

**A Working Outline and Introduction to the Building & Construction  
Industry Security of Payment Act 1999 (“the Act”)**

1. The object of *the Act* is set out in S.3. It is to ensure that any person who undertakes to carry out **construction work** or undertakes to supply **related goods and services** under a **construction contract** is entitled to receive, and is able to recover **progress payments** in relation to **the carrying out of that work and the supplying of those goods and services.**
2. It provides that a contractor/sub-contractor who undertakes to carry out construction work under a construction contract is entitled to receive and is able to recover progress payments in relation to the carrying out of that work.
3. *The Act* aims to establish a speedy, relatively cheap and informal method for the provisional or interim resolution of a significant class and number of contractual disputes within the building and construction industry. The means by which a builder/sub-contractor can do this is by accessing the statutory provisions of *the Act* by the making of a payment claim against the principal.
4. Although the common law does not permit inconsistent judgments it has in this instance clearly sanctioned such a remedy by this particular statute and it is clear that *the Act* confers **statutory rights** on a builder/sub-contractor to receive a **provisional or an interim progress payment** in the applicable circumstances.
5. It does this by creating what has been described as a dual railroad track system in which the statutory mechanism provided in the Act operates **in addition** to and not in derogation of any **similar procedure or rights** (including contractual rights) arising under the **construction contract**.
6. The statutory mechanism provides procedures to such an entitlement for such persons to receive a progress payment via this mechanism regardless of whether the relevant construction contract makes provision for progress payments.
7. Where there is a contractual progress claim provision in the contract, both the claimant and respondent must first engage it before seeking to invoke the assistance of *the Act*. However under s. 34 of *the Act*, this dual system is limited where the effect of the contract is to exclude, restrict or modify the operation of the Act.
8. *The Act* has a very broad scope and a wide application. It applies to any written or oral **construction contract**. The courts have emphasised that *the Act* applies to any construction contract work to be carried out in NSW or related goods and services to be supplied in NSW and where a party claims that it does not apply it

is for that party to demonstrate that the contract falls within the class of contracts that are exempted.

9. The procedures created involve:
- (a) The making of a **payment claim** by those persons claiming payment (ie. the **claimant**) who must prepare and serve a written payment claim on the person who is liable to make the payment (the **respondent**); and
  - (b) The provision of a **payment schedule** by the person by whom the payment is payable (the **respondent**). If any of the liability is disputed, the **respondent** may prepare and serve on the **claimant** a written **payment schedule** detailing the amount, if any at all, that the **respondent** is prepared to pay and the reasons for withholding the full amount claimed;
  - (c) Where any dispute remains or there is no response to the **payment claim** the referral of any disputed claim to an **adjudicator** for determination; and
  - (d) The **determination** by an **adjudicator** of the matter(s) in dispute;
  - (e) The filing of an **adjudication certificate** as a judgment in a court of competent jurisdiction; and
  - (f) The summary enforcement and payment of the progress payment (if any) so determined without any prejudice to the common law rights of the parties which can be determined in the normal manner.

**Note:** Whilst the respondent has the right to commence proceedings to have the entry of the said judgment set aside, the respondent must pay into court the unpaid portion of the adjudicated amount as security pending the final determination of those proceedings by a court. **S-Section 25 (4)** of the Act provides that the **respondent** cannot in **those proceedings** to set aside judgment bring any cross-claim against the claimant, raise any defence relating to the construction contract or seek to impugn the adjudicator's determination.

However, because of **s. 32** of *the Act* it **does not limit any other entitlement** that a **claimant** or **respondent** may have under the construction contract or any other remedy they may have for recovering under such entitlement.

The courts have viewed that the scheme created by *the Act* favours a narrower range and a limited view of judicial review in cases involving a **non-jurisdictional error of law** on the face of the record. That is broadly to say circumstances where the decision maker incorrectly decided something that he or she was authorised to make.

Similarly the courts have favoured a similar approach in cases involving a **jurisdictional error of law on the face of the record**. This is broadly to say circumstances where a decision maker with authority makes a decision which is outside of the limits of their authority and the powers conferred on them or where they do something which they lack the power to do.

The courts have taken this view because the legislature intended that *the Act* provide a speedy means ( with a minimum of judicial interference) of ensuring that builders/sub- contractors entitled to receive progress payments do so albeit by way of provisional/interim progress payments pending any final determination of building dispute proceedings with the principal by a court.

In the unanimous principal decision of the NSW Court of Appeal in *Brodyn-v-Davenport (2004) 61 NSWLR 421* Hodgson JA held that the court **could set aside any judgment obtained under *the Act* as well as precluding the claimant from prospectively obtaining judgment**. This finding by the court has effectively taken the urgency previously associated with such cases relating to the filing of judgment. However, at the same time the court has also confirmed and acknowledged that it has sought to uphold the Legislature's intention that *the Act* and the policy of the legislative scheme set out under *the Act*.

That is that disputes involving progress payments in the building and construction industry are to be resolved with a minimum of delay and a minimal of judicial involvement. His Honour Hodgson JA also found that this policy would weigh against any relief sought for judicial review and was unavailable for **non-jurisdictional error of law on the face of the record** (see s. 25(4)).

Instead, his Honour Hodgson JA said that relief would lie by **declaration and injunction** in the following circumstances:

- (i) When an adjudicator has failed to comply with the basic and essential requirements laid down in the Act for there to be a valid determination;
- (ii) When the adjudication determination does not amount to an attempt in good faith to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to that power;
- (iii) When an adjudicator has denied natural justice to a party (the content and operation of this right, however, is dependent upon the relatively limited scheme put forward by *the Act* for the provision of natural justice); and
- (iv) When the adjudication determination been procured by fraud in which the adjudicator is complicit.

Any determination made in such circumstances would be void, per se, within the meaning of *the Act*. Relief would lie by way of declaration that the determination was void and an injunction preventing the entry of any judgment on same. This is because in law no determination has been made and there is no need to invoke the provisions of s- s. 25(4) (a)(iii) of the Act.

His Honour then outlined some basic, though not exhaustive, essential requirements for a valid determination. These included;

- (i) The existence of a construction contract between the claimant and the respondent, to which the Act applies. (see ss. 7& 8);

- (ii) The service by the claimant on the respondent of a payment claim; (see s. 13)
- (iii) The making of an adjudication application by the claimant to an authorised nominating authority; (see s. 17)
- (iv) The reference of the application to an eligible adjudicator, who accepts the application; (see ss. 18 & 19) and
- (v) The determination by the adjudicator of the application (see ss. 19(2) & 21(5), determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (see ss. 22(1) and the issue of a determination in writing (ss. 22(3)(a))

10. In keeping with the principle of maintaining the cash flow cash flow of progress payments for builders/sub-contractors, *the Act* is founded on the proposition that any payments made pursuant to an adjudication determination(s) are **interim or provisional payments only** and the contractual rights of the parties are not extinguished by the adjudication procedure but remain extant until they are finally determined by a court of competent jurisdiction (see s. 32 (2)).

11. Further s-s 32 (3) of *the Act* specifically provides that any payments made under the adjudication process will be taken into account and may even be ordered to be repaid when a final order is made. The core operational principle of *the Act* has euphemistically described by some judges as “pay now [and] argue later”.

12. Section 4 contains definitions. It is worth noting the definition of **subcontractor** and that *the Act* does not apply to **exempt residential construction** contracts as specified in sub-section 7(2) (b) as a **construction contract**. S. 5 defines **“construction work”** and section 6 defines **“related goods & services”**.

13. Both are fairly wide definitions and it is worth noting that **construction work** does mean construction, alteration, repair extension, demolition etc., however it does not include drilling or extraction of oil, natural gas, minerals, tunnelling or boring or construction of underground works for that purpose. As to the meaning of **related goods and services** see section 6.

14. *The Act* applies to any **construction contract** whether written or oral partly written partly oral. Section 7 prescribes that the Act does not apply to a construction contract that forms part of a loan agreement, contract guarantee or contract of insurance under which a **recognised financial institution** undertakes to lend money or repay money lent, guarantee payment of money owing or lent or provide an indemnity to **construction work** carried out or related goods & services supplied under the **construction contract**.

15. Section 7 also states that it does not apply to employees, a **construction contract** for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on such part of any premises as the party for whom the work

is carried out resides or proposes to reside in or a **construction contract** that the work payable or related goods and services supplied under the contract is to be calculated otherwise than by reference **to the value of the work carried out or the value of the goods and services supplied**. However, where the person who resides on such premises directly engages a head contractor it does apply to the head contractor if they engage sub-contractors in such a situation.

16. Section **8** provides for the entitlement of such persons to a **progress payment** at a date determined by or in accordance with the terms of the contract or if no such provision is made in the contract the last day of the named month in which the **construction work** was first carried out (or related goods & services supplied) and the last day of each subsequent month named.
17. Section **9** provides that the amount of the progress payment to which a person is entitled is to be the amount calculated in accordance with the terms of the contract or if no such provision is made the amount calculated on the basis of the value of the **construction work** carried out or undertaken (or related goods & services supplied) under the contract.
18. Section **10** provides for the method of calculation of the value of **construction work** and **related goods & services**. Basically this is to be valued in accordance with the terms of the contract or the contract price for the work, any other rates or prices set out in the contract and any other rate or price cut set out in the contract and if any of the work is defective the estimated cost of rectifying the defect. The same applies for related **goods & services supplied** .
19. Section **11** provides the due date for payment of a **progress payment** to be made by a **principal** to a **head contractor**. Sub-section **(1A)** provides that it becomes due and payable **15 business days** after a payment claim is made or an earlier date provided in the terms of the contract.
20. Section **11 (1B)** provides a progress payment due to be made to a **subcontractor** under a **construction contract** becomes due and payable **30** days after a payment claim is made.
21. Section **11 (1C)** provides a progress payment to be made under a **construction contract** connected to an **exempt residential construction contract** on the date it becomes due and payable under the terms of the contract or if no such provisions in contract **10 business days** after a **payment claim** is made.
22. Section **12** provides that a **pay when paid provision** of a **construction contract** in relation to any payment for **construction work undertaken** carried out or related **goods & services supplied** is of no effect.

## Payment Claims

23. Section 13 relates to payment claims and provides that a person referred to in s. 8 who claims to be entitled to a **progress payment** may serve a **payment claim** on the person liable to make payment under the **construction contract**. A **payment claim** must identify:
- a) the **construction work** or **related goods & services** to which it relates,
  - b) the amount of the progress payment the claimant claims to be due and
  - c) if **the construction contract** is connected with an **exempt residential construction contract**, it **must state** that it is made under this Act.
24. The claimed amount may include any amount the respondent is liable to pay under s. 27 (2A) or that is held under the contract by the respondent the claimant claims is due for release.
25. Critically a payment claim may be served only **within:**
- (a) the period determined by or in accordance or in accordance with the terms of the **construction contract**, or
  - (b) the period 12 months after the **construction work** to which it relates was last carried out or the **related goods & services** last supplied, **whichever is the later**
  - (c) A claimant cannot serve more than one **payment claim** in respect of each reference date under the **construction contract**, however, this does not prevent the claimant including in a **payment claim** that has been the subject of a previous claim.
26. (a) Most importantly a **head contractor** must not serve a **payment claim** on the **principal** unless the claim is accompanied by a **supporting statement** that indicates that it relates to **that payment claim**, (Penalty units apply); and
- (b) **head contractor** must not serve a payment claim on the **principal** accompanied by a **supporting statement** knowing that it is false or misleading in a material particular in the particular circumstances (Penalty units or 3 months imprisonment apply)
- (c) **Supporting statement** means a statement that is in the form prescribed the regulations and (without limitation) that includes a declaration to the effect that all **subcontractors**, if any have been paid all amounts that have due and payable in relation to the **construction work** concerned

## Payment Schedules

27. Section 14 relates to payment schedules. It provides that a person on whom a **payment claim** is served may reply to the claim by providing a **payment schedule** to the claimant. The **payment schedule** must identify the payment

claim to which it relates and must indicate the amount (if any) that the respondent proposes to make ie. the **scheduled amount**. If the **scheduled amount** is less than the **claimed amount** the schedule must indicate why the amount is less and if the amount is less because the **respondent** is withholding payment for any reason the **respondent's** reasons for withholding payment.

28. If a claimant serves a **payment claim** on a **respondent** and the **respondent** does not provide a **payment schedule** to the **claimant** within the time required by the relevant **construction contract** or within **10 business days** after the **payment claim** is served whichever time expires earlier the **respondent** becomes liable to pay the **claimed amount** to the **claimant** on the **due date** for the **progress payment** to which the **payment claim** relates.

### **Section 15**

#### **Consequences of not paying a claimant where no payment schedule has been provided**

29. If the **respondent** fails to provide a payment schedule to the **claimant** within the time allowed the **claimant** may recover the unpaid portion from the **respondent** as a debt due to the claimant in any court of competent jurisdiction and make an adjudication application under section 17 (1) (b) in relation to the **payment claim**. It may also serve notice on the respondent of its intention to suspend the carrying out of work or supplying the **related goods & services**.
30. If a **claimant** commences proceedings to recover **the unpaid portion of the claimed amount** under this section judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances in s-s. 15(1) and critically the **respondent** in those proceedings is not entitled to bring **any cross claim or raise any defence** in relation to the matters arising under the **construction contract**.

### **Section 16**

#### **Consequences of not paying claimant in accordance with the payment schedule**

31. Where a **claimant** serves a **payment claim** on a **respondent** and the **respondent** provides a **payment schedule** to the **claimant** within the time required by the relevant **construction contract** or within **10 business days** whichever time expires earlier and the **payment schedule** indicates a **scheduled amount** that the **respondent** proposes to pay the **claimant**. If the respondent fails to pay the whole or any part of the **scheduled amount** to the **claimant** on or before the due date to which it relates the **claimant** may recover the unpaid portion from the **respondent** as a debt due to the claimant in any court of competent jurisdiction and make an adjudication application under section 17 (1) (b) in relation to the

**payment claim**. It may also serve notice on the respondent of its intention to suspend the carrying out of work or supplying the **related goods & services**.

32. If a **claimant** commences proceedings to recover the unpaid portion of the **claimed amount** under this section judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances in s-s. 16(1) and critically the **respondent** in those proceedings is not entitled to bring any cross claim or raise any defence in relation to the matters arising under the **construction contract**.

## **Section 17**

### **Adjudication Applications**

33. A **claimant** may apply for adjudication of a **payment claim** if the **respondent** provides a **payment schedule** but the **scheduled amount** indicated in the **payment schedule** is less than the **claimed amount** indicated in the **payment claim**, (s-s.17 (1)(a)(i)) OR
34. The **respondent** fails to pay the whole or any part of the **scheduled amount** to the **claimant** by the **due date** for payment of the amount, (s-s 17(1)(a)(ii)) OR
35. The **respondent** fails to provide a **payment schedule** to the **claimant** and fails to pay the whole or any part of the **claimed amount** by the **due date** for payment of the amount. (s-s17(b))
36. **Note: s-s 17 (2)** provides that an adjudication application cannot be made in the circumstances described in paragraph 35 above unless:
- (a) the **claimant** has notified the **respondent** within the period of **20 business days** immediately following the **due date** for payment of the **claimant**'s intention to apply for adjudication of the **payment claim**, and
  - (b) the **respondent** has been given an opportunity to provide a **payment schedule** to the **claimant** within **5 business days** after receiving the **claimant**'s notice.

**(NB: This provision in the Act provides a statutory form of natural justice or procedural fairness within the scheme of the statutory mechanism in cases where no payment schedule has been provided to the payment claim made by the respondent following the service on it, him/her of a payment claim by the applicant)**

36. An adjudication application must be in writing and must be made to an **authorised nominating authority** chosen by the claimant.

In the case of:

(a) an application made under paragraph **33** above it must be made within **10 business days** after the claimant receives the **payment schedule**, and

(b) an application made under paragraph **34** above must be made within **20 business days** after the **due date** for payment, and

(c) an application made under paragraph **35** above must be made within **10 business days** after the end of the **5 day** period referred to in paragraph **35 (b)** above.

37. The application must identify the **payment claim** and the **payment schedule** (if any) to which it relates and must be accompanied by such application fee as determined by the **authorised nominating authority** and may include such submissions relevant to the application as the **claimant** chooses.

38. A copy of an adjudication application must be served on the respondent and the authorised nominating authority to whom an adjudication application is made has a duty to refer the application to an adjudicator as soon as possible.

39. **Section 18** of *the Act* provides for the requirements of eligibility for an adjudicator. An **adjudicator** is a natural person and has qualifications, expertise and experience as may be prescribed by the regulations.

40. **Section 19** of *the Act* provides that if an **authorised nominating authority** refers an adjudication application to an adjudicator, the **adjudicator** may accept the adjudication application by causing notice of the acceptance to be served on the **claimant** and the **respondent**. On accepting an **adjudication application** the **adjudicator** is taken to have been appointed to determine the application.

42. **Section 20** of *the Act* provides that the respondent may lodge a response to the claimant's adjudicator application within **5 business days** after receiving a copy of the application or **2 business days** after receiving notice of an adjudicator's acceptance of the application whichever expires later.

43. The **adjudication response** must be in writing, identify the application to which it relates and may contain such submissions relevant to the response as the **respondent** chooses to include. However, a respondent may only lodge a response if they have provided a payment schedule schedule to the claimant within the time specified in **sections 14 (4) or 17 (2) (b)**. (See paragraphs 26-27 and paragraphs 32-36 above). A copy of the response must be served on the claimant

44. **Section 20** of *the Act* provides that the **adjudicator** is not to determine an **adjudication application** until the end of the period within which the **respondent** may lodge an **adjudication response**. An **adjudicator** is not to consider an **adjudication response** unless it was made before the end of the period within which the respondent may lodge such a response.

45. **Section 21** of *the Act* provides that subject to what is said at paragraph 44 above an **adjudicator** is to determine an **adjudication application** as expeditiously as possible and in any case within **10 business days** after which the **adjudicator** notified both the parties or such further time as they agree. The **adjudicator** may request further written submissions and must give the parties an opportunity to comment on same, may set deadlines for further submissions and comments by the parties, may call a conference and may carry out an inspection of any matter to which the claim relates.

46. Any such conferences are to be conducted informally and the parties are not entitled to any legal representation. Critically an **adjudicator's** power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or comply with the **adjudicator's** call for a conference of the parties.

47. **S-section 22 (1)** of *the Act* provides that an **adjudicator** is to determine the amount of the progress payment (if any) to be paid (the **adjudicated amount**), and the date it became or becomes payable and the rate of interest payable on such an amount.

48. **S-s 22 (2)** of *the Act* provides that in determining an adjudication application the **adjudicator** is to consider the following matters only:

(a) the provisions of *the Act*,

(b) the provisions of the **construction contract** from which the application arose,

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

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

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

49. **S-s 22 (3)** of *the Act* provides that the **adjudicator's determination** must be in writing and include the reasons for the **determination** unless both parties request not to include those reasons.

50. **S-s 22 (4)** of *the Act* provides the value of any construction work or related goods and services supplied the adjudicator will maintain the same value as previously determined unless the parties satisfy the adjudicator concerned that it has changed.

51. **S-s 22 (5)** of *the Act* provides for corrections in an **adjudicator's determination** relating to slippage, clerical mistake or defect of form.

52. **Section 23** of *the Act* defines **relevant date** and provides that if an **adjudicator** determines that a **respondent** is required to pay an adjudicated amount, the respondent must pay the amount to the **claimant** on or before the **relevant date**. **Relevant date** means the date occurring 5 business days after the date of the **adjudicator's determination** is served on the **respondent** or if an **adjudicator** determines a later date that later date.

54. Broadly, **section 24** of *the Act* provides for obtaining an **adjudication certificate** for an **adjudicated amount**. Where the debt is not paid wholly or partially by the due date the **claimant** can request an **adjudication certificate** from the **authorised nominating authority** and serve notice on the respondent of its intention to suspend carrying out **construction work** or the **supply of related goods & services**.

55. Broadly, **section 25** provides for the filing of an **adjudication certificate** as a **judgment debt** in a court of competent jurisdiction. An **adjudication certificate** cannot be filed unless it is accompanied by an affidavit that the whole or part of the **adjudicated amount** has not been paid at the time of filing.

### **Summary**

1. Whilst the common law does not permit inconsistent judgments this may be and in this instance **the legislature** has sanctioned this by this statute and it is clear that by this it has conferred statutory rights on a builder/sub-contractor under *the Act* to receive interim or progress payments in relation to construction work or to the supply of related goods and services;
2. The means by which a person does this is by the statutory provisions and mechanisms available in *the Act* by the making of a payment claim against the principal;
3. Where a **respondent** does not provide a **payment schedule** in reply to a **payment claim** within the prescribed times they cannot do so at a later point nor can they make submissions to an **adjudicator** in relation to that **payment claim**.
4. However, it must be emphasised that the purpose of *the Act* is to maintain the right to receive a cash-flow by sub-contractors in the Building and Construction Industry on an interim/provisional basis in the first instance, and, further *the Act* enables that right to be determined informally, summarily and quickly, **and then summarily enforced** with a minimum of judicial involvement by the referral of any disputed claim to an adjudicator for determination **without prejudice to the common law rights of both parties which can be determined in the normal manner**;

5. Although the statutory process under *the Act* provides that an assessment by an **adjudicator** may be enforced as a debt that is only insofar as a court has not finally determined the extant rights of the parties under the construction contract or does not otherwise determine same;
6. However, at the same time the court has also confirmed and acknowledged that it has sought to uphold the Legislature's intention that *the Act* and the policy of the legislative scheme set out under *the Act*. The courts have also found that this policy would weigh against any relief sought for judicial review and was unavailable for **non-jurisdictional error of law on the face of the record**. In *Brodyn*, supra his Honour Hodgson JA also found that this policy would weigh against any relief sought for judicial review and was unavailable for both **non-jurisdictional error of law on the face of the record and jurisdictional error of law** on the face of the record.
7. The assessment by the adjudicator does not depend on the true state of the underlying facts but rather on the assessment of the adjudicator who is not authorised or required to make any findings about those facts;
8. The adjudication Certificate is provisional only both in what it grants and what it refuses;
9. The operation of **s. 32**, *the Act* does not limit any other entitlement that a claimant may have under a construction contract or any other remedy that a claimant may have for recovering any such other entitlement;
10. **Critically, s. 32** of the Act also provides that nothing done under the Act affects the rights of any party under a construction contract and that nothing done under or for the purposes of the Act affects any civil proceedings arising under a construction contract;
11. The end result is that either party can still pursue their claim even though it was rejected by the adjudicator, or challenge the other parties right to the amount awarded by same, and obtain restitution of any amount it has previously paid to the other party.

## **Addendum to Paper.**

### **1. Adjudicator's Determination:**

See *Hallen J. of the Supreme Court Of NSW in Pittwater Council-v-Keystone Projects Group Pty Ltd [2014] NSWSC 1791 17 December 2014 particularly para's 94-100.*

The assessment by the adjudicator does not depend on the true state of the underlying facts but rather on the assessment of the adjudicator who is not authorised to make any findings about those facts.

*"...There is no determination, even provisionally, of the actual rights of the parties, and there is no judicial determination of such rights under their construction contract. The payments in themselves are only payments on account of a liability that will finally be determined by a court..."* (my emphasis)

### **2. Quashing an Adjudication Determination and service of copies of application etc.**

See Recent decision of Hammerschlag J. of NSW Supreme Court in *Parkview Constructions Pty Limited-v- Total Lifestyle Windows Pty Ltd t/a Total Concept Group [2017] NSWSC 194 (& March 2017).*

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