

Australia: Adjudicators' Security of Payment Determinations Not Reviewable for Errors of Law

IN SHORT

The Situation: The High Court of Australia has, for the first time, confirmed that determinations by adjudicators appointed under security of payment legislation are not reviewable for errors of law alone.

The Result: The actions confirm that Australian courts will only in very limited circumstances overturn a determination under the statutory adjudication process.

Looking Ahead: Those in the construction industry should be aware that an error by an adjudicator in considering the effect of a contract or applying legal principles is unlikely (without more) to amount to jurisdictional error. This is a shot in the arm for the statutory adjudication process, which in recent times has been criticised for its failure to "keep the money flowing" to contractors and subcontractors.

In February 2018, the High Court of Australia handed down two decisions concerning adjudication determinations under Australian security of payment legislation: *Probuild Constructions v Shade Systems* and *Maxcon Constructions v Vadasz*. These decisions are the High Court's first forays into judicial review of adjudication determinations.

Both cases considered whether errors of law on the part of the adjudicators could amount to jurisdictional error, such that the adjudicators' decisions should be quashed and rendered void.

Adjudicators were appointed to determine payment disputes that had arisen in respect of building projects in New South Wales (in the case of *Probuild*) and South Australia (in the case of *Maxcon*). The adjudicators determined that amounts were payable to the claimants. Both respondents sought judicial review of the determinations, contending that the adjudicators had committed reviewable errors when wrongly applying certain terms of the contracts.



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Decisions

The High Court determined that the relevant security of payment legislation prohibited state courts from reviewing adjudication decisions on the grounds of nonjurisdictional errors of law.

Critical to the High Court's reasoning was the overarching objective of the security of payment legislation—to reform payment behaviour in the construction industry and to provide a fast, "interim" statutory entitlement, not to finally and conclusively determine the entitlements of parties. In the High Court's view, permitting lengthy and time-consuming judicial review proceedings on alleged errors of law would frustrate these objectives.

In Western Australia, the courts have grappled with similar issues in many high-profile and high-value adjudications under the *Construction Contracts Act 2004* (WA) brought about in part by the recent downturn in commodity prices and the completion of a number of major projects. While the Western Australian model differs from the security of payment legislation in New South Wales (the distinction commonly described as the 'West Coast Model' versus the 'East Coast Model'), for the following reasons those differences are unlikely to mean that the High Court's decision will not be applied in Western Australia.

First of all, the High Court's decisions are in line with the position that has been adopted in Western Australia, most recently in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130 ("LORAC"). In *LORAC*, the court of appeal found that an adjudicator will not exceed jurisdiction merely if he or she misinterprets or fails to properly consider the terms of the construction contract relevant to the payment dispute. Second, Western Australian courts have previously been comfortable applying 'East Coast' judgments to cases concerning judicial review of Western Australian adjudication determinations (see for example His Honour Justice Beech's reliance on *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport and Anor* in *O'Donnell Griffith Pty Ltd v John Holland Pty Ltd*, another Western Australian case where it was found that adjudication determinations cannot be quashed solely on the basis of an erroneous interpretation of the law or a construction contract).

The WA Court of Appeal is poised to deliver a decision concerning appeals from eight consolidated

applications for judicial review and enforcement of adjudication determinations, which were heard in August 2017. How the court of appeal approaches this issue, in light of *Probuild* and *Maxcon*, may determine this question in Western Australia conclusively.

Conclusion

The High Court's approach is consistent with the "quick and dirty" aim of adjudications under security of payment legislation. This should strengthen the adjudication process as a viable avenue of remedy for parties seeking timely payment under a construction contract.

Respondents (i.e., owners and head contractors) ought consider the latitude afforded to adjudicators to make legal errors when assessing adjudication risk. The continued application of this legislation to large disputes in the energy and resources sectors exacerbates the potential monetary consequences to respondents brought about by adjudicators committing non-reviewable errors.

THREE KEY TAKEAWAYS

1. The High Court's approach is consistent with the "quick and dirty" aim of adjudications under security of payment legislation.
2. These actions should strengthen the adjudication process as a viable avenue of remedy for parties seeking timely payment under a construction contract.
3. Respondents (i.e., owners and head contractors) ought consider the latitude afforded to adjudicators to make legal errors when assessing adjudication risk. The continued application of this legislation to large disputes in the energy and resources sectors exacerbates the potential monetary consequences to respondents brought about by adjudicators committing non-reviewable errors.

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