

MEMORANDUM: SECURITY OF PAYMENTS LEGISLATION IN TASMANIA

Building and Construction Industry Security of Payments Act (TAS) 2009

1. Background

2. The *Building and Construction Industry Security of Payments Act (Tas) 2009* (“the Act”) came into operation on 17 December 2009. The Act in Tasmania, and other states, is to ensure, fairly and efficiently, the claimant’s cashflow, rather than determine the ultimate entitlements under the Contract.
3. The Act follows generally the regime of the NSW Act¹ and the Queensland Act², and has not included the limitations in the Victorian Act³ relating to claimable variations and excluded claims⁴. The WA Act⁵ is different in some ways, to the NSW Act and Qld Act (and the Act). In the ACT, new legislation (“the ACT Act”)⁶ is to apply to contracts entered into after 1 July 2010. In South Australia, new legislation (“the SA Act”) has been passed⁷ but no date has been set for commencement.
4. The Act creates a regime of payment claim and payment schedule in relation to progress payments under construction contracts as follows:
 1. Where a claimant (“the claimant”) is entitled to progress payments, it may deliver a “payment claim” to the respondent (“the respondent”) liable to make the payment.
 2. In relation to progress claims relating to construction work other than residential construction work, the respondent must deliver a “payment schedule”, within 10 business days of receiving the payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment “on account”, which can be challenged under the Contract).
 3. In relation to progress claims relating to residential construction work, the respondent must deliver a payment schedule within 20 business days of receiving a progress payment claim, , failing which the full amount of the payment claim becomes due.
 4. Where the payment schedule is for less than the payment claim, the Act provides a system of fast, independent, adjudication.
 5. The Act provides for enforcement of the amount due, and judgment in favour of the claimant if required.I set out below the payment claim/payment schedule, and adjudication, process.
5. In NSW, the first jurisdiction to introduce the legislation (in 2000), and the first to remove the previous restriction permitting the respondent to provide security rather than payment (in 2002), there have been a substantive number of adjudications under the NSW Act, and the New South Wales Supreme Court has considered the NSW Act on a

¹ *Building and Construction Industry Security of Payments Act 1999 (NSW)*

² *Building and Construction Industry Payments Act 2004 (Qld)*

³ *Building and Construction Industry Security of Payments Act (Vic) 2002*

⁴ Section 10A (Claimable Variations) and 10B (Excluded Claims)

⁵ *Construction Contracts Act 2004 (WA)*

⁶ *Building and Construction Industry Security of Payments Act (SA) 2009*

⁷ *Building and Construction Industry Security of Payments Act (ACT) 2009*

number of occasions. In addition, there have been a substantial number of adjudications in Queensland. In Victoria, however, to date, the Act has been little used. There have been few adjudications, due, principally, it seems, to the option for respondents to provide security rather than make payment to claimants (prior to the 2007 amendments), and since then, due to the critical limitations contained in Section 10A (Claimable Variations) and 10B (Excluded Claims).

6. The courts have generally concluded⁸ that where the respondent fails to deliver a payment schedule within the required 10 business days, or where the claimant has obtained an adjudication determination in its favour, the respondent must pay (subject to the limited exceptions below), on account, the amount due, and, if necessary, has given summary judgment to enforce that obligation. The respondent, in effect, is forced to make the payment immediately, then, if the respondent disputes that payment, proceed under the Contract to recover that payment. (This is the opposite cash flow position to what occurred pre-legislation.)
7. The courts have, further, set out a number of general principles as to the matters required (the “basic and essential requirements”) for a valid adjudication determination.
8. **The payment claim/payment schedule process**
9. The Act sets out a detailed process and timetable for payment claims and payment schedules.
10. The claimant submits a “payment claim” under section 17 of the Act. That payment claim must be expressed (under the Act) to be a payment claim under the *Building and Construction Industry Security of Payments Act (Tas) 2009*.
11. The effect of this is to require the respondent to deliver to the claimant, within 10 business days (or 20 business days where it relates to residential work, and the respondent owns the land and is not a registered building practitioner), a “payment schedule” within the meaning of the Act. Failing delivery of that payment schedule within that time, the full amount claimed by the claimant in the payment claim is due and payable as from that date.
12. The substantive effect of these sections is that where the respondent does not provide a payment schedule within 10 business days, the claimant is entitled to immediate payment (albeit, as with all progress payments, payment is merely “on account”, and the final amount owing under the Contract may still be disputed in accordance with the provisions of the Contract). These provisions are directed at cashflow (rather than the final resolution of monies owing under the Contract).
13. Section 17 of the Act provide, so far as relevant, as follows:

17. Claims for payment may be made

(1) A person (in this Act referred to as a "claimant") who is, or who claims to be, entitled to a progress payment in respect of a building or construction contract may serve a payment claim on the person who is, or may be, liable under the contract to make the payment.

⁸ Though see *Schiavello*, referred to below.

- (2) A payment claim must –
- (a) be in writing; and
 - (b) be addressed to the person on whom it is served; and
 - (c) state the name of the claimant; and
 - (d) identify the building work or construction work, or building or construction-related goods and services, to which the progress payment relates, in sufficient detail to enable the person on whom it is served to assess the claim; and
 - (e) specify the amount of the progress payment that the claimant claims is due; and
 - (f) state that the claim is made under this Act; and
 - (g) include the prescribed details, if any.

.....

(4) A claimant must not serve more than one payment claim in respect of each reference date under the building or construction contract.

(5) However, subsection (4) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

(6) A payment claim may be served only within whichever of the following periods occurs later:

- (a) the period determined by or in accordance with the terms of the building or construction contract;
- (b) the period of 12 months after –
 - (i) the building work or construction work to which the claim relates was last carried out; or
 - (ii) the building or construction-related goods and services to which the claim relates were last supplied.

(emphasis added)

The key points from Section 17:

1. The payment claim must be in writing and must state that it made under the Act.
2. The payment claim must identify the work the subject of the payment claim.
3. Payment claims may include work the subject of previous payment claims.
4. Payment claims must be made within the later of the time under the Contract, or 12 months after (the last of) the work was performed.

14. Sections 18-19 of the Act provide, so far as relevant, as follows:

18. Schedules for payment may be provided to claimant

(1) A person (in this Act referred to as the "respondent") on whom a payment claim is served by a claimant may provide to the claimant a payment schedule in relation to the claim.

(2) A payment schedule –

(a) must identify the payment claim to which the schedule relates; and

(b) must indicate the amount of the payment, if any, that the respondent proposes to make (in this Act referred to as the "scheduled amount").

(3) If the scheduled amount is less than the claimed amount, the schedule must specify why the amount is less.

(4) If the amount is less because the respondent is withholding payment of the claim for any reason, the schedule must specify the respondent's reasons for withholding the payment

19. Consequences of failing to provide payment schedule within relevant period

.....

(2) If –

*(a) a claimant serves a payment claim on a respondent; and
(b) the respondent does not provide to the claimant a payment schedule –
(i) before the end of the period in which the payment is required to be made under the building or construction contract under which the payment is to be made; or
(ii) before the expiry of the applicable day in relation to the payment claim made to the respondent –
whichever period expires earlier, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.*

(3) In subsection (2)(b)(ii), the applicable day in relation to a payment claim made to the respondent –

(a) is the day 20 business days after the payment claim is served on the respondent, if –

*(i) the claim relates to a residential structure to be built on land; and
(ii) the respondent is the owner of the land; and
(iii) the respondent is not a building practitioner; or*

(b) is, in any other case, the day 10 business days after the payment claim is served on the respondent.

(4) Subsection (5) applies to a claimant if the respondent –

*(a) becomes liable under subsection (2) to pay to the claimant the claimed amount; and
(b) does not pay all of the claimed amount on or before the due date for the progress payment to which the payment claim relates.*

(5) If this subsection applies to a claimant, the claimant –

(a) may –

(i) apply to a court of competent jurisdiction to recover from the respondent the unpaid part of the claimed amount, as a debt due to the claimant; or

(ii) make an adjudication application under section 21 in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out building work or construction work, or supplying goods and services, under the building or construction contract.

(6) A notice served under subsection (5)(b) must specify that the notice is made under this Act.

.....

(8) A respondent in proceedings under this section in a court of competent jurisdiction is not entitled in those proceedings –

(a) to bring a cross-claim against the claimant; or

(b) to raise a defence in relation to matters arising under, or relating to the subject matter of, the building or construction contract.

(emphasis added)

The key points from Sections 18-19:

1. The respondent must deliver a payment schedule within the time specified in the Act.
 2. The payment schedule must specify what the respondent proposes to pay, and reasons why that amount is less than the amount in the payment claim.
 3. If no payment schedule within the specified time, the claimant may recover the whole amount claimed, as a debt due, or alternatively, make an Application for Adjudication.
 4. The time to deliver a payment schedule is 10 business days after receiving the payment claim, or alternatively, 20 business days if the payment claim relates to residential construction, and the respondent is the owner of the land and is not a registered building practitioner.
15. The legislation in other states, originally, had limited operation, applying only to work the subject of “progress claims”. The Act in Tasmania has adopted the expanded definition of “progress payment” to include a wider range of payments, including:
- final payments
 - single or one-off payments
 - payments based on events or dates (eg milestone payments)
16. The date upon which the claimant becomes entitled, under the Act, to payment of the amount in the payment schedule (or, if no payment schedule was delivered within 10 business days, the full amount claimed in the payment claim), is the “due date” under the Contract, or where the Contract provides no such date, then on the day 10 business days after the payment claim is served on the respondent⁹.
17. The entitlement to payment is only “on account”. The Act preserves the rights of either party to dispute the amounts payable under the Contract. In fact, as with all progress payments, the amount owing under the Contract is, if necessary, to be resolved in accordance with the provisions of the Contract.
18. Where the claimant becomes entitled to payment of monies, if the respondent fails to pay the monies identified in the payment schedule, by the due date, the claimant may:
- a) recover the whole of the amount claimed plus interest as a debt due, or alternatively, make an Application for Adjudication; and/or
 - b) serve notice on the respondent, suspending the work.
- 19. Defences to Claims where failure to provide the payment schedule within time**
20. There were a number of early cases in New South Wales where the respondent had attempted, unsuccessfully, to avoid making payment for the full amount of the payment claim, where, for whatever reason, it had failed to deliver a payment schedule at all, within the 10 business days. In each of these cases, the respondent raised technical defences. In each instance, those technical defences failed. The court, each time, held that the Act did have the effect of compelling the respondent to pay the full amount of the payment claim, despite the respondent disputing that this was owing under the

⁹ See Sections 15, 19(3).

relevant contract.

21. For example, in *Beckhaus v Brewarrina Council* [2002] NSWSC 960 (18 October 2002), the plaintiff was a builder, carrying out, for the defendant, construction of levees and associated works. The contract incorporated AS 2124-1992. On 27 March 2002 the plaintiff issued progress claim number 6 pursuant to the contract. The contract required the superintendent to assess that claim within 14 days and issue a payment certificate stating the amount of the payment which in the opinion of the superintendent was to be paid by the respondent to the claimant or by the claimant to the respondent. The plaintiff's progress claim was for an amount of \$465,437.25 and the superintendent assessed the amount of the claim (out of time) at nil.. A progress claim was submitted on 26 April 2002 (claim number 7) in a covering letter expressed to be a claim under the contract and also carrying an endorsement required by the *Building and Construction Industry Security of Payments Act 1999*. The superintendent issued a payment certificate in respect of progress claim number 7 on 28 May 2002 assessing a nil payment.
22. The defences to payment raised by the defendant were:
 - (i) the progress claim was not supported by such information as the Superintendent reasonably required, and therefore no entitlement to payment arose under clause 42.1;
 - (ii) the progress claim was not made in conformity with the contract because such claims could only be made monthly, whereas this claim was not;
 - (iii) no contractual entitlement arose in the absence of a statutory declaration required by clause 43;
 - (iv) most of the items comprising the claim had previously been claimed in progress claim no. 6, and rejected by the Superintendent;
 - (v) the progress claim was ambiguous, uncertain and of no effect by reason of the endorsement thereon of the words: "This claim is made under the Building and Construction Industry Security of Payments Act 2002 .
23. His Honour (Acting Justice Macready) observed that the contractual position did not prevent the operation of the Act, and, further, that the parties' respective rights under the contract were not affected by the statutory process (in effect, the payment was no more than a payment on account). His Honour rejected each of the above defences, and ordered the defendant to pay the whole amount of the payment claim.
24. In *Jemzone v Trytan* [2002] NSWSC 395 (7 May 2002), however, Austin J was considering a contract between a hotel and motel developer respondent (the plaintiff), and a builder (the defendant). His Honour distinguished, under the (then) NSW Act, between progress payments, which are assumed to be payments requested in respect of work carried out before practical completion, and the "payment on practical completion". This has now been resolved by the inclusion of one off payments, etc, under the various state Acts.
25. **Adjudication**
26. Time for Lodging Application for Adjudication
27. Where the respondent delivers a payment schedule within the prescribed time, and the claimant disputes the amount contained in the payment schedule, the claimant may

lodge an Application for Adjudication with a Nominating Authority (NA).

28. The time for lodging an Application for Adjudication is as follows:
- a) where payment schedule is received, but is less than the amount claimed, within 10 business days after the claimant receives the payment schedule¹⁰;
 - b) where the respondent did not pay all of the scheduled amount by the due date, within 20 business days after the due date for payment¹¹.

29. Optional Adjudication

30. Section 21(4) provides for optional adjudication where no payment schedule is received in time, and payment is not made by the due date. The incentive to the claimant in seeking an optional adjudication is the perceived convenience of obtaining an adjudication certificate (see below), compared to commencing proceedings to obtain judgment on the basis of the payment schedule not being delivered within the prescribed time.

31. The pre-conditions and timing for lodging an Application for Adjudication in relation to optional adjudication in these circumstances is complex, and strict. Section 21(4) provides, so far as relevant, as follows:

A claimant may only make an application under subsection (1) pursuant to subsection (2)(c) if –

- (a) the claimant has notified the respondent, within 20 business days after the due date for payment, that –*
 - (i) the claimant intends to make the application; and*
 - (ii) the respondent may provide a payment schedule to the claimant within 5 business days after the notice is given; and*
- (b) the respondent has not provided a payment schedule within the period of 5 business days since the notice was given to the respondent; and*
- (c) the application is made within 10 business days after the end of the 5-day period referred to in paragraph (b).*

(emphasis added)

The key points from Section 21(4):

1. The claimant must notify intent to make the Application for Adjudication, within 20 business days of due date for payment.
2. The respondent does not, within 5 business days after the notice is given, provide a payment schedule.
3. The Application for Adjudication must be made within 10 business days after the end of the 5 business days period above.

32. Appointment of the adjudicator

33. The Application for Adjudication is made by the claimant to a Nominating Authority (NA) appointed under the Act.

¹⁰ Section 21(3)(a)

¹¹ Section 21(3)(b)

34. The Application for Adjudication must:¹²
- identify the payment claim and payment schedule to which it relates
 - the application fee (if any) payable to the particular NA
- and should include:
- a copy of the contract
 - a copy of the payment claim
 - a copy of the payment schedule
 - any submissions by the claimant in relation to the adjudication application
 - any other relevant documents (eg invoices from suppliers, measurements, test results, quality assurance certificates, statutory declarations, proof of insurance, legal advices and expert reports,)
- A copy of the Application for Adjudication is required to be served on the respondent.¹³
35. The adjudicator is appointed by the NA. The adjudicator is required to accept the adjudication by serving a Notice of Acceptance on the claimant and the respondent.¹⁴
36. In the event that the claimant does not receive a Notice of Acceptance from an adjudicator within 4 business days, the claimant may withdraw the Application for Adjudication and may make a new Application for Adjudication.¹⁵
37. Where a party to an adjudication believes that the nominated adjudicator is disqualified from adjudicating the application, on the basis that he or she has a material personal interest in a building or construction contract, dispute, or party to the contract, to which the application relates, that party may, by notice in writing to the adjudicator, giving particulars as to the grounds for that belief, request the adjudicator to disqualify himself/herself.¹⁶ Where the adjudicator does not disqualify himself/herself, the party may apply to the Magistrates Court (Administrative Appeals Division) for a review of the decision of the adjudicator not to disqualify himself/herself.¹⁷
38. Adjudication response
39. The respondent is entitled to lodge an adjudication response with the adjudicator. The adjudication response must be lodged within:
- a) 10 business days after receiving a copy of the adjudication application; or
 - b) 5 business days after receiving the adjudicator's Notice of Acceptance.¹⁸
40. The adjudication response:¹⁹
- must identify Application for Adjudication to which it relates
 - should include any submissions by the respondent in relation to the adjudication application
 - should include any other relevant documents (eg invoices from suppliers, measurements, test results, quality assurance certificates, statutory declarations,

¹² See Section 21(5).

¹³ Section 21(7)

¹⁴ Section 22(4)

¹⁵ Section 28(2)

¹⁶ Section 36(1)

¹⁷ Section 36(4)

¹⁸ Section 23(2)

¹⁹ See Section 23(3).

proof of insurance, legal advices and expert reports,)

41. Critically, the adjudication response is limited to reasons included in payment schedule. Section 23(4) provides, so far as relevant, as follows:

A respondent must not include in an adjudication response reasons for withholding payment, unless those reasons have already been included in the payment schedule provided to the claimant.

(emphasis added)

42. The adjudication proceedings

43. The adjudicator is required to determine the Application for Adjudication within:
- a) 10 business days after the date on which the adjudicator receives the adjudication response; or
 - b) where the respondent delivered a payment schedule, 10 business days after the date by which the respondent may lodge an adjudication response; or
 - c) where the respondent did not deliver a payment schedule, 10 business days after the date on which the adjudicator delivered the Notice of Acceptance; or
 - d) within a further period, if any, agreed to by the claimant and the respondent.²⁰

44. In the event that the adjudicator fails to determine the application within the time allowed, the claimant may withdraw the Application for Adjudication and may make a new Application for Adjudication.²¹

45. The adjudicator may:
- a) request further written submissions, subject to giving the other party an opportunity to comment on such further submissions;
 - b) carry out an inspection.

46. The adjudicator must determine:²²
- a) whether all or part of a progress payment is to be paid by the respondent to the claimant;
 - b) the amount of the payment;
 - c) the date on which the payment became or becomes due;
 - d) the rate of interest payable.

47. Previous Determinations

48. Where the value of work the subject of an Application for Adjudication has been previously in an earlier Application for Adjudication, the adjudicator is to use that same value for the work²³, unless a party satisfies the adjudicator that the value of the works or goods and services has changed since the value was first determined²⁴.

²⁰ Section Section 24(1)

²¹ Section 28(2)

²² Section 25(1)

²³ Section 25(5)

²⁴ Section 21(6)

49. Costs of the adjudication
50. The parties pay the adjudicator equally. The adjudicator may vary this if he decides that either the claim for payment or the reasons for not paying are wholly unfounded.
51. The adjudicator is entitled to be paid fees, as agreed between the adjudicator and the parties, or, failing agreement, the amount, by way of fees and expenses, that is reasonable having regard to the work done and the expenses incurred by the adjudicator.²⁵ The claimant and the respondent are jointly and severally liable to pay the fees charged by the adjudicator, in equal proportions, or as otherwise determined by the adjudicator.
52. Section 25(7) gives the adjudicator the power to determine that a party to an adjudication is required to pay to another party some or all of the costs that have been incurred by the other party because of “frivolous or vexatious conduct, or the making of unfounded submissions”.
- 53. Review by the Courts of the adjudicator’s determination**
54. The adjudication process has been reviewed several times in the NSW Supreme Court: (for example, *Musico v Davenport* [2003] NSWSC 977, *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019, *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, *Transgrid v Walter Construction Group Ltd* [2004] NSWSC 21, *Transgrid v Siemens Ltd* [2004] NSWSC 87, *Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd* [2004] NSWSC 85). A discussion of these cases is beyond this note. In brief, the Supreme Court will, if it believes the adjudicator has gone wrong, review his determination.
55. Brodyn
56. The NSW Court of Appeal decision in *Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor* [2004] NSWCA 394 (3 November 2004) has been referred to with approval in many Australian decisions.
57. Hodgson JA reasoned that as long as the basic and essential requirements laid down by the Act had been complied with, the determination was not open to challenge, in the absence of any denial of natural. Hodgson JA, further, identified a number of “basic and essential requirements” for an adjudication determination to be valid. At paragraph 53, His Honour reasoned:

53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

- 1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).*
- 2. The service by the claimant on the respondent of a payment claim (s.13).*
- 3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).*

²⁵ Section 37(1)

4. *The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).*
5. *The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).*

58. Schiavello

59. In *Hickory Developments Pty Ltd v Schiavello* (Vic) Pty Ltd & Anor [2009] VSC 156 (24 April 2009), the Victorian Supreme Court Building Cases Judge, Vickery J, among other things, was considering whether an application for adjudication was made within the time required by the Act and whether the application in substance was in accordance with the Act and, if not, whether the shortcoming rendered the adjudication determination void.

60. Vickery J noted the substantive change that this type of legislation has made to the power balance between principals and contractors. At paragraph 2:

The Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted.[1] Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which compliments the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.....

61. Vickery J also noted that the Australian courts have tended towards preferring a less formal approach in the interpretation of provisions relating to payment claims and payment schedules. For example, in *Protectavale Pty Ltd v K2K Pty Ltd*, Finkelstein J reasoned²⁶:

It is necessary to decide whether the invoice meets the requirements of s 14. The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context: Multiplex Constructions [2003] NSWSC 1140 at [76].

The manner in which compliance with s 14 is tested is not overly demanding: Leighton claimants Pty Ltd v Campbelltown Catholic Club Ltd [2003] NSWSC 1103 at [54] citing Hawkins Construction (Aust) Pty Ltd v Mac's Industrial

²⁶ [\[2008\] FCA 1248](#) at [\[10\]](#) – [11], cited by Vickery J in *Hickory Developments Pty Ltd v Schiavello* (Vic) Pty Ltd & Anor [2009] VSC 156

Pipework Pty Ltd [2002] NSWCA 136 at [20] ("[The requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner"); Multiplex Constructions [2003] NSWSC 1140 at [76] ("[A] payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves"); Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) [2007] QSC 333 at [20] ("The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint").

(emphasis added)

This approach (the common sense, less formal) seems, to me, likely to be followed in all Australian states.

62. Vickery J, however, was not persuaded that the statements of law in *Brodyn*, applied to the (Victorian) Act. At paragraphs 72-75:

72 The statements of law enunciated in Brodyn, as applied to the NSW Act, are in substance persuasive. If the NSW Act and its Victorian counterpart are to achieve their objectives in providing for the speedy resolution of progress claims, displacing conventional curial intervention may be seen as a necessary sacrifice. Further, in the context of national building operations being conducted in this country, it is desirable that there be consistency in the regimes for payment under construction contracts in both jurisdictions, particularly where common legislative schemes are in place.

73 However, it does not follow from these observations that the principles stated in Brodyn to which I have referred can or should be adopted in Victoria, and in significant part, I find myself unable to do so. I am compelled to this course having undertaken a close examination of the Victorian Act and by application of relevant provisions of the Constitution Act 1975 (Vic). I do so in spite of the position taken by counsel in the case before me that Brodyn should be applied.

74 In Brodyn, the view was taken in relation to the NSW Act that, although there was not an explicit exclusion of the jurisdiction of the Court prior to the obtaining of judgment, an intention was disclosed to exclude curial intervention for errors of law in the adjudicator's determination. It followed that, under the NSW Act properly construed, relief in the nature of certiorari was not available to quash an adjudicator's determination which is not void and merely voidable.

75 In my opinion, this construction is not open under the Victorian Act.

63. Vickery J concluded, at paragraph 90:

... in my opinion, relief in the nature of certiorari is not excluded either expressly or by implication under the Act. The prerogative writ may be invoked

in relation to the determination of an adjudicator under the Victorian Act. In this respect, I do not follow Brodyn

64. His Honour eventually declined to strike down the adjudicator's determination (on the basis argued by the respondent, to the effect that Application for Adjudication had been lodged out of time).
65. The likelihood, to me, is that Australian courts are likely to be less inclined to uphold legal challenges to determinations of the adjudicator on the basis of technical failures to comply with the Act.
- 66. Enforcement/Adjudication Certificate**
67. The real objective of the Act, as in all Australian states, has been to oblige principals to pay contractors immediately, on account, (without affecting rights to seek redress subsequently), for the purpose of cashflow.
68. Where the adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant before:
- a) the end of the period of 5 business days immediately after the date on which the adjudicator's determination is served on the respondent; or
 - b) the date determined by the adjudicator on which the payment became or becomes payable.²⁷
69. Where the respondent fails to make the payment due, the claimant may:
- a) request the nominating authority to which the adjudication application was made to issue an adjudication certificate; and/or
 - b) serve notice on the respondent of the claimant's intention to suspend the work.²⁸
70. The adjudication certificate is to include:²⁹
1. the name of the claimant;
 2. the name of the respondent who is liable to pay the adjudicated amount;
 3. the adjudicated amount;
 4. the date on which payment of the adjudicated amount was due to be paid to the claimant;
 5. the amount of any interest payable; and
 6. the respondent's share of the adjudication fees not reimbursed by the respondent;
71. Section 27 provides that the adjudication certificate may be filed (accompanied by an affidavit by the claimant stating that a part of the adjudicated amount has not been paid at the time the certificate is filed) as a judgment for a debt in a court of competent jurisdiction, and that the adjudication certificate is enforceable as a judgment for a debt.
72. Importantly, the respondent is not able to seek to set aside the judgment on grounds including:
1. a cross-claim against the claimant;

²⁷ Section 26(1), Section 25(1)(b)(ii)

²⁸ Section 26(2)

²⁹ Section 27

2. a defence in relation to matters arising under, or relating to the subject matter of, the building or construction contract;
 3. challenge the adjudicator's determination.³⁰
73. The effect therefore of obtaining an adjudication certificate is that the claimant has judgment for the amount determined, and that judgment may not be set aside on grounds related to the construction contract and/or the the adjudicator's determination.

J McMullan
26 March 2010

³⁰ Section 27(5)