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

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

Critical to the High Court's reasoning was the overarching objective of the security of payment legislation—to reform payment behaviour in the construction industry ...

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

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

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

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

The WA Court of Appeal is poised to deliver a decision concerning appeals from eight consolidated
applications for judicial review and enforcement of adjudication determinations, which were heard in August 2017. How the court of appeal approaches this issue, in light of Probuild and Maxcon, may determine this question in Western Australia conclusively.

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

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

THREE KEY TAKEAWAYS

1. The High Court's approach is consistent with the "quick and dirty" aim of adjudications under security of payment legislation.

2. These actions should strengthen the adjudication process as a viable avenue of remedy for parties seeking timely payment under a construction contract.

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

AUTHORS

Simon Bellas
Perth

Kenneth P. Hickman
Perth

Stephen McComish
Perth

Katie E. Gothard-Leigh
Perth

All Contacts >>

YOU MIGHT BE INTERESTED IN:  Go To All Recommendations >>

"Absolute Liability" for a Failure to Prevent Foreign Bribery: Significant Change Ahead in Australia?

Australian Court Refuses to Stay Overlapping Class Actions

Significant Reform Signalled for Australia’s Foreign Bribery Regime