Recent developments in relation to the Security of Payments Regime

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Note: *This is an updated version of a paper presented in October 2016. This version, current as at 9 February 2017, provides an update on various appeal decisions and reports that have been delivered since the original paper was delivered.*

Introduction

Since its introduction in New South Wales in 1999, security of payments (**SOP**) legislation has been adopted in every state and territory.[2] The regime is aimed at ensuring cash flow to building contractors and subcontractors, and moving the risk of insolvency to principals and head contractors.[3]

SOP legislation varies across jurisdictions, despite ongoing calls for a nationally uniform scheme across Australian states and territories.[4]

Broadly, state and territory legislation falls within one of two models: the West Coast model (Western Australia and Northern Territory) and the East Coast model (everywhere else). Some of the key differences between the two models are: [5]

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[2] *Building and Construction Industry Security of Payment Act 1999* (NSW); *Building and Construction Industry Security of Payment Act 2002* (Vic); *Building and Construction Industry Payments Act 2004* (Qld); *Construction Contracts Act 2004* (WA); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building and Construction Industry (Security of Payment) Act 2009* (ACT); *Building and Construction Industry Security of Payment Act 2009* (SA); *Building and Construction Industry Security of Payment Act 2009* (Tas).

[3] Bruce Collins QC, *Independent Inquiry into Construction Industry Insolvency in NSW* (Collins Inquiry Report), November 2012, pp 20-21.

[4] Australian Senate Economics Reference Committee, *"I just want to be paid" — Insolvency in the Australian construction industry*, December 2015, xxiv. Recommendation that uniform national legislation be adopted based on the corporations power.

[5] See for example Australian Senate Economics Reference Committee, *"I just want to be paid" — Insolvency in the Australian construction industry*, December 2015, 125-6, 132.

- In the West Coast model, payment claims can be made up and down the contracting chain, while in the East coast model, they can only be made up the chain. The East Coast Model allows only contractors and subcontractors to apply for adjudication of progress claims whereas under the West Coast Model, any party to a construction contract can seek adjudication of any payment dispute; [6]
- the West Coast model allows any party to apply to have a "payment dispute" adjudicated while in the East Coast model only the claimant can apply for an adjudication;
- the East Coast Model uses Authorised Nominating Authorities to refer disputes to a nominated adjudicator selected by the authority whereas the West Coast Model allows the parties to agree an adjudicator; [7]
- the SOP regime in the West Coast model is only implied in contracts where there is no express provision made for a payment scheme. While parties are free to negotiate terms of payment, "pay when paid" provisions and payment due dates of greater than 50 days after claim is made are prohibited.[8]

The SOP regimes vary in the scope of their application and reach. In Tasmania, Western Australia and the Northern Territory, the SOP regime applies to residential projects, including contracts with owner-builders.[9] In Victoria, domestic building contracts are excluded from the SOP regime, unless the owner is "in the business of building residences".[10] In NSW and South Australia, the Act does not apply to domestic building contracts where the person with whom the contract is made intends to live in the residence.

Victoria alone excludes certain types of claims from the SOP regime, known as "excluded amounts". These are:[11]

- any amount claimed under the construction contract as compensation for happening of an event including any amount relating to:

[6] NSW Fair Trading, Building and Construction Industry Security of Payment Act 1999 Discussion Paper, December 2015 (NSW Discussion paper), p 19.
[7] NSW Discussion paper, p 19.
[8] NSW Discussion paper, p 19; *Construction Contracts Act 2004* (WA) ss 10, 11, Part 2, Division 2.
[9] NSW Discussion paper, p 13.
[10] Victorian Act, s 7(2)(b).
[11] Victorian Act, s 10B.

    - latent conditions;
    - time-related costs;
    - regulatory changes;
- damages arising under or in connection with the contract; and
- any claim arising at law other than under the construction contract.

The Victorian Act also divides variations into two classes of "claimable variations". The second class of variations includes variations where parties agree that the work has been carried out, but dispute its value or that it constitutes a variation. For this class of variation to be claimable, the contract price must be $5 million or less, or where more than $5 million, the contract does not contain a method of resolving disputes.[12]

In Victoria and elsewhere, the number of matters coming before adjudicators and the courts has increased.[13] The SOP legislation continues to give rise to a range of interesting issues, with some diverging approaches between jurisdictions.

Scope of judicial review applications

In Victoria and New South Wales, the scope of the court's supervisory jurisdiction over adjudicators on judicial review applications has been the subject of recent developments. The issue is an important one because expanding the scope of judicial review may constitute an impediment to realising the aims of the SOP regime as a quick and cost-effective means of ensuring payment to building contractors and transferring the risk of insolvency in building projects.[14]

[12] Section 10A. When the total amount of variations is more than 10 percent of the contract price, the $5 million threshold reduces to $150,000. Any amount relating to a variation that is not a "claimable variation" is an "excluded amount": s 10B.
[13] Minter Ellison, *Security of Payment Round Up*, 2015, http://www.minterellison.com/guides/security-of-payment/ ,21. In Victoria, the number of adjudications increased by 36 percent in 2015; in Western Australia by 35 percent. In Queensland, the number of claims coming before the court has dramatically reduced.
[14] For transferring the risk of insolvency as one of the purposes of the SOP regime see *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, [207]-[211]; *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 [83].

Amasya Enterprises v Asta Developments

In Victoria,[15] unlike in NSW[16] and Western Australia,[17] judicial review has been available for error of law on the face of the record as well as jurisdictional error.

Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd dealt, as a preliminary issue, with the availability of judicial review after judgment has been entered on the basis of an adjudication certificate under s 28R of the Victorian Act.[18] Section 28R provides (relevantly) as follows:

28R Proceedings to recover amount payable under section 28M or 28N

(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N. …

(5) If a person commences proceedings to have the judgment set aside, that person—

(a) subject to subsection (6), is not, in those proceedings, entitled—

(i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or

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

(iii) to challenge an adjudication determination or a review determination …

In November 2014, Asta obtained an adjudication determination favourable to it and had judgment entered pursuant to s 28R on 12 December 2014. On 16 December 2014, Amasya sought judicial review of the adjudication determination on grounds

[15] *Amasya Enterprises v Asta Developments* [2015] VSC 233 [37], referring to *Hickory v Schiavello* [2009] VSC 156; (2009) 26 VR 112, 134 [88]; *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 (15 October 2013).

[16] See *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport and Anor* (2004) 61 NSWLR 421 [51]; *Transgrid v Walter Construction Group Ltd* [2004] NSWSC 21; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393. However note the discussion that follows in relation to *Probuild v Shade Systems* indicating that this position may be changing.

[17] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corp* [2016] WASCA 130 [197].

[18] [2015] VSC 233 (2 June 2015).

including that there was no valid payment claim vesting jurisdiction in the adjudicator to make a determination, and that the adjudicator had denied Amasya natural justice. Amasya also applied to have the judgment set aside. Amasya argued that the court could entertain a judicial review application notwithstanding the entry of judgment under s 28R.

Justice Vickery considered the issues of whether s 28R(5)(a)(iii) was a valid privative clause, and it if it was, whether it removed from the Supreme Court the power to grant certiorari on the basis of jurisdictional error.

His Honour found that s 28R(5)(a)(iii) only operates after a judgment has been entered and does not prevent other steps taken to prevent the judgment from being entered, for example a challenge by way of judicial review.[19]

Section 85 of the Constitution Act of Victoria provides that the Supreme Court of Victoria shall be the superior court of Victoria with unlimited jurisdiction. Subsection (5) permits the passing of legislation that limits the court's jurisdiction, but only where the provision of the Act purporting to do so expressly refers to s 85 and expressly states an intention to repeal, alter or vary the section, and the reasons for doing so are referred to by the member of Parliament who introduces the Bill.

His Honour found that section 28R(5)(a)(iii) was a valid privative clause, noting that s 51(2) of the Victorian Act specifically provides that it is the intention of s 28R to alter or vary s 85 of the Constitution Act 1975.[20]

Unlike the NSW legislation, the adjudication certificate in Victoria is not itself deemed a judgment debt; it must be entered as a judgment as an exercise of judicial power.[21]

In this respect, his Honour distinguished *Chase Oyster Bar,*[22] in which the NSW Court of Appeal determined (in *obiter*) that the equivalent provision of the NSW Act

[19] [2015] VSC 233 [64]-[66].
[20] [2015] VSC 233 [33].
[21] [2015] VSC 233 [45], [51].
[22] (2010) 78 NSWLR 393.

did not oust the jurisdiction of the Supreme Court to grant relief in the nature of certiorari on a judicial review application.

His Honour came to that conclusion for two reasons. First, because the entry of judgment under the Victorian Act is an exercise of judicial power (unlike NSW, where the adjudication certificate is simply filed), s 28R(5)(a)(iii) lent itself more readily to being characterised as a privative clause. Secondly, as noted above, there was the express statutory statement in s 51(2) in relation to s 85 of the Victorian Constitution, for which there was no counterpart in the NSW legislation.[23]

Following on from this, his Honour applied the High Court's reasoning in *Kirk*[24] to find that the legislature may take away from the Supreme Court power to grant relief for error of law appearing on the face of the record, but not on account of jurisdictional error. That would be inconsistent with the character of the Supreme Court of Victoria as a Chapter III court.[25]

Section 28R(5)(a)(iii) therefore validly removed the court's jurisdiction to review for error of law on the face of the record once judgment was obtained, but not for jurisdictional error.

In relation to what constitutes jurisdictional error, his Honour found instructive the observations of McDougall J in *Chase Oyster Bar* that a "jurisdictional fact" is "a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question".[26]

Contrary to Amasya's argument, it was not possible to set aside or quash the adjudication determination but leave the judgment in place, because certiorari is a remedy available only in respect of an order that has legal effect.[27] However, if Amasya's challenge to the adjudication was founded upon jurisdictional error and

[23] [2015] VSC 233 [54]-[56].
[24] (2010) 239 CLR 531, 539.
[25] [2015] VSC 233 [68].
[26] [2015] VSC 233 [82], citing *Chase Oyster* at [164]-[172] referring to *Gedeon v Commissioner of the NSW Crime Commission* (2008) 236 CLR 120.
[27] [2015] VSC 233 [19]-[20], [24]-[25], applying *Wingfoot Australia Partners Pty Ltd v Eyup Kocak* (2013) 303 ALR 64.

was made out, then the adjudication determination could be quashed and the judgment set aside.[28]

In a subsequent decision, Vickery J found that the adjudication determination was void and set it aside. Asta sought an extension of time in which to appeal, however the matter was subsequently resolved following referral to arbitration.[29]

The effect of *Amasya v Asta* is that a party who wishes to seek judicial review after judgment has been entered may still do so but will be confined to a challenge based on jurisdictional error. It will therefore be necessary for aggrieved respondents to turn their attention to the prospect of a judicial review application at the earliest possible opportunity.

Saville v Hallmarc Constructions

Saville v Hallmarc Constructions Pty Ltd[30] is the most recent Victorian authority dealing with the scope of judicial review applications. In that case, the Court of Appeal considered and adopted part of the NSW Court of Appeal's reasoning in *Chase Oyster Bar*[31] in relation to the scope of judicial review.

In *Chase Oyster Bar,* the NSW Court of Appeal determined that the issue of whether a notice of intention to apply for an adjudication determination was given within time was a jurisdictional fact.[32] In *Sugar Australia,*[33] Vickery J adopted Basten JA's reasons from *Chase Oyster* in determining that it was not for an adjudicator to decide the validity of an adjudication application, and that any challenge to the jurisdiction of an adjudicator must be determined on judicial review.[34]

[28] [2015] VSC 233 [96].
[29] [2015] VSC 500. On appeal, *Asta v Amasya* [2016] VSCA 186 (Whelan and Ferguson JJA, 3 August 2016).
[30] [2015] VSCA 318 (27 November 2015).
[31] (2010) 78 NSWLR 393.
[32] Section 17(2)(a) of the NSW Act provides that where no payment schedule is issued, notice must be given of intention to apply within 20 business days immediately following the due date for payment.
[33] *Sugar Australia* [2013] VSC 535 [113].
[34] *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 [71], [72].

Chief Justice Spigelman in *Chase Oyster* also considered the time requirement in s 17(2)(a) a jurisdictional matter subject to the court's supervisory jurisdiction.[35] Justice McDougall JA considered whether a requirement is a jurisdictional fact by applying the test from *Project Blue Sky,*[36] and finding that the s 17(2)(a) requirement was a jurisdictional fact. His Honour also emphasised that the fixing of a due date is a matter that can be worked out by a calendar and does not depend on the opinion of the adjudicator applying any special expertise.[37]

In *Saville v Hallmarc Constructions,* Saville contracted with Hallmarc Constructions to supply the joinery for a 148 apartment residential complex in Highett. Saville completed work on the project in September 2013, but submitted a payment claim on 17 February 2014. Hallmarc argued that the adjudicator had no jurisdiction because the payment claim was served out of time.[38]

The adjudicator determined in Saville's favour that Hallmarc owed it $46,000. The adjudicator found that the claim was within time, relying upon an invoice dated 25 November 2013 from JMP Carpentry that was for rectification of defects in the wardrobes that fell within Saville's scope of works. Saville had argued that the work carried out by JMP Carpentry was either done on its behalf, or that it had some sort of supervisory responsibility in relation to JMP Carpentry.

Hallmarc sought judicial review of the adjudicator's decision. Justice Vickery found that the adjudicator's decision was invalid because the payment claim was made out of time.[39] His Honour found that the payment claim was in truth a final payment claim, so that the reference date for the purposes of submitting a payment claim was the day after the completion of the works on 30 September 2013. The claim of February 2014 was therefore made beyond the timeframe of three months from the reference date. Saville was accordingly out of time for the claims it had made and for any further claims.

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[35] *Chase Oyster* (2010) 78 NSWLR 393 [37]-[55].
[36] *Project Blue Sky v Australian Broadcasting Authority* (1988) 194 CLR 355.
[37] *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 [80], [84], citing *Chase Oyster* per McDougall JA at [166], [220].
[38] A second payment claim dated 16 May 2014 was submitted but had not been adjudicated at the time of Vickery J's decision.
[39] *Hallmarc Construction v Saville* [2014] VSC 491.

Saville appealed to the Court of Appeal but was unsuccessful. Relevantly, the Court of Appeal considered the scope of judicial review applications of adjudications. Chief Justice Warren and Tate JA, in a joint judgment with which Kaye JA agreed, rejected an argument that the court's supervisory jurisdiction is limited to where the adjudicator has made a straightforward calculation of dates, or where the adjudicator's decision is arbitrary or capricious. The court found that the reasoning of Basten and McDougall JJA in *Chase Oyster Bar* was not so limited.[40]

Their Honours agreed with Dixon J in *Parisienne Basket Shoes*[41] that a jurisdictional fact is an event or circumstance on which the jurisdiction of the court depends. If a matter is a jurisdictional fact it is reviewable by a superior court de novo. By contrast, errors within jurisdiction are not reviewable unless they amount to error of law on the face of the record.[42]

The Court of Appeal found that judicial review may extend to situations where the adjudicator engages in a process of evaluation or assessment in making a determination.[43] The question for the court is whether the decision amounts to an essential condition for the validity of an adjudication application. If it does, then it is subject to judicial review, whether it involves an expert opinion or assessment or not.

The making of a valid payment claim was a jurisdictional fact and essential to the adjudicator's jurisdiction to determine the application. The fixing of a reference date under s 9(2)(d) was reviewable.[44]

The court found that Vickery J did not err in finding that JMP Carpentry was not directly engaged by Hallmarc and Saville had no supervisory role over the work done by JMP. As found by Vickery J, the adjudicator had mistakenly proceeded on the basis that Hallmarc was not disputing that JMP Carpentry had carried out works on

[40] *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 [79], [86].
[41] (1938) 69 CLR 369.
[42] *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 [55], [59], [62].
[43] [2015] VSCA 318 [87].
[44] [2015] VSCA 318 [94], [99].

Saville's behalf, because it did not dispute that the rectification was of defects in the wardrobes supplied by Hallmarc.[45]

Lewence Construction v Southern Han Breakfast Point

Two months before the Court of Appeal's decision, the NSW Court of Appeal handed down *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd*.[46] In that case, the Court of Appeal found that the existence of a reference date is not a jurisdictional fact or essential pre-condition to the exercise of jurisdiction.[47]

Lewence Construction contracted with Southern Han for construction of an apartment complex in Breakfast Point. Lewence Construction issued a payment claim and subsequently obtained an adjudication determination in its favour. Southern Han sought judicial review on the basis that the adjudicator had fallen into jurisdictional error in determining that a reference date had arisen under s 8 when it had not.

Justice Ball at first instance found in favour of Southern Han that there was no available reference date to support the claim under either of the factual scenarios available. His Honour concluded that the expression "a person referred to in s 8(1)" in s 13(1) referred to a person who has undertaken construction work under the contract "in respect of which a reference date has arisen"". On that basis, the question of whether a reference date had arisen was a jurisdictional fact capable of determination by the court.[48]

On appeal, Lewence challenged that finding. Southern Han, pursuant to a notice of contention, sought to affirm Ball J's decision on the basis that the payment claim was invalid pursuant to s 13(5) as it was a subsequent claim in respect of a reference date.

Justices Ward and Emmett considered that the words "on and from each reference

[45] [2015] VSCA 318 [103], [108].
[46] *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 (25 September 2015).
[47] *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 (25 September 2015), per Ward JA at [60], [93]; Emmett JA at [119]; Sackville AJA at [133].
[48] *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 (Ball J) [37], [40].

date" within s 8 of the NSW Act do not apply to the person who is entitled to a progress payment, but to when a person who falls within s 8(1)(a) or (b) is entitled to a progress payment. Whether a claim was valid, including because it was supported by a reference date, was not a jurisdictional fact.[49]

Justice Ward also took into account the words "or who claims to be entitled to a progress payment" in s 13(1) of the NSW Act as indicating that there may be a valid payment claim even if there is a dispute as to entitlement.[50]

Southern Han's notice of contention was dismissed on the basis that there was no evidence that the impugned payment claim was made in respect of the same reference date as a previous claim.[51]

For a brief period, this decision placed New South Wales and Victorian Courts of Appeal at odds over the issue of whether the existence of a reference date is properly the subject of judicial review. Although the Victorian and New South Wales provisions are not identical, they are similar in that the Victorian Act in s 9(1) also prefaces "a person" with the words "on and from each reference date". Section 14(1) of the Victorian Act also contains the words "or who claims to be entitled to a progress payment" as appear in s 13(1) of the NSW Act.[52]

Special leave was granted by the High Court in relation to the issue of whether the existence of a reference date is a jurisdictional fact.

In *Southern Han Breakfast Point Pty Ltd v Lewence Constructions Pty Ltd,*[53] the High Court allowed Southern Han's appeal against the Court of Appeal's decision and agreed with the reasoning of the trial judge. In a joint judgment, the High Court found that the existence of a reference date is a prerequisite to the making of a valid payment claim, and is a jurisdictional fact.

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[49] [2015] NSWCA 288 per Ward JA at [61], per Emmett JA at [119], per Sackville A at [124], see also Sackville JA at [132]. By contrast, whether s 13(5) applies is a jurisdictional fact capable of determination by the court: per Ward JA at [94].
[50] *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 (25 September 2015), per Ward JA at [61], [93].
[51] *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 per Ward JA at [67], per Emmett JA at [121], per Sackville JA at [151].
[52] Though it is to be noted that there is no equivalent in the NSW Act of s 14(4) and (5) of the Victorian Act.
[53] *Southern Han Breakfast Point Pty Ltd v Lewence Constructions Pty Ltd* [2016] HCA 52 (21 December 2016).

Their Honours found that Part 2 of the Act makes an important distinction between an entitlement to a progress payment in s 8 and the amount of the progress payment, which is cast in terms of future assessment by an adjudicator under s 9.[54] Contrary to the Court of Appeal, their Honours found that the words "or who claims to be entitled to a progress payment" in s 13 simply recognise, consistently with s 9, that a claimant may be entitled to make a progress claim, yet ultimately be found to be entitled to less than the amount claimed, or even to nothing at all.[55]

Section 8 makes a person referred to in s 8(1) who has undertaken to carry out construction work entitled to a progress payment only on and from each reference date. The existence of a reference date was therefore a jurisdictional fact. Under either of the scenarios considered by the trial judge, no reference date arose in respect of which Lewence could make a payment claim.

If Southern Han had taken the work out of Lewence's hands, then cl 39.4 expressly provided for the suspension of all payment. Alternatively, if Lewence had terminated the contract, then the parties were restricted to enforcing rights that had accrued under the contract, except to the extent that the contract was to be interpreted otherwise. As at the date of termination, 28 October 2014, no further reference date had arisen. Their Honours found that it is a limitation of the Act that it is designed to provide security of payment for work carried out under a construction contract, but not for damages for breach, or restitution on termination after repudiation.[56]

No change in the NSW position on the scope of judicial review? *Shade Systems v Probuild*

As noted above, in New South Wales, unlike in Victoria, judicial review has been confined to cases of jurisdictional error. However, the decision of Emmett AJ in

[54] *Southern Han Breakfast Point Pty Ltd v Lewence Constructions* [2016] HCA 52 (21 Dec 2016) [59].
[55] *Southern Han Breakfast Point Pty Ltd v Lewence Constructions* [2016] HCA 52 (21 Dec 2016) [57], [60].
[56] *Southern Han Breakfast Point Pty Ltd v Lewence Constructions* [2016] HCA 52 (21 Dec 2016) [57], [61], [66], [75], [79].

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd[57] for a time indicated a possible change in the position of New South Wales courts regarding the availability and scope of judicial review of adjudication determinations.[58]

Shade Systems obtained an adjudication determination which was challenged by Probuild in the Supreme Court. The adjudicator had dismissed Probuild's claim to deduct liquidated damages from the amount otherwise due to Shade Systems on the basis that Probuild was required to prove that Shade System's failure to reach practical completion was caused by its own default. Probuild argued that the adjudicator had made an error of law on the face of the record and sought judicial review on that basis.

Acting Justice Emmett considered the reasons of Hodgson JA in *Brodyn Pty Ltd v Davenport*[59] regarding the availability of judicial review for error of law on the face of the record to be *obiter* only.[60]

His Honour considered that, as well as not being strictly binding, the observations of Hodgson JA in *Brodyn* had been put "substantially in doubt" by the High Court's decision in *Kirk.*[61]

His Honour found that s 69 of the *Supreme Court Act* (NSW) provides the court with jurisdiction to grant any relief or remedy by way of writ, including certiorari, including jurisdiction to quash an adjudication determination made on the base of an error of law on the face of the record. The adjudicator's statutory powers were subject to s 69, which was not to be excluded absent any clear legislative intention to the contrary.[62]

His Honour quashed the determination and remitted the matter to the adjudicator to determine in accordance with the law.

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[57] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770 (15 June 2016).
[58] Note that in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [126] Sackville JA also expressed the view that judicial review was available pursuant to s 69 of the Supreme Court Act for both jurisdictional error and error of law on the face of the record.
[59] (2004) 61 NSWLR 421.
[60] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770 [65].
[61] [2016] NSWSC 770 [64], referring to *Kirk* (2010) 239 CLR 531.
[62] [2016] NSWSC 770 [74].

In a decision late last year,[63] the Court of Appeal overturned Emmett AJA's decision and affirmed the approach previously followed in New South Wales, that judicial review of an adjudicator's determination is available only for jurisdictional error and not for error of law on the face of the record.

Justice Basten, who delivered a judgment with which Bathurst CJ, Beazley P, and Macfarlan and Leeming JJA agreed, found that a reconsideration of the scope of the court's supervisory jurisdiction under the Security of Payment Act was justified,[64] however, ultimately his Honour considered that the principles in *Brodyn* had subsequently been applied by numerous courts in New South Wales and other jurisdictions and there was no basis upon which to now depart from them.[65]

In considering whether there was an ouster of the court's jurisdiction in relation to non-jurisdictional error of law on the face of the record, his Honour considered the potential conflict between the lack of a privative clause ousting the court's jurisdiction on the one hand, and the lack of a legislative right of appeal from an adjudicator's decision on the other. His Honour found that the conflict must be resolved by examining the content, structure and practical operation of the Act.[66]

In *Musico v Davenport,*[67] McDougall J referred to s 25(4) of the Act, which restricts the grounds of challenge in an application to set aside a judgment entered on the basis of an adjudication, and found that there was no legislative intention to exclude judicial review for jurisdictional error, but inferred from that provision that review for error of law on the face of the record was not available. Justice Basten found that s 25(4) did not directly address the supervisory jurisdiction of the Supreme Court and created only a weak inference that this restricted the grounds of challenge generally available in the exercise of the court's supervisory jurisdiction.[68]

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[63] *Shade Systems Pty Ltd v Probuild Aust Pty Ltd* [2016] NSWCA 379 (23 Dec 2016) (Bathurst CJ and Beazley P, Basten, Macfarlan and Leeming JJA)
[64] *Shade Systems Pty Ltd v Probuild Aust Pty Ltd* [2016] NSWCA 379 (23 Dec 2016) (Bathurst CJ and Beazley P, Basten, Macfarlan and Leeming JJA) [7].
[65] *Shade Systems Pty Ltd v Probuild Aust Pty Ltd* [2016] NSWCA 379 [79]-[85].
[66] *Shade Systems Pty Ltd v Probuild Aust Pty Ltd* [2016] NSWCA 379 [33], [48].
[67] *Musico v Davenport* [2003] NSWSC 977.
[68] *Shade Systems Pty Ltd v Probuild Aust Pty Ltd* [2016] NSWCA 379 [49]-[55].

His Honour noted that s 32, which makes provision for a court to order restitution of money previously paid under the Security of Payment regime on determination of a contractual dispute, is consistent with a scheme that does not permit review of an adjudicator's determination made within power.[69]

The availability of review for any error of law by an adjudicator would, his Honour found, be inconsistent with the purpose of the Security of Payment regime identified in *Chase Oyster Bar v Hamo Industries,*[70] namely to provide an efficient mechanism for ensuring cashflow to builders. The "coherent and expeditious" procedure provided by the Act would be undermined if judicial review were available for error of law on the face of the record.[71] His Honour noted that a similar approach had been accepted in principle by Vickery J in *Hickory Developments Pty Ltd v Schiavello*.[72]

In *Southern Han v Lewence Constructions*, considered above, special leave was refused in relation to this very point.[73] Given that *Southern Han* is the only High Court case to consider security of payment legislation since its introduction in 1999, it seems likely that the position on judicial review set out in *Shade Systems* will apply for some time to come. However, an application for special leave to the High Court in *Probuild v Shade Systems* has been foreshadowed.[74]

Excluded amounts

In *SSC Plenty Road v Construction Engineering Australia,*[75] SSC Plenty, as principal, engaged Construction Engineering (Aust) (**CEA**) to design and construct a shopping centre in Reservoir for the sum of $35.5 million.

[69] *Shade Systems Pty Ltd v Probuild Aust Pty Ltd* [2016] NSWCA 379 [61].
[70] Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190.
[71] *Shade Systems Pty Ltd v Probuild Aust Pty Ltd* [2016] NSWCA 379 [67]-[68].
[72] *Hickory Developments Pty Ltd v Schiavello* (2009) 26 VR 112.
[73] Note that in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [126] Sackville JA also expressed the view that judicial review was available pursuant to s 69 of the Supreme Court Act for both jurisdictional error and error of law on the face of the record
[74] *Shade Systems Pty Ltd v Probuild Aust Pty Ltd (No 3)* [2016] NSWCA 382.
[75] [2015] VSC 631.

On 1 July 2015, CEA served a payment claim in the amount of $4.46 million. SSC responded by providing a payment schedule indicating a proposed payment of $967,000. CEA applied for adjudication of its claim. On 20 August 2015, the adjudicator determined the amount of progress payment to be paid to CEA as $2.173 million, in addition to the $967,000 which had already been paid in accordance with the payment schedule.

SSC Plenty sought judicial review of the adjudication determination on the following grounds:

- the adjudicator had failed to fulfil a basic and essential requirement of the Act by simply adopting the claimant's submissions and not assessing the progress payment in accordance with the terms of the contract; and
- the adjudicator erred in law in including within the scope of the adjudication determination "excluded amounts" contrary to s 23(2A), based on a finding that the contract did not contain a "method of resolving disputes" for the purposes of s 10A(3)(d)(ii) of the Act.

Section 10A of the Victorian Act provides that certain classes of variations may be taken into account in calculating the amount of a progress payment. Where the parties agree that the work has been done, but do not agree that the doing of the work constitutes a variation of the contract, it is a claimable variation where the consideration under the contract exceeds $5 million and the contract "does not provide a method of resolving disputes under the contract". It follows that, in determining the amount of a progress payment, an adjudicator cannot take into account a variation to a high value construction contract (consideration exceeding $5 million) in which the parties have agreed to a method of resolving disputes under the contract.

Section 10B(2)(a) of the Act provides that any amount that relates to a variation of the contract and is not a "claimable variation" is an "excluded amount".

Section 23(2B) provides that an adjudicator's determination is void if it takes into account any amount or matter referred to in subsection (2A), to the extent that the

determination is based on that amount or matter. Section 23(2A) provides that the adjudicator must not take into account any part of the claimed amount that is an excluded amount.

Justice Vickery allowed the judicial review application in part, but dismissed the two primary arguments raised by SSC Plenty.[76] The first ground of challenge was that the adjudicator had failed to fulfil a basic and essential requirement of the Act by not assessing the progress payment in accordance with the terms of the contract. In particular, SSC Plenty argued that by clauses 3, 36.4 and 37.1 the adjudicator was obliged to accept the value of the construction work determined by the Superintendent.

Clause 36.4 provided that the Superintendent was to ascertain the "price" of a variation and add or deduct that from the contract sum. Pursuant to clause 37.1 the amount of a progress payment to be paid was to be "as certified by the superintendent".

His Honour rejected this argument. The adjudicator is required to determine what construction work has been done and its value, and may not simply accept the claimant's arguments and reject those of the respondent.[77] While an adjudicator does not form her or his own expert opinion, the adjudicator must determine and apply what the adjudicator considers to be the true construction of the Act in light of current case law, and determine and apply construction of the contract. The adjudicator must work out what construction work has been performed and its value in accordance with the terms of the contract if they exist, or otherwise pursuant to ss 11(1)(b) and 11(2)(b).[78]

In respect of 33 of the variations, the adjudicator had erred by placing an onus on the respondent to show why the payment should not be made, finding the respondent had not satisfied the onus, and rejecting the respondent's arguments and simply accepting the claimant's arguments. In doing so, he failed to demonstrate any

[76] [2015] VSC 631.
[77] [2015] VSC 631 [76]-[83].
[78] [2015] VSC 631 [96]-[109].

assessment of the value of the work other than merely adopting the claimant's assessment. The same error was made in relation to three of the five deduction claims.[79]

However, his Honour found that if the contract provides for progress payments to be made in accordance with the Superintendent's certification, that was not a means for determining the value of construction work under s 11(1)(a). A contractual reference to certification is not the kind of clause envisaged by s 11(1)(a) as such an interpretation would delegate the adjudicator's task to the superintendent, and be inconsistent with the adjudicator's role of independently valuing the work. It would also contravene s 48. The adjudicator may, however, take the assessment into account and consider it.[80]

His Honour also rejected the second ground of judicial review in relation to "excluded amounts". Clause 42 of the construction contract set out a tiered dispute resolution process. If a dispute arose between the parties, notice was to be given, after which the parties were to meet and use reasonable endeavours acting in good faith to resolve the dispute. If the dispute was not resolved within 28 days of the giving of the notice, the dispute was then to be referred to mediation according to the terms of the contract. If mediation did not result in resolution, or the dispute was not otherwise resolved within 56 days of service of the notice of dispute, then either party might pursue its rights at law.

His Honour considered that clause 42 of the contract did not contain a method of resolving disputes. His Honour applied his earlier reasoning from *Branlin v Totaro*,[81] and found that for a provision to provide a "method of resolving disputes" it must prescribe a mandatory procedure that results in a binding decision by a third party.[82]

Although clause 42 required the parties to attend mediation compulsorily, there was no guarantee that mediation would result in a binding outcome, and therefore it was not a method of resolving disputes. A clause that mandates attendance at mediation

[79] [2015] VSC 631 [135]-[142].
[80] [2015] VSC 631 [114]-[118].
[81] [2014] VSC 492.
[82] [2015] VSC 631 [41].

without more is not a method of resolving disputes. His Honour took into account the indication in extrinsic materials that the provision was intended to exclude complex variations on large projects from the Security of Payments regime, however he found that the precise purpose of s 10A(3)(d)(ii) was not revealed in those materials.[83]

His Honour found that clause 42.1A, whereby the parties agreed that clause 42 was a "method of resolving disputes", infringed s 48 of the SOP Act and was void and of no effect.[84]

The Court of Appeal dismissed SSC Plenty's appeal, agreeing with Vickery J that clause 42 did not contain a method of resolving disputes.

In a joint judgment, Santamaria, Beach and McLeish JJA found that "method of resolving disputes" requires something that results in an actual resolution, rather than simply offering a forum for "addressing" the dispute.[85] The objects of the Act were expressed in terms of the "entitlement" of contractors to payment, and addressing the problem of insecurity of payments to contractors. These objects would not be met if the Act was found not to apply simply because the dispute would be referred to a forum where it might or might not be resolved.[86]

Clause 42.1A, which stipulated that the parties agreed to the clause providing for a "method of resolving disputes", was void as it was an attempt to contract out of the Act, which violated s 48.[87]

Following this reasoning, clause 42 did not provide for a "method of resolving disputes" and the variations were therefore claimable variations capable of being included in the adjudication.

Their Honours also dismissed the appeal on the second ground. The court considered views expressed previously by Hodgson JA and Basten JA in *John*

[83] [2015] VSC 631 [42]-[47].
[84] [2015] VSC 631 [54]-[55].
[85] *SSC Plenty Pty Ltd v Construction Engineering (Australia) Pty Ltd* [2016] VSCA 119 [54].
[86] [2016] VSCA 119 [56]-[57].
[87] [2016] VSCA 119 [62].

Holland[88] and other cases to the effect that the adjudicator is bound to perform its own calculation of the value of construction work and cannot be bound by the certification of a third party such as an architect or Superintendent.

The court considered the decision of *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd,*[89] which found that a court may be confined to considering whether a Superintendent had issued a certificate in accordance with the contract. However, in this case, there was contractual provision for disputing a superintendent's certificate such that it could not be said to be final.[90]

The Court referred to various authorities including Hodgson JA and Basten JA in *John Holland* expressing the view that, consistent with the use of the word "calculated" in s 9 of the NSW Act and the prohibition on contracting out of the Act in s 34, the adjudicator was to perform its own calculation of the value of construction work and not be bound by the Superintendent's certification.[91]

Their Honours agreed with Vickery J that for the adjudicator to simply accept the Superintendent's calculation would be inconsistent with the adjudicator's statutory task under s 23 of independently valuing the construction work.[92]

As was noted in the Second Reading Speech to the legislation that introduced s 10A, disputed variations on large contracts were to be exempt from the SOP scheme, addressing the concern that such disputes on major contracts should not be subject to the scheme and normal contractual methods of dispute resolution should apply.[93]

The consequences of *SSC Plenty* are that parties to high-value construction projects will need to include a provision for arbitration or binding expert determination in their contracts, if they wish to avoid the adjudication process applying to disputed variations.

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[88] *John Holland* [2009] NSWCA 19.
[89] Dura Constructions (Aust) v Hue Boutique Living [2013] VSCA 179.
[90] [2016] VSCA 119 [75]-[76].
[91] [2016] VSCA 119 [79]-[83].
[92] [2016] VSCA 119 [83].
[93] *Parliamentary Debates*, Legislative Council, 15 June 2006, 2420, referred to at [2015] VSC 631 [44].

Interplay between federal and state legislation

Façade Treatment Engineering v Brookfield Multiplex Constructions

Façade Treatment Engineering v Brookfield Multiplex Constructions[94] concerned the interplay between SOP legislation and the Corporations Act and inconsistency between state and federal legislation.

In September 2011, Façade Treatment Engineering (**Façade**) entered a subcontract with Brookfield Multiplex Constructions (**Multiplex**) for the installation of façade and curtain wall in the Upper Westside project on Lonsdale Street. Façade sought to recover a total of $1.19m pursuant to two payment claims, nos 18 and 19, issued in August and September 2012.

Payment Claim no 18 was part paid by Multiplex and no payment schedule was issued. Payment Claim no 19 was not paid and Multiplex sent Façade an email stating that the payment claim was not valid. Multiplex argued that the email constituted a payment schedule under the Act.

In Feb 2013, Façade was wound up by court order.

Façade sought to enter judgment in the amount of the two payment claims pursuant to s 16(2)(a)(i) of the Act on the basis that no payment schedule had been issued. Section 16(4) of the Act provides that in these circumstances, the respondent company may not bring any cross-claim or raise any defence arising under the contract.

Multiplex proposed to bring a counter-claim for liquidated damages and the cost of completing the construction work in an amount that exceeded Façade's claim.

[94] [2015] VSC 41.

Multiplex argued that, because Façade was insolvent, s 553C of the Corporations Act operated to allow it to set off the amount it claimed against Façade against the amount Façade was claiming. Multiplex argued that in relation to an insolvent company, s 16 had no operation, and was invalid to the extent it was inconsistent with s 553C pursuant to s 109 of the Constitution.

S 553C provides as follows:

Insolvent companies--mutual credit and set-off

(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:

(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and

(b) the sum due from the one party is to be set off against any sum due from the other party; and

(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

Justice Vickery upheld Multiplex's argument and dismissed Façade's application. His Honour followed the approach taken in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd,*[95] where the NSW Supreme Court recognized that there are "mutual dealings" for

[95] [2004] NSWSC 1230 [83].

the purposes of s 553C where one party has a breach of contract claim against the insolvent company arising before administration.[96] In that case, the court found in similar circumstances that s 553C prevailed over the SOP Act.[97]

His Honour found that in relation to an insolvent company, s 16 of the Act was invalid. For a claimant company to enter judgment under s 16(2)(a)(i) without taking account of any set-off or defence would fly directly in the face of s 553C.[98]

Applying *Telstra v Worthing*,[99] the SOP Act if applied in this case, would alter, impair or detract from the Commonwealth legislation, and there would be a conflict between s 16 BCISP and s 553C, such that the SOP Act must yield. The entry of judgment would itself give rise to inconsistency which could not be averted by a stay of execution.[100]

His Honour rejected Façade's argument that Multiplex had knowledge of its insolvency at the time of the two claims and therefore could not rely on s 553C because of s 553C(2). Multiplex's obligation arose at the time of contract (2011) and there was not a separate giving of credit to Multiplex on the occasion of each monthly payment claim. There was no suggestion that Façade showed any signs of insolvency earlier than February 2012 or that such signs came to Multiplex's attention.[101]

Based on his Honour's finding, there was no need to consider the alternative argument in *Brodyn* that the SOP Act should be construed as only operating when the head contract and subcontract were going concerns.[102]

On 14 October 2016, the Court of Appeal handed down its decision in *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd.*[103]

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[96] [2015] VSC 41 [61].
[97] [2015] VSC 41 [77].
[98] [2015] VSC 41 [80], [83].
[99] (1999) 197 CLR 61.
[100] [2015] VSC 41 [73], [81]-[82].
[101] [2015] VSC 41 [97]-[98].
[102] [2015] VSC 41 [86].
[103] [2016] VSCA 247.

Façade was successful in its appeal in relation to the validity of the payment schedule, but ultimately lost the appeal, with the Court of Appeal finding in Multiplex's favour on the Constitutional point.

The Court of Appeal found that it was not strictly necessary to decide the Constitutional point because it held that Part 3 of the SOP Act does not apply to companies in liquidation.[104] Questions of construction should be considered prior to Constitutional issues.[105] Considering the text of the legislation, the court adopted a narrow construction of s 9(1) as applying only to persons who *continue* to carry out construction work or supply related goods and services.[106]

If the Act were to apply to persons in liquidation, the interim payment regime intended by the legislature would become final, as the payment made under the Act would become available for distribution to creditors and the respondent would not be able to claw it back.[107]

The court found that its interpretation was supported by the second reading speeches for the legislation in Victoria and NSW, which indicated that ensuring cashflow to contractors was a driving concern of the legislation; this does not apply to companies in liquidation.[108] Their Honours referred to Young CJ's decision in *Brodyn v Dasein Constructions,*[109] where his Honour found that the NSW legislation applies only to "going concerns", however the court considered that it is easier to focus upon the point in time at which a company goes into liquidation, rather than whether or not the company is a "going concern".[110]

Although not necessary to decide, the court went on to consider the Constitutional point. The court considered other authorities dealing with the relationship between the SOP Act and federal legislation. Their Honours agreed with the approach of

[104] [2016] VSCA 247 [2].
[105] [2016] VSCA 247 [55].
[106] [2016] VSCA 247 [77]-[84].
[107] [2016] VSCA 247 [81].
[108] [2016] VSCA 247 [82].
[109] (2005) 21 BCL 443
[110] [2016] VSCA 247 [85].

Beech J in *Hamersley Iron v James*[111] that to grant leave to enforce an adjudication determination where the claimant was insolvent would alter or impair the purpose of s 553C. The same would apply to the entry of judgment pursuant to s 16(2)(a)(i).[112]

The Court also considered cases in the United Kingdom, where insolvency laws have been found to prevail over the security of payments regime, and considered that this impliedly recognises and resolves a conflict between the two regimes.[113]

Applying the test in *Worthing v Telstra,* ss 16(2)(a)(i) and 16(4) "alter, impair or detract from" the operation of s 553C. The sections were inconsistent with s 553C and invalid to the extent of the inconsistency.[114]

The practical effect of the finding of inconsistency is that where a claimant company is being wound up and there is a 'mutual dealing', so that s 553C of the Corporations Act is enlivened, an application for summary judgment should be dismissed.[115]

Although not necessary, the court also went on to consider the validity of the payment schedule for Payment Claim no 19. The court held that the email satisfied the requirement of indicating Multiplex's intention not to pay anything in relation to the claim, notwithstanding that it did not say so expressly.

However, it was not a valid payment schedule because it did not indicate the reasons for paying less than the claimed amount. The matters raised in the email – that the statutory declaration was incorrect and that it could not be determined which items were unfixed items – were complaints relating to the general conduct of the contract and did not relate to specific items in the payment claim.[116]

[111] [2015] WASC 10 (for discussion see below).
[112] [2016] VSCA 247 [162].
[113] [2016] VSCA 247 [174].
[114] [2016] VSCA 247 [179]-[180].
[115] [2016] VSCA 247 [191].
[116] [2016] VSCA 247 [255]-[259].

Hamersley HMS Pty Ltd v James; Hamersley HMS Pty Ltd v Davis

Façade Treatment v Multiplex was decided a month after the Western Australia Supreme Court decision in *Hamersley HMS Pty Ltd v James.*[117] In that case, Forge obtained an adjudication in its favour and the owner, Hamersley, applied to the Supreme Court to set it aside. Forge went into liquidation and the liquidators sought to enforce the adjudication under s 43 of the WA Act. Hamersley relied upon a counterclaim which was for a sum more than the amount of the adjudication relying on s 553C of the Corporations Act.

Justice Beech stayed Forge's application for enforcement pending the determination of the counterclaim. Section 109 of the Constitution was not mentioned, however his Honour considered that to grant leave to enforce the determination in the circumstances would defeat the purpose and object of s 553C. His Honour held that the case fell within the circumstances of s 553C and it would not be fair for the liquidators to recover the full amount of the debt where the owner would be likely to only receive a portion of its debt if it proved as a creditor in Forge's liquidation. His Honour also noted that because Forge was in liquidation, the object of the SOP regime (maintaining cashflow in the contracting chain) did not demand the grant of leave to enforce the determination.[118]

In the related case of *Hamersley HMS Pty Ltd v Davis*,[119] Beech J held that the adjudicator had erred in failing to apply s 553C himself and finding that it was the role of the liquidator to do so. However, his Honour still dismissed Hamersley's application to quash the adjudication determination on the basis that the adjudicator had found that in any case he was not satisfied that Hamersley's offsetting claim was made out on the material before him.[120]

Together, these cases indicate that where a company is insolvent at the time of adjudication, the respondent will be entitled to raise its right of set-off in the

[117] *Hamersley HMS Pty Ltd v James* [2015] WASC 10; *Hamersley HMS Pty Ltd v Davis* [2015] WASC 14.
[118] *Hamersley HMS Pty Ltd v Davis* [2015] WASC 10 [171]-[172].
[119] *Hamersley HMS Pty Ltd v Davis* [2015] WASC 14.
[120] *Hamersley HMS Pty Ltd v Davis* [2015] WASC 14 [55]-[56].

adjudication process and have it considered by the adjudicator. Further, if the claimant is insolvent at the time it is sought to enforce an adjudication determination in its favour, the court will allow the respondent to raise its right of set-off even in circumstances where the SOP Act would otherwise preclude it from doing so.

Payment schedules

To date, the Victorian Building Authority has not issued templates or guideline forms for payment claims or payment schedules.

The Supreme Court has remarked upon the increased certainty and benefit that would flow from the existence of such forms.[121] In *Façade Treatment Engineering v Brookfield Multiplex Constructions,* the Supreme Court considered the validity of a payment schedule in the form of an email, that did not expressly stipulate an amount to be paid but made clear that nothing was to be paid on the basis that the payment claim was said to be invalid.

Justice Vickery found that the email constituted a payment schedule. A payment schedule that made clear that "none" or "nil" amount would be paid was a valid payment schedule, and the reason given for non-payment, namely that the payment claim was considered to be invalid, was sufficient to satisfy the requirements of s 15.[122] His Honour followed *Multiplex Constructions Pty Ltd v Luikens and Anor*,[123] where it was said that the reasons for payment of a lesser amount need not be given with particularity as long as it the essence of the reason was made sufficiently clear to enable a claimant to decide whether to pursue the claim and the nature of the case it would have to meet.[124]

However, on appeal the email was found not to constitute a payment schedule on the basis that the general issues raised in relation to the claim did not marry up with specific items in the payment claim. Therefore it did not meet the requirement of a

[121] *Façade Treatment Engineering v Brookfield Multiplex Constructions* [2015] VSC 41 [27].
[122] [2015] VSC 41 [34]-[39].
[123] [2003] NSWSC 1140 [76]-[78].
[124] A similar decision was made by Vickery J in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500.

valid payment schedule to identify the reasons for withholding payment with sufficient particularity to enable the claimant to understand, at least in broad outline, the issue between the parties.[125]

Other cases of interest

Reference dates

Hutchinson v Glavcom

In *Hutchinson Pty Ltd v Glavcom Pty Ltd*,[126] Ball J determined that a contractual provision making the occurrence of a reference date conditional on a statutory declaration being supplied was void as it was an attempt to exclude the operation of the Act contrary to s 34 of the NSW Act.

Glavcom subcontracted to Hutchinson to carry out joinery works at Bondi Pacific for the sum of $5.3 million. Although Hutchinson was required to give Glavcom non-exclusive access to the site by 14 August 2014, Glavcom was not given access until March or April 2015. The date for practical completion was 21 April 2015.

Glavcom issued a payment claim for $2.9 million to which Hutchinson served a payment schedule stating that Glavcom owed it $6.3 million including approximately $4.3 million in liquidated damages for delay. The matter proceeded to adjudication and the adjudicator determined that Hutchinson owed Glavcom $1.2 million plus GST. The adjudicator dismissed the claim for liquidated damages on the basis that Hutchinson could not claim damages for delay that had been brought about by its own substantial breach.

Hutchinson sought to set aside the adjudication determination on the basis that the adjudicator had made a number of jurisdictional errors, and also on the basis that Glavcom had submitted a statutory declaration of payment of its employees as a

[125] [2016] VSCA 247 [255]-[259].
[126] *Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126.

precondition to a reference date arising, and the statutory declaration was knowingly false because workers' compensation premiums had not been paid.

Clause 37 of the subcontract provided that Glavcom was required to submit a statutory declaration as to payment of its employees before a reference date arose and before Glavcom was entitled to make a payment claim.

Justice Ball found that there was no reason to think that the director of the company in this case would have personal knowledge of whether workers' compensation premiums had been paid, and it was reasonable for him to rely on the knowledge of others in making the statutory declaration.[127]

However, Ball J found that while s 8 of the NSW Act permits a contract to state a method for fixing a reference date, it does not allow additional conditions to be imposed before a reference date or right to receive a payment arises. Clause 37 was void by operation of s 34 of the Act because it was an attempt to modify the circumstances in which a person could receive a progress payment.[128]

His Honour noted that a condition that facilitates the purpose of the legislation may not infringe s 34. However, the provision of a statutory declaration of this nature operated to make the payment of progress payments conditional on Glavcom paying worker's compensation premiums. That was not a condition that advanced the purpose of the SOP legislation.[129]

His Honour also noted, although it was not necessary to decide, that an adjudicator is not entitled to deduct liquidated damages if the contract does not provide for making that calculation in assessing a progress payment. If the contract makes no provision for calculating a progress payment, the amount is calculated based on s 9(b) of the Act, that is the value of the construction work and there is no reference to

[127] [2016] NSWSC 126 [21].
[128] [2016] NSWSC 126 [26].
[129] [2016] NSWSC 126 [27], following *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd* [2014] QSC 293.

any set-off in that section. If the parties wished to allow a right of set-off in relation to a progress payment, they could have made provision for that in the contract.[130]

Broadview Window v Architectural Project Specialists

Broadview Window Pty Ltd v Architectural Project Specialists Pty Ltd[131] concerned the issue of what were argued to be two payment claims by reference to the same "reference date" contrary to s 13(5) of the NSW Act.

Broadview contracted with Architectural Project Specialists (**APS**) for APS to install windows and doors on a building site. The parties disagreed on when the work under the contract was completed and Broadview did not pay certain invoices rendered by APS.

On 24 November 2014 APS served Broadview with a payment claim and Broadview did not respond. On 23 February 2015 APS served a second payment claim attaching copies of the same invoices as the first payment claim. The second payment claim proceeded to adjudication and Broadview challenged the adjudicator's jurisdiction on the basis that there were two payment claims in respect of the same reference date contrary to s 13(5), that reference date being 31 August 2014, when work under the contract was last completed. The adjudicator found that he had jurisdiction and made a determination in favour of APS. Broadview sought judicial review.

Justice McDougall referred to the decision of Hodgson JA in *Brodyn Pty Ltd v Davenport*[132] and *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd*[133] that the concept of a "reference date" is not tied to the performance of work in any given month.

Justice McDougall accepted the submission of APS that pursuant to the proper operation of s 8(2)(b), there were successive "reference dates" under the contract

[130] [2016] NSWSC 126 [57].
[131] [2015] NSWSC 955 (9 July 2015).
[132] (2004) 61 NSWLR 421.
[133] (2006) 23 BCLR 292.

notwithstanding that work had finished. It was noted that Hodgson JA expressly contemplated that reference dates did not necessarily cease "on termination of a contract or cessation of work". Although no work had been done under the contract from at the latest 31 August 2014, reference dates continued to accrue for the purposes of s 8(2)(b) and on their face, the claims were not referable to the same date.[134]

Failure to perform adjudicator's function

Richard Crookes v CES Projects

In *Richard Crookes Construction Pty Ltd v CES Projects (Aus) Pty Ltd (No 2)*,[135] an adjudication determination was successfully challenged on the basis that the adjudicator had failed to perform the essential statutory task applicable to that role.

The plaintiff, Richard Crookes, entered into an agreement with a developer to construct a residential apartment complex in Newcastle. It subcontracted the fit out works to the defendant, CES Projects. CES Projects submitted a payment claim which was disputed. The dispute was referred for adjudication to the second defendant, who found that $573,000 of the $966,000 claimed was payable by Richard Crookes.

Richard Crookes claimed that the determination was void because the adjudicator breached its fundamental statutory obligation by failing to carry out the essential function of identifying the construction work that had been carried out and its value. In the alternative, Richard Crookes argued that the adjudication lacked the necessary quality of reasonableness.[136]

Justice McDougall found that the adjudicator had not carried out the minimum content of the statutory task entrusted to him, namely "determining whether the construction work identified in the payment claim has been carried out, and what is

[134] [2015] NSWSC 955 [49]-[51].
[135] [2016] NSWSC 1229.
[136] A third ground, that there was no available reference date enabling the making of the payment claim, was not pursued following the Court of Appeal's decision in *Lewence*.

its value".[137] The adjudicator's reasons were inadequate; there was no explanation for how the adjudicator moved from the total of the invoices to the conclusion that the whole of the part of the payment claim was made good.[138]

Justice McDougall found that the adjudicator had simply adopted the subcontractor's valuation of its claim, and in doing so failed to perform the task required of determining the amount of the progress payment (if any) to be paid, having regard to the matters set out in s 22(2) of the NSW Act.[139]

His Honour considered (without deciding) whether it was possible to remit the matter to the original adjudicator for determination without a separate application being made for a writ of *procedendo.* His Honour also noted that the issue of remittal would depend upon the construction of the time limits for adjudication in s 21(3) of the NSW Act and whether they were an essential precondition to the exercise of the adjudicator's statutory power. Ultimately, as the matter had not been fully explored in argument and the relief not properly pleaded, his Honour did not determine the matter.[140]

Suprima Bakeries v Australian Weighing Equipment

In the second case of this kind, *Suprima Bakeries Pty Ltd v Australian Weighing Equipment Pty Ltd,*[141] the adjudicator failed to perform its statutory function by not engaging with the respondent's argument as to why it did not owe the claimant any money.

The first defendant, Australian Weighing Equipment (**AWE**), agreed to supply plant and equipment to be used in the manufacture of frozen dough to Suprima. AWE argued that there only one contract between the parties, which was a construction contract for the purposes of the NSW Act. Suprima served a payment schedule

[137] [2016] NSWSC 1229 [47].
[138] [2016] NSWSC 1229 [50], [54].
[139] [2016] NSWSC 1229 [56].
[140] [2016] NSWSC 1229 [79], [80], [85].
[141] [2016] NSWSC 998.

asserting that there was no construction contract, and that the plant and equipment supplied and installed by AWE was essentially worthless.

The matter was submitted for adjudication and the adjudicator determined that there was a construction contract and that AWE was entitled to be paid $535,000 of the claimed $662,000.

Suprima challenged the adjudication on the following bases:

a. that there were several contracts between the parties;
b. that each of them was not a construction contract;
c. that the adjudicator had not carried out his statutory function of valuing the construction work;
d. that the adjudicator had denied Suprima natural justice in dealing with its claim of defective work.

Justice Ball allowed Suprima's appeal. The adjudicator had erred in finding that there was one contract between the parties; the parties appeared to contract through seeking quotations, the obvious inference being that if Suprima required further work, it would enter into a separate contract/s for that work, which is what happened.[142] However, Ball J did not agree with Suprima's argument that any of the contracts was other than a construction contract for the purpose of the Act.[143]

In relation to Suprima's third argument, Ball J found that the adjudicator had not failed to perform its statutory function of valuing the construction work. Suprima had put its case that the claim included work that was not "construction work" at a very general level and the adjudicator dealt with the matter as it had been put to him. Where Suprima did not assist the Adjudicator by identifying specific parts of the works that in its view should not be regarded as construction work, it was not incumbent on the Adjudicator to do so.[144]

[142] [2016] NSWSC 998 [12]-[17].
[143] [2016] NSWSC 998 [24].
[144] [2016] NSWSC 998 [33]-[37].

Suprima succeeded on the fourth argument, that the adjudicator failed to engage with Suprima's argument that the plant and equipment was worthless and not operating as required. This was not a mistake within jurisdiction (e.g. misconstruction of the contract) but a failure to engage at all with part of the statutory task, namely valuing the defects in the work. His reasons did not show what he had made of that evidence. In failing to engage with the argument, the adjudicator denied Suprima natural justice, and the adjudication was void.[145]

Restraining a successful claimant from enforcing an adjudication

The recent NSW case of *Hakea Holdings Pty Ltd v Denham Constructions Pty Ltd; Baptist Care NSW & ACT v Denham Constructions Pty Ltd,*[146] involved two applications to continue orders which prevented Denham Constructions from obtaining the benefit of adjudication determinations in its favour.

In the first application, Hakea Holdings sought extension of an order restraining Denham from enforcing an adjudication in its favour for $1.138 million. In the second, Baptist Care sought to restrain enforcement of a judgment that had been entered following a determination in Denham's favour for $475,000. Both applications were made on the basis that Denham was insolvent or at risk of becoming insolvent.

The relevant considerations in determining to make such an order were:[147]

(a) the strength of the applicant's claim;
(b) the basis of the applicant's claim, including whether the adjudication was challenged and whether the debt was challenged;
(c) the likelihood that the contractor will be unable to repay the amount of the determination;
(d) the risk of insolvency of the contractor if a stay is granted.

Justice Ball found that it was appropriate to continue the orders preventing Denham from enforcing the adjudication determination. Both applicants had strong cases to

[145] [2016] NSWSC 998 [45]-[68].
[146] [2016] NSWSC 1120.
[147] [2016] NSWSC 1120 [6].

argue that they did not owe the amounts the subject of the determinations under their respective contracts. In Hakea's case, it had an offsetting claim and a challenge to liability. Baptist Care had an offsetting claim that was well in excess of the amount owing under the adjudication.

The court found that there was little prospect of either applicant being able to recover any payment made from Denham; its business had declined rapidly over the past three years and there was no reason to believe that things would improve substantially in the near future. There was a substantial risk of the company being wound up.[148]

Adjudication applications simultaneously with civil litigation

Gambaro v Rohrig

Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd[149] concerned a claim for restitution by Gambaro following its part payment of an adjudication determination in Rohrig's favour. Rohrig applied for Gambaro's claim to be struck out in whole or in part. Gambaro also applied for summary judgment on its claim.

Pursuant to an agreement between them, Rohrig was to construct a hotel and refurbish parts of a building.

At first instance, Atkinson J found that once the rights under Parts 2 and 3 of the Act have been exercised, the Act does not seek to exclude parties from enforcing their rights by civil litigation. Nothing in s 100 or in the objects of the Act mandated that a party could exercise its rights to civil litigation only on completion of the construction contract.[150]

Her Honour also rejected Gambaro's application for summary judgment, finding that the requirements of r 292(2) of the Civil Procedure Rules were not satisfied, as there

[148] [2016] NSWSC 1120 [60]-[68].
[149] [2015] QSC 170.
[150] [2015] QSC 170 [28], [32].

remained a number of issues that were the subject of factual and legal dispute between the parties that could only be determined at trial.[151]

Gambaro's appeal against her Honour's decision was determined in *Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd; Rohrig (Qld) Pty Ltd v Gambaro Pty Ltd*.[152] Justice Fraser, with whom Morrison JA and Boddice J agreed, dismissed Gambaro's appeal but allowed Rohrig's appeal.

Gambaro's statement of claim was struck out with leave to file an amended statement of claim. Its case as pleaded was that because the adjudicated amount for variations claimed by Rohrig exceeded the total of the amounts assessed by the superintendent in progress certificates as the prices of the variations, it was unjust for Rohrig to retain the excess. It did not claim that the superintendent's certifications were contractually binding, or that either party was precluded from claiming different prices in the final account. There was no final determination sought in relation to the parties' contractual rights.

Justice Fraser held that Gambaro's claim must fail because it relied only upon contractual provisions concerning the amount of a progress payment to be paid on account of the contractual remuneration, and these did not detract from the statutory rights and liabilities created by Pt 2 and 3 of BCIPA. Gambaro was not seeking a determination of Rohrig's entitlement to remuneration under the contract.[153]

The court left open the question of whether, prior to the completion of a contract, a claimant could be ordered to make restitution of that part of an adjudication amount that exceeds the amount to which the claimant is contractually entitled, but noted that was not the case pleaded by the defendant.[154]

[151] [2015] QSC 170 [34]-[35].
[152] [2015] QCA 288.
[153] [2015] QCA 288 [40].
[154] [2015] QCA 288 [29].

Adjudicator's fees

Alucity Architectural Produce Supply Pty Ltd v Australian Solutions Centre[155] involved a challenge to the payment of adjudicator's fees where the adjudicator found he had no jurisdiction to determine the application, as there was no valid payment claim. The respondent to the claim, Empire Windows, issued a payment schedule stating that nothing was payable on the basis that the reference date was the same as in relation to a previous claim. This argument was accepted by the adjudicator.

The applicant, Alucity, brought proceedings against the nominating authority and against the adjudicator claiming a total failure of consideration and unjust enrichment on the basis that there had been no determination and so no entitlement to fees. Alucity also claimed in the alternative damages for misleading or deceptive conduct or in the tort of deceit on the basis that the adjudicator had misrepresented that there had been a determination when he had in fact identified that he lacked jurisdiction.

The court found that the plaintiff's argument was without merit. Section 29(1) of the NSW Act provides that an adjudicator is entitled to be paid for "adjudication of an adjudication application" and this is what the adjudicator did. The relationship between Alucity, the authority and the adjudicator was statutory and did not arise out of contract. There would be injustice, unfairness and inequity were Alucity to be given restitution.[156]

The evidence demonstrated that the authority provided services, and there was nothing to suggest that it had exceeded any statutory limitation on the fee it could charge.[157] The adjudicator was entitled to his fee as he had considered the application before determining that it was invalid under the Act. The services provided were in connection with an adjudication application, whether valid or not.[158]

[155] [2016] NSWSC 608 (Hammerschlag J).
[156] [2016] NSWSC 608 [59], [65], [73].
[157] [2016] NSWSC 608 [79]
[158] [2016] NSWSC 608 [78].

There was no proper foundation for the allegations by the plaintiff of misrepresentation, or misleading or deceptive conduct, or deceit. The court also "mark(ed) its disapproval of groundless proceedings such as these which if not discouraged will have the effect of deflecting adjudicators from accepting important appointments and properly discharging their duties under the Act".[159]

Inquiries and reports into SOPA legislation

In recent years, there have been a number of inquiries in different jurisdictions into the SOP legislation with a view to determining its effectiveness and the need for legislative reform. The details of the most recent relevant inquiries and some additional developments are set out below.

Commonwealth

On 30 November 2016, the Senate and the House of Representatives passed the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth). The Act re-establishes the Australian Building and Construction Commission (ABCC). A Security of Payments Working Group is set up by the Act to monitor how the activities of the ABCC impact on the practices of the building industry in relation to compliance with security of payment laws. The group is also tasked with making recommendations about how compliance with security of payment laws can be improved.[160]

Following on from the recommendations arising from the recent Senate Economic References Committee Inquiry,[161] the federal government has also announced a review into security of payment laws, with a final report due at the end of 2017.[162]

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[159] [2016] NSWSC 608 [85].
[160] *Building and Construction Industry (Improving Productivity) Act 2016* (Cth), s 32A.
[161] Australian Senate Economics Reference Committee, *"I just want to be paid" — Insolvency in the Australian construction industry*, December 2015.
[162] Minister's Media Centre, "John Murray AM appointed to review security of payments laws", 21 December 2016, https://ministers.employment.gov.au/cash/john-murray-am-appointed-review-security-payments-laws.

The review will examine the differences in approach across jurisdictions with a view to identifying best practice.

New South Wales

NSW was the first jurisdiction in Australia to introduce security of payment laws. The *Building and Construction Industry Security of Payment Act 1999* was introduced as an attempt to redress the issue of small contractors (e.g. bricklayers, electricians, etc) not being paid for their work and taking a disproportionate amount of the risk of insolvency of head contractors.[163]

In August 2012, the NSW government announced an independent inquiry into Construction Industry Insolvency (**Collins Inquiry**) following a spate of insolvencies in the NSW building and construction industry.

Recommendations of the Collins Inquiry included:[164]

- Establishment of a NSW Building and Construction Commission with control and regulation of all aspects of the building industry (after cost benefit analysis) (Recommendation 1);
- The establishment of a construction trust holding moneys on trust for subcontractors for all projects of $1 million or more (Recommendation 6);
- Retention sums to be held in the construction trust (Recommendation 18);
- No moneys to be paid to the head contractor until they have provided a statutory declaration certifying that subcontractors have been paid (Recommendation 20);
- Powers given to adjudicators should be expanded to include adjudication of disputes concerning retention sums and cashing of bank guarantees (Recommendation 39); and
- More intensive training and qualification regime for adjudicators (Recommendation 40).

[163] Building and Construction Industry Security of Payment Bill 1999, Second Reading Speech.
[164] Bruce Collins QC, *Final Report: Independent Inquiry into Construction Industry Insolvency in NSW,* December 2012 (for recommendations see pp 351 ff).

The Inquiry resulted in key reforms in 2013, namely:[165]

- Establishing prompt payment provisions;
- Requiring a head contractor to give a principal a written statement verifying that all subcontractors have been paid when making a claim; and
- Providing penalties for contractors who provide false or misleading statements in order to get paid.

In 2014, the NSW government proposed changes to the Building and Construction Industry Security of Payment Regulation. These amendments subsequently commenced on 1 May 2015.

The reforms apply to contracts between principals and subcontractors for non-residential building projects of more than $20 million. The amendments include a requirement for head contractors to deposit retention money into approved accounts; making retention money available only for purposes specified in the contract; and introducing a maximum penalty for breaches of $22,000.

In December 2015, the NSW Department of Fair Trading released the *Building and Construction Industry Security of Payment Act 1999 Discussion Paper.* Submissions and a survey closed on 26 February 2016.

The issues raised in the Discussion Paper extend to a wide variety of issues covering various aspects of the SOP regime, such as time frames, adjudicator qualification, and scope of the regime. Key issues raised for discussion in the Discussion Paper include:

- Whether it should be possible to make claims down as well as up the contracting chain;[166]
- Whether the deadline for providing payment schedules should be extended for more complex matters;[167]

[165] NSW Discussion paper, p 10.
[166] NSW Discussion Paper, p 15.

- Whether adjudicator qualifications should be prescribed by the Act, and what they should be;[168]
- The use of requests by subcontractors to principals to withhold payments from a contractor when an adjudication application is made and their effectiveness;[169]
- Whether there should be a more impartial means of appointing adjudicators;[170]
- Whether there should be a compulsory mediation process before an adjudication application can be made;[171]
- Whether the Queensland Registry of Adjudicators would be a preferable system;[172]
- Whether NSW should introduce a bipartite system (like Queensland) of complex and simple adjudications;[173] and
- Whether the retention moneys trust account system should be extended to contracts with a value of less than $20 million.[174]

As at the time of writing, no final report had been released in response to the Discussion Paper and no release date had been indicated.

Queensland

In Queensland, the relevant legislation is the *Building and Construction Industry Payments Act 2004*. Queensland also has the *Subcontractors' Charges Act 1974* which provides in certain circumstances for moneys owed to a subcontractor to be secured by a charge over moneys owing by a head contractor to a contractor.[175]

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[167] NSW Discussion Paper, p 17.
[168] NSW Discussion Paper, p 21.
[169] NSW Discussion Paper, p 22.
[170] NSW Discussion Paper, p 22.
[171] NSW Discussion Paper, p 23.
[172] NSW Discussion Paper, p 23.
[173] NSW Discussion Paper, p 24.
[174] NSW Discussion Paper, p 27.
[175] Qld Department of Housing and Public Works, *Security of Payment Discussion Paper,* December 2015 (Queensland Discussion Paper), p 8.

In May 2013, barrister Andrew Wallace handed down the *Final Report of the Review of the Discussion Paper on Payment Dispute Resolution in the building and Construction Industry*.[176]

Key recommendations included:

- The Act should not be restricted to exclude payment claims for some types of work other than those already excluded in ss 3 and 10 (extraction of oil and natural gas) e.g. by a cap on the value of claims or contract value (Recommendation 1);
- Act should not be amended to allow an adjudicator to decide an amount in favour of a respondent where a right of set-off exceeds the amount claimed by the builder (Recommendation 7);
- Moneys held on retention should be held under a Construction Retention Bond Scheme (Recommendation 11);
- The system of nominating authorities appointing adjudicators is not appropriate and should be discontinued (Recommendation 17);
- Unless the contract otherwise provides, timeframe for making a payment claim should be restricted to six months after construction work has been completed (Recommendation 22);
- Extend time for making adjudication responses (Recommendation 22);
- New processes should be adopted for claims greater than $750,000, for latent defects or time related costs (with extended timeframes) (Recommendation 23);
- Where a claimant wishes to apply to court on the basis that no payment schedule has been issued, a second chance should be given to the respondent (Recommendation 29);
- Adjudicators should be registered and graded according to skills, experience and qualifications (Recommendation 36);

[176] Andrew Wallace, *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry,* May 2013.

- The Act should not be amended to introduce a statutory declaration regarding payment to contractors and workers as a precondition to making a payment claim (Recommendation 49).

Following this report, the Queensland government passed the Building and Construction Industry Payments Amendment Bill 2014, which commenced in December 2014.

The key reforms introduced by the legislation were:[177]

- Creating a single adjudication registry within the Qld Building and Construction Commission;
- Introducing a dual model for dealing with standard and complex claims (complex claims are those for more than $750,000, a claim for a latent condition or for time-related costs);
- Reducing the time in which a payment claim can be made generally from 12 months to six months;
- Introducing a shut-down period over the Christmas/New Year period to reflect industry practice (days between 22 December and 10 January do not count as "business days");
- Providing a second opportunity for respondents to issue a payment schedule;
- Allowing a respondent to include further information in an adjudication response;
- Requiring adjudicators to decide if they have jurisdiction to make a decision;
- Allowing for withdrawal of adjudication applications; and
- Allowing for additional matters to be considered in determining apportionment of payment of adjudicator's fees.

In December 2015, the Department of Housing and Public Works released the *Security of Payment Discussion Paper*. Submissions closed on 31 March 2016. The discussion paper builds on the Building and Construction Commission's 2014 *Better Payment Outcomes discussion paper*.

[177] Qld Discussion Paper, p 19.

Key issues identified in the Discussion Paper are:[178]

- Insolvency leaving subcontractors unpaid for work they have already completed;
- Retention money being used as cash flow by contractors and head contractors, instead of being kept aside for defects;
- Protracted and unjustified delays in payment for work done; and
- A lack of financial management skills in the industry.

Possible options for reform outlined in the Discussion Paper include:[179]

- The use of Project Bank Accounts for government (initially) contracts and later for private contracts, allowing for funds to be held in trust and then paid directly to subcontractors when performance is certified by the principal and the contractor – currently being trialled on government projects in NSW, WA and NT and some private projects in Victoria (Option 1);[180]
- Retention Trust Fund Schemes to protect retention moneys and ensure that they are not used as cashflow by head contractors (introduced in NSW in 2015 for non-residential building projects over $20m) (Option 2);
- Replacement of retention with an insurance scheme (not currently practised in any Australian jurisdiction) (Option 3);
- Reform of federal corporations legislation to provide a priority payment to subcontractors in the event of head contractor insolvency (Option 4);
- An education program to increase the financial and business skills of industry (Option 5);
- Altering the reporting requirements for licensees in relation to financial position; and
- Possible reforms to the *Subcontractors Act 1974*.

[178] Qld Discussion Paper, p 5.
[179] Qld Discussion Paper.
[180] At present, payments into trust are required by NSW legislation for projects over $20 million during a trial period: Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2014 (NSW), Sch1, Pt2, s5(3).

Deloittes was subsequently engaged by the Queensland Government to conduct an analysis of some of the proposals arising out of the consultation on the Discussion paper. Deloittes released its report in November 2016. Key recommendations made include:[181]

- The benefits of introducing a Project Bank Account scheme outweigh the costs;
- Recommending proposed changes to remove a requirement to state that a payment claim is made under the Act and extending timeframes for making adjudication applications.

In the same month, the government released the *Queensland Building Plan Discussion Paper,* which sets out proposals to:[182]

- Introduce Project Bank Accounts for government projects of $1m to $10m;
- Consolidate security of payment provisions into one piece of legislation;
- Make improvements to the claims process;
- Enhance the independence of the Queensland adjudication registry.

South Australia

In South Australia, the relevant legislation is the *Building and Construction Industry Security of Payment Act 2009* (**SA Act**).

In June 2016, the Minister for Small Business requested the Small Business Commissioner to coordinate submissions on the proposed changes. The Small Business Commissioner prepared a Consultation Paper setting out its recommendations on reform of the SA Act,[183] including those set out in a review

[181] Deloitte, Analysis of security of payment reform for the building and construction industry, 8 November, 2016, http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDeloitteReport.pdf.
[182] Department of Housing and Public Works, *Queensland Building Plan Discussion Paper,* November 2016, http://queenslandbuildingplan.engagementhq.com/why-do-we-need-a-building-plan/documents.
[183] Small Business Commissioner South Australia, *Proposed Changes to the Building and Construction Industry Security of Payment Act 1999 and other initiatives to improve payment to contractors in the building and construction industry,* Consultation Paper, June 2016 (SA Consultation Paper).

undertaken by retired District Court Judge Alan Moss and tabled in May 2015.[184] Submissions in response to the consultation paper closed on 19 August 2016.

The Moss review examined how well the Act had worked in practice, and whether any changes were required to the Act and Regulations.

The Moss review found:[185]

- The Act was most used by medium level subcontractors working for large contractors as opposed to contracts where the parties were on par;
- Most submissions favoured the model recently introduced in Qld (which encourages parties to negotiate and where adjudicators are appointed by the Building and Construction Commissioner);
- There were complaints that the process pushed the parties into disputes in timeframes when negotiation may have been more productive;
- Contractors complained that ANAs were biased towards choosing adjudicators who were pro-claimant in order to attract business;
- The ANA's role should be given to an independent agency like the Small Business Commissioner to remove the concern that ANAs and adjudicators were commercially influenced to be pro-claimant. The SBC should be the sole ANA and should nominate independent adjudicators;
- Time frames were adequate for simple matters but too short for complex matters;
- There was no reason why the Act should not apply to home owner-builders; and
- Adjudications should be collected and published except where considered necessary to avoid loss to one of the parties.

The SA Consultation Paper released in June 2016 noted that the collapse of Tagara Builders in 2015 (after the Moss review was published) and to a lesser extent BJ Jarrad in July 2014 had had a significant impact on sub-contractors. When Tagara

[184] Alan Moss, *Review of Building and Construction Industry Security of Payments Act 2009* (Moss review), 12 March 2015.
[185] Moss review, [20]-[22], [31], [32], [37].

Builders went into liquidation, the liquidators announced that they were issuing or reissuing $4.8m in progress claims and seeking payment of $10 million in amounts owing and progress claims.[186]

The Consultation Paper proposed substantive reforms to the SOP regime in three stages. It is anticipated that if stage one is not effective in reforming an improvement in the operation of the Act, heavier regulatory measures could be imposed with stages two and three. Substantive reforms proposed for Stage One include:[187]

- Replacing ANAs with the SBC (modelled on the Queensland government take over of the role in 2014);
- Fixing fees for adjudications;
- Inserting a penalty provision for intimidation;
- The insertion of procedures to ensure that contractors to government on projects of over $1m are paid on a regular basis;
- The establishment of a Building and Construction Industry Code under the FTA to provide for ADR procedures; and
- The establishment of a program to promote the Act and educate the industry.

Substantive reforms proposed for Stage Two:

- Extension of the Act to home owner-builders;
- Introduction of simple and complex claims;
- A good behaviour test for contractors on government projects of $4m and over in cities and $1m and over in regional areas;
- Introduction of statutory declarations by principal contractors that subcontractors have been paid;
- A provision re holding amounts in dispute in trust where an adjudication application has been made; and
- Trust account arrangements for retention in projects over $10m.

[186] SA Consultation Paper, pp 5-6.
[187] SA Consultation Paper, pp 6-9.

Stage Three proposal is to establish a scheme for direct payment of subcontractors on government projects.

As at the time of writing, no final report had been released in response to the inquiry.

Western Australia

The relevant legislation in Western Australia is the *Construction Contracts Act 2004* (**WA Act**).

In June 2014, Professor Phillip Evans of Curtin University was appointed by the Building Commissioner to conduct a review of the WA Act.

In October 2014, Professor Evans released a discussion paper on the operation of the WA Act,[188] following which a number of submissions were received. This culminated in the preparation of Professor Evans' *Report on the Operation and Effectiveness of the Construction Contracts Act 2004* in August 2015, which was subsequently tabled in Parliament in August 2016.

The report made the following key findings:

- All submissions and stakeholder meetings indicated that the Act had had a positive influence on payment issues;[189]
- The period of 28 days after dispute arises for filing an adjudication application should remain;[190]
- Adjudicator training courses should be expanded to include training on interpreting legislation and contracts, and analysis of costs and claims;[191]
- The Act should not be amended to exclude liquidated damages;[192]
- The inclusion of domestic building contracts should remain;[193]

[188] Professor Phil Evans, *Report on the Operation and Effectiveness of the Construction Contracts Act 2004,* August 2015 (WA Report).
[189] WA Report, p 10.
[190] WA Report, p 15-23.
[191] WA Report, p 2.
[192] WA Report, p 5.

- Processes for enforcing adjudicator's determinations should be simplified;[194]
- Consideration should be given to having retention moneys held on trust by an independent third party;[195]
- Construction contracts for the purposes of the Act should be in writing;[196]
- The Act should not be amended to require a claimant to provide a statutory declaration confirming payment of subcontractors and trades before making a claim.[197]

The Construction Contracts Amendment Act was assented to on 29 November 2016. The key changes incorporated in the amending legislation are:

- Amending time limits by reference to "business days" rather than "days";
- Increase the application time for adjudication of payment disputes from 28 days to 90 business days (not recommended by Evans);
- Enabling 'claims recycling' (allowing claims which have previously been rejected to be made at a later stage);
- Focus on substantial compliance rather than form of adjudication applications;
- Removing the requirement of leave of the court in order to enforce an adjudication determination, replacing it with a requirement to file the determination together with an affidavit stating that payment has not been received.

The government has also mandated project bank account arrangements on public projects of between $1.5 and $100 million.

Conclusion

On the basis of the recent cases and inquiries discussed above, it is evident that the SOP regimes in Australia will remain a removable feast for some time to come.

[193] WA Report, p 5.
[194] WA Report, p 6.
[195] WA Report, p 7.
[196] WA Report, p 8.
[197] WA Report, p 8.

Legislative changes are likely to arise from the various state inquiries, the outcomes of which should be released sometime in the coming 12 months.

Developments continue to occur in the scope of judicial review in Victoria and elsewhere, with indications that the scope of judicial review in New South Wales may be further clarified at some stage by the High Court, which may also have ramifications for Victoria.

As noted above, the federal government has initiated a review into security of payment laws across Australia, due to be completed at the end of 2017.[198] Until such time as the review is completed and acted upon, the differences between the various regimes, both in terms of legislation and the ability of courts to review the determinations of adjudicators, will continue to pose challenges for those working in different jurisdictions.

[198] Minister's Media Centre, "John Murray AM appointed to review security of payments laws", 21 December 2016, https://ministers.employment.gov.au/cash/john-murray-am-appointed-review-security-payments-laws.