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WHITE PAPER

September 2020

Security of Payment Legislation in Australia

Australia-wide, companies are navigating the uncertainties arising from COVID-19. Our previous *White Papers* identified the risks arising for construction projects and observed that the fallout is likely to give rise to disputes at all contracting levels. Projects will experience delay and disruption, or suffer from supply-chain impacts and the financial hardship of project participants. These impacts will continue as more projects fall into distress.

State and Federal governments have increased spending on public infrastructure projects as part of economic recovery and stimulus spending. Any hasty planning or execution will increase the risk of time and cost overruns on such projects, which still face the risks and challenges posed by the COVID-19 era.

These factors are likely to cause an increase in payment disputes under statutory security of payment regimes in every Australian jurisdiction, which differ in key procedural aspects. Given this, it is more important than ever for businesses to be up to date with the regimes in each jurisdiction, especially for companies operating in multiple jurisdictions. This *White Paper* provides an overview of security of payment legislation in each Australian State and Territory, along with recent legislative developments and case law trends. Given the differences in the security of payment regimes across the country, we have also included comparison tables that provide a quick reference guide on key differences between each State and Territory.

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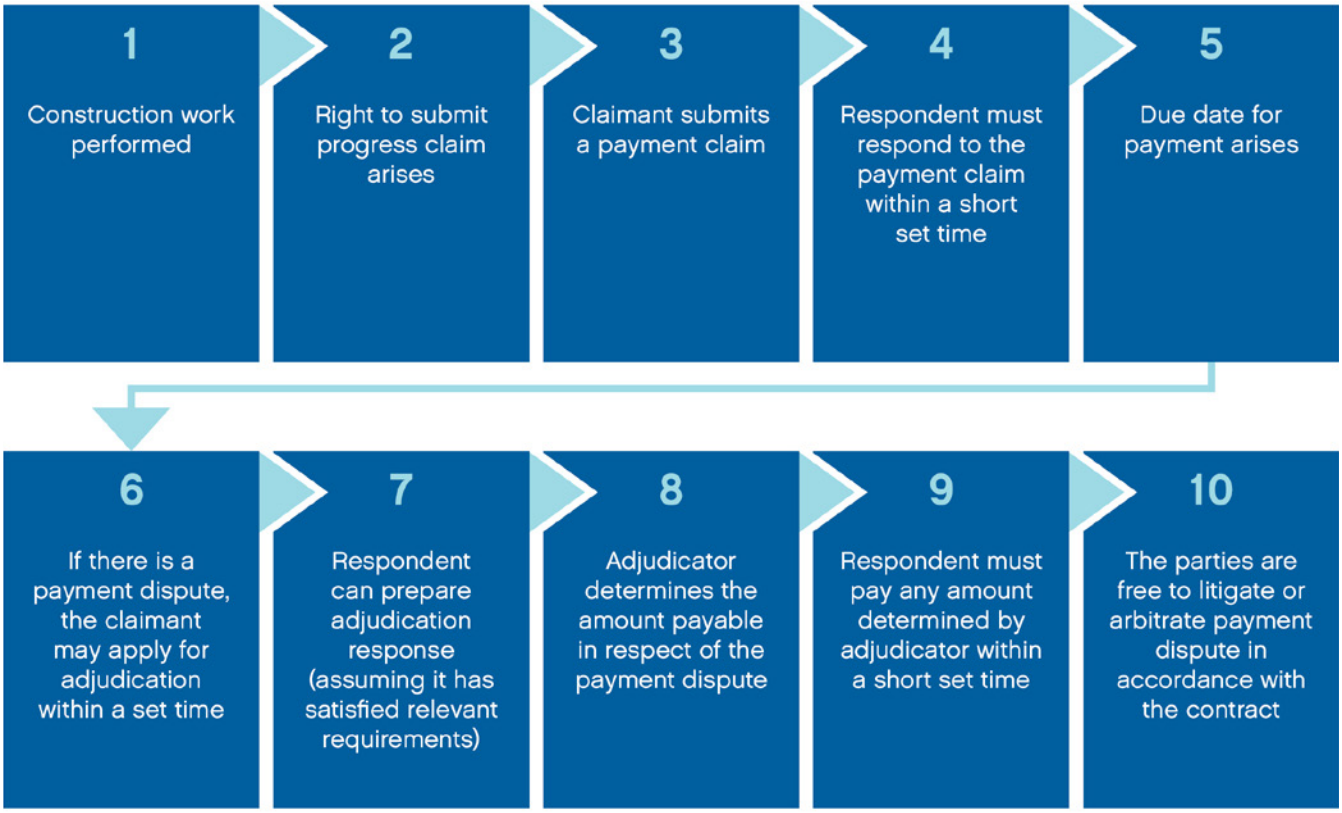
AUSTRALIA: A SNAPSHOT

Security of payment legislation has been enacted in every Australian jurisdiction, providing a statutory regime for the submission and payment of regular progress claims and the resolution of any payment disputes in relation to construction work that falls within the ambit of the relevant legislation. Each of the regimes grant rights to submit progress claims and to have any dispute in respect of those claims resolved more quickly, on an interim basis, by a process of statutory adjudication governed by specific rules and short timeframes. In broad terms, each regime generally involves the following:



The overall time it takes to have a disputed payment claim determined by adjudication varies in each jurisdiction, but it can be as short as approximately 35 business days (in New South Wales ("NSW") and South Australia ("SA")—so the process is a fast one, presenting both opportunities and challenges for those involved. The adjudicator's decision is binding on the parties unless and until a party seeks relief from a court to set aside the adjudicator's award (which is generally available only in limited circumstances) or as part of an action to finally determine the rights between the parties on the matters the subject of the adjudication. The process provides a quicker, "interim" resolution procedure, without prejudicing the parties' final rights if disputes remain.

Although there are similarities between jurisdictions, there are also important differences in the procedural steps, requirements and timeframes that apply, and non-compliance can have significant consequences. Keeping up to date on the differences is of particular importance given that many major industry participants operate on a national basis.

There have long been calls for harmonization of security-of-payment legislation across Australia, and there have been a number of formal reviews recommending how this should be achieved. This includes the national review undertaken by John Murray in December 2017 ("Murray Review")[1] and the review undertaken by John Fiocco in October 2018 ("Fiocco Review"),[2] both of which are influencing legislative developments. The desire for a consistent national security of payment regime has contributed to recent reforms being proposed in some Australian jurisdictions, with a particular focus on bringing the "West Coast Model" into line with the "East

Coast Model". Western Australia recently proposed significant reform to its security of payment regime (for more information, see our recent *White Paper* on proposed reform to Western Australia's security of payment regime[3]), reforms on a similar scale have been proposed in Queensland and a number of changes to the NSW regime commenced not all that long ago, in October 2019.

This *White Paper* provides an overview of the current status of security of payment legislation in each Australian State and Territory, along with a snapshot of recent legislative developments and trends in case law. Across all Australian jurisdictions, a continuing theme seen in the cases regarding adjudication is the tension between upholding strict procedural requirements on the one hand and protecting substantively meritorious claims on the other.

Given the differences in the security of payment regimes across the country, we have also included a quick reference guide in the form of two comparison tables. The tables highlight key differences between each State and Territory's sec rity of payment regime and adjudication process—such as the timeframes involved for payment claims and responses, and the types of work that may be claimed in a payment claim or adjudication application brought under the local legislation.

COMPARISON TABLE: NSW, QLD, VIC AND WA

	NEW SOUTH WALES	QUEENSLAND	VICTORIA	WESTERN AUSTRALIA
Main local legislation	*Building and Construction Industry Security of Payment Act 1999* (NSW)	*Building Industry Fairness (Security of Payment) Act 2017* (Qld)	*Building and Construction Industry Security of Payment Act 2002* (Vic)	*Construction Contracts Act 2004* (WA)
What amounts can be claimed?	Payment for "construction work" or the supply of related goods or services undertaken under a construction contract.	Payment for "construction work" or the supply of related goods or services undertaken under a construction contract. Payment claims are either "standard" or "complex". Complex payment claims are claims for an amount more than $750,000 (exclusive of GST).	Payment for "construction work" or the supply of related goods or services undertaken under a construction contract. Excludes most variations and claims for "excluded amounts".	Amounts relating to the performance (or non-performance) by a contractor of obligations under a construction contract.
Do any specific exclusions apply?	In NSW, the following does not qualify as "construction work": drilling for and extracting oil or natural gas; or extraction of minerals, including tunnelling, boring or constructing underground works for that purpose.	In QLD, the following does not qualify as "construction work": drilling for, or extracting of, oil or natural gas; or extraction of minerals, including tunnelling, boring or constructing underground works for that purpose.	In VIC, the following does not qualify as "construction work": drilling for and extracting oil or natural gas; or extraction of minerals, including tunnelling, boring or constructing underground works for that purpose. There are also a number of "excluded amounts" that cannot be claimed as part of a progress payment: non-claimable variations that are disputed (subject to the terms of the contract); time-related costs; latent condition related costs; costs for changes in regulatory requirements; damages for breach of contract; and amounts in relation to a claim other than under the construction contract.	In WA, the following does not qualify as "construction work": drilling for and extracting oil or natural gas; or constructing a shaft, pit or quarry, or drilling, for the purpose of discovering or extracting any mineral bearing or other substance; fabricating or assembling plant used to extract or process oil, natural gas or any mineral bearing or other substance (referred to as the "mining exclusion"); and constructing watercraft (i.e., shipbuilding).

	NEW SOUTH WALES	QUEENSLAND	VICTORIA	WESTERN AUSTRALIA
Party that may make adjudication application under the Act	Claimant only (i.e., party entitled to make a payment claim).	Claimant only (i.e., party entitled to make a payment claim).	Claimant only (i.e., party entitled to make a payment claim).	Both parties up and down the contract chain (contractor and principal) (i.e., the party entitled to make a payment claim and the party that receives a payment claim).
Timing for service of payment claim (or similar)	Payment claims may be served on and from the earlier of: the last day of the named month in which the construction work was first carried out under the contract and on and from the last day of each subsequent month; or the date provided under the construction contract. The claim must be served by the later of: the period determined under the construction contract; or 12 months after the construction work was last carried out (or related goods or services were last supplied).	A contractor is entitled to claim a progress payment on and from each "reference date" calculated under the construction contract. If the contract does not provide for such a date, the "reference date" will be the last day of the month in which the work was first carried out, and the last day of each subsequent month. The claim must be served by the later of: the period determined under the construction contract; or 12 months after the construction work was last carried out (or related goods or services were last supplied). If the claim is for a "final payment", see s 75(3).	A contractor is entitled to claim a progress payment on and from each "reference date" calculated under the construction contract. If the contract does not provide for such a date, the "reference date" will be 20 business days after the work was first carried out, and after that, 20 business days after the previous reference date. The claim must be served by the later of: the period determined under the construction contract; and 3 months after the reference date applicable to the payment claim.	Within the period determined under the construction contract. If the contract does not include a written provision about how a party is to make a claim for payment: the implied provision provided by the Act will be applicable; and the contractor will be entitled to claim a progress payment at any time after it has performed any of its obligations.
Does the payment claim need to be endorsed as a claim under the Act?	Yes. The payment claim must state that it is made under the Act.	No.	Yes. The payment claim must state that it is made under the Act.	No.

	NEW SOUTH WALES	QUEENSLAND	VICTORIA	WESTERN AUSTRALIA
Timing for service of response to payment claim (payment schedule or similar)	By the earlier of: the period determined under the construction contract; or 10 business days after the payment claim is served.	By the earlier of: the period determined under the construction contract; or 15 business days after the payment claim is served.	By the earlier of: the period determined under the construction contract; and 10 business days after the payment claim is served.	Within the period determined under the construction contract. If the contract does not include a written provision about how a party is to respond to a payment claim: the implied provision provided by the Act will be applicable; and the responding party must serve a notice of dispute within 14 days if it disputes all or any part of the payment claim.
Effect of not serving a valid response to a payment claim	If a payment schedule is not served in time, the respondent is liable to pay the full claimed amount by the due date for payment. However, a claimant may not bring an adjudication application seeking payment of the same unless it provides the respondent with a further opportunity to serve a payment schedule under s 17(2).	If a payment schedule is not served in time, the respondent is liable to pay the full claimed amount by the due date for payment. Failure to respond to a payment claim is an offence under the Qld legislation, and respondents could face penalties (up to 100 penalty units) or, if the respondent holds a QBCC licence, disciplinary action under the *Queensland Building and Construction Commission Act 1991* (Qld) ("QBCC Act").	If a payment schedule is not served in time, the respondent is liable to pay the full claimed amount by the due date for payment. However, a claimant may not bring an adjudication application seeking payment of the same unless it provides the respondent with a further opportunity to serve a payment schedule under s 18(2).	In WA, this depends on the terms of the construction contract. If the contract does not include a written provision about how a party is to respond to a payment claim, the implied provision provided by the Act will apply, and a respondent will be liable to pay the full claimed amount if it does not serve a notice of dispute. However, even where this implied provision is applicable, it does not preclude a respondent from defending an adjudication application despite any failure to dispute the whole or part of a payment claim.

	NEW SOUTH WALES	QUEENSLAND	VICTORIA	WESTERN AUSTRALIA
Maximum payment terms	The maximum period for a progress payment to be payable in NSW is: for payments to head contractor, 15 business days after the service of a payment claim; and for payments to a subcontractor, 20 business days after the service of a payment claim.	The maximum period for a progress payment to be payable in QLD is: for a construction management trade contract or subcontract, 25 business days; and for a commercial building contract, 15 business days. Contractual provisions that purport to provide for a longer period are void pursuant to ss 67U and 67W of the QBCC Act.	No specific maximum period applicable under the Act, unless the construction contract does not provide a term for when payment falls due. In that case, a progress payment will be payable within 10 business days after the service of a payment claim.	No specific maximum period applicable under the Act, unless the construction contract does not provide written a term for when payment falls due. In that case, the implied provisions will apply and a progress payment will be payable within 28 days after the respondent receives a payment claim.
Timeframe for serving adjudication application	The timeframe depends on the nature of the application: if respondent has scheduled an amount less than the amount claimed in the payment claim, within 10 business days after the payment schedule is served; or if respondent has failed to pay all or part of a scheduled amount, within 20 business days from the due date for payment.	The timeframe depends on the nature of the application: if respondent has failed to serve a payment schedule, within 30 business days after the later of the due date for payment and the due date of the payment schedule; if respondent has failed to pay all or part of a scheduled amount, within 20 business days from the due date for payment; or if respondent has scheduled an amount less than the amount claimed, within 30 business days after the payment schedule is served.	The timeframe depends on the nature of the application: if respondent has scheduled an amount less than the amount claimed in the payment claim, within 10 business days after the payment schedule is served; or if respondent has failed to pay all or part of a scheduled amount, within 20 business days from the due date for payment.	Within 90 business days after a payment dispute arises. A payment dispute will arise where a payment claim is disputed in full or in part, or when a payment is not made at the time it becomes due.
Appointment of adjudicator by appointing authority	As soon as practicable (no set timeframe).	The registrar must refer an application to an adjudicator within four business days after it is served. The adjudicator must then accept or reject the appointment within four business days after the referral is made.	As soon as practicable (no set timeframe).	Within five business days after service of an adjudication application, failing which, an adjudicator will be appointed by the Building Commissioner.

	NEW SOUTH WALES	QUEENSLAND	VICTORIA	WESTERN AUSTRALIA
Timeframe for serving adjudication response	By the later of: five business days after receipt of the application; or two business days after receipt of notice of adjudicator's acceptance of the application.	By the later of: 10 business days after receipt of the application (15 business days for complex claims); or seven business days after receipt of adjudicator's acceptance of the application (12 business days for complex claims). For complex claims, adjudicator may extend timeframe by up to 15 business days.	By the later of: five business days after receipt of the application; or two business days after receipt of notice of adjudicator's acceptance of the application.	Within 10 business days after being served with the application.
Can a respondent argue new reasons for non-payment in the adjudication response?	No. Limited to reasons already included in the payment schedule.	No. Limited to reasons already included in the payment schedule.	Yes. However, if new reasons are included, the claimant will be entitled to respond to those new reasons within two business days after being notified under s 21(2B).	Yes.
Timeframe for adjudication determination	Unless the parties consent to a longer timeframe, within 10 business days after the respondent lodges a response (or if no response is lodged, the end of the period in which the response was due).	Unless extended, within the following period after the respondent lodges a response (or if no response is lodged, the final day the response was due to be lodged): 10 business days: standard claims; or 15 business days: complex claims.	Within 10 business days after the adjudicator accepts the application. The claimant may also agree to an extension of up to 15 additional business days.	Unless the parties consent to a longer timeframe, the earlier of: 10 business days after the service of the adjudication response; or if no response is served, 10 business days after the last day for service of the response.
Recycled claims permitted?	Yes. A claimant may include an amount in its payment claim that has been the subject of a previous payment claim. However, a claimant is unlikely to be permitted to re-adjudicate a claim for payment of an amount that has been determined by a previous adjudication application.	Yes. A claimant may include an amount in its payment claim that was included in a previous payment claim. However, a claimant is unlikely to be permitted to re-adjudicate a claim for payment of an amount that has been determined by a previous adjudication application.	Yes. A claimant may include an amount in its payment claim that has been the subject of a previous payment claim, if the amount has not been paid. However, a claimant is unlikely to be permitted to re-adjudicate a claim for payment of an amount that has been determined by a previous adjudication application.	Yes. A payment claim may include matters covered in a previous payment claim (and may give rise to a new "payment dispute" which can be adjudicated). However, a claimant is unlikely to be permitted to re-adjudicate a claim for payment of an amount that has been determined by a previous adjudication application.

	NEW SOUTH WALES	QUEENSLAND	VICTORIA	WESTERN AUSTRALIA
Right to suspend for non-payment	A right to suspend performance of the works arises where: a respondent has failed to serve a payment schedule, and failed to pay all or part of amount due to the claimant; a respondent has served a payment schedule, but failed to pay all or part of the scheduled amount; an adjudication determination has been issued, but the respondent has failed to pay all or part of the amount awarded in the determination. In any case, the claimant must serve a "notice of intention" indicating that it intends to suspend the works. The claimant may proceed with the suspension if the payment remains outstanding at least two business days after the service of this notice.	A right to suspend performance of the works arises where: a respondent has failed to serve a payment schedule, and failed to pay all or part of amount due to the claimant; a respondent has served a payment schedule, but failed to pay all or part of the scheduled amount; an adjudication determination has been issued, but the respondent has failed to pay all or part of the amount awarded in the determination. In any case, the claimant must serve a "notice of intention" indicating that it intends to suspend the works. The claimant may proceed with the suspension if the payment remains outstanding at least two business days after the service of this notice.	A right to suspend performance of the works arises where: a respondent has failed to serve a payment schedule, and failed to pay all or part of amount due to the claimant; a respondent has served a payment schedule, but failed to pay all or part of the scheduled amount; an adjudication determination has been issued, but the respondent has failed to pay all or part of the amount awarded in the determination. In any case, the claimant must serve a "notice of intention" indicating that it intends to suspend the works. The claimant may proceed with the suspension if the payment remains outstanding at least three business days after the service of this notice.	A right to suspend performance of a contractor's obligations arises where a respondent fails to pay an amount awarded under an adjudication determination. In such circumstances, the claimant must comply with the following procedure: give a "notice of intention" to the respondent indicating that it intends to suspend the performance of its obligations; state in the "notice of intention" the date on which the claimant intends to suspend performance; serve the notice at least three business days before the date stated in the notice; and if the amount remains unpaid by the date stated in the notice, a claimant may then suspend performance.

COMPARISON TABLE: NT, SA, ACT AND TAS

	NORTHERN TERRITORY	SOUTH AUSTRALIA	AUSTRALIAN CAPITAL TERRITORY	TASMANIA
Main local legislation	*Construction Contracts (Security of Payments) Act 2004* (NT)	*Building and Construction Industry Security of Payment Act 2009* (SA)	*Building and Construction Industry (Security of Payment) Act 2009* (ACT)	*Building and Construction Industry Security of Payment Act 2009* (Tas)
What amounts can be claimed?	Amounts relating to the performance (or non-performance) by a contractor of obligations under a construction contract.	Payment for "construction work" or the supply of related goods or services undertaken under a construction contract.	Payment for "construction work" or the supply of related goods or services undertaken under a construction contract.	Payment for "building work or construction work" or the supply of related goods or services undertaken under a building or construction contract.
Do any specific exclusions apply?	In the NT, the following does not qualify as "construction work": drilling for and extracting oil or natural gas; or constructing a shaft, pit or quarry, or drilling, for the purpose of discovering or extracting any mineral bearing or other substance; or constructing watercraft (i.e., shipbuilding).	In SA, the following does not qualify as "construction work": drilling for and extracting oil or natural gas; or extraction of minerals, including tunnelling, boring or constructing underground works for that purpose.	In the ACT, the following does not qualify as "construction work": drilling for and extracting oil or natural gas; or extraction of minerals, including tunnelling, boring or constructing underground works for that purpose.	In TAS, the following does not qualify as "building or construction work": drilling for and extracting oil or natural gas; or extraction of minerals, including tunnelling, boring or constructing underground works for that purpose.
Party that may make adjudication application under the Act	Both parties up and down the contract chain (contractor and principal) (i.e., the party entitled to make a payment claim and the party that receives a payment claim).	Claimant only (i.e., party entitled to make a payment claim).	Claimant only (i.e., party entitled to make a payment claim).	Claimant only (i.e., party entitled to make a payment claim).

	NORTHERN TERRITORY	SOUTH AUSTRALIA	AUSTRALIAN CAPITAL TERRITORY	TASMANIA
Timing for service of payment claim (or similar)	Within the period determined under the construction contract. If the contract does not include a written provision about how a party is to make a claim for payment: the implied provision provided by the Act will be applicable; and the contractor will be entitled to claim a progress payment at any time after it has performed any of its obligations.	A contractor is entitled to claim a progress payment on and from each "reference date" calculated under the construction contract. If the contract does not provide for such a date, the "reference date" will be the last day of the named month in which the work was first carried out, and the last day of each subsequent named month. The claim must be served by the later of: the period determined under the construction contract; or six months after the construction work was last carried out (or related goods or services were last supplied).	A contractor is entitled to claim a progress payment on and from each "reference date" calculated under the construction contract. If the contract does not provide for such a date, the "reference date" will be the last day of the calendar month in which the work was first carried out, and the last day of each subsequent month. The claim must be served by the later of: the period determined under the construction contract; or 12 months after the construction work was last carried out (or related goods or services were last supplied).	A contractor is entitled to claim a progress payment on and from each "reference date" calculated under the construction contract. If the contract does not provide for such a date, the "reference date" will be the last day of each calendar month in which works are carried out under the contract. The claim must be served by the later of: the period determined under the construction contract; or 12 months after the building or construction work was last carried out (or related goods or services were last supplied).
Does the payment claim need to be endorsed as a claim under the Act?	No.	Yes. The payment claim must state that it is made under the Act.	Yes. The payment claim must state that it is made under the Act.	Yes. The payment claim must state that it is a claim made under the Act.
Timing for service of response to payment claim (payment schedule or similar)	Within the period determined under the construction contract. If the contract does not include a written provision about how a party is to respond to a payment claim: the implied provision provided by the Act will be applicable; and the responding party must serve a notice of dispute within 10 working days if it disputes all or any part of the payment claim.	By the earlier of: the period determined under the construction contract; or 15 business days after the payment claim is served.	By the earlier of: the period determined under the construction contract; or 10 business days after the payment claim is served.	By the earlier of: before the end of the period in which payment is required under the building or construction contract; or the expiry of either 10 or 20 business days after the payment claim is served (the longer period applying to certain residential projects).

	NORTHERN TERRITORY	SOUTH AUSTRALIA	AUSTRALIAN CAPITAL TERRITORY	TASMANIA
Effect of not serving a valid response to a payment claim	In the NT, this depends on the terms of the construction contract. If the contract does not include a written provision about how a party is to respond to a payment claim, the implied provision provided by the Act will apply, and a respondent will be liable to pay the full claimed amount if it does not serve a notice of dispute. However, even where this implied provision is applicable, it does not preclude a respondent from defending an adjudication application despite any failure to dispute the whole or part of a payment claim.	If a payment schedule is not served in time, the respondent is liable to pay the full claimed amount. However, a claimant may not bring an adjudication application seeking payment of the same unless it provides the respondent with a further opportunity to serve a payment schedule under s 17(2).	If a payment schedule is not served in time, the respondent is liable to pay the full claimed amount. However, a claimant may not bring an adjudication application seeking payment of the same unless it provides the respondent with a further opportunity to serve a payment schedule under s 19(2).	If a payment schedule is not served in time, the respondent is liable to pay the full claimed amount. However, a claimant may not bring an adjudication application seeking payment of the same unless it provides the respondent with a further opportunity to serve a payment schedule under s 21(4).
Maximum payment terms	No specific maximum period applicable under the Act, unless the construction contract does not provide written a term for when payment falls due. In that case, the implied provisions will apply and a progress payment will be payable within 28 days after the respondent receives a payment claim.	No specific maximum period applicable under the Act, unless the construction contract does not provide a term for when payment falls due. In that case, a progress payment will be payable within 15 business days after the service of a payment claim.	No specific maximum period applicable under the Act, unless the construction contract does not provide a term for when payment falls due. In that case, a progress payment will be payable within 10 business days after the service of a payment claim.	No specific maximum period applicable under the Act, unless the construction contract does not provide a term for when payment falls due. In that case, a progress payment will be payable within 10 or 20 business days after the payment claim is served (the longer period applying to certain residential projects).

	NORTHERN TERRITORY	SOUTH AUSTRALIA	AUSTRALIAN CAPITAL TERRITORY	TASMANIA
Timeframe for serving adjudication application		The timeframe depends on the nature of the application: if respondent has scheduled an amount less than the amount claimed in the payment claim, within 15 business days after the payment schedule is served; or if respondent has failed to pay all or part of a scheduled amount, within 20 business days from the due date for payment.	The timeframe depends on the nature of the application: if respondent has scheduled an amount less than the amount claimed in the payment claim, within 10 business days after the payment schedule is served; or if respondent has failed to pay all or part of a scheduled amount, within 20 business days from the due date for payment.	The timeframe depends on the nature of the application: if respondent has scheduled an amount less than the amount claimed in the payment claim, within 10 business days after the payment schedule is served; or if respondent has failed to pay all or part of a scheduled amount, within 20 business days from the due date for payment.
Appointment of adjudicator by appointing authority	Within five working days after service of an adjudication application, failing which, an adjudicator will be appointed by the Registrar.	As soon as practicable (no set timeframe).	As soon as practicable (no set timeframe).	As soon as practicable (no set timeframe).
Timeframe for serving adjudication response	Within 15 working days after being served with the application.	By the later of: five business days after receipt of the application; or two business days after receipt of notice of adjudicator's acceptance of the application.	By the later of: seven business days after receipt of the application; or five business days after receipt of notice of adjudicator's acceptance of the application.	By the later of: 10 business days after receipt of the application; or five business days after receipt of notice of adjudicator's acceptance of the application.
Can a respondent argue new reasons for non-payment in the adjudication response?	Yes.	No. Limited to reasons already included in the payment schedule.	No. Limited to reasons already included in the payment schedule.	No. Limited to reasons already included in the payment schedule.
Timeframe for adjudication determination	By the earlier of: 10 business days after the service of the adjudication response; or if no response is served, 10 business days after the last day for service of the response. The timeframe may be extended by the consent of the parties or the Registrar.	Unless the parties consent to a longer timeframe, within 10 business days after the respondent lodges a response (or if no response is lodged, the end of the period in which the response was due).	Unless the parties consent to a longer timeframe, within 10 business days after the respondent lodges a response (or if no response is lodged, the end of the period in which the response was due).	Unless the parties consent to a longer timeframe, within 10 business days after the respondent lodges a response (or if no response is lodged, the end of the period in which the response was due).

	NORTHERN TERRITORY	SOUTH AUSTRALIA	AUSTRALIAN CAPITAL TERRITORY	TASMANIA
Recycled claims permitted?	Yes. A payment claim may include matters covered in a previous payment claim (and may give rise to a new "payment dispute" which can be adjudicated). However, a claimant is unlikely to be permitted to re-adjudicate a claim for payment of an amount that has been determined by a previous adjudication application.	Yes. A claimant may include an amount in its payment claim that has been the subject of a previous payment claim. However, a claimant is unlikely to be permitted to re-adjudicate a claim for payment of an amount that has been determined by a previous adjudication application.	Yes. A claimant may include an amount in its payment claim that has been the subject of a previous payment claim. However, a claimant is unlikely to be permitted to re-adjudicate a claim for payment of an amount that has been determined by a previous adjudication application.	Yes. A claimant may include an amount in its payment claim that has been the subject of a previous payment claim. However, a claimant is unlikely to be permitted to re-adjudicate a claim for payment of an amount that has been determined by a previous adjudication application.
Right to suspend for non-payment	A right to suspend performance of a contractor's obligations arises where a respondent fails to pay an amount awarded under an adjudication determination. In such circumstances, the claimant must comply with the following procedure: give a "notice of intention" to the respondent indicating that it intends to suspend the performance of its obligations; state in the "notice of intention" the date on which the claimant intends to suspend performance; serve the notice at least three working days before the date stated in the notice; and if the amount remains unpaid by the date stated in the notice, a claimant may then suspend performance.	A right to suspend performance of the works arises where: a respondent has failed to serve a payment schedule and failed to pay all or part of amount due to the claimant; a respondent has served a payment schedule but failed to pay all or part of the scheduled amount; an adjudication determination has been issued, but the respondent has failed to pay all or part of the amount awarded in the determination. In any case, the claimant must serve a "notice of intention" indicating that it intends to suspend the works. The claimant may proceed with the suspension if the payment remains outstanding at least two business days after the service of this notice.	A right to suspend performance of the works arises where: a respondent has failed to serve a payment schedule and failed to pay all or part of amount due to the claimant; a respondent has served a payment schedule but failed to pay all or part of the scheduled amount; an adjudication determination has been issued, but the respondent has failed to pay all or part of the amount awarded in the determination. In any case, the claimant must serve a "notice of intention" indicating that it intends to suspend the works. The claimant may proceed with the suspension if the payment remains outstanding at least two business days after the service of this notice.	A right to suspend performance of the works arises where: a respondent has failed to serve a payment schedule and failed to pay all or part of amount due to the claimant; a respondent has served a payment schedule but failed to pay all or part of the scheduled amount; or an adjudication determination has been issued, but the respondent has failed to pay all or part of the amount awarded in the determination. In any case, the claimant must serve a "notice of intention" indicating that it intends to suspend the works. The claimant may proceed with the suspension if the payment remains outstanding at least three business days after the service of this notice.

NEW SOUTH WALES

Building and Construction Industry Security of Payment Act 1999 (NSW)

The security of payment regime in New South Wales is governed by the Building and Construction Industry Security of Payment Act 1999 (NSW) ("NSW Act") and the Building and Construction Industry Security of Payment Regulation 2008 (NSW) ("NSW Regulations").

After its introduction ahead of the infrastructure boom generated by the 2000 Sydney Olympics, the regime formed the basis of many other security of payment regimes across Australia.

As discussed in our previous *Alert*, significant changes to the NSW Act came into force on 21 October 2019, introduced by the Building and Construction Industry Security of Payment Amendment Act 2018 (NSW) ("Amendment Act"). Several of the changes implement recommendations made in the Murray Review, with the intention of simplifying the process for progress payments and adjudications. One of the major changes in this regard was the removal of the concept of a "reference date" for the right to submit a payment claim, which had been criticised for being overly technical, and had been a significant source of disputes and case law. It has been replaced with a simpler right to submit monthly payment claims, without recourse to the term "reference date".

Other amendments include the following:

- Re-introduction of the requirement that a payment claim is identified as being made under the NSW Act;
- Entitling a contractor to serve a payment claim on or after the date of termination of the contract (irrespective of the terms of the contract) (to overcome the effect of case law to the contrary that had developed);
- Reducing the due date for payment of a payment claim to a subcontractor from 30 business days to 20 business days after the payment claim is served;
- Enabling a head contractor or subcontractor (who has lodged an adjudication application with a nominating authority) to withdraw the application at any time before the appointment of an adjudicator;
- Enabling a head contractor or subcontractor to withdraw an adjudication application after an adjudicator has been appointed (but before the application has been determined) unless the respondent objects to the withdrawal and the adjudicator considers that it is in the interests of justice to uphold the objection;
- Giving the Supreme Court jurisdiction to set aside only part of an adjudicator's determination if it finds that jurisdictional error has occurred in less than all the issues covered by the determination;
- Prohibiting corporations in liquidation from serving a payment claim or taking action to enforce a payment claim or adjudication determination;
- Extending the inspection of records entitlement to a subcontractor entitled to the retention money;
- Increasing penalties for head contractor corporations that fail to issue a supporting statement with a payment claim from 200 penalty units to 1,000 penalty units; and
- Giving officers from the Department of Finance, Services and Innovation and Fair Trading powers to investigate, monitor and enforce compliance with the NSW Act.

Proposed New Regulations

The NSW Government has also released a draft of proposed new regulations in the Building and Construction Industry Security of Payment Regulation 2020 ("New NSW Regulation") which will replace the current NSW Regulation. Most of the changes implemented by the New NSW Regulation took effect from 1 September 2020; however, there will be a transitional period for some reforms, such as the trust account requirements.

The New NSW Regulation is broadly similar to the existing NSW Regulation but aims to implement several recommendations from the Murray Review and the Collins Inquiry.[4] Most of the changes are intended to provide greater protections for retention money while improving administrative efficiency. Specifically, the New NSW Regulation:

- Requires head contractors to maintain retention money trust accounts on projects with a value of $10 million or more (the current threshold is $20 million);

- Requires head contractors to deposit retention amounts into the retention trust accounts as soon as possible and no later than seven days after receiving the money;
- Removes the annual reporting requirements in respect of retention money trust accounts (to offset the increased regulatory burden arising from the lowering of the threshold); and
- Requires head contractors to provide trust account records to subcontractors where their money is held on trust (these ledgers must be provided to the subcontractors every three months or, if otherwise agreed in the contract, at least every 12 months).

Significant for the adjudication process in NSW, the New NSW Regulation introduces qualifications and eligibility requirements for adjudicators, including at least 10 years' industry experience and compliance with continuing professional development requirements.

Case Law Developments: Strict Compliance with Timeframes for Response

Recent case law in NSW confirms the importance of complying strictly with certain procedural steps and timeframes. In June 2020, a developer learned the hard way to comply with the timeframes set out in the NSW Act, even when separate proceedings are on foot.

In *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*,[5] the developer and Decon Australia Pty Ltd ("Decon") were engaged in a series of disputes, one of which had already proceeded to court when Decon served a payment claim on the developer. The developer failed to respond to the payment claim and was therefore prohibited from bringing any cross-claim or raising contractual matters in their defense (despite the fact that the developer had filed a cross-claim in the other proceedings on foot). Decon, as it was entitled to, proceeded to obtain judgment against the developers.

The developers requested that the judgment be stayed on the basis that if they were required to pay Decon, they would become insolvent and their cross-claim might never be heard. The Court was not sympathetic to this argument, deciding that the ability for contractors to receive prompt payment outweighed the potential injustice the developer might suffer by not having its cross-claim heard.

In the current economic situation, it is more important than ever for principals to be aware of their obligations under the NSW Act and to ensure that they respond to claims in time—lest they also lose the opportunity to pursue cross-claims.

VICTORIA

Building and Construction Industry Security of Payment Act 2002 (Vic)

The Building and Construction Industry Security of Payment Act 2002 (Vic) ("Victorian Act") was introduced in 2002 and, like in most Australian jurisdictions, was modelled on the New South Wales regime. Many of the protections afforded by the Victorian Act are similar to the NSW legislation. There are legislative guarantees on regular progress payments, default payment terms which apply when a construction contract is silent on those matters and a legislative right to suspend works in the event of non-payment.

However, while there are similarities between the regimes in NSW and Victoria, amendments to the Victorian Act in 2006 significantly curtailed the types of claims that could be included in valid payment claims under the Victorian Act and therefore, by extension, the types of claims and payment disputes that could be resolved via rapid adjudication. As a result, there are significantly fewer adjudications in Victoria than there are in Queensland and NSW. There is some debate as to whether the lower number of adjudication applications is reflective of a system that is working better or worse than its equivalents elsewhere.[6]

Unlike in other jurisdictions where adjudicators are empowered to determine all manner of common construction disputes, an adjudicator appointed under the Victorian Act is not empowered to adjudicate a claim for:

- A variation (unless it is a "claimable variation" which is typically a variation that has been accepted by the parties or a low-value variation which has arisen under an informal and/or relatively low-value construction contract); and
- An "excluded amount", which includes an amount for damages, delay costs, latent conditions or non-contract-related claims like misleading or deceptive conduct.

The effect of these limitations is that the Victorian Act gives rise to far fewer high-value and complex adjudications, which are common in NSW, Queensland and Western Australia. The use of statutory adjudication processes for high value and complex adjudications has long been an issue of significant contention as respondents bemoan the preparation of complex and lengthy responses to adjudication applications in a highly compressed timetable. That said, the Murray Review recommended against legislation that bifurcates "complex" and "standard" adjudication applications, as is the case in Queensland.[7] The Murray Review was also highly unsupportive of legislation like the Victorian Act that carves out certain categories of claim from the adjudication process, stating that they "operate against the object of the Act and have the potential to impose severe financial hardship on contractors".[8]

The Victorian regime also differs from other jurisdictions in that it has remained largely unchanged since 2006 when the above limitations were introduced. Notwithstanding this legislative stability, the Victorian Act has had its share of uncertainty, and contractors still test the outer limits of what is permitted under the Act. This has manifested in a steady flow of litigation in the Victorian Courts regarding the precise operation of the Act. These cases have centred around the accrual of reference dates, the validity of payment claims and the correct application of the "excluded amounts" provision.

What Claims Can Be Adjudicated?

A valid payment claim under the Victorian Act capable of being referred to adjudication must not include a claim for a variation (unless it is a "claimable variation") or an "excluded amount". In summary:

- A variation which is not disputed by the parties is a claimable variation;
- A variation can be a claimable variation (regardless of its value) where the construction contract does not have a dispute resolution clause or where the total contract sum is less than $150,000;
- If the contract sum is between $150,000 and $5 million then a variation may be a claimable variation unless the total amount of disputed variations between the parties exceeds 10% of the original contract sum; and
- If the contract sum exceeds $5 million then a variation can only be a claimable variation where there is no dispute resolution clause.

It is unsurprising that the provisions in the Victorian Act which prescribe what "claimable variations" are have been described as "remarkable", "convoluted" and "tortuous" by the Victorian Supreme Court.[9] Others have attributed some of the blame for the poor take-up of the adjudication process to the drafting of these provisions.

In addition to restricting what variations can and cannot form part of a payment claim, the Victorian Act lists several categories of claims which must not be taken into account when calculating the value of progress payments under the Act (i.e., in adjudication). These claims, common in the construction industry and other Australian security of payment regimes, are referred to as claims for "excluded amounts" and include claims for:

- Compensation due to the "happening of an event" including any amount relating to latent conditions, time-related costs and changes in regulatory requirements;
- Damages, including damages for breach of the construction contract; and
- Claims arising at law including, for example, claims of misleading or deceptive conduct under the *Australian Consumer Law*.

The vast majority of sophisticated contractors enter into lengthy, written construction contracts (many based on standard forms) which contain sophisticated dispute resolution clauses. Accordingly, the concept of non-claimable variations has curtailed the application of the Victorian Act to most large, complex construction disputes. This stands in contrast to other jurisdictions which regularly see adjudicators determine, on an interim basis, disputed variation claims and claims for excluded amounts, including, for example, claims for breach of contract.

As one might expect, claimants have sought to test the outer limits of what is permitted under the Victorian Act in an attempt to avail themselves of the adjudication procedure. As set out below, in recent cases before the Victorian Supreme Court, the

Court has adopted a 'substance over form' approach to adjudication applications that have sought to reformulate payment claims in an attempt to avoid the application of the above restrictions.

Case Law Developments: Reclassifying Excluded Amounts, Seabay and Shape

In 2011 the Victorian Supreme Court delivered its judgment in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor*.[10] In this case, the respondent (Galvin) submitted a payment claim to the applicant (Seabay) claiming a total of just under $2.2 million. Seabay assessed the payment claim and provided a payment schedule under which it assessed the amount due to Galvin as nil after liquidated damages were deducted from the amount otherwise owed to Galvin.

Galvin commenced adjudication and argued that Seabay was not entitled to deduct liquidated damages, as it was an excluded amount under the Victorian Act. The adjudicator agreed and found in favour of Galvin. Seabay sought judicial review of the adjudicator's determination.

Vickery J held that Seabay's deduction for liquidated damages was an "excluded amount" as it fell within the concept of an amount claimed under the contract for compensation due to the "happening of an event" and an amount for damages for breach of contract, referred to above.

Vickery J concluded that such an excluded amount is to be removed from the interim payment and ignored by an adjudicator in order to give effect to the "pay now and argue later" intention of the Act. Critically, Vickery J applied the definition of "excluded amounts" to amounts claimed by a claimant in a statutory payment claim and by a respondent in a payment schedule. This was important as it meant that the definition of "excluded amounts" curtailed not only payment claims served under the Act but also payment schedules served under the Act which sought to set off excluded amounts, including with respect to liquidated damages.

More recently, in *Shape Australia v The Nuance Group*,[11] the Supreme Court of Victoria was required to consider the correct application of the Seabay principles in the context of a final payment claim submitted by a contractor under the Act. The decision demonstrates the "substance over form" approach that the Victorian Supreme Court has taken to the identification of excluded amounts under the Act.

In *Shape*, the applicant (Shape) served payment claim 14 under the Act on the respondent (Nuance) in connection with works performed by Shape for the redevelopment of Melbourne International Airport.

Shape submitted that the amount claimed in payment claim 14 was calculated by taking the total value of the works performed and subtracting the amounts previously paid by Nuance. Nuance submitted that this amount was in substance an attempt to recoup liquidated damages that had been periodically levied by Nuance over time and deducted from sums otherwise due to Shape. Indeed, Nuance pointed out that Shape initially characterized payment claim 14 as a "reconciliation" of the contract.

The adjudicator accepted Nuance's submission and determined that while the payment claim did not expressly state that its purpose was to recoup liquidated damages, that was its effect in substance. The adjudicator then concluded that the claimed amount was an excluded amount having regard to the principles set out in *Seabay*.

Shape referred the adjudicator's decision to the Supreme Court of Victoria. On this issue, Justice Digby stated that the salient question to be determined was whether Shape had sought to pre-emptively "recoup" Nuance's asserted and earlier adjusted entitlement to liquidated damages through payment claim 14. His Honor found that despite there being no express reference to liquidated damages, the claims in payment claim 14, in all probability, are in substance in the nature of a claim to recoup Nuance's asserted entitlement to liquidated damages. The adjudicator was, therefore, correct to conclude they were excluded amounts that must be ignored.

QUEENSLAND

Building Industry Fairness (Security of Payment) Act 2017 (Qld)

The security of payment legislation in Queensland is the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) ("Qld Act") which came into force on 17 December 2018.

The Qld Act replaced the previous *Building and Construction Industry Payments Act 2004* (Qld) ("BCIPA").[12] Significant changes to the progress payment process under the Qld Act (from the previous regime under BCIPA) included:

- Refining the definition of "construction work" and "supply of related goods and services";
- Removing the requirement that a payment claim be endorsed under the Act (i.e., a payment claim no longer needs to state that it is made under the legislation);
- Precluding respondents from raising new reasons for withholding payment in adjudication, which were not included in the payment schedule, regardless of whether the claim is standard or complex; and
- Introducing new penalties and offences for failure by the respondent to provide a payment schedule or pay an adjudicated amount by the due date.

Recent Legislative Reforms

The Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020 ("Amending Act") was passed on 15 July 2020, amending the Qld Act. The Amending Act received royal assent on 23 July 2020.

The new amendments to the Qld Act are principally aimed at simplifying the project bank account framework and introduce reforms to further enhance the effectiveness of the payment process, including:

- New rights for contractors if an adjudicated amount is not paid by the due date for payment. Under the Amending Act, claimants may make a withholding request against both owners and financiers or place a charge on land if the respondent owns the land on which the building took place;
- New obligations on head contractors to provide a supporting statement to the principal stating that all subcontractors have been paid, or if they have not been paid, the reasons why; and
- Additional penalties for principals for failure to pay sums certified or adjudicated by the due date for payment.

These amendments will commence on 1 October 2020.[13] For further insights, keep an eye out for our separate upcoming publication on the amendments.

Case Law Developments: Payment Schedules, Service and Identifying the Construction Work

In Queensland, recent cases highlight the necessity for both claimants and respondents to observe strict compliance with any statutory requirements before parties can avail themselves of their statutory rights under the Qld Act, where strict compliance is required to achieve the overriding objective and purpose of the legislation. In determining whether strict compliance with any formal statutory requirements for service or essential steps in the payment adjudication process is necessary, Queensland courts will have regard to the nature and overriding purpose of the legislation. Strict compliance on the part of both claimants and respondents will be required where that facilitates the achievement of the legislative purpose: quick and expedient resolution of payment disputes.

For respondents, there have always been severe consequences for failing to submit a payment schedule in compliance with the legislative requirements. Those consequences have been accentuated by recent legislative amendments, and that trend has been upheld in recent judicial decisions. Those consequences can include being precluded from raising valid reasons for withholding payment in a subsequent adjudication—and in contrast to the previous BCIPA, this is now irrespective of the size or complexity of the payment dispute.

Under the previous BCIPA, respondents in an adjudication over a "complex" payment claim (claims in excess of $750,000) could raise additional reasons for withholding payment even if they were not originally raised in the payment schedule. However, the December 2017 introduction of the Qld Act altered the position so as to ensure that a respondent is required to raise any reasons on which it might wish to rely in any subsequent adjudication for withholding payment in its payment schedule, irrespective of whether the payment claim is standard or complex. This change, and the policy reasons behind it, were considered in the recent decision of *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd.*[14]

Monadelphous was head contractor on a project involving the upgrade of a sewage treatment facility and entered into a subcontract with Acciona to carry out process engineering design and engineering support, supply of mechanical equipment and material for incorporation into the head contract

works, commissioning, and training support. The issue before the Court concerned an adjudication decision made in relation to a fifth adjudication application submitted by Acciona, in which the adjudicator determined that Acciona was entitled to $nil. The adjudicator reached that conclusion by setting off monies found owing by Acciona to Monadelphous against the payment claim in respect of certain obligations under the contract that Monadelphous had not raised in its payment schedule. On that basis, Acciona applied to the Court to set aside the adjudication decision.

Section 82(4) of the Qld Act provides that the adjudication response must not include any reasons for withholding payment that were not included in the payment schedule when given to the claimant. Section 88(3) in turn provides that the adjudicator must not consider a reason included in an adjudication response to the adjudication application, if the reason is prohibited from being included in the response under s 82.

While Monadelphous had asserted a contractual entitlement against Acciona under specific provisions of their subcontract as a reason for issuing a $nil payment schedule, its adjudication response later referred to certain post-termination conduct which had not been mentioned as an explanation for withholding payment in the payment schedule. A review of the adjudicator's reasons revealed that not only had he had regard to those "new reasons" but had relied on them in justifying his ultimate conclusion.[15] Justice Bond held that this demonstrated that the adjudicator had breached s 88(3)(b) by considering reasons for withholding payment that he was obliged to ignore[16] and found in favour of Acciona on the point that this part of the adjudicator's decision was a jurisdictional error.

An important part of his Honor's reasoning was a finding that the evident policy behind the Qld Act is to alter what had been the status quo under the BCIPA. That is, so as to ensure that a respondent includes in its payment schedule any reasons for withholding payment on which it might wish to rely in any subsequent adjudication, thereby permitting a claimant to engage with those submissions in its adjudication application and avoiding the possibility of surprise in the adjudication response.[17]

Also of some note, this decision is the first to apply s 101(4) of the Qld Act which expressly allows the Court to sever parts of a decision attended by jurisdictional error from the remainder of the decision. In this case, the result was that the part of the adjudicator's decision where he had found an entitlement to Acciona in the payment claim survived and remained binding on the parties.

In *Melaleuca View Pty Ltd v Sutton Constructions Pty Ltd & Ors*,[18] the respondent's payment schedule was found not to comply with s 69(a) of the Qld Act in that it failed to identify the specific payment claim to which it related. The claimant, Sutton, had submitted two invoices to the respondent, Melaleuca. The respondent delivered a payment schedule which responded only to the matters raised in respect of one of the invoices but not the other. The adjudicator determined that as the payment schedule failed to conform with s 69 of the Qld Act, the respondent had not provided a payment schedule under s 76. Consequently, the respondent had no right of reply during the adjudication process which, unsurprisingly, was determined in favour of the claimant. The respondent was subsequently liable to pay to the claimant the full amount claimed and also the entirety of the adjudicator's fees. The Court stated that, although an overly technical approach to payment schedules should not be adopted, there was no way it could be inferred that the payment schedule applied to both invoices.

For claimants, the decision in *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor*[19] (which was upheld by the Court of Appeal)[20] held that the valid exercise of an adjudicator's jurisdiction is conditional on the decision having complied with a basic or essential statutory requirement that the claimant has validly served a payment claim on the respondent, as soon as possible. The issue in *Niclin* concerned s 21(5) of the now repealed BCIPA but is of continuing relevance given that the provision is substantially the same as s 79(3) in the Qld Act.[21] The section provides that an adjudication application *must* be served on the respondent but does not stipulate a time by which service must be effected.

Niclin and SHA had entered into contracts for the construction of petrol stations. Niclin lodged three adjudication applications with the Queensland Building and Construction Commission ("QBCC") on 28 November 2018. On the same day, documents were served upon SHA's solicitors, including submissions in support of the adjudication applications. The documents served, however, did not include the approved form for an adjudication application for any of the purported adjudication

applications. The accompanying application forms were ultimately served 12 days later. The adjudicator determined that s 38(4) of the *Acts Interpretation Act* 1954 (Qld) ("AIA") applied such that in the absence of a timeframe under s 21(5), the timeframe was "as soon as possible". He further determined that service of the application forms 12 days after their filing was not "as soon as possible". As the applications had not been served in accordance with s 21(5), and the defect in service could not be cured after the point in time at which the respondent had served its response, the adjudicator's jurisdiction was not enlivened.

Niclin applied to the Court for a declaration that the adjudicator's decisions were void, contending that the adjudicator had not had jurisdiction to determine the applications. In *Niclin*, Justice Ryan ultimately concluded that, although what occurred (i.e., the failure to submit the adjudication application forms along with the application submissions) was an oversight, and "that there is an argument that, in real terms, the respondent has suffered no prejudice or no real prejudice, … service within 12 business days when near contemporaneous service is contemplated within a scheme that imposes brutally fast timeframes, does not allow the expeditious consideration of adjudication applications, which is what is intended by the [BCIPA]."[22] Her Honor considered the importance of service as the starting point for the calculation of timeframes under the BCIPA, for example, for the start of the 10 days within which the respondent must provide its response, which in turn is the starting point for the calculation of the timeframe within which the adjudicator is to make his or her decision.[23] Justice Ryan considered that it "is an important requirement in the context of the [legislative] scheme".[24]

Her Honor endorsed the following statement made in *Chase Oyster Bar v Hamo Industries* in the context of the NSW Act:[25]

> The Security of Payments Act gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payments, the Security of Payments Act lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.

Justice Ryan also referred to the decision of the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[26] and emphasised that a feature of the adjudication scheme in the NSW Act is "that each party knows precisely where they stand at any point in time" and that this applied equally to claimants and respondents. It was on that premise that she applied the service requirements under section 21(5) strictly and concluded that they were required before an adjudication could be validly undertaken.

Her Honor dismissed the applicant's argument that in this case there could be in effect two-step service of the adjudication application and submissions because, in this case,[27] the essential element of the application in the approved form had not been served when the adjudication was made.[28]

In *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd & Ors*,[29] the claimant (Muggeridge) issued a payment claim that the respondent (KDV) contended was invalid because it did not adequately identify the construction work to which it related and therefore failed to satisfy the requirements of s 17(2)(a) of the BCIPA (which is in near-identical terms to s 68(1)(a) of the Qld Act). The matter proceeded to adjudication, and the adjudicator rendered a decision requiring KDV to pay some $800,000 to Muggeridge. KDV was successful in applying to the Court for a declaration that the decision was void for jurisdictional error and that it be set aside.

The payment claim in question was a one-page document, containing six columns, which provided no more than a description of the category of the work in a "Trade Breakdown Schedule" rather than identifying the actual construction work done. The Trade Breakdown Schedule was a document which was required to be submitted as part of the tender to provide a breakdown of the contract sum. It set out the various categories of work required under the contract and attributed a part of the contract price to each category.

Justice Brown accepted, as Muggeridge contended, that KDV was aware of the content of the Trade Breakdown Schedule, but held that "where there are some 51 categories of work in a sizeable contract with a number of components in the work to be undertaken, merely referring to the category of work does not identify the construction work itself to which the claim relates".[30] Her Honor also considered that Muggeridge's

identification of the percentage of work carried out in total was insufficient for KDV to reasonably identify the work in respect of the claim—there was nothing to identify which 30% of the work was done.

Her Honor concurred with a previous Queensland judgment that it is not reasonable to require a respondent to a payment claim to "reconstruct all the previous claims to try to determine what had been paid for and the work done, so as to identify the balance of the work which was the subject of the claim"[31] and that requiring such work is not consistent with the short timeframe in which the payment schedule must be issued.

Importantly, Her Honor distinguished this from cases such as *Clarence Street Pty Ltd v Isis Projects Pty Ltd*[32] where the Court approved statements to the effect that the equivalent NSW payment claim requirement is capable of being satisfied where it gives an item reference from the contractual or other written identification of the work. Her Honor placed weight on the fact that in that case, the item number was supplemented by a single line item description, which was not present here, and that the case also involved a course of prior dealings where that format had been used, apparently without objection.[33]

While the cases above emphasise the importance of strict compliance with procedural elements, they can be contrasted with the emphasis on "substance over form" in *J.R. & L.M. Trackson Pty Ltd*[34] in relation to the prohibition upon service of more than one payment claim per reference date.

In *Trackson,* a payment claim was submitted by an email containing three attached invoices referring to the same date and work under one contract. The adjudicator accepted this as one payment claim, and the claimant was successful in the adjudication. The respondent applied for an order setting aside, or declaring void, the adjudication decision on the basis that the claimant had served more than one payment claim in respect of the same reference date contrary to s 17(4), or, in the alternative, if it had served only one payment claim, it had filed more than one adjudication application contrary to s 21.

Justice Ryan referred to several other decisions that adopted an approach of "substance over form" in relation to the legislation[35] and ultimately upheld the adjudicator's decision on this issue in concluding:[36]

> The authorities emphasise the need to approach this issue in a way which does not give undue emphasis to form over substance, having regard to the purpose for the prohibition upon service of more than one payment claim per reference date, and to consider the way in which the documents were likely to be reasonably understood by their recipient.

WESTERN AUSTRALIA

Construction Contracts Act 2004 (WA) and the "West Coast Model"

The *Construction Contracts Act 2004* (WA) ("WA Act") came into force on 1 January 2005. The Act modifies certain provisions in construction contracts and seeks to provide a regime for the rapid adjudication of payment disputes under construction contracts. The Act also implies key terms into WA construction contracts, including the right to be paid and how to claim payment where those terms are silent.

The WA Act differs in material ways from the security of payment regimes in other Australian jurisdictions, other than the Northern Territory. The distinction between WA and the Northern Territory on the one hand and the remaining states on the other is often described as the "West Coast Model" versus the "East Coast Model". Some key characteristics unique to the WA regime are as follows.

Implied statutory rights, rather than mandatory terms	The East Coast Model prescribes mandatory payment terms to govern the parties' relationship, which can override inconsistent provisions in a construction contract. The West Coast Model implies statutory payment terms where the construction contract is silent. This means that in WA (and the NT), construction contracts can include longer periods for the service of a payment claim or response, which can extend the period before a claimant becomes entitled to adjudicate.
Both parties can make a payment claim and adjudicate	Either party to a construction contract can make a payment claim up or down the contracting chain, and can refer that claim to adjudication. For example, under the WA Act, a principal could adjudicate a payment claim in order to recover liquidated damages from a contractor, or for the cost of remedial works for defects. This would not be possible under the East Coast Model, which allows only for recovery of progress payments up the contracting chain.
Respondents can raise new reasons for rejecting payment	The recipient of a payment claim may include new reasons for rejecting payment in any adjudication response. This differs from the East Coast Model, where respondents in all states (except Victoria) are limited to the reasons for rejecting payment that were included in the payment schedule. The ability to raise new arguments in an adjudication response benefits respondents in complex claims which may require a more detailed or legalistic consideration by an adjudicator. However, new arguments may give rise to further disputes if claimants are not given a reasonable opportunity to address arguments not previously raised by respondents, such as reliance on new set-offs or counterclaims.
Broad definition of "payment dispute"	The broad definition of "payment dispute" in the WA Act means that a large variety of claims can be adjudicated. This includes claims for payment of contractual entitlements such as variations and costs for delay and disruption, as well as claims seeking to recover security or retention monies being held pursuant to the construction contract.
90 days to make an adjudication application	Under the WA Act, a party has 90 days from the date of a payment dispute arising to make an application for adjudication. This time frame is significantly longer than what is afforded in other jurisdictions (again, other than the NT) and gives claimants more time to prepare detailed, reasoned and well-substantiated adjudication applications.
No mandatory statutory trusts/project bank accounts	The WA Act does not require the principal to retain money to cover the value of a claimant's adjudication application, nor are there provisions establishing a statutory trust model in WA. Consequently, there are limited protections available to contractors and subcontractors in WA engaged by principals or head contractors who become insolvent. One common tool to protect contractors is the use of project bank accounts ("PBAs"), which function like a trust. PBAs and trust accounts are used effectively on the East Coast. In WA, however, PBAs are mandated only for use on government projects exceeding $1.5 million in value, and are not currently required for use in the private sector.
Mining exclusion	The definition of "construction work" under the WA Act excludes fabricating and assembling plants related to mining. The only other jurisdiction with a similar concept is Queensland. What constitutes "excluded work" for the purposes of the WA Act has long been a fraught question for adjudication applicants and respondents, and has been the subject of much judicial consideration in Western Australia, as parties grapple with the practical consequences of the mining exclusion's application to large construction contracts.

The adjudication process contemplated by the WA Act was intended as an informal, rapid and less expensive method of resolving payment disputes in the construction industry. Instead, its application has resulted in a long line of disgruntled parties seeking judicial review (or enforcement) of adjudication determinations. The myriad of complex jurisdictional issues and procedural requirements arising from the WA Act's formulation provide fertile ground for parties seeking to avoid or delay making payment. As a result, an increasing number of payment disputes are being referred to the Supreme Court for review based on technical objections, often resulting in parties with valid claims being kept out of pocket for years while the Court processes occur. Due to the nature of the WA construction industry and the focus on major resources, many of those challenges involve mega-payment claims and therefore high-value disputes. For example, Jones Day recently represented Duro Felguera in relation to challenges adjudication determinations valued at approximately $64 million.[37]

In some instances, these Court processes (including appeals) involving what are supposed to be "rapid adjudications" can take as long—if not longer—than what it would take to resolve the disputes by commercial arbitration. This practical reality represents a stark contrast from the ideals and purpose behind the WA Act, directed to resolving payment disputes quickly, efficiently and cost effectively.

However, reforms have recently been proposed with a view to bringing the WA model more into line with the East Coast Model, as discussed below.

Recent Proposed Legislative Reforms

The Western Australian government has recently sought industry comment on a suite of significant proposed reforms to the WA regime by way of the *Building and Construction Industry (Security of Payment) Bill 2020* ("WA Bill"). If passed, the Bill represents the most significant reform to the regulation of payments in the construction industry since the enactment of the WA Act more than a decade ago, and it would make WA the first jurisdiction to adopt certain of the more significant recommendations of the Murray and Fiocco Reviews.

Key proposed reforms in the WA Bill include a number of claimant-friendly amendments to the adjudication procedure, including:

- A prohibition on unfair time bars. Under the WA Bill, an adjudicator, judge or arbitrator tasked with considering a payment claim or the correct operation of a construction contract will be empowered to declare a time bar as void if compliance with the provision is "not reasonably possible" or is "unreasonably onerous";
- A substantial narrowing of the mining exclusion (a concept unique to WA and Queensland);
- A reduction in the maximum timeframes for making payment, submitting a payment schedule and applying for adjudication;
- A requirement that a payment schedule include reasons for certifying an amount less than the amount claimed;
- A requirement to indorse payment claims as having been made under the legislation;
- An immediate right to recover amounts claimed in a payment claim as a debt due if no payment schedule is submitted;
- An express right of an adjudicator to engage an expert directly to investigate and report on any matter to which the claim relates;
- A legislative right to make a final payment claim within six months after construction work was last carried out;
- Confirmation that companies in liquidation may not avail themselves of some of the key protections under the WA Act;
- A procedure whereby a claimant may seek to have an adjudication determination reviewed by a "senior adjudicator" where the amount determined is above a monetary threshold; and
- A requirement that parties to construction contracts give the other party five business days' notice of an intention to have recourse to performance security provided under the contract (regardless of whether a notice is otherwise required under the contract).

We recently published an in-depth review of the proposed reforms to the WA Act. For more detail and our analysis of the proposed reforms, see our recent *White Paper*.[38] A further update will be provided when the WA Bill is released for further comment or introduced into the WA Parliament.

Case Law Developments: Cherry-Picking Claims, Simultaneous Adjudications and Estoppel

A recent example of the issues confronting parties to adjudications in WA is the Supreme Court of Western Australia's decision in *Sandvik Mining and Construction Australia Pty Ltd v Fisher [No 2]*,[39] which was handed down in April 2020. The decision is one in a long line of cases which have considered the meaning and scope of a "payment dispute" under the WA Act. Specifically, in this case, the question was whether a determination would be void for jurisdictional error if an adjudicator determined amounts in relation to a progress claim which had already been the subject of a prior determination under the WA Act.

Her Honor Justice Archer denied the application for judicial review and upheld the adjudication determination. Relying on authority established by the WA Supreme Court in *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*[40] (in which Jones Day represented Duro Felguera), Archer J held that each item within a progress claim may itself constitute a payment claim as defined by the WA Act. The decision thus confirms that contractors in Western Australia can now cherry-pick desirable items to adjudicate under a progress claim, while retaining the right to commence separate adjudications over alternative items in the future.

Her Honor Justice Archer handed down another decision earlier this year considering the WA Act, in *Salini-Impregilo SPA v Francis*.[41] The *Salini* case involved a dispute between Salini-Impregilo and subcontractor Geodata Engineering Pty Ltd in relation to two interim payment applications ("IPAs") lodged by Geodata. Geodata made a total of three adjudications applications pursuant to two IPAs.

In September 2018, Geodata lodged an adjudication application in relation to one IPA ("First Application"). In October 2018, Geodata made a further application in relation to the second IPA ("Second Application"). On 3 October 2018, the adjudicator requested further submissions from the parties and an extension of time in relation to the First Application. Salini did not consent to an extension of time. On 5 October 2018, the adjudicator informed the parties that he intended to exercise his statutory right to dismiss the application by virtue of its complexity if Salini refused to consent to an extension of time. On 9 October 2018, the adjudicator asked the parties if Geodata had served its Second Application in accordance with the formalities required by the Act. On 10 October 2018, the period in which the First Application was to be determined lapsed, and a determination was made only in relation to the Second Application. Geodata subsequently lodged a third application on the same grounds as the First Application ("Third Application").

On the day the determination of the Second Application was due, the adjudicator informed the parties he had reached a decision but, pursuant to his statutory right under the Act, was withholding the determination until his fees were paid. The adjudicator's fees were paid the next morning, and only then were the adjudicator's written reasons ("Second Determination") sent to the parties.

Salini applied for judicial review of the adjudicator's determinations, arguing that:

- The adjudicator's correspondence on 3 October 2018 amounted to the beginning of simultaneous adjudication of the First and Second Applications without the parties' consent; and
- The Second Determination was not made within the time prescribed by the WA Act, or alternatively the adjudicator amended the Second Determination after the prescribed time without having the power to do so.

The Court considered the meaning of "simultaneous adjudication", the definition of "determination" under the WA Act and the availability of issue estoppel in certain situations under the WA Act. Her Honor's key findings on each of these three issues were as follows.

- **Simultaneous Adjudication:** The Court held that simultaneous adjudication occurs where an adjudicator adjudicates a dispute during a period overlapping the adjudication of another dispute. For this purpose, "adjudicating" was limited to "evaluating and determining the merits of a dispute" and did not include administrative tasks such as requesting an extension of time, seeking parties' consent for simultaneous adjudications under s 32(3)(b), contemplating exercising discretion under s 32(3)(c), deciding whether to dismiss an application or seeking a deposit for costs.
- **Definition of "Determination":** Her Honor drew a distinction between the function of making a determination and the

obligation to record it in the required format under s 36, finding that the written record of the adjudicator's decision is not the determination. As such, any alterations to an adjudicator's written reasons will not constitute a change to the determination itself. Her Honor also held that that an adjudicator's determination does not include determining liability to pay adjudicator's fees under the WA Act.

- **Issue Estoppel:** Her Honor found that "adjudication estoppel", a form of issue estoppel, arose when Salini attempted to raise a defense in the Third Application that had already been rejected by the adjudicator in the Second Determination. In line with the NSW decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*,[42] Archer J held such an estoppel can be inferred by the provisions of the WA Act to "prevent … the re-agitation of an issue that was fundamental to" a determination under s 32(2)(b). This finding helps to align the WA Act with the East Coast Model, which recognizes that a party can be estopped from disputing a fact that has already been determined in an earlier adjudication.

Taken together, the decisions in *Sandvik Mining* and *Salini* have the potential to materially impact the adjudication process under the WA Act and are significant for the future of adjudications in Western Australia. They also demonstrate the complexities within the WA Act and the difficulty arising from the inconsistent East Coast and West Coast Models. These decisions highlight the need for national reform in order to achieve a more harmonized security of payment model and avoid costly and time-consuming disputes over bespoke legislative regimes. The WA Bill may, or may not, be a step in the right direction.

NORTHERN TERRITORY

Construction Contracts (Security of Payments) Act 2004 (NT)

The Northern Territory's security of payment legislation is contained in the *Construction Contracts (Security of Payments) Act 2004* (NT) ("NT Act"). The NT Act is largely similar to the WA Act and contains similar provisions and objectives. The WA Act and the NT Act together make up the "West Coast Model" for security of payment legislation.

Recent Legislative Reforms

The NT Act was amended in February 2020, following a statutory review in late 2017. The Northern Territory review drew heavily on issues identified in Western Australia's 2014 statutory review. The amendments clarify when payment disputes arise, when adjudication may occur and how determinations may be enforced. Notably, section 27(a) was amended to exclude applications for payment disputes that have already been the subject of a valid determination, precluding parties from applying for adjudication where an application had already been made. This amendment clarified doubt that had arisen in the case law as to whether section 27(a) precluded a party from making an application where a previous application in relation to the same dispute had been made and then withdrawn.[43]

The amendments also reduced the timeframe for lodging an application under section 28 to 65 business days (rather than 90 calendar days) and amended section 29 to allow a respondent 15 working days (increased from 10) to submit an adjudication response. In line with the WA approach, section 34(3)(b) was amended to allow an adjudicator to simultaneously adjudicate two or more payment disputes between the same parties "if it will not adversely affect the ability of the adjudicator" to do so. Previously an adjudicator could consider multiple payment disputes simultaneously only with the consent of both parties.

The amendments further align the Northern Territory with the WA Act and the West Coast Model, despite calls for the East Coast Model to be implemented nationwide. If the proposed WA Bill (discussed above) is enacted, further amendments to the NT Act in the near future seem likely, particularly with the pressure to create national harmonisation.

Case Law Developments: Objective Existence of a Payment Dispute and Simultaneous Adjudication

The Northern Territory continues to produce a body of case law with a considerable amount of adjudication determinations arising out of the ongoing Ichthys project. Unlike some of the other Australian jurisdictions, the Northern Territory Supreme Court has adopted a more substance-focussed

approach to the assessment of adjudication proceedings, with several decisions seeming to construe the express terms of the NT Act broadly in order to allow the Court to focus on the substance of the parties' dispute. Below we discuss two cases that demonstrate this trend favouring "substance over form" in recent years.

One such recent decision was that in *Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions & Engineering Pty Ltd & Smith*.[44] In that case, Jemena Northern Gas Pipeline Pty Ltd ("Jemena") subcontracted certain work under a construction contract to Civmec Constructions & Engineering Pty Ltd ("Civmec"). During the course of the project, Civmec made a payment claim asserting that it should be entitled to "reversed" liquidated damages to offset its delay costs, in circumstances where, as Civmec argued, Jemena should have granted an extension of time. Jemena rejected the payment claim, on the basis that it was time barred under the EOT provisions in the subcontract.

Civmec applied for adjudication of the payment dispute. In response, Jemena applied to the Supreme Court seeking orders compelling the adjudicator to dismiss the application, arguing that there was nothing for the adjudicator to determine because no payment dispute had arisen for the purposes of the NT Act.

The Supreme Court refused Jemena's application. In considering whether a payment dispute had arisen, the Court stated that the identification of a payment dispute was an objective task, and it was "not determinative that the parties treat the dispute in a certain way". Notwithstanding those comments, the Court went on to say that it could and would look to the parties' conduct and treatment of the payment claim and adjudication application to determine whether or not a payment dispute existed.

The Court considered that the fact that Jemena had told Civmec in correspondence that it had reviewed the payment claim and assessed the amount payable as nil was evidence that Jemena accepted the existence of the payment claim. The Court also found that because Jemena's adjudication response addressed the terms of the parties' contract in detail and submitted that the adjudicator should find in Jemena's favour, Jemena must have recognized the existence of a payment dispute.

This case should serve as a warning to principals to be consistent in their conduct and treatment of payment claims and adjudication applications. The decision in *Jemena* illustrates that assessing a payment claim can be evidence of accepting the existence of a payment claim (even if the assessment disputes the validity of the payment claim), and that actively participating in an adjudication process can constitute acceptance of a payment dispute.

Another recent Northern Territory Supreme Court decision in which the Court appeared to favour a substantive rather than purely technical approach was in *Ichthys LNG Pty Ltd v JKC Australia LNG Pty Ltd*.[45] In that case, INPEX engaged JKC Australia Pty Ltd ("JKC") to provide EPC works for the Ichthys Project. JKC submitted invoices which were disputed by INPEX. JKC applied for adjudication on 8 November 2018, and subsequently submitted a further two adjudication applications on 21 December 2018. The same adjudicator was appointed to adjudicate the applications, making two separate determinations.

INPEX sought judicial review of both determinations, arguing that they were infected by jurisdictional error because the adjudicator adjudicated those payment disputes simultaneously without the consent of both parties (where such consent was required by s 34(3)(b)). There was a period of overlap of four days, or alternatively two days, that the adjudicator could have been adjudicating both applications simultaneously without consent. INPEX argued that the NT Act's objectives were promoted only by a strict temporal interpretation of simultaneity, which should be inferred from the temporal overlap of four (or two) days.

Barr J held the fact that the adjudicator's appointments overlapped was insufficient to prove, on the balance of probabilities, that the adjudicator started to conduct the adjudication of the second payment dispute before he had finished adjudicating the first payment dispute. Barr J found that the evidence did not disclose when the adjudicator started the adjudication of the second payment dispute, and therefore there was no proper basis to draw an inference that the adjudicator started to adjudicate the second payment dispute before he had completed the first. As such, INPEX's application was dismissed and the adjudicator's determination was upheld. This reasoning departed somewhat from the stricter technical interpretation of simultaneity adopted by the Court in previous cases.[46]

TASMANIA

Building and Construction Industry Security of Payment Act 2009 (Tas)

The security of payment regime in Tasmania is governed by the *Building and Construction Industry Security of Payment Act 2009* (Tas) ("Tas Act"). The Tas Act adopts the East Coast Model approach and contains similar provisions and timeframes to the NSW Act. Consistent with the East Coast Model, the Tas Act allows a claimant to make a claim up to 12 months after construction work is completed.

One of the only areas where Tasmania differs from its East Coast counterparts is that it applies to "residential structures", regardless of whether the party for whom the work is carried out resides or intends to reside at the premises. Different timeframes apply depending on whether the claim is for residential structures or other construction work.

Recent Legislative Reforms

The most recent review of the Tasmanian security-for-payment regime was the Building Regulation Framework Review, which was completed in 2016. The review examined aspects of building regulation with a view to reducing red tape. The resulting Building Reform Package contained three Acts: the *Building Act 2016* (Tas), the *Residential Building Work Contracts and Dispute Resolution Act 2016* (Tas) ("RBWCDR") and the *Occupational Licensing Amendment Act 2016* (Tas). A building contractor's right to make a payment claim under the Tas Act is unaffected by the introduction of these acts.

The RBWCDR contains an adjudication process for parties involved in a dispute about defects in residential construction work, similar to provisions allowing for adjudication for residential construction disputes in the Tas Act.

Case Law Developments: No Adjudication Where Construction Contract Completed

Case law considering the Tas Act is limited, with an average of just one decision handed down per year since 2013.

One recent case was the 2018 decision in *Forico Pty Ltd v Sive,*[47] where the Court applied a relatively strict approach in determining that an adjudicator has no jurisdiction to determine a claim under the Tas Act where the works the subject of a contract are complete, and there is therefore no longer an existing building and construction contract for the purposes of the Act.

In that case, Forico entered into a contract with SEMF for new structures at Forico's premises. Practical completion under the contract was achieved in 2015, but SEMF remained involved post practical completion for the purpose of performing project management and design services relating to defects in one of the pathways at the project site. SEMF requested the original contract be extended for the post-completion works, but Forico refused.

In August 2017, SEMF made a payment claim for services it performed between 2015 and 2017. Forico refused to pay, and SEMF applied for adjudication under the Tas Act. The adjudicator determined that Forico was liable to SEMF for the full amount in SEMF's payment claim. Forico sought judicial review of that determination, arguing the payment claim issued in August 2017 was not a payment claim under the Tas Act because the work to which the payment claim related was not construction work under a contract for the purpose of the Act.

Forico's judicial review application was upheld by the Tasmanian Supreme Court. Marshall AJ found that the adjudicator did not have jurisdiction to make the determination and the payment claim issued by SEMF was invalid. The major reason for the finding was that the parties did not enter into any contract to carry out the post-completion rectification works, and the Court considered their contractual relationship had ended upon payment of the final invoice in 2015.

The *Forico* decision emphasizes the need for parties performing work to ensure they are covered by a construction contract which falls within the provisions of the Tas Act. Failure to do so may result in a claim for payment for work properly performed falling outside the scope of the security of payment regime.

AUSTRALIAN CAPITAL TERRITORY

Building and Construction Industry (Security of Payment) Act 2009 (ACT)

The security of payment regime in the ACT is governed by the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) ("ACT Act"). Due to the geo-economic position of the ACT, the ACT security of payment ("SOPA") is based upon, and largely similar to, the NSW SOPA. However, unlike the NSW SOPA, there have been no significant changes to the ACT regime recently.

Case Law Developments: Entitlement for a Person "Who Is or Who Claims to Be Entitled"

In *Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd,*[48] the ACT Court of Appeal considered the effect of section 15(4) and the scope of "jurisdictional facts" under the ACT Act. Canberra Drilling Rigs Pty Ltd ("Canberra Drilling") challenged an adjudication determination, arguing that the adjudicator had fallen into jurisdictional error. The primary judge rejected this and dismissed the application. On appeal, Canberra Drilling's central contention was that section 15(4) of the ACT SOPA has the effect that whether the claimed work was performed under the construction contract is a jurisdictional fact and the primary judge erred in failing to determine that jurisdictional fact.

The primary issue between the parties on appeal was whether it was sufficient for the contractor to claim that work had been done under the construction contract, or whether the objective fact of the work being done under the construction contract was a precondition to the adjudicator exercising jurisdiction.

The Court considered the history of section 13 of the NSW SOPA (which is equivalent to section 15 of the ACT Act). Section 13 had been amended in 2002 to refer to the claimant as person "who is *or who claims to be* entitled" and the respondent as a person who "is *or may be* liable". Since the ACT Act adopted the amended language to include a person who claims to be entitled to payment, the Court considered that any argument that a payment claim could be made only by a person who was actually entitled to a progress payment under a construction contract must fail.

The Court of Appeal therefore dismissed Canberra Drilling's appeal, stating that "it would be inconsistent with the statutory scheme to find that an essential precondition to the making of a claim, and hence the exercise of the adjudication powers under the [ACT Act], was that the work was done 'under' the relevant construction contract".

SOUTH AUSTRALIA

Building and Construction Industry Security of Payment Act 2009 (SA)

The *Building and Construction Industry Security of Payment Act 2009* (SA) ("SA Act") is closely based on the original NSW Act and has not been amended since its commencement in 2011. This is not to say that consideration has not been given to amending the Act. In 2015, a review of the operation of the SA Act was conducted by retired District Court Judge Alan Moss, and then, following the collapse of Tagara Builders in 2016, proposed amendments were put before parliament in the form of the *Building and Construction Industry Security of Payment (Review) Amendments Bill 2017*. However, the bill lapsed, and consequently the SA Act remains in its original form.

While the SA Act is similar to the NSW Act, there are differences in respect of time periods provided and the ability to withdraw adjudication applications:

- If no date for payment is provided in the contract, it is 15 business days after the payment claim is served (rather than 10 days in NSW).
- The maximum time for providing a payment schedule is 15 days.
- After receipt of a payment schedule, the claimant has 15 business days to make an adjudication application.
- The time for an adjudicator to make a determination runs from the date of receipt of the adjudication response, rather than the adjudicator's acceptance of the application.
- The claimant has the express right to withdraw an adjudication application any time before the application is determined.

Case Law Developments: Claims for Running Account Payments

There has been limited judicial consideration of the SA Act since its commencement (with just 22 cases considering the SA Act in the nine years it has been in place). In his report, Alan Moss observed that this may be due to a perception in South Australia that sub-contractors who use the procedures under the SA Act will face retribution from their major clients.

The recent case of *Commercial Fitouts Australia Pty Ltd v Miracle Ceilings (Aust) Pty Ltd*[49] demonstrated the need for careful compliance in relation to payment claims, in circumstances where one party alleged that the parties were dealing with each other on a running-account basis. The issue arose because while construction work was carried out in the six months prior to the payment claim being issued, the payment claim did not identify any unpaid amounts in the last six months.

It was argued that the payment claim was valid because the parties had dealt with each other on a running-account basis, and therefore payments were not being made in result of specific invoices. This argument failed because, inconsistent with the way in which running accounts usually operate, Commercial Fitouts had been making payments in respect of particular invoices. Additionally, while the payment claim referred to an invoice issued in the previous six months, it also recorded that payment had specifically been made in respect of that invoice.

Consequently, it was held that the payment claim did not claim for construction work that had been carried out in the previous six months, and therefore a valid payment claim did not exist. In reaching this conclusion, Justice Stanley remarked that "the manner in which compliance with s 13 [dealing with payment claim requirements] is tested is not overly demanding", but the case demonstrates that in practice, it still requires some care and forethought by claimants.

LAWYER CONTACTS

John Cooper
Brisbane/Sydney
+61.7.3085.7010/+61.2.8272.0718
johncooper@jonesday.com

James Ebert
Sydney
+61.2.8272.0588
jebert@jonesday.com

Steven W. Fleming
Sydney
+61.2.8272.0538
sfleming@jonesday.com

Kenneth P. Hickman
Perth
+61.8.6214.5742
khickman@jonesday.com

Annie Leeks
Brisbane
+61.7.3085.7023
aleeks@jonesday.com

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ENDNOTES

1 J Murray AM, "Review of Security of Payment Law: Building Trust and Harmony", December 2017.

2 J Fiocco, "Security of Payment Reform in the WA Building and Construction Industry", October 2018.

3 See Jones Day's *White Paper* "Western Australia Proposes Building and Construction Industry (Security of Payment) Bill 2020".

4 B Collins QC, "Inquiry into Construction Industry Insolvency in NSW", November 2012.

5 [2020] NSWCA 118.

6 Murray Review, page 71.

7 *Ibid*, recommendation 2.

8 The Murray Review, page 123, recommendation 11.

9 *Branlin Pty Ltd v Totaro* [2014] VSC 492 at [35]; *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC 631 per Vickery J.

10 [2011] VSC 183.

11 [2018] VSC 808.

12 Progress claims issued before 17 December 2018 remain subject to the requirements of the previous BCIPA regime.

13 Amendments relating to progress payments under the Qld Act will commence on 1 October 2020. See Proclamation No. 158 of 2020 made under the Amending Act.

14 [2020] QSC 133 (27 May 2020).

15 At [65].

16 *Ibid*.

17 At [36(g)].

18 [2019] QSC 226.

19 [2019] QSC 91.

20 *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QCA 177.

21 The only change was from "served on" to "given to" the respondent.

22 *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QCA 177 at [7] to [10].

23 At [8].

24 At [15].

25 [2010] NSWCA 190 at [209].

26 [2018] HCA 4.

27 In the process, distinguishing *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor* [2014] QSC 30 on the basis that in that case, the approved form had been served when the adjudication was made.

28 At [17].

29 [2019] QSC 178.

30 At [36].

31 At [49], referring to *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17 at [29] per White J.

32 (2005) 64 NSWLR 448.

33 At [58].

34 *J.R. & L.M. Trackson Pty Ltd (ACN 088 333 831) v NCP Contracting Pty Ltd (ACN 121 915 017) & Ors* [2019] QSC 201.

35 *See*, e.g., *Ardnas (No1) Pty Ltd v J Group (Aust) Pty Ltd* [2012] NSWSC 805 at [11] per Hammerschlag J; *Camporeale Holdings Pty Ltd v Mortimer Construction Pty Ltd and Anor* [2015] QSC 211 per Henry J.

36 At [101].

37 See *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] 52 WAR 323.

38 See Jones Day's *White Paper*, "Western Australia Proposes Building and Construction Industry (Security of Payment) Bill 2020".

39 [2020] WASC 123.

40 (2018) 52 WAR 323.

41 [2020] WASC 72.

42 [2009] NSWCA 69.

43 *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44; *Brierty Limited v Gwelo Developments Pty Ltd* [2014] NTCA 7.

44 [2019] NT 52.

45 [2019] NTSC 71.

46 *See Northern Territory of Australia v Woodhill and Sons Pty Ltd* [2018] NTSC 30, where Grant CJ held that a temporal overlap of four days between the adjudicator being appointed to determine two separate applications amounted to simultaneous adjudication for the purposes of s 34(3)(b).

47 [2018] TASSC 21.

48 [2019] ACTCA 15.

49 [2020] SASC 11.