

The Court view of security of payment legislation in operation

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Robert McDougall[1]

1. Introduction

[1] The Building and Construction Industry Security of Payment Act 1999 ("the Act") commenced on 26 March 2000. The Act deals with an industry whose contracts have long been "notorious" for their extremely tight profit margins.[2] This situation led to the inclusion in many contracts of 'pay when paid' and 'pay if paid' provisions, where, for example, a subcontractor's entitlement to payment would be made conditional upon a third party's payment to the head contractor. A consequence of these provisions was that cash flow was sporadic, both within the industry as a whole and for smaller operators in particular. The State's now Premier, the Hon Morris Iemma MP, as the Minister for Public Works and Services at the time, referred to such provisions as "inequitable" and "unAustralian", because their consequence was "all too frequently the case that small subcontractors...[were] not paid for their work."[3]

[2] The Act was passed to remedy the situation. It aimed to "reform payment behaviour in the construction industry"[4] by ensuring that any person who carries out construction work (or the supply of related goods and services) under a construction contract in New South Wales is provided with: (a) a statutory right to progress payments in respect of that work, regardless of whether the contract is silent on the matter; and (b) access to a "fast track"[5] adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately, without prejudice to the right of parties to have disputes ultimately determined in accordance with ordinary court or arbitral processes.

[3] This paper will provide an overview and critique of the Act's operation from the Court's perspective, [6] with particular emphasis on: the objects of the Act; the nature of judicial review available under the Act; and the impact of judicial review upon the dispute resolution system created by the Act.

2. Objects of the Act

[4] Section 3(1) describes, rather less colourfully than did the Second Reading Speech, the principal object of the Act as being to "ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services."

[5] In bald terms, the Act creates the following system, which enables that statutory entitlement to be exercised. First, the person claiming payment ('claimant') must prepare and serve a written 'payment claim' upon a person who is or may be liable to make the payment under the construction contract ('respondent'). If liability is disputed, the respondent may prepare and serve on the claimant a written 'payment schedule' detailing the amount, if any at all, that the respondent is prepared to pay and the reasons for withholding the full claimed amount. Where any dispute remains, or no response to the original payment claim has been received, then the matter may then be referred to an adjudicator for determination if the claimant so desires. Once the adjudicator's determination has been received then, if no payment is forthcoming, the claimant can request an adjudication certificate or serve notice of the claimant's intention to cease work. The adjudication certificate can then be filed as a judgment in a court of competent jurisdiction and enforced accordingly. While the respondent has the right to commence proceedings to have the entry of such judgment set aside, it cannot in those proceedings bring any cross-claim against the claimant, raise any defence relating to the construction contract or in any way seek to impugn the adjudicator's determination.[7] In addition, the respondent is obliged to pay into court the unpaid portion of the adjudicated amount as security pending final determination of those proceedings.

[6] There are several noteworthy features of this system. First, this process does not detract from "any other entitlement that a claimant may have under a construction contract" (s 4(a)). The Act creates what has been described as a "dual railroad track system" [8], whereby statutory mechanisms operate in addition to, and not in derogation of, any similar procedure provided for in a construction contract.

Where there is a contractual progress claim mechanism - something that normally involves decisions by an appropriate professional, such as an engineer or architect, in the role of contract superintendent - the claimant and respondent must first engage it before seeking the assistance of the Act. This dual system is, however, limited where the effect of the contract is to exclude, restrict or modify the operation of the Act: s 34.[9]

[7] Secondly, the proposition that "payments made pursuant to adjudication determinations are interim payments"[10] lies at the core of the operation of the Act. In consonance with the "dual railroad track system", the parties' common law rights under their contract are not extinguished by the triggering of the adjudication procedure. Indeed, s 32 requires that any progress payments which have been made be taken into account when a final order or award is made (s 32(3)). The emphasis on maintaining cash flow and the haste with which the adjudication process must be conducted under the Act will, as Einstein J has remarked, "necessarily give rise to many adjudication determinations which will simply be incorrect"[11]. The availability of litigation or arbitration at the conclusion of the contract to recover any surfeit or shortfall anticipates and makes accommodation for this possibility.

[8] Thirdly, s 12 of the Act contains an important modification of contractual freedom. This modification is also consistent with the desire to maintain cash flow within the industry and reform payment behaviour. Section 12 renders 'pay when paid' and 'pay if paid' clauses in contracts for construction work or the supply or related goods and services of "no effect". These clauses operate either to delay the payment of a subcontractor until such time as the head contractor receives payment from the principal ("pay when paid"), or to limit the payment of a subcontractor to such amount as the head contractor receives from the principal in the event of a dispute arising in respect of the latter contract ("pay if paid"). The philosophy behind this provision is clear, and it applies equally to the entire Act. That philosophy, pithily stated by Palmer J, is simply to ensure that parties to construction contracts "pay now [and] argue later"[12].

[9] Fourthly, the Act has a very broad scope and a wide application. By s 7, the Act applies to any written or oral "construction contract" (s 7(1)) insofar as that contract involves construction work to be carried out or related goods and services to be supplied in New South Wales (s 7(4)(a), (b)). This is so irrespective of the selection by the parties of a governing law for the contract other than the law of New South Wales (s 7(1)). "Construction contract" is defined in s 4 "a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party"; in turn, sections 5 and 6 respectively define 'construction work' and 'related goods and services' in broad and inclusive terms.[13]

[10] Fifthly, the Court has emphasised that, prima facie, the Act applies to any construction contract and that where it is claimed that the Act does not apply, it is for the party so claiming to demonstrate that the contract falls within one of the classes of contract which attract exemption.[14] Section 7 provides a full list of all the exempted types of contract, but by way of outline, the Act does not apply to a contract:

- (a) that "forms part of" a loan agreement, contract of guarantee, or contract of insurance: s 7(2)(a). Similarly, the Act does not apply to a construction contract to the extent that it contains provisions under which a party undertakes to carry out construction work as a condition of a loan agreement, guarantee or contract of indemnity: ss 7(3)(b) and (c);
- (b) to the extent that a party undertakes by it to carry out construction work as an employee of the person for whom the work is to be carried out: (s 7(3)(a));
- (c) for residential building work, within the meaning of the Home Building Act 1989 (NSW), on the residential premises of the party for whom the work is carried out: (s 7(2)(b));
- (d) the consideration for which is to be calculated "otherwise than by reference to the value of the work carried out or the value of the goods and services supplied": s 7(2)(c).

[11] In short, the Act aims to establish a speedy method for the interim resolution of a significant class and number of contractual disputes within the construction industry.

3. The Court's approach to Judicial Review

(a) The Nature and Availability of Judicial Review

[12] The premium which the Act places on the swift resolution of adjudication applications has an obvious drawback; namely that the tight timeframe for the completion of the adjudication process will "necessarily give rise to many adjudication determinations which will simply be incorrect"[15]. An important area of concern for the Court has been whether judicial review ought to be available (and in what form) where it is shown that an adjudicator has made an incorrect decision.

[13] Until recently, it had been thought by many that relief in the nature of certiorari would lie against the determination of an adjudicator made under Act on the grounds of denial of natural justice, jurisdictional error of law on the face of the record, or fraud. So much had been established by the decisions in *Musico v Davenport* [2003] NSWSC 977, *Abacus Funds Management v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 and following. This position had become so well established that Barrett J, in *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 at [4], noted that the defendant had conceded that the relevant power "had been exercised in so many analogous instances...that there was no real point in its seeking to make submissions on the matter."

[14] There were several features to this type of relief. First, it was a discretionary remedy. Secondly, it operated, in effect, to quash a decision in its entirety. Finally, the Court had concluded that the scheme created by the Act favoured a narrower range of judicial review, where relief was not available on the basis of non-jurisdictional error of law because to do so would be "quite inconsistent with the legislative intention that is evident in s 25(4)."[16] Thus, judicial review would lie against a determination when it:

- was given in bad faith or was procured by fraud;
- was one which the adjudicator had no power under the Act to make;
- was made without complying with the limited requirements of natural justice provided by s.17(5), s.20(1), (2) and (3), s. 21(1), s.21(4)(a) and s.18(4) of the Act;
- did not deal with the question remitted for adjudication;
- determined a question not remitted for adjudication;
- did not take into account something which the Act required to be taken into account; or
- was based upon something which the Act prohibited from being taken into account.

[15] In two decisions last November, the Court of Appeal took a significantly different, and in substance more limited, view about the nature of the available judicial relief and the grounds on which it could be given.

[16] The principal decision is *Brodyn v Davenport* (2004) 61 NSWLR 421. The leading judgement was delivered by Hodgson JA, with whom Mason P and Giles JA agreed. In that case, the first instance decision was delivered by Gzell J, who considered that the adjudicator's determination before him was infected with a reviewable error of law. His Honour held, however, that relief by way of certiorari was unavailable because the adjudication determination had already been filed as a judgment under s 25 of the Act. This, in Gzell J's view, would deprive an order for certiorari of its efficacy since "the only utility of an order in the nature of certiorari is to ground an application to set aside judgment." The Court of Appeal disagreed, and held that an order of the Supreme Court quashing an adjudication determination could support the setting aside of any judgment already obtained, as well as precluding the claimant prospectively from obtaining judgment.

[17] Hodgson JA then proceeded to consider the scope of judicial review. His Honour agreed with McDougall J's view in *Musico* that judicial review was unavailable for non-jurisdictional error of law on the face of the record because this ground of review was inconsistent with the legislative scheme set out in s 25(4) of the Act. This scheme displayed an evident policy that disputes concerning progress payments be resolved with a minimum of delay. Hodgson JA also considered that this legislative policy weighed against granting relief for jurisdictional error of law on the face of the record. Instead, his Honour said that relief would lie by way of declaration and injunction in the following circumstances:

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

[18] In these circumstances, any purported determination would not be a 'determination' within the meaning of the Act at all and so would be void and not merely voidable. Accordingly, relief would lie by way of a declaration that the adjudication determination was void and an injunction restraining the entry or enforcement of any judgment dependent on that determination. There would be no need for an order of certiorari quashing the determination. Equally, because in law there was no determination,

the prohibition in s 25(4)(a)(iii) against challenging determinations was not enlivened.

[19] Hodgson JA at [53] in Brodyn then outlined some, but perhaps not all, of the "basic and essential requirements" for a valid determination. These are, or include:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).
2. The service by the claimant on the respondent of a payment claim (s 13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and 19).
5. The determination by the adjudicator of this application (ss 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).

[20] Finally, his Honour considered some discretionary matters. In particular, Hodgson JA considered the availability of a stay of a judgment obtained under s 25. Although his Honour concluded at [87] that, just as with any other judgment of the Court, such a judgment could be stayed, he stressed that the evident policy of the Act, its emphasis on speed and minimal judicial involvement, might weigh against the grant of a stay in a particular case.

[21] The decision in Brodyn has not, however, been without criticism. Indeed, in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228, the appellant sought leave to re-argue Brodyn.

[22] In that case, the plaintiff and first defendant were parties to a sub-contract under which the defendant agreed to carry out construction work relating to the redevelopment of the Gazebo Hotel in Elizabeth Bay. Over the course of the construction a number of adjudication determinations were made. The proceedings related to three in particular. It was alleged that the determinations were void for a number of reasons, but, in particular, because each determination concluded that the defendant was entitled to be paid, as part of a progress payment, an amount of 'delay damages' claimed under an express provision of the subcontract.

[23] McDougall J delivered the decision at first instance and held that irrespective of whether delay damages and interest thereon could be included in a determination of the amount of a progress payment, any error would not render the determination void. This finding was upheld on appeal, and leave to reargue Brodyn was refused. Hodgson JA held at [47] that the question of leave to reargue Brodyn had two possible aspects: firstly, whether challenges to determinations are limited to those situations where the determination is void, or whether challenges can extend to situations where the determination is not invalid but may be the subject of an order for certiorari; and secondly, whether the requirements for validity laid out in Brodyn were set too low. Hodgson JA did not deal with either of these, because his Honour did not view either as sufficiently persuasive to justify the reconsideration of Brodyn; and, in any event, his Honour held at [49] that certiorari, even if available in principle, would not issue in the present case.

[24] Ipp JA declined to comment on the correctness of the decision in Brodyn, because his Honour agreed with Hodgson JA's decision that amounts for delay damages and interest could be included within payment claims and that such a decision was within the adjudicator's jurisdiction.

[25] Basten JA also agreed with Hodgson JA's decision about the availability of amounts for 'delay damages' within payment claims. Although Basten JA did not favour the grant of leave to reargue Brodyn, because the issue did not arise, his Honour raised the following doubts about the reasoning in Brodyn.

(1) One of the factors which was apparently not considered a "basic" requirement for the validity of a determination was compliance with s 13(2). Basten JA noted at [73] that according to "that provision, a payment claim "must" do certain things. The basis for reading "must" as "must but need not" is not explained." His Honour felt that this did not accord with the High Court's approach to different legislation in *SAAP v MIMIA* [2005] HCA 24.

(2) Basten JA also doubted the conclusion in Brodyn that seemed to suggest that the decision of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 required an adjudicator not only to consider the matters raised in s 22(2) but also to arrive at a legally correct conclusion about these matters. Basten JA thought that neither s 22(2) nor the decision in Luikens required that outcome.

(3) His Honour also thought that the reliance on *R v Hickman* (1945) 70 CLR 598 in Brodyn may have

been misplaced. Hickman had been relied upon for the proposition that all that was intended by the legislature was compliance with certain identified 'basic requirements' and a bona fide attempt by an adjudicator at exercising the relevant power relating to the subject matter or the legislation and reasonably capable of reference to that power. Basten JA questioned the reliance on Hickman, because that case required the reconciliation of a privative clause with apparently mandatory provisions, whereas there are no such provisions in the Act.

(4) The reasoning in Brodyn that a failure to accord the statutory measure of natural justice is only a basic requirement for the validity of a determination when that failure is "substantial" appeared to be inconsistent with the High Court's reasoning in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [17].

(5) Basten JA also considered at [78] that if Brodyn in fact drew a distinction between a determination which could be challenged for invalidity due to jurisdictional error but one which could not be quashed if error of law were shown on the face of the record, then that could be a basis for reconsidering Brodyn. This was because it would depart from the question posed in Brodyn, namely, whether a requirement in the Act was considered to be an essential pre-condition to the exercise of power. His Honour noted that the issue regarding questions of law is whether the adjudicator was intended to have power to determine questions of law, or power only to apply the law correctly. Basten JA thought that one reading of Brodyn indicated that "contrary to the general rule with respect to administrative tribunals, an adjudicator has been given power to determine a payment claim so long as he or she takes into account the legal parameters prescribed by the Act and the contract, and whether or not the decision actually made reflects a correct understanding of the legal principles to be derived from those sources."

[26] So, while the decision in Brodyn is still good law and binding upon first instance judges, the principles which underlie the decision may perhaps be regarded as unsettled, and will remain that way until further clarification is received from appellate courts. The broad approach is, nonetheless, clear. The latitude afforded to adjudicators in their application of the Act is simply a reflection of the Court's interpretation of the legislative policy which underlies it. To approach the Act otherwise would undermine the very system that it establishes.

(b) Broad approach to interpreting the Act

[27] It should also be noted that the Court has also sought to uphold the Parliament's intention that the Act apply broadly within the construction industry. Examples of this include the approach taken to the exclusion within the Act for loan agreements, as well as what type of work can be said to be done 'for' construction work. In both examples, the Act has been construed to give it a wide application. So, for a loan agreement to 'form part of' a contract, it must be incorporated into the contract in accordance with general contractual principles.[17] It is not enough for one party to the contract simply to be aware that the other party has entered into a loan agreement.[18] Similarly, a loan agreement that was 'associated' with a construction contract did not attract the exemption under the Act because it was considered that s 7(2)(a) would only apply where to hold otherwise would provide a claimant with "concurrent rights, in respect of the one progress claim, against both the proprietor and the financier."[19]

[28] The Court of Appeal took a similar approach to the construction of the Act in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228 and *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229. In both those cases it was argued an adjudicator's determination ought to be set aside because the payment claim had included an amount ostensibly for 'delay damages' and 'interest' and these amounts were not 'for' construction work or related goods and services, as mandated by s 13(2)(a). This argument was rejected by Hodgson JA, with whom Ipp and Basten JJA agreed on this point. His Honour held [42] that:

"If in substance [the amounts awarded as delay damages or interest] represent the increased cost or price of construction work actually carried out, in my opinion they are clearly for construction work carried out. If they represent the cost or price of goods or services actually supplied in connection with the construction work under the contract, they are for related goods or services supplied, even if not for construction work carried out."

4. Consequences of the Court's Approach

[29] The Court's approach to the interpretation of the Act, and the way that has shaped the availability of judicial review, have two important consequences. The first is procedural and revolves around the change in the nature of relief. As Palmer J pointed out in *Co-ordinated Construction P/L v J M Hargreaves P/L* [2004] NSWSC 1206, the decision in Brodyn means that the "dire and irretrievable consequences thought to attach to the filing of an adjudication certificate prior to the decision in

Brodyn" no longer apply. The Court of Appeal has made it clear that judicial intervention is available both before and after an adjudication determination has been filed as a judgment under s 25 of the Act. Consequently, there is no longer any absolute need for an urgent injunction to prevent the filing of an adjudication certificate, since relief will still be available.

[30] This has not, however, been fully appreciated by practitioners; and injunctions have been sought seeking either to prevent the filing of an adjudication certificate or to restrain the adjudication process altogether. When considering an application to restrain the filing of an adjudication certificate shortly after the decision in Brodyn, Palmer J emphasised that an injunction granted by the Court "is not the only chance which a party has to prevent enforcement of an adjudication determination which is said to be void for non-compliance with an essential requirement of the Act"[20]. Although the injunction was granted in that case, his Honour emphasised that should similar applications be made in the future at so late a stage "the applicant runs the risk that it will be refused out of hand and that it will be left to set aside a judgment entered pursuant to s25(1) in the appropriate court, if it can." [21] This is because eleventh hour applications require "the Court to act under the suggestion, almost under a threat, that unless the Court grants the injunction irretrievable consequences will follow immediately." [22] The fact that judicial review is available after the filing of an adjudication certificate, and the expressly interim nature of adjudication determinations, severely diminish the possibility of any 'irretrievable consequences' flowing from the filing of an adjudication certificate.

[31] A similar approach was taken by McDougall J in Australian Remediation Services P/L v Earth Tech Engineering P/L [2005] NSWSC 362 when considering an application to restrain a claimant from proceeding with an adjudication application at all. In refusing the relief sought, his Honour noted at [14] that such an application ignored the fact that the legislature had made it clear that it is adjudicators under the Act who are the primary organs for the resolution of disputes about payment claims, whereas the power of the Court operates at a later stage. Accordingly, the Court ought to "think long and hard before interfering in the implementation, in a particular case, of that statutory scheme." Similarly, the comments of Hodgson JA in Brodyn about the availability of injunctive relief are relevant here.

[32] This is not to say, however, that injunctions are not available. The matter before McDougall J in Australian Remediation Services P/L came back before Campbell J after the adjudication determination had been issued. An injunction was sought restraining the claimant from requesting an adjudication certificate. While his Honour granted the injunction, this was only done subject to both the payment of the entire amount adjudicated in favour of the claimant into court - some \$3.7 million dollars - as well as an amount for interest on that amount for 180 days - the estimated time for the matter to be expedited and brought to trial.

[33] The second consequence of the Court's approach is that the litigants have sought both to flesh out further and expand the list of "basic and essential requirements" for a valid adjudication determination. Hodgson JA clearly stated that the list provided in Brodyn was not exhaustive and subsequent litigants have focussed on this. Attempts to add a new "basic and essential requirement" to the list have been unsuccessful thus far. In TransGrid v Siemens [2004] NSWCA 395, the Court of Appeal considered that the failure of the adjudicator to calculate the amount of the progress payment in accordance with the contract, as required by s9(a) of the Act was not a breach of a "basic and essential requirement" for a valid determination. The Court of Appeal also held in The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd [2005] NSWCA 142 that compliance with the fifth 'basic and essential requirement' set forth in Brodyn, namely the making of an adjudication determination, does not involve compliance with s 9 of the Act. Similarly, in Rothnere v Quasar [2004] NSWSC 1151, McDougall J considered that compliance with s 22(4) of the Act was not a "basic and essential requirement" for a valid determination.

[34] More success has been had in setting aside adjudication determinations on the basis that the adjudicator has denied a party natural justice, or failed to exercise his or her powers under the Act in good faith. In Pacific General v Soliman & Sons [2005] NSWSC 378 McDougall J concluded that an adjudication determination was void because of a failure to comply with a "basic and essential requirement of the Act" or because of a subsequent denial of natural justice where a plaintiff, a respondent to a payment claim, did not receive notice of the appointment of an adjudicator even though the notice was sent. This had the effect that the respondent's submissions were ruled out of time. McDougall J accepted the plaintiff's evidence that no notice was received and accordingly, held that the adjudication determination was void.

[35] In Timwin Constructions Pty Ltd v Façade Innovations Pty Ltd & Ors [2005] NSWSC 48, an application was made to have an adjudication determination declared void on the grounds that the

adjudicator had not in good faith attempted to exercise the relevant power. There, the plaintiff (the respondent to the payment claim) alleged that the adjudicator had not dealt with its defence to the payment claim, which asserted that the variations claimed were in fact work that should have been carried out under the contract. McDougall J considered at [38] that the requirement of good faith in Brodyn did not encompass dishonesty, but rather it demanded "an effort to understand and deal with the issues in the discharge of the statutory function". His Honour held that the requirement of an adjudicator to 'consider' various matters in s 22(2) was equivalent to a requirement to have regard to something (Zhang v Canterbury City Council (2001) 51 NSWLR 589 at 602), a duty encompassed by a need to give weight to the specified considerations as a fundamental element in the determination. This was something that the adjudicator failed to do. Accordingly, the determination was declared void.

5. Future Considerations

[36] The Court's role within the dispute resolution system created by the Act is an ancillary one, but essential nonetheless. It is essential for two reasons. Firstly, the availability of judicial review ensures the integrity of the adjudication process. Secondly, the involvement of the Court is needed because the Act is only designed to resolve disputes in the interim. The parties' contractual rights (subject to s 34) remain unaltered by the Act and any dispute at the completion of the construction process will be resolved, if all else fails, by litigation or arbitration. It is in considering this second point - the interim nature of the dispute resolution mechanism provided by the Act - that it is useful to examine some statistics outlining the Act's operation.

[37] A review of the Act was concluded in May 2004. While the Report which resulted from the review did not recommend any changes to the legislation, it did contain some useful data concerning the Act's operation. It noted the dramatic increase in the number of adjudication applications made in the year prior to the completion of the review. From 1999 until March 2003, only 116 adjudication applications had been filed and only 65 determinations concluded. In the year from March 2003 until February 2004, some 593 adjudication applications were filed, with some 400 determinations concluded.[23] This amounts to some 50 adjudication applications filed per month.[24] This would indicate an increased level of awareness and familiarity in using the legislation.

[38] Of those applications, some 67.5% proceeded to determination by an adjudicator. Another 15% of applications were either withdrawn or settled, while a further 12% were invalid.[25] It also appears that the Act has drawn a good response from those whom it was intended to assist; namely small contractors or sub-contractors. The 2004 Review found that 57% of applications related to claims of less than \$50,000, and 86% of applications related to claims of less than \$250,000.[26] The Report also indicates a correlation between the size of a payment claim and the amount determined in favour of the applicant. In the 12 months after the 2002 Amendment Act was passed, over 80% of the amount claimed in the adjudication application was awarded to the claimant in determinations where the amount claimed was under \$50,000.[27] For claims between \$250,000 and \$500,000 only some 60% of the amount claimed was awarded. This percentage diminished even further the more the amount claimed increased so that of claims over \$750,000 only around 40% of the amount claimed was awarded in the adjudication determination.

[39] In Appendix B to the Report, a submission was noted that the payment claims be capped. The Report concluded that:

"Although there was some support for this restriction, a majority of responses suggested that there was no justification to limit the size of the claim. As one submission stated "The Act allows the parties to agree upon the number, amount and method of calculation of progress payments. If the parties don't cover these matters in their contract then there is no justification for a statutory limit.""[28] (emphasis in original)

[40] The conclusion that the size of payment claims ought not to be capped bears rethinking. The Act was intended to ensure cash flow for smaller operators in the construction industry and, on the statistics contained in the May 2004 Report, appears to be functioning well in this respect. The Act appears to be less efficacious in dealing with larger claims. The reason for this becomes clear when one bears in mind the tight timeframe under which the adjudication process operates. As noted above, this will inevitably result in some errors, and the likelihood for error only increases with the size, complexity and sheer volume of paper involved in larger payment claims. Further, larger payment claims are inevitably levelled against companies with the resources to dispute payment claims where an error is perceived.

[41] Consider the two Australian Remediation Services cases discussed above. There, the amount

awarded to the claimant in the adjudication determination was several million dollars. The parties had negotiated a complex contract fully outlining their rights and responsibilities. The Court has already heard three interlocutory applications and the injunction in the second decision was granted only on the basis that a final trial be pursued on an expedited basis. Clearly, the parties to that dispute are in a different category from the small subcontractors for whose benefit (according to the Minister - see [1] above) the Act was intended. This becomes even more apparent when one considers that the legal costs for each side to this dispute will probably amount to more than the amount claimed in the majority of adjudication applications. Under the present system, a tool designed to assist the cash flow of small players within the construction industry can be used as another weapon in a large commercial feud. This problem could be remedied by placing a cap on the value of contracts about which payment claims can be made, if a cap on the size of payment claims themselves is thought to be inappropriate.

[42] There may however be a problem if a statutory cap is applied, either to contract values or to payment claims. In the typical case, a head contractor will undertake responsibility for a project, and will subcontract out various areas of the work. If there is a statutory cap, the consideration under the head contract may exceed the cap. In that case, the head contractor will not have the security of the Act to bolster its entitlement, as against the principal, to progress payments. In many cases, however, subcontract values will be below the cap, so that subcontractors will have the benefit of the Act. There will thus be created a situation of imbalance from the perspective of the head contractor. On one side, it will be burdened by its statutory obligations. On the other side, it will not have the corresponding benefit of the statute. This imbalance will exist regardless of whether the cap is on contract values or payment claim values (and, in the latter case, the submission noted at [39] above has independent force).

[43] Any attempt to remedy the possible imbalance flowing from the imposition of a statutory cap is likely to create yet further complication and confusion. Ultimately, the resolution of this problem is - as is the statutory scheme itself - a matter of policy with which the legislature must deal.

End Notes

[1] A Judge of the Supreme Court of New South Wales. The views expressed in this paper are mine, and should not necessarily be attributed either to my colleagues or to the Court. I gratefully acknowledge the very substantial contribution of my tipstaff, Stewart Old, BA (Hons) LLB (Hons), who prepared the draft on which this paper is based. Its virtues are his; its defects are mine.

[2] *Abignano Ltd v Electricity Commission of New South Wales* (1986) 3 BCL 290 at 297, per Smart J.

[3] Second Reading Speech, the Hon M Iemma, MP, New South Wales Hansard Articles, Legislative Assembly, 29 June 1999, No 16.

[4] Note 3.

[5] *Brodyn Pty Limited t/as Time Cost and Quality (ACN 011 998 830) v Philip Davenport & Ors* [2003] NSWSC 1019 at [14], per Einstein J.

[6] In this context, "the Court's perspective" should be understood as mine, supplemented by my understanding of the decisions of others to which I refer.

[7] The last, and apparently wide, prohibition must be understood in the light of what the Court of Appeal said in *Brodyn v Davenport* (2004) 61 NSWLR 421: see the discussion at [16] to [23] below.

[8] *Transgrid v Siemens & Anor* [2004] NSWSC 87 at [56], per Maccready AJ.

[9] See, *The Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [51].

[10] *Grosvenor Constructions (NSW) Pty Limited (In administration) v Musico & Ors* [2004] NSWSC 344 at [27], per Einstein J.

[11] *Brodyn Pty Limited t/as Time Cost and Quality (ACN 011 998 830) v Philip Davenport & Ors* [2003] NSWSC 1019 at [14], per Einstein J.

[12] *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 at [96], per Palmer J.

[13] Including, in relation to construction work, the construction, alteration, repair, demolition and so forth of any building or part thereof (walls, heating, air conditioning, lighting, plant), road works, docks, runways, drains, building sites, scaffolding or paintings. And in relation to 'related goods and services', including any materials or components to form part of a building and the provision of labour to carry out construction work or design, engineer, decorate or landscape such works.

[14] *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [70]-[77], per Nicholas J. Followed by Einstein J in *Brambles Australia Limited v Davenport* [2004] NSWSC 120 at [11] - [12].

[15] *Brodyn Pty Limited t/as Time Cost and Quality (ACN 011 998 830) v Philip Davenport & Ors* [2003] NSWSC 1019 at [14], per Einstein J.

[16] *Musico v Davenport* [2003] NSWSC 977 at [55], per McDougall J.

[17] *Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd* [2004] NSWSC 110 held at [33], per McDougall J.

[18] Note 17.

[19] *ACA Developments Pty Ltd (As trustee for the Bellagio Unit Trust) v Sullivan; Austrac Constructions Ltd v ACA Developments Pty Ltd* [2004] NSWSC 304 at [17], per McDougall J.

[20] *Co-ordinated Construction P/L v J M Hargreaves P/L* [2004] NSWSC 1206 at [8], per Palmer J.

[21] Note 20, at [10].

[22] Note 20, at [8].

[23] "Review Report May 2004", Building and Construction Industry Security of Payment Act, Fig 1, p 6.

[24] Note 23, p 6.

[25] Note 23, Fig 3, p 7.

[26] Note 23, p 8.

[27] Note 23, Fig 8, p 10.

[28] Note 23, Appendix B, p 18.