the title of the NT Act has the potential to confuse the intention of the NT Act, which is facilitating timely resolution of disputes, with the actual recovery of monies owed.

The NT Act replaced the *Workmen's Liens Act*<sup>18</sup>. That Act had attempted to provide some form of security. However, the Act was generally considered to be ineffectual and counterproductive for the effective resolution of construction disputes. Other than in South Australia<sup>19</sup> such legislation does not exist elsewhere in Australia. This issue is discussed at pages 17-18 of the Commonwealth paper by reference to the possibility of creating a statutory trust.

4. Should the name of the Act and section 3 (Objective provision) be amended to reflect the Act's function? For example, '*Construction Contracts (Payment Disputes and Statutory Provisions) Act*', '*Construction Contracts Act* (as per the name of the WA Act) or something similar?
5. Should the Act have other provisions that provide for greater security?

### 3.3 Should the times for making an application be reduced?

The NT Act permits a claim to be made within 90 calendar days. This is longer than in most other jurisdictions. Legislation providing for this longer period was enacted in 2007<sup>20</sup>. When the NT had a 28 day time limit approximately 50% of claims were dismissed for being out of time.

The WA Report considered this issue – with a recommendation that the WA period (28 calendar days) not be changed<sup>21</sup>. However, the former WA Government rejected the recommendation on the basis that:

- the 28 day period “the absolute effect of the time limit is impeding the ability of some claimants to access adjudication ...”;
- changing the period to 90 days will improve consistency of the “West Coast model”<sup>22</sup>.

<sup>18</sup> *Workmen's Liens Act*(NT)

<sup>19</sup> *Worker's Liens Act 1893*

<sup>20</sup> *Justice Legislation Amendment Act (No 2) 2007*

<sup>21</sup> Recommendation No 1(a) in the WA Government response to the WA report, page 4

<sup>22</sup> WA Government response to the WA report, page 4



The WA change was implemented in 2016 with the relevant period becoming 90 business days<sup>23</sup>.

6. Does the 90 day period in which applications can be made adversely affect the speedy resolution of payment disputes?

### 3.4 Should the times for responding to payment claims be extended?

Under the NT Act, the subcontractor making the claim has considerable time (up to 90 calendar days) to prepare the claim but the respondent contractor only has 10 working/business days to make a response (section 29). This means that a head contractor of a construction contract may not have enough time to provide adequate factual and legal responses to all of the issues. Arguably, these time requirements work unfairly, particularly, in respect of large and complex claims.

The general position elsewhere in Australia under similar legislation is that a head contractor has 10 working/business days to respond to a claim. Queensland has recently amended its legislation so that the period is 15 business days for what it considers are complex claims (involving amounts over \$750,000).

These arguments have some merit noting that the substantial difference between the NT and the other states is that subcontractors have 90 calendar days from when a payment is due to prepare a payment claim. The equivalent period elsewhere is within 10 and 20 days (with WA being the exception having recently amended its period to 90 business days). The 90 calendar day period was chosen in the NT (following amendments in 2007) having regard to a perception that local contractors don't follow up on outstanding payments so that the previous period (28 days) was too short. Applications by small businesses were being refused because they were out of time. The 2007 amendments were not designed to make it easier for large subcontractors to make more comprehensive claims. That, however, is a consequence.

Picking a different period is, obviously, somewhat arbitrary. However the core object of the NT Act (speedy informal resolution) would be severely affected if the period for response were extended to 90 calendar or business days.

It can be noted that the WA report recommended that there be no substantive change from the 14 calendar days<sup>24</sup>. Regarding this recommendation, it can be noted that the WA report also recommended against extending the period in which an application could be made. The main reasoning behind the WA recommendation for the timing of a response was that this would adversely affect the key purpose of the NT Act – namely that of having a scheme that is not overly complicated and that is one that provides for rapid resolution. The WA report also did not support having tiered response times that depended on the complexity of the construction contract.

<sup>23</sup> *Construction Contracts Amendment Act 2016*, section 8

<sup>24</sup> See WA Report, pages 23-25. Noting that *Construction Contracts Amendments Act 2016* did change the period in a superficial manner from 14 calendar days to 10 working days

For the Northern Territory, it seems appropriate that there be a longer period. At the moment, it seems unfair that the claimant has 90 calendar days (approximately 65 working days) to prepare a claim whilst the respondent only has 10 working days to prepare a response.

7. Should the period in section 28 of the NT Act for a response be extended?
8. If so, would:
  - (a) 20 working days be appropriate for large contracts; and
  - (b) 15 working days be appropriate for other construction contracts; or
  - (c) some other period be more appropriate?

### 3.5 Should the timeline for making determinations be extended from 10 working days?

This issue was raised in the WA Report noting that some submissions favoured extending the period from 14 calendar days to 21 calendar days. The WA Report notes that over the period 2005-1014 there had been 845 determinations with the average time being 13 days.

From the WA Report it appears there was not much support from the key industry stakeholders for any substantive change in the period (other than to express the period in terms of working days rather than calendar days).

The Queensland legislation provides for periods that vary depending on the complexity of the claim. For example, the period is 15 business days if the claim is for an amount greater than \$750,000 (or such another amount as is prescribed by legislation).

9. Should the timeline in section 33 for the making of a determination by an adjudicator be extended?

### 3.6 Should an adjudicator have the right to extend the time for making a determination other than with the consent of the parties?

Currently, section 34(3) of the NT Act permits an adjudicator to extend the period if the Registrar consents. The WA Report (dealing with legislation which only provided for extension by agreement) canvassed issues concerning the adjudicator having an automatic right to give themselves such an extension.

The WA Report recommended that an adjudicator have the right to extend the period by an additional 7 day business period<sup>25</sup>. The WA report noted that some submissions favoured extending the period from 14 calendar days to 21 calendar days. The former WA Government did not support this recommendation stating that it would not accord with the spirit of rapid adjudication and the maintaining of simplicity of process. The WA Government noted that further work would be done on developing criteria for the granting of extensions.

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<sup>25</sup> WA Report, page 30 (recommendation 4(a))

From the WA Report it appears there was not much support from the key industry stakeholders for any substantive change in the period (other than to express the period in terms of working days rather than calendar days).

10. Should section 33 be amended so that adjudicators have the right to extend the time for making a decision by a period of up to 5 working days?

### 3.7 Should section 28(2) be amended so that an adjudication can occur despite minor failures with the application?

The WA Report noted that section 28(2) of the WA Act has been interpreted so that failures to include minor aspects of the requirements set out in the regulations have resulted in applications being dismissed. The WA Report noted that it is inconsistent with the aim of the legislation for applications to be dismissed because of failings quite unrelated to the merits of the matter. The WA report recommended that the legislation be amended so that an application should be valid so long as there has been substantial compliance with the regulations.<sup>26</sup>

The former WA Government supported this recommendation but no changes were made by the 2016 WA legislation<sup>27</sup>.

11. Are there any current or potential problems regarding the operation of section 28(2) for minor procedural flaws in an application?

### 3.8 Should the NT Act permit applications to be withdrawn and then re-lodged?

Section 27(a) seeks to ensure that a payment dispute is only dealt with once under the NT Act. It precludes a party to a construction contract from applying to have a payment dispute adjudicated where an application has already been made for adjudication of that dispute (regardless of whether the first application was made by that party or the other party).

However following litigation in *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44 and *Brierty Limited v Gwelo Developments Pty Ltd* [2014] NTCA 7, it is not entirely clear whether section 27(a) precludes an application in cases where a previous application in relation to the same dispute was made, but then withdrawn.

There may be a number of reasons why a party may withdraw an application for adjudication before the adjudication commences. One such example may be where the parties were actively disputing payment, however the trigger that money was due and payable at the time the application was lodged was not present. Such a situation would otherwise prove fatal if it were not withdrawn and a subsequent application made within time and with all the relevant criteria addressed. As the NT Act is intended to rapidly resolve disputes, should a party be prevented

<sup>26</sup> Recommendation No 19 in the WA Government response to the WA report, page 8

<sup>27</sup> WA Government response to the WA report, page 8

from accessing the dispute resolution process due to technicalities associated with making and then withdrawing a prior application?

On the other hand, a party receiving an adjudication application may go to some considerable time and expense in responding to it, only to have the application withdrawn and subsequently replaced by a new application. Against the setting of rapid dispute resolution, should a party be placed in a situation of having to potentially respond to a number of successive applications over the same dispute?

12. Should section 27(a) be amended to make it clear that a previous application in relation to that dispute, including one that has been withdrawn, precludes a further application; or should section 27(a) be limited to matters that have already been determined by an adjudicator?

### **3.9 Should the NT Act be amended so as to clarify what happens if there is a failure to return a bank guarantee?**

In addition to a failure to pay a payment claim, a failure to pay retention monies, or a failure to return security provided under a contract also triggers a payment dispute under section 8 of the NT Act.

Although an adjudicator has the power under section 33(1) (b) (ii) of the NT Act to determine whether a party is liable to return any security, and determine the date on which that security should be returned, there are practical difficulties with enforcing such a determination where the security is in a non-monetary form, such as a bank guarantee.

Section 45(1) of the NT Act enables a determination to be enforced as a judgment of a court of competent jurisdiction, however that provision contemplates that determinations will be for the payment of monetary sums. Section 45 does not appear to permit enforcement of determinations relating to the return of non-monetary security, such as returning a bank guarantee.

13. Should section 45 be amended to enable the enforcement of an adjudicator's determination to return a bank guarantee or other non-monetary security as an order of a court of competent jurisdiction?

### **3.10 How should the NT Act deal with rolling invoices?**

The NT Act seeks to ensure that proceedings under it commence within a specified time of when a payment is due. Often a construction contract will include terms where consolidated invoices or payment claims can be issued. Such terms allow rolling invoices that pick up outstanding amounts under previous payment claims.

The latest payment claim in a series of rolling payment claims supersedes all past claims, resulting in previous outstanding amounts forming part of the latest claim. This has an impact on assessing when the applicable time period is for the lodging of a payment dispute application.

The ability to reissue a payment claim on a rolling basis extends the time to make an application to the payment dispute arising from the latest rolling claim, rather than an earlier one. The matter of *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 suggests that where a contract provides for rolling invoices, the result may be that the contract permits the same unpaid moneys to be the subject of more than one payment dispute.

14. Should the Act be amended to limit the time period for a payment claim to when it first arose, or should parties continue to be free to set the terms of payment as they see fit, including by way of rolling invoice?

### 3.11 Should an adjudicator be able to consider multiple payment disputes?

Under section 34(3) (b), an adjudicator may only consider multiple payment disputes simultaneously where both parties agree. The default therefore is that each payment dispute must be considered separately.

This raises a number of practical issues, particularly where a contract requires progress payments in relatively short periods (such as monthly), or where a contract calls for a party to separate into components and submit separate payment claims for a number of facets of what would otherwise be generally considered one item (for example, requiring a party to submit one payment claim for the cost of works done, and another for GST).

As is the case with rolling invoices, there may be times when a number of successive progress payment claims may be disputed within a short period of time. The question then arises as to whether it is either appropriate or cost effective to then require a party to make separate applications resulting in multiple independent adjudications. A further question is whether it is appropriate or cost effective to prevent related or like claims from being considered at the same time.

The WA Report recommended in favour of removing the need for the consent of the parties<sup>28</sup>. The WA Government supported the proposal which was implemented in 2016<sup>29</sup>.

15. Should the NT Act be amended to allow for an adjudicator to consider multiple payment disputes arising under the one contract simultaneously?

### 3.12 Should the NT Act be amended so that it is clear that responses to an application for adjudication are not required to include information provided with the application?

Section 29(2) (c) requires the respondent's response to state or have attached to it all of the information, documents and submissions which it intends to rely on in the adjudication. This has been interpreted as technically<sup>30</sup> including any documents, information or submissions that

<sup>28</sup> Recommendation No 22 in the WA Government response to the WA report

<sup>29</sup> WA Government response to the WA report, page 9, *Construction Contracts Amendment Act 2016*, section 13

<sup>30</sup> In practice it may be the case that the parties accept that there is no need to insist on this level of compliance

the applicant has provided with the application that the respondent may challenge or discuss in support of its position.

The practical effect is that the respondent often has to double up on the material that is presented to the adjudicator for no discernible benefit. This increases the time and expense faced by the respondent.

In the interests of quick resolution, it would appear appropriate that the respondent's requirement, to provide all the information, documents and submissions it intends to rely upon, be limited to the provision of information or documents that have not already been provided in or with the application.

16. Should the requirement that the respondent provide all the information, documents and submissions it intends to rely upon be limited to that material that has not already been provided as part of the application?

### 3.13 Should the NT Act be amended so as to exclude liquidated damages?

The WA Report (page 46) canvassed issues around whether the legislation should exclude the power of adjudicators to make decisions based on contractual rights and obligations for liquidated damages. This issue had been raised, in part, because the Victorian legislation excludes damages related to claims for breach of a construction contract where progress payments are calculated<sup>31</sup>.

The WA Report (page 47) recommended that the WA Act should not be amended so as to exclude liquidated damages. The main reason being that the objective of the legislation is to get a speedy determination of the rights of the parties under the contract. To do this, the provisions of the contract need to be applied.

17. Are there any issues regarding adjudicators having a power to award liquidated damages?

### 3.14 Should the NT Act be amended so as to exclude the mining exemptions?

Section 62(a) and (b) provide exemptions for works relating to mining – e.g. construction work relating to drilling or the constructions of shafts and quarries for the purpose of discovering or extracting minerals.

Issues regarding the equivalent WA provisions are discussed in some detail in the WA Report (pages 46-54).

The WA Report recommended that the exceptions be removed with the main reason being that the reviewer could not see why mining construction activities should be treated any differently to other construction activities.

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<sup>31</sup> Section 10B(2)(c) of the *Building and Construction Industry Security of Payment Act 2002*

The former WA government did not accept that recommendation stating that it is not convinced that there is a compelling argument to expand the operation of the Act in that way<sup>32</sup>.

18. Should the legislation be amended so as to include mining activities?

### 3.15 Should the NT Act be amended so as to remove the artistic exemptions?

Section 62(c) provides an exemption for works relating to the construction of artistic works.

Issues regarding the equivalent WA provisions are discussed in some detail in the WA Report (pages 55-56).

The WA Report recommended that the exceptions be removed with the main reason being that the reviewer could not see why artistic construction activities should be treated any differently to other construction activities. The former WA government accepted that recommendation. Legislation providing for the amendment has now been enacted<sup>33</sup>.

19. Should the legislation be amended so as to remove the exemption concerning artistic works?

### 3.16 Should there be exemptions or a contracting out procedure for complex claims?

As the Territory's economic potential expands, the propensity for large scale construction projects increases. Along with the increase in project scale is the increase in contractual complexity, including the complexity of project deliverables and payment terms and conditions.

The NT Act is designed to facilitate rapid adjudication of disputes, in part to keep monies flowing within the contract chain. As mentioned above, an applicant has up to 90 calendar days from the time of there being a payment dispute in which to apply for an adjudication. The other party must respond to the application within 10 working days of being served with the application and the adjudicator must make a decision of some kind within 10 working days (subject to limited grounds of extension) after the response.

This timeframe is intended to expedite resolution of payment disputes. However, it does not necessarily take into account the complexity that large scale projects may entail. The effect of the timeframes may unintentionally restrict a party's ability to respond appropriately to a payment claim, and an adjudicator's ability to adequately consider the dispute.

An option to improve the effectiveness of the scheme for all parties could involve amending the NT Act to provide for increased timeframes in which to serve a response to, and determine, an application where the matter is complex/high value.

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<sup>32</sup> Response of the Western Australian Government to the The Report on the Operation and Effectiveness of the *Construction Contracts Act 2004 (WA) May 2016*, Page 12

<sup>33</sup> *Construction Contracts Amendment Act 2016 (WA)*

There is some level of arbitrariness associated with defining what constitutes complexity. Queensland recently amended its legislation so that the period in which to respond to a payment dispute is 15 business days for what it considers are complex/high value claims (involving amounts over \$750,000).

Another option suggested by a large head contractor related to excluding \$500 million plus contracts. There may also be issues in developing the legislation around that concept. Contracts don't necessarily have fixed prices or fixed values. They are often amended in the course of the term of the contract. It may be simpler to design an exemption around the size of payment claims. If the generality of this proposal is accepted, the details of what is a high value contract could be set out in regulations and that the precise definition be the subject of further discussion with the construction industry.

An alternative to increasing timeframes for complex claims could be to provide an exemption from whole or a part of the NT Act if the parties to large scale projects can demonstrate that the contract contains a mechanism that enables the speedy resolution of disputes. Such a framework would require an administrative process where the parties could apply to the Construction Contracts Registrar for an exemption either before or after the commencement of the contract (but not for a dispute already being dealt with under the NT Act). Regulations could set out matters that must be included in the contract before an exemption could be considered.

Judicial, arbitration and mediation proceedings can take a long time. They can also disrupt the parties getting on with those aspects of the contract that are not in dispute. It has been suggested that some high value contracts have their own speedy decision / dispute resolution process as a contractually agreed version of the provisions contained in security of payments legislation but drafted in a way that, at least between parties of equal economic capacity, suits the interests of both of the parties.

There appears to be few legal or policy problems in permitting parties to construction contracts to have their own speedy resolution provisions so long as they comply with requirements prescribed by legislation concerning matters such as there being:

- a reasonable period of time in which to make a payment claim (being no more than the time prescribed in the NT Act);
- a reasonable period of time in which to respond to the claim (being no less a time than the time prescribed in the NT Act);
- a process for the appointment of an independent adjudicator;
- a reasonable time for the adjudicator to make a decision; and
- agreement to comply with the adjudicator's decision within a period of time not less than the time prescribed in the NT Act.

For all parties to a construction contract, a potential advantage of private versions of a speedy resolution dispute system is that it can operate to ensure that the disputes (and their outcomes) can be kept between the parties. Of course one of them may be disgruntled (e.g. if they claim the process is unfair and was forced on them by the economic power of the other party). For the resolution of that kind of issue, the parties to a construction contract could apply to the Construction Contracts Registrar for a determination as to whether or not the speedy



resolution process complies with the legislation. A decision of the Registrar would, as is usual for administrative decisions, be the subject of review by the Northern Territory Civil and Administrative Tribunal.

The NT Act, in section 9(4), provides that regulations can be made that permit exemptions from the Act. In the second reading debate regarding the Bill for the Act, it was clearly stated that this provision existed for the purpose of widening or narrowing the scope of the Act. As mentioned above, the Supreme Court has also noted that “*there may be some question as to whether this is the kind of dispute, or the kind of process, which was in contemplation of the legislature when the Act was passed*”<sup>34</sup>.

The WA Report very briefly considered whether the WA Act should be amended so as to permit contracting out. The reviewer received submissions about inequalities in bargaining powers in the industry and was concerned that some parties may misuse their dominant power and coerce others to contract out of the provisions of the Act. The WA Report recommends against permitting contracting out<sup>35</sup>. This recommendation was supported by the former WA Government<sup>36</sup>.

20. Should the NT Act be amended to provide an alternative process for complex/high value payment disputes?
21. The definition of complex/high value contract/dispute could either refer to the value of the contract or the value of the dispute or, alternatively, the type of contract, to extend the period of time a party must respond to a claim from 10 business days to 20 business days, with the adjudicator/Registrar to have discretion to approve a further 10 days.
22. Another option could be to exclude high value contracts from the operation of the NT Act.
23. Another option would be to provide an exemption in relation to contracts that contain their own approved speedy dispute resolution process.

### **3.17 Should there be additional requirements regarding the suitability of adjudicators for complex disputes?**

Prior to being registered, adjudicators must possess relevant professional qualifications and undertake specialist approved training. However the inherent nature of complex/high value claims requires that the adjudicator possess the necessary skills and experience associated with the issues that are in dispute.

In identifying and addressing this issue, the recent Queensland reforms saw the introduction of a grading system for adjudicators based on experience and capacity. Queensland amended its legislation in 2014 so that a Government official appoints adjudicators.

<sup>34</sup> *INPEX Operations Australia Pty Ltd v JKC Australia LNG Pty* [2017] NTSC 45 at paragraph 43

<sup>35</sup> Recommendation No 26 WA Report

<sup>36</sup> WA Government response to the WA Report, page 97

The NT Construction Contracts Registrar has noted challenges to decisions are often as much about what is at stake, and the advice the disgruntled party may have received, as they are about the perceived quality of the determination. Conversely the Registrar sees determinations go unchallenged that are poorly written, and which seem to make quantum leaps when arriving at conclusions with little or no discussion about the evidence behind those conclusions.

It seems reasonable that for high value contracts there should be a mechanism in place that gives greater assurance that the adjudicator has the competence relevant to the task. This is said noting that decisions of adjudicators on disputes involving a head contractor, as in the matter recently decided by the NT Supreme Court, have significant operational changes all the way down the contractual chain. An appropriate mechanism seems to be one requiring that the appointer consult with the parties in disputes involving high value contracts about the nature of the dispute and their preferences regarding the adjudicator, and must only appoint a person as adjudicator if that person has professional skills and experience, as prescribed by regulation, relevant to the dispute.

Queensland has base grading on experience and limits lower graded adjudicators to lower value applications. They also require adjudicators to undergo a continuing education scheme similar to that used by the various law societies in order for adjudicators to maintain their registration.

This may be a good idea for jurisdictions that have the resources to administer such a scheme and which have the numbers of adjudicators and numbers of adjudications to make it work. However, the NT is a small pond. We have very few locally based adjudications and the volume of adjudications varies between 37 in the 2014 calendar year, and 2 in 2011. Last year there were 20 matters decided or withdrawn.

There is also doubt as to how the Queensland requirements work with interstate adjudicators registered under mutual recognition principles as is the case of the majority of adjudicators registered in the NT. Do they have to fly to Queensland to attend approved courses? Do the determinations made by them interstate count when they are graded? How would the Registrar know what they have done interstate in a jurisdiction that does not maintain a record of determinations and dismissals?

24. Should the NT Act be amended to require appointers to consult with the parties about the adjudicator proposed to be appointed in complex/high value payment disputes or should a grading system be considered?

### **3.18 Is there a need to simplify the withdrawal of an adjudicator owing to incapacity?**

Other than through being disqualified on the grounds of conflict of interest, an adjudicator cannot withdraw from an adjudication once appointed. Where an adjudicator becomes incapacitated during an adjudication, or is otherwise unable or unwilling to continue with the adjudication, the issue arises as to how best to manage the situation.

Presently, where an appointed adjudicator is unable/unwilling to continue, the applicant has to await the expiration of the 10 working days statutory time period the adjudicator has to make

a decision, rely upon a deemed dismissal of the application under section 33(2) and then re-apply for an adjudication relying on section 39(2) to permit the second application.

Such a scenario goes against the notion of rapid determination of a matter, seeing a delay of upward of 20 working days from lodgement of the initial application before the matter can be considered (assuming that the appointer makes a second appointment as soon as the second application is made, and the respondent serves a response immediately thereafter).

An alternative approach may be to amend the NT Act to provide that where an appointed adjudicator becomes incapacitated or otherwise is unable/unwilling to adjudicate the matter, the adjudicator may withdraw from the adjudication by notice to the parties, the Registrar and the appointer. Under this option, the appointment could be deemed to not have been made, which would permit the appointer to appoint another adjudicator in accordance with section 30.

25. Should the NT Act be amended to enable the appointment of an alternative adjudicator in cases where the appointed adjudicator is incapacitated or otherwise unable/unwilling to continue with the adjudication?

### 3.19 Should the implied provisions in Part 2, Division 2 of the NT Act be retained?

Part 2, Division 2 (along with the Schedule) of the NT Act contains the implied terms. This issue is canvassed in some detail in the WA Report<sup>37</sup>. Most of the issues seemed to relate to differences of views amongst WA courts and tribunals regarding the application of the implied provisions. None of the issues appear to relate to problems under the NT Act.

On a conceptual level, the WA Reviewer received a detailed submission arguing that implied provisions should only exist if there is a level of expectation on the parties that the terms are reasonable. The suggestion is that the terms implied don't necessarily have that quality.

One NT implied condition that may be of concern is clause 6(2) of the Schedule to the NT Act. It has the effect that a claim must be paid within 28 days if the contractor has not disputed the claim within 14 days after receiving the claim. There have been suggestions that 21 days is the more standard period by which a claim can be disputed.

The WA Report recommended that the implied provisions should be retained<sup>38</sup>. The former WA Government accepted this recommendation<sup>39</sup>. However, the recommendation has not been implemented.

26. Should the implied provisions be retained?

27. Should any of the current implied terms be amended?

<sup>37</sup> WA Report, pages 74-79.

<sup>38</sup> Recommendation No 20(a) in the WA Government response to the WA Report

<sup>39</sup> WA Government response to the WA Report, page 8

### 3.20 Should there be penalties where a contract has clauses voided by Part 2, Division 1 of the NT Act?

Part 2, Division 1 of the NT Act sets out provisions that, if they are in contracts, are, in effect, voided. Some of them provide for substituted provisions. The NT Act does not contain any penalties for the party who is responsible for the inclusion of the clauses (usually the party with the apparent benefit of the provision).

The WA Report identified that such clauses, if they exist, can work against the interest of subcontractors<sup>40</sup>. This can occur in the following situations:

- The subcontractor may be unaware of the effect of the legislation on the clauses (and thus will comply with them).
- The commercial realities of contractual relationships may mean that subcontractors are unwilling to avail themselves of the statutory right.

The WA Report canvasses various possibilities under WA law for imposing penalties on contractors who use prohibited clauses. The conclusion is that none of them offer any clear remedy. The same would be case under NT legislation such as registration provisions of the *Building Act* and the complaint mechanisms under the *Building (Resolution of Residential Work Disputes) Regulations*. The Australian Consumer Law also appears to have no relevant provisions.

The WA Report recommended that:

- the WA Act should include strict liability offences for contracts that contain prohibited clauses<sup>41</sup>. The report did not offer a view as to what the penalty might be; and
- alternatively, the annual report of the WA Regulatory body should name offenders<sup>42</sup>.

The former WA Government noted that it will “include penalties where appropriate”<sup>43</sup>. However, no such penalties have been included as at August 2017.

28. Should the NT Act be amended so as to provide penalties for a contractor responsible for including clauses that do not comply with Part 2, Division 1 of the NT Act?

### 3.21 Should the implied provisions dealing with retention monies be retained?

Clause 10 of the Schedule provides an implied clause to cover any retention monies held by a head contractor. In essence, the monies are to be held in trust until any dispute about them is resolved. There is no requirement for the money to be held in a separate trust account. The WA Report expresses the view that if the head contractor becomes insolvent, the retention money will not necessarily be available to the subcontractor. The 2003 Commonwealth Bill recommended by the Royal Commission dealt with this issue.

<sup>40</sup> WA Report. Pages 71-72

<sup>41</sup> Recommendation No 16(a) in the WA Government response to the WA Report

<sup>42</sup> Recommendation No 16(b) in the WA Government response to the WA Report

<sup>43</sup> WA Government response to the WA Report, page 7

The WA Report recommended that the implied provision be amended so as to require that retention money be held in trust by an independent 3<sup>rd</sup> party (including the WA regulatory authority)<sup>44</sup>.

The former WA Government approved further work to be done to see if there should be a statutory requirement for high value projects.<sup>45</sup>

29. Should there be a requirement that, for implied clauses regarding retention monies, the retention monies be held in trust by an independent 3<sup>rd</sup> party?

### 3.22 Adjudicator registration period/annual fees.

Once an adjudicator has been registered, that registration is permanent. A once only fee (115 revenue units<sup>46</sup>) is paid. The open ended nature of the registration combined with no ongoing financial commitment may be problematic, particularly where an adjudicator obtains registration through mutual recognition of registration in another jurisdiction, and is subsequently deregistered in their original jurisdiction (for whatever reason).

Under such circumstances, the mutual recognition obligation sees the adjudicator continuing to be registered in the Northern Territory notwithstanding that deregistration elsewhere. It would seem appropriate that continued registration of an adjudicator be dependent upon their continued eligibility for registration, rather than an historic artifice.

In addition, there is also the question of adjudicators who are registered but who have not, for a number of reasons, conducted an adjudication in a number of years. Notwithstanding the training and qualifications requirements for registration, there is a likely public and industry expectation that registered adjudicators possess and maintain necessary skills and experience and that those who are registered are in fact available.

One option to manage these issues is the limiting of registration to a fixed period, such as 5 years and/or the payment of an annual fee. Renewal of registration could be on an automatic basis while the adjudicator continues to meet the eligibility requirements.

In respect of an annual or 5 yearly fee, the low numbers of registered adjudicators would make the fee relatively uneconomic to collect. The main purpose would be to ensure a level of currency for the registrations in the NT – that is, an adjudicator would need to be at least sufficiently active to pay the fee.

30. Should adjudicator registration be limited to fixed periods and/or a fee be required for the purposes of maintaining registration?

<sup>44</sup> Recommendation No 21(a) in the WA Government response to the WA Report

<sup>45</sup> WA Government response to the WA Report, page 8

<sup>46</sup> A revenue unit is currently worth \$1.15

### 3.23 De-registration of adjudicators.

The Construction Contracts Registrar has the power to register a person as an adjudicator under section 52(2) of the NT Act. While section 44(1) of the *Interpretation Act* expresses that a power to appoint includes a power to terminate or suspend an appointment, the *Construction Contracts (Security of Payments) Act* is silent on the processes or considerations for de-registration.

31. Should the NT Act be amended to provide specific power and processes for the Constructions Contracts Registrar to de-register adjudicators?

### 3.24 Requirement to sign a payment claim.

Where a construction contract does not specify the processes for making a payment claim, section 19 implies into the contract the default process set out in Division 4 of the Schedule to the NT Act. Amongst the default process, clause 5(1) (h) of the Schedule imports a requirement into the construction contract for the claimant to physically sign the payment claim.

With the increasing uptake of computer generated invoicing packages that have the capacity to automatically email invoices, the implied requirement to sign the invoice is not able to be strictly complied with. Although the *Electronic Transactions (Northern Territory) Act* substitutes a requirement for a written signature in the case of electronic communication of documents through email, section 9(1) of that Act requires reasonably stringent identification and verification measures to establish that the communication was genuine, authentic and authorised. Section 9(1) also requires prior consent of the receiving party in respect of the substitution.

While electronic invoices often have features identifying the claimant (name, logo, etc.), they are generally sent from generic email accounts which reduces the ability for either the sender or the recipient to verify authenticity on its own. Therefore, unless the claimant is able to verify the invoice, and the recipient agrees to receive payment claims electronically, the clause 5(1) (h) requirement to physically sign the payment claim will prevail and result in an invalid payment claim.

A similar scenario arises in relation to notices of dispute or rejection of a payment claim, with clause 6(3) (h) requiring the notice to be signed by the respondent. If the rejection or dispute is sent electronically, there is a risk that the rejection/dispute would not be valid.

32. Should the NT Act be amended to remove the implied requirement to sign a payment claim or a notice of dispute/rejection of a payment claim?

### 3.25 Consistent terminology regarding the use of the word “day”.

In determining the timing for when actions must be done, the NT Act variously uses:

- “day” (meaning a calendar day and so including days of the weekends and public holidays);  
and

- “working days” (as defined in section 4 to mean days other than Saturdays, Sundays and public holidays). Most NT Acts use the term “business day” when referring to these kinds of days.

As a general rule, legislation tends to describe days in terms of business days for relatively short periods.

Calendar days tend to be used for longer periods that, optimally, amount to a particular number of weeks (e.g. 28 days).

This Act sometimes uses calendar days when business days would appear to be the more rational choice – for example the references to 14 days in section 31(6B) and in clause 6(2) of the Schedule.

The same issue existed, but to a greater extent, under the WA Act. The WA Report recommended that:

- all time limits in the WA Act should be expressed in terms of “Business days”; and
- the period between 24 December and 7 January, as well as Good Friday to Easter Monday should be excluded from the counting of days<sup>47</sup>.

The former WA Government accepted this recommendation<sup>48</sup>. Legislation has been enacted in WA to convert all periods from calendar days to business days<sup>49</sup>. Usually this was done in such a way that the period did not change (e.g. 14 days to 10 working days”). One slightly odd tangential change was that in section 26 (dealing with the timing by when applications for an adjudication must be made) the former reference to 28 days was replaced by “90 business days”. The WA Government’s stated policy for this change included bringing the WA provision into line with the NT provision. However, the current NT provision is couched in terms of calendar days – which would be approximately 65 business days.

33. Should the NT Act be amended to standardise the reference of days to ‘business days’?

### **3.26 Should the NT Act be amended so that the Northern Territory Civil and Administrative Tribunal deals with reviews under sections 48 and 60?**

Currently the Local Court has jurisdiction to deal with appeals under sections 48 and 60. Given that the decisions being appealed are administrative decisions, it seems appropriate that they be the responsibility of the Northern Territory Civil and Administrative Tribunal.

The WA legislation provides that the state administrative tribunal has responsibility for dealing with equivalent matters under the WA Act.

<sup>47</sup> Recommendation No 17 in the WA Government response to the WA Report

<sup>48</sup> WA Government response to the WA Report, page 7

<sup>49</sup> *Construction Contracts Amendment Act 2016* (WA)

34. Should the NT Act be amended to provide the Northern Territory Civil and Administrative Tribunal with jurisdiction to hear administrative reviews under sections 48 and 60?

### 3.27 Publication of decisions.

Section 54 of the NT Act requires the Construction Contracts Registrar to either publish a report of adjudicator decisions or make the results of those decisions available for public inspection. Section 54(2) however requires the Registrar to redact all information that might identify the parties or is otherwise confidential. Construction contract dispute determinations are published on the Department of the Attorney-General and Justice's website: <https://nt.gov.au/property/building-and-development/construction-contracts-and-resolving-disputes/construction-dispute-determinations>.

The requirement to redact identifying information has proved problematic at times, particularly where a matter involved a unique project. Under such circumstances, the release of any information, including the nature of the work performed or the quantum of the claim, would necessarily identify the parties given its uniqueness. The practical effect of section 54(2) results in the publication of uninformative statements such as 'on xx date, a decision was made'.

The Construction Contracts Registrar has noted that there are several NT decisions published that are so heavily redacted that there is doubt anyone can make much sense of them. There are others where the type of work is so specific (e.g. dredging for a pipeline, power station construction, prison security system installation) or the sums and the currencies used would identify the projects and the parties, that the Registrar has done no more than report that a determination or a decision to dismiss an application was made by a particular adjudicator on a specified date. In the case of determinations, the Registrar might say whether the applicant was successful, unsuccessful, or partially successful in recovering the money claimed. The Registrar has also noted that, when determinations are of no precedent value, it is difficult to justify publishing a redacted version. Alternatively, if there was publication of the full versions of determinations and dismissal decisions, that could deter some people from using the scheme. Part of the attraction of the scheme is that the contract disputes are not made public.

There are also times when a party may seek to have the determination addressed in the courts, either in terms of challenging the decision, or as part of the enforcement process. While the court process openly covers the matters within the determination, thus making the determination a matter of public record, the Registrar is nevertheless required to redact the information in its report.

Given the above, the rationale for publishing redacted determinations is not entirely clear. While there is an argument that a level of anonymity may encourage parties to use the dispute resolution mechanism, the publishing of determinations in full aids transparency.

Of the other two jurisdictions that make determinations available, Western Australia also redacts identifying information (though does not actively publish a report), and Queensland publishes all determinations in full.



The WA Act differs from the NT Act in so far as the regulatory body has a discretion regarding the publication of decisions. At the time of the WA Report, no decisions had been published. The WA Report considered this issue and, while it recommended the retention of a discretion, it also recommended that the name of the adjudicator be removed<sup>50</sup>. The former WA Government supported the recommendation. However, no legislative changes have been made<sup>51</sup>.

The Registrar has also noted there may be a need to amend the legislation to allow the Registrar to share personal information with the ABCC<sup>52</sup>, the Building Practitioners Board and interstate security of payments regulatory authorities.

35. Should the provisions dealing with the publication of adjudicator determinations be amended so that they are either published in full or not at all?
36. Should the Registrar be specifically permitted to share information with the ABCC and others?

### 3.28 Should the small claims scheme be amended?

The small claims scheme is rarely used.

37. Should the small claims scheme under the *Community Justice Centre Act* be repealed?
38. Should the current monetary limit be revised?

### 3.29 Should the NT Act be amended regarding judicial review of decisions of adjudicators?

Concerns were raised in the WA Report about apparent judicial “interference” with adjudicator’s decisions.

Aside from appeals to the Local Court as mentioned in Part 2.12, there are no reviews or appeals on the merits regarding decisions of adjudicators. However, applications for judicial review by the Supreme Court can be made on the ground of jurisdictional error<sup>53</sup>. The Commonwealth Constitution operates so that state laws cannot deny judicial review of jurisdictional errors by decision makers. This principle also would apply for the NT (though the point does not seem to have been the subject of any formal decision of the High Court regarding Commonwealth Territories).

<sup>50</sup> Recommendation No 25 in the WA Government response to the WA Report

<sup>51</sup> WA Government response to the WA Report, page 9

<sup>52</sup> The ABCC has sought this information (October 2017)

<sup>53</sup> The WA Report. Page 65, identifies “jurisdictional error” as including erroneous assertion or denial of jurisdiction, misunderstanding or disregard of the limits of jurisdiction, decision making wholly or partially beyond the limits of a power, disregarding a condition of jurisdiction, considering a matter that is required to be ignored and an incorrect interpretation of a statute leading to a misunderstanding of a function

It is reasonably apparent that there is a practical need for the Supreme Court to exercise a supervisory role regarding adjudications. See recent IPEX decision summarised in Appendix A.

The WA Report concluded that it is not constitutionally possible to amend the legislation to further restrict the review of adjudicator's decisions<sup>54</sup>. This is also likely to be case in the NT.

39. Should there be any further regulation of the role of the Supreme Court in dealing with judicial review of decisions of adjudicators determinations?

### 3.30 Are there problems with the enforcement of decisions of adjudicators?

Concerns were raised in the WA Report about delays in the registration of adjudicator's determinations in the Magistrate's Court. Concerns were also raised about the lack of expertise of the court in dealing with adjudicator's determinations. In part this arose because the leave of the court was required in order to enforce determinations.

The WA Report recommended that consideration be given to amendments to Court regulations or the WA Act in order to allow speedy registration of adjudication determinations as a court order<sup>55</sup>.

The equivalent NT section (section 45) does not require leave of the Court. However, nor does it spell out any filing requirements for the determinations.

WA amended its legislation so as to remove the requirement for leave of the Court in order to register a determination of an adjudicator. The WA Act now provides that once a certificated copy of the determination and an affidavit as to the level of debt are filed with the Court the determination is taken to be an order of the Court.

It might be appropriate to amend the NT Act to spell out what is required. Any legislation could be based on sections 84 and 84A of the *Northern Territory Civil and Administrative Tribunal Act*. They spell out that the Tribunal's orders are filed with the Local Court together with an affidavit of what is outstanding under the order. When this is done, the order is enforced as if it is an order of the Local Court.

40. Should the NT Act be amended so as to provide for the filing in the Local Court of adjudicator determinations?

### 3.31 Should there be more regulation of the time by when a payment claim is made?

This is an issue raised in the Commonwealth discussion paper. The question presupposes that the relevant scheme is the East Coast model. Under the West Coast model, it is the contract that determines when and how a payment claim is made, but that does raise the issue of whether the legislation should intervene to restrict the ability of the principal/head contractor to unreasonably restrict the time within which a payment claim can be made to the

<sup>54</sup> See WA Report, page 69

<sup>55</sup> Recommendation No 15(a) in the WA Government response to the WA Report

consequence that, if you miss the time limit, no money is payable. There is no evidence that this is an issue in the NT.

There is a related issue of whether someone should be allowed to put in a payment claim after the termination (as opposed to the expiry) of a contract. The NT Act provides for the resolution of payment disputes, and a payment dispute is triggered by a payment claim (either being rejected or not paid when due) made under a construction contract. Unless the contract provides for post-termination claims (and that provision is expressed to survive termination) you can't have a payment claim without a contract.

A possible solution for the West Coast model is to have an implied clause dealing with claims for works carried out prior to termination in the Schedule. If provision is not made for this eventuality in the contract or if post-termination claims for pre-termination works are expressly forbidden, the Schedule clause will apply setting out when and how the claim is to be made.

41. Should the NT Act be amended so as regulate the time by when payment claims must be made?

### 3.32 Should the provisions dealing with the appointment process for adjudicators be changed?

Under the NT Act, an adjudicator for any particular adjudication is one or another of the following:

- a registered adjudicator appointed by the parties to the adjudication<sup>56</sup>;
- a registered adjudicator appointed by a prescribed appointer if the parties to the adjudication have appointed a prescribed appointer<sup>57</sup>; or a prescribed appointer chosen by the party seeking the adjudication<sup>58</sup>; or
- if a prescribed appointer does not make an appointment within 5 working days, the Registrar may make the appointment<sup>59</sup>.

Operationally, most adjudicators are appointed by "prescribed appointers". The prescribed appointers are set out in the *Construction Contracts (Security of Payments) Regulations*<sup>60</sup>.

Potential issues arise when a prescribed appointer is a commercial organisation seeking to make a profit from its role in the adjudication process.

<sup>56</sup> NT Act, section 28(1)(c)(i);

<sup>57</sup> NT Act, section 28(1)(c)(ii);

<sup>58</sup> NT Act, section 28(1)(c)(iii) (this occurs when there is no agreement between the parties);

<sup>59</sup> NT Act, section 30(2)

<sup>60</sup> Currently the prescribed appointers are organisations such as the Royal Australian Institute of Architects, Housing Industry Association Limited, Contractor Accreditation Limited, RICS Australasia Pty Ltd ACN 089 873 067 trading as RICS Dispute Resolution Service, Law Society Northern Territory, The Institute of Arbitrators & Mediators Australia, Australian Institute of Quantity Surveyors and Master Builders Association Northern Territory Incorporated.

These issues were canvassed in the WA Report<sup>61</sup>. The Report noted that Queensland amended its legislation so that a government body (Building and Construction Commission) makes all of the appointments.

Whilst the structure of the NT and WA Acts are similar regarding prescribed appointers, the provisions differ in so far as the NT regulations have prescribed profit making bodies as prescribed appointers whereas the WA legislation provides only for industry or professional bodies.

The WA Report also referred to competency issues regarding adjudicators appointed by the for-profit appointers in the Eastern States. The SA Report noted concerns about competency issues and possible conflicts of interest.

The WA Report found no reason to change the current legislative provisions<sup>62</sup>.

42. Should the adjudicator appointment process in the NT Act be changed?

### 3.33 Should an appointor of an adjudicator be able to charge a fee for the appointment?

The NT Act provides a system for the recognition of persons or bodies (“appointers”) who can, for any particular dispute, determine the adjudicator who is to handle the dispute. There are 8 prescribed appointers under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*. Of those, only 2 are known to charge a fee for the service of appointing an adjudicator.

While there does not appear to be an active issue arising from the absence of regulation of appointer fees (other than the requirement to publish those fees under section 55(1) of the NT Act), a number of questions do arise that suggest the NT Act could benefit from clarifying the issue of fees that an appointer may charge.

These include:

- clarifying that appointers are permitted to charge a reasonable fee for the review of an application and appointment of a suitable adjudicator;
- whether fees should be a pre-determined fixed amount and published on the appointer’s website; and
- whether appointers should be expressly prohibited from percentage fee (commission) from the amount paid to the adjudicator for transparency and accountability purposes.

These issues were canvassed in the WA Report<sup>63</sup>. The Report identified that some of the WA appointers required members appointed as adjudicators to pay to the appointer (usually an industry body) 10% of the professional fees paid to the adjudicator. The WA Report recommended<sup>64</sup> that the WA Government make a regulation providing that this 10% of the fee

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<sup>61</sup> WA Report, pages 60-61.

<sup>62</sup> Recommendation No 14 in the WA Government response to the WA Report

<sup>63</sup> WA Report, pages 60-61.

<sup>64</sup> Recommendation No 14 in the WA Government response to the WA Report

is borne by the association member rather than the parties. The WA Government agreed to amend the regulations so as to prohibit the charged of nomination fees. As at 10 August 2017 no such amendment appears to have been made.

43. Should the NT Act provide greater clarity around the issue of fees that an appointer may charge?

### 3.34 Would there be benefit in amending the NT legislation so that it lines up with the East Coast model or some other national model?

As noted above the Commonwealth is undertaking a review of security of payment laws around Australia with the aim of identifying areas of best practice to improve uniformity between the laws in place around Australia.

The “East Coast” and “West Coast” models are briefly described in **Part 1.18** of this paper.

The “East Coast” legislation applies in Queensland, NSW, ACT, Victoria, Tasmania and South Australia. However, there are substantial differences between the various Acts.

The “West Coast” legislation applies in the Northern Territory and Western Australia. The differences between the WA and NT Acts have been relatively minor with, until 2016, the major difference being the period of when a payment claim can be made. However the 2016 WA amendments have brought the 2 Acts closer together as follows:

- the amendments to WA section 4 (limitation on the exclusion of certain types of construction work for mining);
- the amendments to WA section 6 (structure of section 6(1)(a));
- the amendment of WA section 10 (prohibitions regarding time for payments);
- the amendment of WA section 26 (time by when to apply for an adjudication);
- the amendment of WA section 28 (appointments);
- the amendment of WA section 31 (adjudicators functions) – using business/working days rather than calendar days;
- the inclusion of WA section 31(2)(a) (permitting withdrawals in line with NT section 28A); and
- the amendment of WA section 46 – period by which an adjudicator must make a new decision following reversal of a dismissal by the State Administrative Tribunal.

Minter Ellison have produced a [‘ready reckoner’](#) comparison of the various security of payment laws in Australia which provides a good snapshot of the differences between the West Coast and East Coast models<sup>65</sup>.

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<sup>65</sup> <http://www.minterellison.com/files/Uploads/Documents/Publications/Articles/Ready%20reckoner%20-%20Security%20of%20Payment%20Act%20-%202016.pdf>

Generally, although not always, the laws that apply to a contract will be the laws of the jurisdiction where the contract was entered into and performed<sup>66</sup>. However in respect of the security of payment laws, the law that applies is that of the jurisdiction where the construction is taking place<sup>67</sup>. This distinction between applicable laws has the potential to cause difficulty and confusion for parties that may operate in a number of jurisdictions given that no two jurisdictions have the same dispute resolution system, even though a number may possess similar features.

Those difficulties may range from determining the applicable timeframes for seeking or responding to an adjudication request, and the basis upon which an adjudication may occur or be determined. The potential risk is that a party may, although experienced with the processes in one state, nevertheless fall foul of compliance requirements in another, resulting in an inability to seek the benefit of the rapid adjudication function. There is also the separate question of whether similar contracts (i.e. construction contracts) are treated differently dependant on which jurisdiction the work is being carried out, and whether this is either equitable or efficient.

In relation to the East Coast model, and South Australia's version in particular, law firm Johnson Winter and Slattery suggested that "there is merit in considering a significant change in approach to adjudication under the (South Australian) Act in line with the more balanced approach taken by the West Coast Model"<sup>68</sup>.

The issues concerning uniformity were discussed in some detail in the WA Report<sup>69</sup>. The reviewer recommended that the current West Coast model legislation should remain as the core legislative model for Western Australia. The WA Report identifies the following advantages of the West Coast model<sup>70</sup>:

- under the East Coast model, a subcontractor making a claim under the Act must rely on the statutory (contractual) conditions rather than the contract itself. The WA Report suggests that this may cause the subcontractor to fear that they will be "backlisted" (presumably as a business that does not honour agreed contractual terms); anecdotal commentary in the NT is that this kind of backlisting may occur for any subcontractor who uses the statutory adjudication processes, including those in place in WA and NT. That is, head contractors prefer not to work with subcontractors who use the provisions of the legislation rather than agreed contractual provisions;
- under the West Coast model, downward claims (by a contractor against a subcontractor) are possible whereas this is not the case under the East Coast model;

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<sup>66</sup> Without over complicating the discussion, it is generally permissible for parties who domicile in different jurisdictions to agree between themselves as to which jurisdiction's laws will govern the operation of a contract. Thus, for example, in relation to a contract for the supply of particular item, and one party is based in New South Wales, and the other in the Northern Territory, it may be permissible for the parties to agree that the contract will be governed by the laws of New South Wales.

<sup>67</sup> Thus, in terms of the example above, if the goods are building materials for a construction site in the Northern Territory, then the Territory's *Construction Contracts (Security of Payments) Act* would apply in relation to payment disputes – section 6.

<sup>68</sup> Review of Security of Payment Legislation in SA, February 2015, <https://www.jws.com.au/en/acumen/item/586-review-of-security-of-payment-legislation-in-sa>, viewed 21 June 2017.

<sup>69</sup> Pages 56-59

<sup>70</sup> WA Report - pages 57-58

- the rights of respondents are superior in so far as the respondent is not required to make a response to the payment claim in order to make an adjudication response;
- under the West Coast model, the adjudicator determines the procedure whereas legal representation is prohibited under the East Coast model<sup>71</sup>. Whilst an adjudicator can decide what procedure will be followed if the adjudicator sees some need to go beyond the application and response, usually that involves a teleconference with the parties or a call for further submissions and dictating the parameters of those submissions and time limits. Beyond the application and response (and any further submission), legal representation does not seem a significant matter when there is no hearing as such. Even under the East Coast model, it can be expected that lawyers could be involved in the preparation of submissions;
- under the East Coast model, the parties cannot agree to appoint an adjudicator whereas this can occur under the West Coast model;
- under the East Coast model, the dual payment system creates an administrative burden;
- the East Coast model has generated “far more litigation than has arisen under the West Coast schemes”<sup>72</sup>. Another commentary has noted that the East Coast model has failed to provide the necessary quality assurance as demonstrated by the frequency with which adjudications are set aside on the basis of jurisdictional error<sup>73</sup>.

It is not clear that the NT law is less susceptible to judicial challenge. Whilst it avoids the complications associated with the need to respond to a payment claim with a payment Schedule, if you don't there is generally nothing to challenge because the applicant gets default judgment. By leaving it to the contract to determine who does what and when, the NT legislation's operation suffers arguments over when a payment claim is not a payment claim, either respondents arguing that an invoice was not a valid payment claim and therefore there is no payment dispute to adjudicate, or an applicant is issuing a second invoice for the same works, possibly to overcome the expiry of the time limit, arguing that the original invoice was not a valid payment claim. The adjudicators get it right as often as not (accepting that the view of the court must be right) but where the validity of a payment claim is in dispute, there is a good chance that the loser will seek to have the adjudicator's decision overturned.

In the recent INPEX case, it was the adjudicator's freedom to set the procedure for further submissions that was his downfall. Kelly J found that his requirement that further submissions be limited to 2 pages and limited to the question of whether an implied clause should apply, was too restrictive and a breach of natural justice. He needed to spell out that he was considering making a ruling on that basis (which begs the question of why else would he have called for submissions on the point), and INPEX should have been given the opportunity to

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<sup>71</sup> The background to this view appears to be as follows: The NT/WA does not have a statutory payment claim/payment schedule procedural step. Under the NT scheme the contract dictates who does what and when in relation to making a payment claim and responding to the claim. All the NT legislation focuses on is that there is a payment dispute, and then either party is free to make an application for adjudication, and the other party can make a response. Under the East Coast model the respondent has to respond to a payment claim with a payment schedule, and if they don't they have lost. If they do, the scope of their response to an adjudication application is limited to the matters covered in the payment schedule.

<sup>72</sup> The WA Report, page 58 quotes the following article in support of that view: Jeremy Coggins, Robert Fenwick Elliott and Matthew Bell. "Towards Harmonisation of Construction Industry Payment Legislation: A Consideration if the Success Afforded by the East and West Coast Models in Australia" (2010) 10(3) *Australasian Journal of Construction Economics and Building* 14, 18.

<sup>73</sup> Society of Construction Law Australia, Australian Legislative Reform Sub-committee, *Report on security of payment and Adjudication in the Australian Construction Industry* (February 2014).

make submissions on why the application of the implied clause should not have the consequence of making all monies claimed due and payable.

The NT legislative scheme derives a certain strength from the strong correlation between it and the WA legislation in terms of both its policy content and the structure of the legislation. It could be seen as a significant step backwards for the NT Act to move away from the WA Act in any significant way. Currently, the differences, major and minor, between the NT and WA Acts are:

- the recently enacted definition of “business day” so that days in the period beginning 25 December and the following 7 January are not considered to be business days;
- the recently amended definition of “payment claim” so that it spells out that a payment claim includes matters covered by a previous payment claim;
- the recently changed exclusion from “construction work” regarding “plant” so that it now only excludes the “fabricating or assembling of plant” used for various mining purposes rather than the construction of such plant. The NT Act does have this exclusion;
- the recently enacted removal of the exclusion from “construction work” or constructions relating to artistic works;
- the recently included qualification regarding “payment disputes” so that they do not include to the extent to which a payment claim includes matters that were the subject of an adjudication that has been dismissed or determined without regard to the merits;
- the recently enacted deeming provision, that is for a payment dispute that arises under both section 6(1)(aa)<sup>74</sup> and 6(1)(a)<sup>75</sup> of the WA Act the time of the dispute is deemed to be the earlier of the 2 occurrences;
- the recently enacted change to the prohibition concerning the limit on the length of time by which payments can be made – reducing the period from 50 calendar days to 30 days. The NT Act provides that the period is reduced to 28 days;
- the recently enacted change to section 31(2)(ia) explicitly recognising that an application can be dismissed if the applicant withdraws by way of written notice;
- the recently enacted change to section 31(2)(iia) explicitly recognising that an application can, despite not complying with all of the technical requirements of WA section 26(2)(a)<sup>76</sup>, be dealt with if the adjudicator considers that the applicant sufficiently complies for the purposes of commencing the adjudication;
- the recently enacted change to section 31(2A) recognising that the adjudicator’s determination may reflect terms agreed by the parties;
- the recently enacted change to section 32(3)(c)<sup>77</sup> recognising that it is not necessary to obtain the consent of all of the parties in order to deal with 2 or more payment disputes at the same time;
- the recently enacted change to section 37<sup>78</sup> for deemed dismissed applications, the time by when a new application can be made is 20 business days rather than 28 calendar days

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<sup>74</sup> Equivalent to NT section 8(a)(i)

<sup>75</sup> Equivalent to NT section 8(a)(ii)

<sup>76</sup> Equivalent to NT section 28(2)(a)

<sup>77</sup> Equivalent to NT section 34(3)(c)

<sup>78</sup> Equivalent to NT section 39(2)(b)



as formally in the WA Act and currently in the NT Act (noting that 20 business days would, but for any public holidays, usually be the same as 28 calendar days;

- the recently amended section 43 (dealing with the enforcement of determinations as orders of the court) provides, amongst other matters, that a party seeking enforcement must file an affidavit as to the amount not paid under the determination<sup>79</sup>. There is no such requirement in the NT Act<sup>80</sup>;
- in WA, the State Administrative Tribunal<sup>81</sup> handles the limited reviews that can occur in respect of decisions of adjudicators. In the NT, the Local Court has this role<sup>82</sup>; and
- under the 2011 WA amendments, section 48(7) now provides that the registration authority (the Building Commissioner) may issue an authoritative certificate that an individual was or was not registered as an adjudicator at a particular time.

44. Do different models of dispute resolution pose difficulties or cause confusion for parties who operate in more than one jurisdiction?
45. Should the NT Act be amended so that it is more consistent with the dominant Australian model or the current version of the Western Australian legislation?

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<sup>79</sup> Section 43(2)(b)

<sup>80</sup> Section 45

<sup>81</sup> Section 46

<sup>82</sup> Section 48

## Appendix A – Northern Territory case law

### Local Court reviews under the Act

There are no reported Local Court decisions, but Cavanagh SM, in an unreported 2007 case, overturned an adjudicator's decision not to make a determination. The same dispute was the subject of the Federal Court decision in *Total Development Supplies Pty Ltd v GRD Building Pty Ltd* [2007] FCA 2032 where the applicant in the court proceedings unsuccessfully sought to prevent the hearing of the respondent's application to the Local Court to overturn the adjudicator's decision to dismiss the respondent's adjudication application.

### Supreme Court decisions

As at June 2017, there have been 20 reported cases involving the operation of the *Construction Contracts (Security of Payments) Act*, (the "Act") including 3 Court of Appeal decisions, one special leave application, the decision in *Boutiques Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5 which did not involve a challenge to a determination, and the decision of the Federal Court in *Total Development Supplies Pty Ltd v GRD Building Pty Ltd* [2007] FCA 2032 mentioned below.

There had been 15 jurisdictional challenges to actual determinations or to the ability of an adjudicator to proceed to make a determination. Of those, only four resulted in the Court overturning the adjudicator's determination (*AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor*, *M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor*, *CH2M Hill Australia Pty Ltd & Anor v ABB Australia Pty Ltd & Anor* and *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45). The others were either unsuccessful, involved challenges to decisions to dismiss applications, or were made in response to an application to prevent the application from being adjudicated:

1. *GRD Building Pty Ltd v Total Development Supplies Pty Ltd* [2007] an unreported Local Court decision of Cavanagh SM – a win for the challenger, but it was a challenge to an adjudicator's decision not to make a determination for a lack of jurisdiction.

The adjudicator dismissed the application on the basis that the invoice giving rise to the payment dispute sought payment for the same works that had been included in an earlier invoice. The adjudicator determined that the earlier invoice triggered the payment dispute and the application was brought out of time.

On 10 March 2008, the Magistrate found that the earlier invoice was not a valid payment claim, and notwithstanding that there had been a dispute notice issued, there could be no dispute without a valid payment claim. The second invoice was found to be valid so the adjudicator was wrong in ruling that the application had been brought out of time. The Magistrate directed that the matter go back to the adjudicator for a determination to be made.

The respondent had earlier sought to prevent the Local Court from deciding the matter by seeking an anti-suit injunction in the Federal Court (see *Total Development Supplies Pty Ltd v GRD Building Pty Ltd* [2007] FCA 2032).

2. *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12 – a win for the challenger. This was a pre-emptive challenge to the ability of the appointed adjudicator to make a determination that was probably unnecessary because it was patently obvious that the contract pre-dated the commencement of the Act and subsection 9(1) made it clear the dispute was not one that could be adjudicated under the Act.

3. *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42 – a loss for the challenger.

The case involved:

- invoices that were not issued in accordance with the requirements of the contract, but against a background where similar previous invoices had been paid without any challenge to their non-compliance; and
- a letter claiming to be a payment claim for previous unpaid invoices after the termination of the contract that only allowed for one final payment claim for all works up to the termination date.

The adjudicator found that the original unpaid invoices together with the associated progress claim documents itemising the works were payment claims and triggered 3 payment disputes, and proceeded to make a determination (without the consent of the respondent required under subsection 34(3) (b) of the Act, but Southwood J found that Transcon “*elected not to rely upon s 34(3) of the Act*” (at para [59])).

The judge agreed with the adjudicator.

4. *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 – another loss for the challenger.

The argument was over when the dispute arose, whether the application was out of time, and whether compliance with the time limit was a condition precedent to the adjudicator’s ability to make a determination, or whether it was a matter that he could determine and get wrong.

Mildren J found that if an adjudicator has the jurisdiction to determine whether the time limit had been complied with, his decision cannot be void (see para [48]).

He also found that the adjudicator’s conclusion as to when the dispute arose (and the time limit began) was correct.

5. *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor* [2009] NTSC 48 and *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 - ultimately the respondent was successful in having the determination overturned, having first lost in the Supreme Court.

The adjudication application involved the issue of repeat claims and discrepancies between the payment claim attached to the application and the version that was served upon the respondent. The adjudicator determined that there was no limit on the number of times an invoice could be issued under the contract, apparently in reliance of comments made by the Magistrate in the *GRD Building Pty Ltd v Total Development Supplies Pty Ltd* case, and each invoice could trigger a new payment dispute. He found that the discrepancies between the 2 versions of the invoice were not fatal to the application.

Kelly J at first instance found that the adequacy of the application was a matter for the adjudicator to determine having regard to the evidence referred to him (see para [18]). He asked the right question and gave due regard to the evidence presented to him.

Kelly J found that actual compliance with the requirements of subsection 28(2) (b) (ii) was not a pre-requisite to the existence of a determination (at para [32]).

Kelly J agreed with the plaintiff that the *GRD Building Pty Ltd v Total Development Supplies Pty Ltd* decision was not authority for the proposition that a contractor can regenerate payment disputes by reissuing invoices (at para [21]).

Although the determination that the application was made within the requisite time amounted to an error of law on the adjudicator's part, the Judge saw no reason to distinguish between factual errors and errors of law. The question of whether the application was served within 90 days of the payment dispute(s) arising is one which the adjudicator was required to decide, and the fact that he made an error of law in the process of making that determination did not render his decision a nullity. There is no right of appeal from the decision of an adjudicator based on error of law (at paras [34] and [35]).

On appeal, Mildren J ruled that allowing repeat payment claims would defeat the purpose of the 90 day time limit for applications under the Act (at para [11]). An adjudicator cannot assume jurisdiction through an error of law that goes to his jurisdiction (at para [13]).

Mildren J also gave consideration to the effect of the privative provision in subsection 48(3) and found that it did not prevent the Supreme Court from declaring that a determination was void for jurisdictional error of a kind where the adjudicator wrongly construes the Act (at para [13]). Riley J concurred (at para [16]).

The later decision of the High Court in *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1 had no real impact in the willingness of the Supreme Court in NT to review decisions of adjudicators.

Southwood J held that an adjudicator's determination that the criteria specified by subsection 33(1) (a) (i) to (IV) of the Act have been fulfilled, has to be founded on a correct understanding of the law, and in particular, a correct interpretation of the underlying statutory provisions (at para [20]). A reasonable and legally correct state of satisfaction as to the fulfilment of the subsection 33(1) (a) (I) to (IV) criteria is a necessary "jurisdictional fact". If such a jurisdictional fact does not exist, an adjudicator would be acting in excess of his jurisdiction if he proceeded to make a determination of an application on the merits. An adjudicator cannot give himself jurisdiction by erroneously deciding that the fact or event exists (at para [33]).

In considering the repeat invoice issue Southwood J said: "*The time when a payment dispute arises cannot be deferred or retriggered by the inclusion in a construction contract of clauses which make provision for the resubmission or reformulation of a payment claim*" (at para [39]).

6. *GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd* [2010] NTSC 34 and *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1

The respondent in the adjudication proceedings was successful at first instance in the Supreme Court in having the determination ruled invalid, but the applicant successfully appealed.

This was a case of a repeat invoice and an argument about whether a summary invoice can overcome the problem of the expiry of the time limits set by earlier invoices. The adjudicator found that the earlier invoices were not valid payment claims, and therefore the time for making an application ran from the non-payment of the summary invoice, which he found was a valid payment claim on the basis that the contract not only permitted such claims to be made, but required them.

At first instance Mildren J found that the adjudicator was wrong in ruling the original invoices as not being valid payment claims and this was an error that went to his jurisdiction (at para[24]).

On the issue of repeat claims Mildren J said that while there was much to be said for allowing such claims if they were permitted under the contract, as a judge at first instance, he was bound to follow decision of the Court of Appeal in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 (at para [30]). On that basis a subsequent invoice could not revive a time limit that expired following a payment dispute arising under an earlier invoice. Southwood J, dissenting, agreed with the judge at first instance.

The Court confirmed that the test for validity of a determination under the Act is whether it complies with what parliament intended were the essential pre-conditions of determinations.

Kelly J held that an error in determining the time for making an application is not jurisdictional or reviewable (at para [107]), and that an error as to the validity of a payment claim is similarly neither jurisdictional nor reviewable (at para [91]).

Olsson AJ found that that a valid payment claim was a “jurisdictional fact” and that the adjudicator was correct in finding that the original invoices were not valid payment claims under the contract (at para [251]).

Southwood J also held that the existence of a valid payment claim is a jurisdictional fact which is a precondition to making a determination (at paras [24] – [25]), but he found that the validity of a payment claim is determined by the Act (at para [48], whereas Kelly J (at paras [116] and [151]) and Olsson AJ (at paras [231] – [129]) held it is determined by the terms of the contract.

Kelly J made no finding on whether the adjudicator was right or wrong in ruling the original invoices to be invalid, having already decided that the decision was not reviewable.

Kelly J and Olsson AJ found that the Act does not prevent repeat claims being made (and the time limit for an adjudication application being revived) if it is permitted under the contract (see Kelly at para [124] and Olsen AJ at paras [260] – [261]).

7. *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22.

The adjudicator was found not to have jurisdiction on the basis that there could be no dispute until 28 days after the payment claim was made, notwithstanding that the payment claim had been rejected by the respondent. The applicant reapplied for a determination after the due date for payment had passed, the same adjudicator was reappointed, and he made the same determination in favour of the applicant.

Possibly the respondent may have thought that a second application would be prevented by s.27(a), but their own argument that there was no payment dispute in existence at the time of the first application meant that there was no barrier to bringing a second application once the dispute had arisen.

This decision lead to the 2014 amendment of the **payment dispute** definition in section 8 to make it clear that a notice of dispute issued in response to a payment claim could trigger a payment dispute before the moneys claimed fell due.

8. *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20

The adjudicator found an entitlement to payment for standby costs under the contract but determined the amount due as ‘Nil’ on the basis that no evidence was provided to show the vessel had remained on standby for the period claimed. He appeared to miss a statutory declaration

provided with the application. The Respondent did not suggest that the vessel was not on standby in its response.

The court found he had failed to consider the plaintiff's evidence. The erroneous conclusions that he made were within his jurisdiction, but the failure to consider the evidence amounted to a substantial denial of natural justice.

9. *Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd and Anor* [2014] NTSC 22 – a loss.

The claim related to the hire of 4 vehicles to be used on a construction site. The respondent claimed that the hire did not begin until they were cleared to use the vehicles on the project site by the head contractor. On that basis, either there was no construction contract, or if there was, it was conditional and the conditions triggering the obligation to pay had not been met, which meant there could be no valid payment claim to trigger a payment dispute.

The adjudicator found that the attempt to add the head contractor approval condition came after the contract had been formed.

On the issue of when a Court will interfere with an adjudicator's decision, Hiley J adopted the view of Kelly J in the *Burns* case (see No 6 above), and Riley J and Southwood J in the *AJ Lucas* case (see no 5 above). It is up to the adjudicator to determine if the matters in subsection 33(1)(a) exist, and judicial review is only available where an adjudicator makes an error of law in reaching his or her state of satisfaction in respect of those matters, or where his or her satisfaction was unreasonable. A mere error of fact will not invalidate a determination unless it can be demonstrated that the adjudicator's state of satisfaction in relation to that fact was unreasonable.

It was the adjudicator's job to determine whether there was a construction contract based on the materials that were provided to him. The only basis for overturning his decision on a subsection 33(1) (a) jurisdictional fact, is when his satisfaction as to the existence of a jurisdictional fact is legally erroneous or unreasonable.

There was no basis to find that the adjudicator misconstrued the Act when determining that he had jurisdiction to make a determination. His findings on the existence of a construction contract were held to be both reasonable and founded on a correct understanding of the law. There was no reviewable jurisdictional error, either in relation to the existence of the contract or the conclusion that performance under it was not conditional on the prior approval of the head contractor.

10. *M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25 the Challenger was partially successful. It failed to have the whole determination ruled invalid but did get the adjudicator's determination on one invoice quashed, reducing the amount it had to pay by \$128,133.39 (including interest).

This is another case involving the application of clause 6 of the Schedule to the Act and a failure to dispute a payment claim as required by clauses 6(2) (a) and (3).

It was unusual in that the adjudication application was made by the contractor in response to payment claims received from its subcontractor.

The applicant (plaintiff) argued that the determination was void because:

- (a) The prescribed time for the delivery of the adjudicator's determination expired 12 days before the determination was made meaning the application was automatically dismissed under s 33(2) of the Act.

- (b) The adjudicator failed to undertake a merits review of the payment dispute in accordance with s 33(b) of the Act and wrongly determined the application on the basis that no notices of dispute had been provided in accordance with Division 5 of the Schedule to the Act.
- (c) The adjudicator failed to accord the applicant procedural fairness because it was not given an opportunity to be heard on the respondent's (first defendant's) response that the applicant was liable to pay the respondent because the respondent did not receive any notice of dispute to its payment claims in accordance with implied condition 6(2)(a) of Division 5 of the Schedule to the Act (the application being the first time the respondent claimed that clause 6 of the Schedule to the Act applied to the contract).
- (d) There was no payment dispute about one of the invoices.

The suggestion that the adjudicator did not deliver his determination within the prescribed time was easily dealt with – he sought and was granted the consent of the Construction Contracts Registrar to an extension of time.

As regards the failure by the adjudicator to conduct a merits review, Southwood J said:

*“The Act does not provide that, regardless of the payment terms of the relevant construction contract, a party is entitled to have a dispute that it has raised resolved. To that end, s 20 of the Act implies certain conditions into a construction contract that does not have written provisions about: (a) when and how a party must respond to a payment claim made by another party; and (b) by when a payment must be made. Those contractual terms are critical to the achievement of the object of the Act and, subject to any question of waiver or estoppel, a party to a construction contract is liable to make payments in accordance with them. A party is not entitled to avoid that liability by making an application for adjudication.”*

*.... The second defendant was not in error in determining the adjudication in accordance with the implied contractual conditions contained in Division 5 of the Schedule to the Act. He was bound to do so. He did not thereby misconceive his function or fail to take into account relevant considerations and/or disregard matters which the Act required he must have regard or conduct the adjudication in an unreasonable or irrational manner. (at paras [38] and [39]).*

The argument that the adjudicator failed to afford the applicant procedural fairness by not calling for further submissions on the application of condition 6 of the Schedule to the Act also failed. The applicant should have anticipated it or taken the step of asking the adjudicator to exercise his powers under section 34(2) to request the adjudicator to call for further information from the applicant.

The applicant was successful in having the adjudicator's ruling on one invoice overturned. The Court found that there were only 3 payment disputes on foot when the application was made. The payment dispute under the 4<sup>th</sup> invoice did not arise until 12 days after the application was made.

The interesting aspect of this matter was that it was the applicant's adjudication application that sought to have its liability for the money claimed in the 4<sup>th</sup> invoice determined by the adjudicator.

The applicant sought to rely on its own error in that regard to have the whole determination nullified. The Court considered there to be 3 discrete payment disputes, and the erroneous decision in respect of the 4<sup>th</sup> invoice did not invalidate the decision made in respect of the other three.

The Court found that the respondent, in responding to the various disputes raised in the application, consented to multiple disputes being determined by the adjudicator, thereby satisfying the requirements of subsection 34(3).

11. *Gwelo Developments Pty Ltd v Brierty Limited [2014] NTSC 44 and Brierty Limited v Gwelo Developments Pty Ltd [2014] NTCA 7 - a win for the Challenger.*

This was a pre-emptive strike based on the fact that there had been a previous application for adjudication made (but withdrawn) in respect of the same payment dispute.

Unlike the other cases involving jurisdictional issues, this one involved the applicant's entitlement to apply under section 27, rather than a consideration of the matters listed in subsection 33(1)(a) for an adjudicator to determine.

The applicant initially applied to have 2 separate payment disputes adjudicated without the consent of the respondent. When it realised the respondent would not consent, it withdrew the application and made 2 separate applications.

At first instance, the applicant argued that the adjudicator was the appropriate person to determine the matter. Kelly J disagreed. She found that the Act does not require the adjudicator to determine anything under section 27 so the question that an adjudicator would have to consider relating to the ability of the applicant to make such an application, would be the same as that before the Court. It does not appear to be a question that the Act contemplates will be determined by an adjudicator let alone a "core function" such as those set out in subsection 33(1)(a) (at para [27]). It is therefore an appropriate question to be dealt with by the Court especially when not all adjudicators are legally qualified (at para [28]).

The applicant argued that the prohibition on applying for adjudication when there had been an application previously made for the same dispute should be read to mean when there was a previous application on foot. Kelly J could see no reason for limiting the scope of section 27(a).

The applicant's next argument was that the first application was invalid because it sought to have 2 disputes determined.

The applicant argued that the use of the present perfect tense in section 27(a) ("has already been made") means there has to be an action in the past which is relevant to the present, in this case, an application that is still on foot.

The argument was unanimously rejected:

[11] *Contrary to the appellant's arguments, the use of the present perfect tense of the verb 'to make' (as in "has already been made") does not resolve the statutory interpretation issue of in favour of the appellant. Rather, it makes it clear that the relevant question to be asked immediately prior to any application to have a payment dispute adjudicated is: "Has any party to the contract already made an application for adjudication of the payment dispute?"*

12. *Lend Lease Building Contractors Pty Ltd and Sitzler Pty Ltd t/as Sitzler Boulderstone Joint Venture v Honeywell Limited t/as Honeywell Building Solutions & Anor [2015] NTSC 10 - a loss.*

A guarantee was required under clause (6.1) of the contract in favour of the head contractor for a percentage of the contract sum as security for their performance of the works, and there was also a requirement that if a guarantee provided, for any reason became unenforceable, a replacement guarantee would be put in place within 7 days.

Clause 6.1(c) provided that if the subcontractor was in breach of any requirement of clause 6.1, they would "have no entitlement whatsoever to payment under or in connection with the Subcontract or the Works until 7 days after such breach is remedied".



The guarantee provided by the subcontractor expired between the service of the first and second payment claims, and at the time of the applications (and subsequent determination) it had not been replaced.

The first application was dismissed on the basis that the payment claim was not valid under the terms of the contract.

In response to the second application, the respondent argued that clause 6.1(c) of the contract meant that no money was payable in the absence of a replacement guarantee. The respondent also argued in the alternative that any determination made would have to be subject to the qualification that the determined amount was not due until 7 days after a replacement guarantee was supplied, of the amount should be reduced by the value of the guarantee.

The adjudicator following the first of these suggested alternatives proceeded to make what was in effect, a contingent determination that the money was payable once the necessary guarantee was put in place.

Despite having offered the contingent determination as an option to the adjudicator, the respondent challenged the determination on the basis that the adjudicator having found that no money was payable until a replacement guarantee was put in place, was bound to find that nothing was owed under the contract. It did not run the argument that if no money was due, there could be no payment dispute. The facts set out in the judgment make no mention of any notice of dispute being issued in response to the payment claims. Instead it argued that once the adjudicator determined he had jurisdiction under subsection 33(1)(a), he was bound to then rule under subsection 33(1)(b) that no money was payable, and that his was an error of a type that fell outside the privative provision in subsection 48(3) and is therefore reviewable by the court.

Kelly J found any error the adjudicator may have made was in construing the terms of the contract and not in construing the requirements of subsection 33(1)(a). Having made the decision to proceed to determine the matter on its merits, any mistake he made after that would have been a mistake that was within his jurisdiction to make. She found it unnecessary to rule whether he did make a mistake.

13. *CH2M Hill Australia Pty Ltd & Anor v ABB Australia Pty Ltd & Anor* [2016] NTSC 42 - a successful challenge to a determination.

The respondent challenged the determination on three grounds:

- the issues raised in the application overlapped with those which were the subject of another application (the subject of the next case) which means the applicant was precluded from making the second application by section 27(a) of the Act, or, alternatively, the second application was an abuse of process;
- the matter was “too complex to determine” and therefore should have been dismissed under subsection 33(1)(a)(iv)(A);
- In making his determination, the adjudicator failed to consider materials provided as part of the response.

The application was not a repeat application in the sense of the *Brierty* matter mentioned in 11 above. In *Brierty* an application was withdrawn and 2 new applications were made in respect of the 2 payment disputes which were the subject of the withdrawn application. In this case there were 2 applications for 2 different payment disputes.

The respondent argued that where there are a series of invoices issued and the respondent disputes those invoices on the same grounds, then it is effectively the same dispute, and so section 27(a) operates to prevent a second application even though it relates to a different invoice.

Kelly J ruled that the reference to a “dispute in section 27(a) is a reference to the payment dispute that arises when a payment claim is disputed or not paid. It does not refer to some wider substantive dispute that the parties might be engaged in (at paras [28] – [31]).

This was not a repeat application and nor was it an abuse of process. The applications did not involve the same disputes and nor did they raise the same issues. It was only the 2 responses that raised the same issues.

Kelly J also noted that the issues were not decided in the first application because it was dismissed on jurisdictional grounds.

As regards the complexity issue the Court noted that the assessment is subjective. It is not whether the matter is too complex to be fairly determined, but rather whether the adjudicator is satisfied that it is too complex. It is a reviewable decision, but only if it can be shown that the adjudicator has misconstrued the Act or that the decision is unreasonable. It was the latter ground that the respondent relied upon.

The Court said that the volume of materials to be considered is not necessarily an indication of complexity and in this case the legal issues were not particularly complex. Kelly J acknowledged that it might be argued that if the adjudicator formed the opinion that the matter was not too complex based on a view that it was only necessary for him to deal with the issues raised by the respondent in the perfunctory manner in which he did, then that was plainly wrong and hence his decision was unreasonable. But it wasn't clear to her that that was what the adjudicator's decision was based upon, and given her ruling on the third argument, it wasn't necessary for her to make a decision on the point.

The respondent succeeded on its third argument. The court found that the adjudicator's treatment of three key areas to be inadequate. He made findings based on a preference for the materials provided by the applicant without making mention of the materials countering the applicant's claims provided with the response, and without giving any reason as to why one report was preferred over another. On one issue he failed to make findings of fact.

Kelly J found that the issues where his reasoning was deficient were fundamental to his determination (at para [108]).

In order for a determination to be valid under the Act, the adjudicator must make a genuine attempt to comply with the essential requirements of the Act. Those requirements include the requirement under subsection 33(1)(b) to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment; and the requirement under subsection 34(1)(a) to make that determination on the basis of the application and its attachments and the response and its attachments (at para [112]).

The adjudicator's failure to properly address three key issues in his determination lead the Court to conclude that he had failed to consider those issues and failed to take into account the response material relating to those key issues. The result is that he failed to comply with basic requirements of the Act in section 34 to consider the response and its attachments, and as a result failed to comply with the subsection 33(1)(b) requirement to determine on the balance of probabilities whether the respondent was liable to make a payment to the applicant (2 para [117]). He did not

make a bona fide attempt to deal with the critical issues in the adjudication and as a consequence the determination was void.

14. *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors [2017] NTSC 1* and *AAB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors (No 2) [2017] NTSC 11*. A successful challenge to a decision of the adjudicator to dismiss the application because it was out of time.

The case involved the first of the AAB payment claims and involved a similar repeat invoice scenario as that considered in *GRD Building Pty Ltd v Total Development Supplies Pty Ltd* and *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd [2009] NTCA 4*.

In this case after issuing the first invoice, the applicant was advised by the respondent that it had breached a security requirement under the Act that was a condition precedent to its entitlement to make a payment claim. It was told that it could resubmit its invoice after it satisfied the security requirement.

Five days later the applicant provided the necessary security and reissued the payment claim. The respondent issued a payment certificate in response that offset the amount it accepted as due against a claim against the applicant for liquidated damages.

Eventually the applicant served the respondent with an application for adjudication, and a response was served by the respondent refuting the application on 6 grounds.

Those grounds did not include any contention that the application was out of time because the payment dispute arose when the first invoice was rejected, but the adjudicator on becoming aware of the first invoice sought further submissions on whether that invoice was valid and triggered a payment dispute.

Ultimately the adjudicator rejected the application on the basis that the first invoice was valid, and its rejection triggered the payment dispute, and as a consequence, the application was out of time.

The adjudicator ruled that even though the first invoice was invalid under the terms of the contract, it was nevertheless valid for the purposes of the Act.

His decision to dismiss the application was challenged under subsection 48(1) of the Act, and the matter was referred by consent from the Local Court to the Supreme Court.

The judge noted that if a claim for payment is incapable of giving rise to a liability to pay under the terms of the contract, it would be pointless for the adjudicator to look into the underlying merits of the contractor's claim to be entitled to payment for performance of its contractual obligations. In this situation, subsection 33(1) (a) of the Act directs the adjudicator to dismiss the application without enquiring into those underlying merits.

In the first decision Kelly J ruled that the first invoice was not a valid payment claim and that the response to that invoice did not give rise to a payment dispute.

The second case involved the orders that should be made as a result of the finding that the adjudicator was in error in dismissing the application.

The respondent argued that the adjudicator made the right decision but for the wrong reason. It claimed that the second invoice was defective for the same reasons as the first.

The Court set aside the decision of the adjudicator and ordered that the application be referred back to him to determine. The Court found that it is the payment certificate issued in response to a

payment claim that triggers the respondent's liability to pay. If an invalid payment claim is submitted, the respondent is under no obligation to issue a payment certificate (as was the case for the first invoice). In the case of the second invoice, it chose to issue a payment certificate.

15. *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45. A successful challenge to an adjudicator's determination.

The adjudicator ruled that the dispute resolution clause in the contract was void for uncertainty and imported clause 6 of the Schedule to the Act into the contract. Because the respondent (the plaintiff) had not delivered a notice of dispute within the 14 day period stipulated in subclause 6(2)(a)(i), the adjudicator determined that the whole of the amount claimed was payable.

In the course of his deliberations he sent the parties an email stating:

*"I have formed a preliminary view, that due to the circular and repetitious nature of Articles 34.2(a) and 34.2(b), INPEX could indefinitely delay payment. The question then arises: whether the provisions implied into deficient construction contracts by section 20 of the Act should or should not be imported into the EPC Contract to cure the uncertainty?"*

*I invite both parties to address this question, in no more than two pages, by close of business Friday, 27 January 2017. Submissions from both parties must be strictly confined to the question raised. Please provide electronic copies of relevant authorities."*

The respondent argued that:

- there was a substantial failure to accord natural justice in not warning it that the adjudicator was contemplating applying clause 6 when both parties saw no uncertainty in the contract clauses, and in not giving the respondent an opportunity to argue why the application of that clause should not have the consequence of all monies claimed being payable to the applicant;
- the adjudicator failed to adjudicate the payment dispute the subject of the application, and instead determined some other "dispute" which was not the subject of the application (at no stage did the applicant ever claim that the respondent was bound to reject the payment claim in 14 days or pay the money in 28 days);
- The adjudicator failed to undertake the statutory task in section 33(1) (b) which required him to consider whether it had been demonstrated that a particular amount was due.

The respondent was successful on the first ground. If an adjudicator decides to embark on a course of ignoring the submissions of the parties and making a determination on a basis that was not raised by either party, "he is obliged to give the parties proper notice of the way he intends to decide and a proper opportunity to make submissions on whether he should do so." (Kelly J at para 44). The Court found that the adjudicator's request for submissions on whether the provisions implied into deficient construction contracts by section 20 of the Act should or should not be imported into the contract did not put the respondent on notice of the basis upon which he was proposing to make his determination, and even if it did forewarn the respondent of that possibility, the terms of the direction in the invitation to make submissions specifically precluded it from making submissions about what the consequences might be if the implied terms were to be imported into the contract, or why those consequences should not automatically apply (Kelly J at para 40).

The court rejected the respondent's argument that the application defines the dispute and therefore the bounds of the adjudicator's jurisdiction.

It also rejected the contention that an adjudicator must always look at the underlying merits of a claim in the sense of determining whether the work was satisfactorily carried out and valued in accordance with the terms of the contract. Kelly J noted that the focus of the Act is on the entitlement to be paid under the contract, and if the contract says that money claimed falls due if it is not disputed within a set time, "*then there is no reason why an adjudicator ought not give effect to that provision in making a determination on the merits under s 33(1) (b), and every reason why he should.*" (Kelly J at para 58).