

**SUPREME COURT OF VICTORIA
COURT OF APPEAL**

S EAPCI 2025 0070

1559 HIGH STREET PTY LTD (ACN 620 354 234)

Applicant

v

CAMILLO BUILDERS PTY LTD (ACN 618 874 776) & ORS
(according to the attached Schedule)

Respondents

JUDGES: McLEISH, KENNEDY and KAYE JJA
WHERE HELD: Melbourne
DATE OF HEARING: 14 May 2026
DATE OF JUDGMENT: 9 June 2026
MEDIUM NEUTRAL CITATION: [2026] VSCA 129
JUDGMENT APPEALED FROM: [2025] VSC 244 (Stynes J)

CONSTITUTIONAL LAW – Inconsistency of laws – Whether s 109 inconsistency arises between ss 28M, 28O and 28R(1)–(5) of *Building and Construction Industry Security of Payment Act 2002* ('SOP Act') and ss 18, 232, 234, 236 and/or 237 of *Australian Consumer Law* ('ACL') – Where respondent obtained judgment against applicant on basis of adjudication certificate under *SOP Act* – Where applicant claims that *SOP Act* provisions impaired its 'rights' to raise an *ACL* claim – Whether *SOP Act* provisions vary, detract from, or impair federal law – *SOP Act* creates novel statutory right separate and distinct from *ACL* rights – Rights operate concurrently – Application for leave to appeal granted – Appeal dismissed.

Birdon Pty Ltd v Houben Marine Pty Ltd (2011) 197 FCR 25; *Momcilovic v The Queen* (2011) 245 CLR 1, applied.

Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd (2016) 337 ALR 452, distinguished.

Bitannia Ltd v Parkline Constructions Pty Ltd (2006) 67 NSWLR 9, discussed.

Bell Group NV (in liq) v Western Australia (2016) 260 CLR 500; *Saville v Hallmarc Construction Pty Ltd* (2015) 47 VR 177; *Black Label Developments Pty Ltd v McMenemy* [2025] NSWCA 114, referred to.

Building and Construction Industry Security of Payment Act 2002, ss 25R, 28M, 28O, 28R.
Commonwealth Constitution, s 109.

Competition and Consumer Act 2010 (Cth), s 131C, sch 1 (*Australian Consumer Law*) ss 18, 232, 234, 236, 237.

BUILDING AND CONSTRUCTION – Adjudication determinations – Where obligation to pay adjudicated amount under s 28M(2)(a) of *SOP Act* runs from date when a copy of the adjudication determination is given under s 23A – Where adjudication determination corrected under s 24 of *SOP Act* – Where adjudication determination defined to mean a determination made under s 23 – Adjudication determination does not extend to a determination which is corrected – Time runs from date that (original) adjudication determination given.

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393, discussed.

Building and Construction Industry Security of Payment Act 2002, ss 23, 23A, 24, 28M.

BUILDING AND CONSTRUCTION – Judgment entered on basis of adjudication certificate under *SOP Act* – Procedural fairness – Where judgment entered ex parte against applicant with no opportunity to be heard on applicant’s *ACL* claim – Right to bring *ACL* claim incapable of affecting right to enter judgment under *SOP Act* – No realistic possibility of different outcome – No failure to accord procedural fairness.

Nathanson v Minister for Home Affairs (2022) 276 CLR 80, referred to.

Counsel

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Second respondent:	No appearance
Third respondent:	No appearance

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McLEISH JA
KENNEDY JA
KAYE JA:

- 1 This application for leave to appeal concerns a dispute arising under a building contract between 1559 High Street Pty Ltd (the applicant, '1559HS') as principal and Camillo Builders Pty Ltd (the first respondent, 'Camillo') as contractor ('the building contract'). Under the building contract, Camillo agreed to design and construct 85 apartments and nine terrace homes at 1559 High Street, Glen Iris, Victoria.
- 2 Following service of a payment claim under the *Building and Construction Industry Security of Payment Act 2002* ('SOP Act'), Camillo applied for an adjudication of the payment claim. In contesting that application, 1559HS alleged that the amount claimed, or the vast bulk of the amount claimed, was caused by Camillo's misleading or deceptive conduct contrary to s 18 of the *Australian Consumer Law* ('ACL') as set out in sch 2 of the *Competition and Consumer Act 2010* (Cth) ('Competition and Consumer Act').
- 3 An adjudicator determined that \$1,709,710.30, including GST, was payable by 1559HS to Camillo ('original determination'). After being notified of a typographical error, the adjudicator issued a corrected adjudication determination which increased the adjudicated amount to \$1,848,310.32, including GST ('corrected determination') and, on 26 September 2023, issued an adjudication certificate in this amount.
- 4 On 10 October 2023 a judge of the County Court made orders on the papers entering judgment in the amount contained in the adjudication certificate, plus interest and costs ('County Court judgment').
- 5 1559HS sought orders before a judge of the Supreme Court that the corrected determination, and the County Court judgment entered on the basis of it, be set aside. In particular, 1559HS contended that the provisions of the *SOP Act* prevented it from relying on its rights under the *ACL* which would provide it with a legitimate defence or cross-claim to extinguish the liability in the judgment. It submitted that the practical effect of the *SOP Act* is to alter, impair or detract from the operation of the *ACL* and, as such, the provisions of the *SOP Act* are inconsistent with a Commonwealth law, contrary to s 109 of the *Commonwealth Constitution* ('Constitution').
- 6 In dismissing 1559HS's proceeding, the judge found that 1559HS was not entitled to raise its defence under the *ACL* in seeking to have the judgment set aside because it related to matters arising under the construction contract under s 28R(5)(a)(ii) of the *SOP Act*.¹ 1559HS's proposed grounds do not make any challenge to this finding.²

¹ *1559 High Street Pty Ltd v Camillo Builders Pty Ltd* [2025] VSC 244, [128]–[129] ('Reasons').

² Although some generalised criticism was made about this finding at the oral hearing, 1559HS did not seek to amend its application to make any such challenge, including by specifying the precise basis for any such challenge. It was also ultimately accepted that the constitutional issue needed to be resolved because 1559HS wanted to pursue a cross-claim in any event.

- 7 In relation to the constitutional argument, the judge made the following findings:
- (a) that the provisions of the *SOP Act* which govern the adjudication process did not alter, impair or detract from the operation of the *ACL*;³
 - (b) that the provisions of the *SOP Act* which govern the entry of judgment⁴ and setting aside of judgment⁵ do not impair, alter or detract from the *ACL*.
- 8 1559HS makes no challenge to the judge's first finding, above. However, it seeks to challenge the judge's findings in relation to the second matter pursuant to grounds 1 and 2.⁶
- 9 1559HS also advances two other grounds. Proposed ground 3 alleges that the judge should have found that the County Court judgment was affected by jurisdictional error by reason that the 'relevant date' for payment had not arisen under s 28M of the *SOP Act* at the time of issue of the adjudication certificate on which the judgment was based. This was because the 'relevant date' for payment of the corrected determination was not said to arise until five business days after a copy of the corrected determination was given (under s 28M(2)).⁷ Proposed ground 4 alleges that the judge ought to have found that 1559HS was denied procedural fairness.⁸
- 10 For reasons explained below, leave will be granted in relation to grounds 1 and 2, but will otherwise be refused. The appeal will be dismissed.

PART A: FACTUAL BACKGROUND

- 11 The parties entered into the building contract on 29 June 2021. The initial contract sum was \$38,000,000. A number of provisional sum items were also included in Annexure Part Q of the contract, one of which was for the 'façade systems' in the amount of \$2,850,000 (the 'façade works'). Camillo initially engaged a subcontractor, Colab Façade Pty Ltd ('Colab Façade'), to carry out the façade works.

³ Reasons, [88]–[99]. Described by the judge as Issue 1: Whether ss 10B, 23(1), 23(2), 23(2A) and/or 28M of the *SOP Act* are inconsistent with ss 18, 232, 234, 236 and/or 237 of the *ACL* and, if so, invalid to the extent of the inconsistency.

⁴ Reasons, [100]–[115]. Described as Issue 2: Whether ss 28M, 28O, and 28R(1)–(4) of the *SOP Act* are inconsistent with ss 18, 232, 234, 236 and/or 237 of the *ACL* and, if so, invalid to the extent of the inconsistency.

⁵ Reasons, [116]–[133]. Described as Issue 3: Whether ss 28R(5)(a)(i) and/or 28R(5)(a)(ii) of the *SOP Act* are inconsistent with ss 18, 232, 234, 236 and/or 237 of the *ACL* and, if so, invalid to the extent of the inconsistency.

⁶ Notwithstanding service of a notice under s 78B of the *Judiciary Act 1903* (Cth) no Attorneys-General sought to intervene. The third respondent (the County Court of Victoria) has taken a *Hardiman* position. The second respondent (the adjudicator) filed a notice of intention not to respond or contest on 2 July 2025.

⁷ This corresponded with Issue 4 in the judge's judgment: Whether the County Court judgment should be set aside on the basis that it is either irregular and/or because a necessary fact to enliven the County Court's jurisdiction did not exist.

⁸ Described as Issue 5: Whether the County Court judgment was made in circumstances where the County Court failed to accord 1559HS procedural fairness.

- 12 There were problems, which included significant delays, with Colab Façade's performance of the façade works. On 13 June 2022, Colab Façade entered into administration and a related entity, Colab Building Tech Pty Ltd ('Colab BT') was engaged to complete the façade works. The problems with the façade works continued. By the end of June 2022, the amount allocated to the provisional sum item for the façade works had increased to \$3,305,382.34 plus GST.
- 13 At a meeting held on 2 September 2022 between 1559HS, the superintendent and Camillo, 1559HS alleges that Camillo recommended to 1559HS that Colab BT be replaced by a new façade subcontractor, Profix Aluminium Pty Ltd ('Profix'), on a 'do and charge' basis. 1559HS alleges, and Camillo denies, that in making that recommendation on 2 September 2022 and in correspondence thereafter, Camillo represented to 1559HS and the superintendent that:
- (a) if Camillo terminated the subcontract with Colab BT and engaged Profix, the total cost of completing the remaining façade works would be approximately \$500,000;
 - (b) Profix could complete the remaining façade works by November 2022;
 - (c) the estimated labour cost to complete the remaining façade works, if Profix was engaged on a 'do and charge' basis, would be approximately \$252,000; and
 - (d) most of the materials needed to complete the remaining façade works had already been ordered, paid for, fabricated and delivered to Australia (the 'September 2022 representations').
- 14 1559HS alleges that, in reliance on the September 2022 representations, the superintendent, on behalf of 1559HS, directed that Camillo terminate its subcontract with Colab BT and engage Profix on a 'do and charge' basis to undertake the remaining façade works and 1559HS agreed to pay Camillo for that work on a day labour charge basis in respect of labour and for the net cost of materials. Camillo denies that any such reliance took place.
- 15 1559HS alleges that after Profix was engaged, the cost to complete the remaining façade works increased well beyond \$500,000, those works were not completed by November 2022 and further:
- (a) from October 2022 to July 2023, Camillo issued progress claims to 1559HS claiming a total of \$3,758,347.04 in respect of the remaining façade works; and
 - (b) Camillo failed to achieve practical completion until 8 May 2023.
- 16 Camillo contends that 1559HS knew that the cost to complete the remaining façade works would exceed \$500,000 and also contends that 1559HS failed to pay to Camillo all of its costs to complete the remaining façade works.
- 17 On 31 July 2023, Camillo served a payment claim for \$2,206,603.58 plus GST, which sought, among other things, the unpaid balance of Camillo's claims for the façade works in the sum of \$1,918,264.00. On 11 August 2023, the superintendent issued a

payment schedule indicating that 1559HS proposed to pay the sum of \$171,384.48 including GST.

18 On 25 August 2023, Camillo made an adjudication application under the *SOP Act*. As indicated already, in contesting Camillo's application, 1559HS alleged that the amount claimed, or the vast bulk of the amount claimed, was caused by Camillo's misleading or deceptive conduct contrary to s 18 of the *ACL*. 1559HS argued that, but for the misleading conduct, there would have been no liability to pay any amount because the instruction to proceed with Profix would not have been authorised by 1559HS and thus the foundation for the relevant payment claim and for the adjudication would not exist ('*ACL* claims').

19 The adjudicator did not consider the merits of 1559HS's *ACL* claims in making his determination. However, the adjudicator accepted the *ACL* claims were 'genuinely in controversy' and, before the trial judge, Camillo accepted that the *ACL* claims were 'non-colourable'.

20 The following steps then occurred:

- (a) on 18 September 2023, the adjudicator made the original determination, which he served on the parties by email on 19 September 2023;
- (b) on 26 September 2023, the adjudicator issued the corrected determination, which was also served on 26 September 2023;
- (c) on 27 September 2023, the adjudicator issued an adjudication certificate pursuant to s 28Q of the *SOP Act* for the corrected determination amount of \$1,879,174.07;
- (d) on 28 September 2023, Camillo filed an originating motion in the County Court seeking judgment, *ex parte*, under s 28R of the *SOP Act* in reliance on the adjudication certificate issued by the adjudicator on 27 September 2023. That application was supported by an affidavit of Christian Crema, the director of Camillo; and
- (e) on 10 October 2023, a judge of the County Court made orders on the papers entering the County Court judgment for Camillo against 1559HS in the sum certified in the adjudication certificate, plus interest and costs.

21 On 4 October 2023, 1559HS then commenced the proceeding in the Trial Division by originating motion, seeking to set the County Court judgment aside.⁹

22 By orders made on 29 May 2025 the judge dismissed the proceeding, with costs.

⁹ On 15 January 2024, 1559HS commenced separate proceedings in the Trial Division against Camillo alleging, among other things, that Camillo engaged in misleading or deceptive conduct in connection with the construction contract, works, and payment claim in issue in these proceedings.

PART B: RELEVANT PROVISIONS

Constitution

23 Section 109 of the *Constitution* provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

ACL

24 Division 2 of pt XI of the *Competition and Consumer Act* makes provision for the application of the *ACL* (in sch 2) as a law of the Commonwealth. Section 131C of that division provides:

131C Saving of other laws and remedies

(1) This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, of a State or a Territory.

...

(4) Except as expressly provided by this Part or the Australian Consumer Law, nothing in this Part or the Australian Consumer Law is taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part and the Australian Consumer Law had not been enacted.

25 Section 18(1) of the *ACL* provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

26 Sections 232, 234, 236 and 237 provide for various causes of action and corresponding remedies available to a court for contraventions of, inter alia, s 18. A claimant may seek an injunction or interim injunction in relation to such a contravention or proposed contravention (ss 232, 234). A claimant may also seek damages where they have suffered loss or damage because of such a contravention (s 236). More broadly, where such a contravention causes, or is likely to cause, loss or damage, the court has a wide discretion to make orders to compensate injured persons or prevent further loss (s 237).

*SOP Act*¹⁰

27 The main purpose of the *SOP Act* is ‘to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts’ (s 1).

¹⁰ For the purposes of these reasons, the relevant version of the *SOP Act* is Authorised Version No 13 incorporating amendments as at 1 February 2024.

28 Section 3 concerns the object of the *SOP Act* and provides:

3 Object of Act

- (1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—
 - (a) the making of a payment claim by the person claiming payment; and
 - (b) the provision of a payment schedule by the person by whom the payment is payable; and
 - (c) the referral of any disputed claim to an adjudicator for determination; and
 - (d) the payment of the amount of the progress payment determined by the adjudicator; and
 - (e) the recovery of the progress payment in the event of a failure to pay.
- (4) It is intended that this Act does not limit—
 - (a) any other entitlement that a claimant may have under a construction contract; or
 - (b) any other remedy that a claimant may have for recovering that other entitlement.

29 In *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*,¹¹ Santamaria, Beach and McLeish JJA endorsed the following statement of Warren CJ and Tate JA (with whom Kaye JA agreed) in *Saville v Hallmarc Construction Pty Ltd*¹² regarding the operation of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (*NSW SOP Act*) which also applied to the (Victorian) *SOP Act*:

- (1) [The Act] operates in a ‘rough and ready’ way to preserve the cash flow to a builder notwithstanding that the builder might ultimately be

¹¹ (2016) 32 BCL 328; [2016] VSCA 119 (*‘SSC Plenty Road’*).

¹² (2015) 47 VR 177; [2015] VSCA 318 (*‘Saville’*).

required to refund the money received and yet have an inability to repay;

- (2) it imposes a mandatory regime regardless of the parties' contract with extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses;
- (3) at each stage of the regime for enforcement of the statutory right to progress payments, it lays down clear specifications of time and other requirements to be observed, rendering it 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';
- (4) as adjudication determinations are capable of being filed as a judgment for debt in a court of competent jurisdiction, a respondent to a payment claim should not be at risk of suffering a judgment where a temporal limitation has not been complied with by the claimant;
- (5) a claimant has alternative remedies; 'even if the door to adjudication is closed, the door to judgment remains open'.¹³

30 As the judge said in the present case, the principle behind the *SOP Act* is that respondents to payment claims should 'pay now, argue later'.¹⁴

31 Part 2 of the *SOP Act* concerns rights to progress payments in respect of a construction contract. Section 9 creates a right to a progress payment on and from a defined 'reference date'. Section 10 then provides for the calculation of a progress payment which must not include an 'excluded amount' (s 10(3)),¹⁵ while s 12 provides for when a progress payment becomes due and payable.

32 Part 3 of the *SOP Act* then sets out the procedure for recovering 'progress payments' by providing for the service of a 'payment claim'. Section 14(1) provides that a person who is, or who claims to be, entitled to a progress payment may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

33 A person on whom a payment claim is served may reply to the claim by providing a payment schedule to the claimant (s 15(1)). The matters that must be included in a payment schedule are set out in s 15(2).

¹³ *Saville* (2015) 47 VR 177, 207–8 [80] (Warren CJ and Tate JA, Kaye JA agreeing at 225 [147]); [2015] VSCA 318 (citations omitted), quoted in *SSC Plenty Road* (2016) 32 BCL 328, 344–5 [51] (Santamaria, Beach and McLeish JJA); [2016] VSCA 119. See also *Saville* (2015) 47 VR 177, 208 [81] (Warren CJ and Tate JA, Kaye JA agreeing at 225 [147]); [2015] VSCA 318.

¹⁴ Reasons, [43].

¹⁵ The term 'excluded amount' is defined in s 10B and includes amounts claimed for damages arising under the relevant construction contract, as well as any amounts for claims arising other than under the construction contract.

34 Various consequences may flow depending on the existence, or content, of any payment schedule. Relevantly to the present case, a claimant may apply for adjudication of a payment claim if the respondent provides a payment schedule, but the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim (s 18(1)(a)(i)).

35 Pursuant to s 23(1), an adjudicator is to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant, the date on which that amount becomes payable, and the rate of interest payable on that amount. In making that determination the adjudicator must consider the matters set out in s 23(2) and only those matters. Under s 23(2A) the adjudicator must also not take into account any excluded amount or any matter that is prohibited from being taken into account by the *SOP Act*.

36 Section 23A makes provision for an adjudication determination to be given to the parties, while s 24(3) makes provision for corrected determinations to be given. Those provisions are detailed further when considering ground 3, below.

37 Section 28M then identifies when the obligation to pay an adjudicated amount arises. It provides:

28M Respondent required to pay adjudicated amount

- (1) Subject to sections 28B and 28N,¹⁶ if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.
- (2) In this section *relevant date* means—
 - (a) the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent under section 23A; or
 - (b) if the adjudicator determines a later date under section 23(1)(b), that later date.

38 A number of provisions then follow which govern the procedure to be followed if the respondent fails to make payment pursuant to s 28M. Thus, s 28O(1) provides that if the respondent ‘fails to pay’ the adjudicated amount in accordance with s 28M, the claimant may request an adjudication certificate from the authorised nominating authority to whom the adjudication application was made. Section 28Q then provides what is to be specified in an adjudication certificate, which includes the ‘amount payable under section 28M’ (s 28Q(1)(c)).

¹⁶ These provisions relate to circumstances where there is a review determination, in which case the obligation to pay arises on the date for payment determined by the review adjudicator under s 28I(6)(f): see s 28N.

- 39 Section 28R is a significant provision in this case. It sets out procedures for commencing proceedings for the recovery of the unpaid portion of the amount payable under s 28M and provides:

28R Proceedings to recover amount payable under section 28M or 28N

- (1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.
- (2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court—
 - (a) the adjudication certificate; and
 - (b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.
- (4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.
- (5) If a person commences proceedings to have the judgment set aside, that person—
 - (a) subject to subsection (6), is not, in those proceedings, entitled—
 - (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or
 - (ii) to raise any defence in relation to matters arising under the construction contract; or
 - (iii) to challenge an adjudication determination or a review determination; and
 - (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.
- (6) Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review

determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.

- (7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.
- (8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

40 Part 3 also contains s 47, which provides:

47 Effect of Part on civil proceedings

- (1) Subject to section 48, nothing in this Part affects any right that a party to a construction contract—
 - (a) may have under the contract; or
 - (b) may have under Part 2 in respect of the contract; or
 - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any proceedings arising under a construction contract (including any arbitration proceedings or other dispute resolution proceedings), whether under this Part or otherwise, except as provided by subsections (3) and (4).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
 - (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order, determination or award it makes in those proceedings; and
 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.
- (4) In any arbitration proceedings or other dispute resolution proceedings under the construction contract, the person determining the arbitration or dispute must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or determination or award the person makes in those proceedings.

- (5) Nothing in this Part affects any right that a principal may have under any contract except as expressly provided for in this Act.

PART C: GROUNDS 1 AND 2 — INCONSISTENCY BETWEEN THE ACL AND SOP ACT

41 It is convenient to consider grounds 1 and 2 together, which read as follows:

Ground 1 — Inconsistency between the ACL and the entry of judgment of \$1,879,174.07 under SOP Act

- a. The trial judge erred in law in:
- i. finding in the Reasons at [104]–[115] that there was no inconsistency between ss 28M, 28O and 28R(1)–(4) of the *SOP Act*, which govern the County Court’s entry of the County Court judgment, and ss 18, 232, 234, 236 and/or 237 of the *ACL*;
 - ii. adopting the reasons of the majority and not engaging with the dicta of Rares JA (in dissent) in *Birdon*;
 - iii. distinguishing or rejecting *Bitannia*; and
 - iv. distinguishing the decision in *Façade Treatment*.
- b. The trial judge ought to have found that:
- i. sections 28M, 28O and 28R(1)–(4) of the *SOP Act* practically impaired 1559HS’s rights under the *ACL* to prevent the entry of judgment for the adjudicated amount; and
 - ii. sections 28M, 28O and 28R(1)–(4) of the *SOP Act* were inconsistent with ss 18, 232, 234, 236 and/or 237 of the *ACL* and therefore invalid under s 109 of the *Constitution* to the extent of that inconsistency.
- c. If the trial judge had so found then, the County Court judgment, having been entered pursuant to those invalid provisions, was affected by jurisdictional error and amenable to an order in the nature of certiorari.

Ground 2 — Inconsistency between the ACL and the provisions of the SOP Act governing the setting aside of the County Court judgment

- a. The trial judge erred in law in finding in the Reasons at [132] that there was no inconsistency between ss 28R(5)(a)(i) and/or 28R(5)(a)(ii) of the *SOP Act*, which govern the setting aside of the County Court judgment and ss 18, 232, 234, 236 and/or 237 of the *ACL*.
- b. Further, as in Ground 1, the trial judge erred in law in:
- i. adopting the reasons of the majority and not engaging with the dicta of Rares JA (in dissent) in *Birdon*;

- ii. distinguishing or rejecting the decision in *Bitannia*; and
 - iii. distinguishing the decision in *Façade Treatment*.
- c. The trial judge ought to have found that:
- i. sections 25R(5)(a)(i) and/or 25R(5)(a)(ii) of the *SOP Act* practically impaired 1559HS's rights to rely on its *ACL* claims by way of cross-claim or in defence in seeking to set aside the County Court judgment; and
 - ii. sections 25R(5)(a)(i) and/or 25R(5)(a)(ii) of the *SOP Act* were inconsistent with ss 18, 232, 234, 236 and/or 237 of the *ACL* and therefore invalid under s 109 of the *Constitution* to the extent of that inconsistency.
- d. If the trial judge had so found then, the County Court judgment, having been entered pursuant to those invalid provisions, was affected by jurisdictional error and amenable to an order in the nature of certiorari.

Judge's reasons

- 42 The judge provided a detailed review of each of three critical authorities cited by the parties: *Bitannia Ltd v Parkline Constructions Pty Ltd* ('*Bitannia*'),¹⁷ *Birdon Pty Ltd v Houben Marine Pty Ltd* ('*Birdon*'),¹⁸ and *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* ('*Façade Treatment*'),¹⁹ before considering each of the issues she was required to consider.
- 43 Her Honour first dealt with whether there was inconsistency between the *ACL* and the provisions in the *SOP Act* governing the adjudication determination. As indicated already, she found there was no such inconsistency.²⁰ In the course of her consideration the judge expressly dealt with *Façade Treatment* and found that it did not assist, stating that '[c]ritical to that decision is that s 553C of the *Corporations Act* is automatically attracted to any mutual dealings at the point of liquidation'.²¹ She noted that by comparison, Camillo was not in liquidation and any entitlement 1559HS might have under the *ACL* 'remains unaltered' by the adjudicator's determination.²²
- 44 Turning then more specifically to provisions in the *SOP Act* governing the entry of judgment (the subject of ground 1), her Honour began by recording various features governing how a person may bring a proceeding under s 28R of the *SOP Act*.²³ She considered that, against this background,

¹⁷ (2006) 67 NSWLR 9; [2006] NSWCA 238 ('*Bitannia*').

¹⁸ (2011) 197 FCR 25; [2011] FCAFC 126 ('*Birdon*').

¹⁹ (2016) 337 ALR 452; [2016] VSCA 247 ('*Façade Treatment*').

²⁰ Although this finding is not the subject of challenge, the judge's treatment of *Façade Treatment* was the subject of some criticism such that it is necessary to refer to it.

²¹ Reasons, [98].

²² *Ibid.*

²³ *Ibid* [105]–[111].

it is plain that the enforcement of the right of a claimant to payment of its progress claim under the *SOP Act* does not intersect with the operation of the *ACL*. The enforcement of an interim payment pursuant to the *SOP Act* ‘pay now, argue later’ regime, ahead of the determination of the rights and entitlements of the parties to the Construction Contract, does not alter, impair or detract from the enjoyment of those asserted rights.²⁴

- 45 The judge adopted the reasons of the majority in *Birdon*, which concerned the *NSW SOP Act*. She considered that the difference in the *NSW SOP Act* (where the adjudication certificate itself is filed as a judgment for a debt) was not critical to the reasoning of the majority. She said:

What was critical was that the task being performed was the enforcement of a right to a progress payment — a new statutory right that does not depend on the true state of underlying facts but on the assessment of the adjudicator, a statutory right determined without prejudice to the parties’ ultimate legal rights.²⁵

- 46 The judge also rejected 1559HS’s reliance on *Bitannia* because in her Honour’s view it was inconsistent with the ratio of *Birdon* (which was correctly decided), and the reasoning of Basten JA in *Bitannia* was obiter.²⁶ She also considered that *Bitannia* was distinguishable on its facts, as the conduct alleged to have been misleading or deceptive in that case concerned the engagement of the process underpinning the statutory entitlement to payment and was not conduct relevant to the final entitlement of the parties as in this case.²⁷

- 47 In relation to provisions in the *SOP Act* governing the setting aside of a judgment (the subject of ground 2), the judge noted that the *SOP Act* provides for a fast-track procedure, which may be undertaken ex parte on very limited evidence; and which then allows the respondent to commence proceedings to have the judgment set aside on limited grounds.²⁸ Her Honour considered that this approach is consistent with the purpose of the *SOP Act* to create an expedited process for enforcing a statutory liability to pay an adjudicated amount on account, while preserving the parties’ other rights.²⁹

- 48 The judge then stated:

Again, in my view and for the reasons I have already set out, the provisions of the *SOP Act* governing the procedure to enforce a payment claim (which include s 28R) do not alter, impair or detract from the operation of the *ACL*. It is not inconsistent with the rights under the *ACL* to allow for the enforcement of an interim payment under the *SOP Act* — ahead of the final determination of the rights of the parties to the Construction Contract.

²⁴ Ibid [112] (emphasis in original).

²⁵ Ibid [113] (citations omitted).

²⁶ Ibid [114(a)–(b)].

²⁷ Ibid [114(c)], citing *Bitannia* (2006) 67 NSWLR 9, 16 [14] (Hodgson JA); [2006] NSWCA 238.

²⁸ Reasons, [130]–[131].

²⁹ Ibid [131].

As submitted by Camillo, the *ACL* creates a regime for the curial enforcement of rights. It does not undermine that scheme to allow a separate and new set of statutory rights to be created, and to leave it to a court to decide whether those rights can be enforced ahead of the *ACL* claim — especially when considered in the context of the ‘full judicial armoury’ (including case management, interlocutory injunctions, stays, freezing orders and remedial awards such as interest and restitution) — and nothing in the *SOP Act* carves out this Court’s inherent power to grant an injunction or to order a stay in a proper case.³⁰

Key authorities

49 Before turning to the submissions in this case, it is convenient to summarise the three key authorities the subject of those submissions, being *Bitannia*, *Birdon* and *Façade Treatment*.

Bitannia

50 The respondent, Parkline Constructions Pty Ltd, served a final payment claim in relation to construction work on the appellants, Bitannia Pty Ltd and Rossfield Nominees (ACT) Pty Ltd, under the *NSW SOP Act*. The appellants did not respond with a payment schedule within the prescribed time. Proceedings were commenced in the District Court of New South Wales and judgment was obtained for the amount of the claim.

51 The appellants resisted payment of the claim in the District Court on a number of grounds including, relevantly, that the respondent had engaged in misleading or deceptive conduct in serving the payment claim which caused the appellants not to prepare a payment schedule. Under the construction contract the progress payments were to be submitted to the architect. During the course of the works, payment claims were directed to the architect as required. However, the impugned payment claim was directed to the general manager of a company which administered the contract. The payment claim indicated that it had been copied to the architect but it had not. Because it had not been copied to the architect, the appellants did not provide a payment schedule within the period required.³¹

52 The New South Wales Court of Appeal unanimously held that the point relied upon by the appellants was not a defence ‘in relation to matters arising under the construction contract’ with the result that such a defence was not prohibited from being raised in the proceeding under s 15(4)(b)(ii) of the *NSW SOP Act*.³²

53 In finding that the defence was not precluded, Basten JA found that the language of s 15(4)(b)(ii) should not be construed so broadly as to prohibit a defence based upon conduct undertaken in service of a payment claim for the purpose of creating a

³⁰ Ibid [132]–[133].

³¹ *Bitannia* (2006) 67 NSWLR 9, 25 [48] (Basten JA); [2006] NSWCA 238.

³² Ibid 36 [96] (Basten JA, Hodgson JA agreeing at 16 [12], Tobias JA agreeing at 17 [17]).

statutory right.³³ However, his Honour went on to consider the result if his analysis was wrong and there was no right to proceed by way of defence, in circumstances where any form of cross-claim was prohibited. More particularly, he considered whether the terms of the *NSW SOP Act* would ‘alter, impair or detract from’ the regulation of trade and commerce under the relevant Commonwealth Act.³⁴

54 Basten JA identified an argument raised by the appellants that, by reason of the statutory restraint on bringing a cross-claim, there was an impairment of a right arising under the *Trade Practices Act 1974* (Cth) (*TP Act*) to resist a judgment for the amount of the payment claim.³⁵

55 His Honour referred to the judgments in *Stock Motor Ploughs Ltd v Forsyth* (*Stock Motor*)³⁶ including the judgment of McTiernan J who cited a passage from *Gould v Robson* as follows: ‘How can a man be said not to be injured if his means of suing be abridged by the act of another?’³⁷ Basten JA then stated:

The [*NSW SOP Act*] prevents the respondent to a payment claim raising, by way of cross-claim, a complaint about the conduct of the claimant in serving the payment claim. The effect is to preclude the respondent from relying upon a complaint which might otherwise have been available in resistance to a claim, even though, if the claim were not payable, the payment may be recoverable in separate proceedings. If that analysis of the effect of the [*NSW SOP Act*] is correct, one may ask, adopting the language from *Gould v Robson* (1807) 8 East 576; 103 ER 463, how can the respondent be said not to be injured, by this abridgment of its rights?³⁸

56 Basten JA accepted the principle enunciated by Dixon J in *Stock Motor* that s 109 of the *Constitution* invalidates a law of a State in so far as it would ‘vary, detract from, or impair’ the operation of a law of the Commonwealth.³⁹ Basten JA considered that this approach focused on the existence of a right arising under a Commonwealth law and the direct impairment of the enjoyment of that right as a result of the operation of State law.⁴⁰ His Honour also noted that it may be necessary to look at the ‘practical effect’ of the State law but, in any event, considered that the impact of the State law on rights conferred under the *TP Act* in this case was ‘direct and significant’.⁴¹

57 Basten JA acknowledged that on occasion a Commonwealth law and State law will be drafted to include a statement which avoids operational inconsistency, for example, by

33 Ibid.

34 Ibid 38–9 [105], citing *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J).

35 *Bitannia* (2006) 67 NSWLR 9, 39 [107] (Basten JA); [2006] NSWCA 238.

36 (1932) 48 CLR 128; [1932] HCA 40 (*Stock Motor*).

37 (1807) 8 East 576; 103 ER 463, 465 (Lord Ellenborough), quoted in *Stock Motor* (1932) 48 CLR 128, 151 (McTiernan J); [1932] HCA 40, quoted in *Bitannia* (2006) 67 NSWLR 9, 40 [111] (Basten JA); [2006] NSWCA 238.

38 *Bitannia* (2006) 67 NSWLR 9, 40 [112] (Basten JA); [2006] NSWCA 238.

39 *Stock Motor* (1932) 48 CLR 128, 136 (Dixon J); [1932] HCA 40, accepted in *Bitannia* (2006) 67 NSWLR 9, 41 [114] (Basten JA); [2006] NSWCA 238.

40 *Bitannia* (2006) 67 NSWLR 9, 41 [115] (Basten JA); [2006] NSWCA 238, citing *Stock Motor* (1932) 48 CLR 128, 137 (Dixon J); [1932] HCA 40.

41 *Bitannia* (2006) 67 NSWLR 9, 41 [115] (Basten JA); [2006] NSWCA 238.

withdrawing a Commonwealth right on exercise of a concurrent State right.⁴² However, here there was no provision which limited or regulated the operation of the *TP Act* in a similar way.⁴³ While s 75 (which appeared in pt V) of the *TP Act* provided that ‘this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory’, Basten JA considered that this acted to save the operation of State laws having a similar effect and not State laws which were in conflict with pt V.⁴⁴ Accordingly he considered that s 75 provided ‘little assistance’ in answering the present question.⁴⁵

58 Basten JA also dealt with the suggestion that the only restraint imposed was a procedural restraint, given that the State law did nothing to prevent rights being pursued in separate proceedings. He said:

However, the suggestion that an injured party could bring separate proceedings in relation to misleading or deceptive conduct is to disregard an important practical consequence of the State law. The loss which the appellants seek to prevent is one which will occur, in a summary way, in the s 15 proceedings. The institution of separate proceedings will not avail them in that respect, unless they can obtain a stay of the s 15 proceedings to allow the separate [*TP Act*] proceedings to be completed. At best that involves a claim for a stay, on discretionary grounds, of the s 15 proceedings. Although dicta in *Brodyn* suggests that such a stay may be appropriate in some circumstances, there must be real doubt as to whether a stay would be appropriate if its purpose were to allow the respondent to the proceedings to raise a matter (albeit elsewhere) which could not, on the present hypothesis, be raised directly in the s 15 proceedings by way of cross-claim or defence. The very purpose of the prohibition is to prevent a right to judgment on a payment claim being delayed by a cross-claim. It is quite likely that a Court would refuse a discretionary stay in those circumstances, on the basis that the respondent was trying to achieve indirectly the very result which the Parliament had prohibited it from obtaining directly. That could be seen as an abuse of process, rather than a legitimate basis for a stay.⁴⁶

59 Accordingly, his Honour considered that there was inconsistency between the State law and the *TP Act* in the way the appellants contended.⁴⁷

60 Hodgson JA substantially agreed with Basten JA’s reasons, but subject to some specific qualifications.⁴⁸ He agreed with Basten JA that the respondent’s defence was

⁴² Ibid 41–2 [116]. The example given was the provision in s 6A(2) of the *Discrimination Act 1975* (Cth) for making a claim under either the Commonwealth Act or a State law. Where a person in fact takes proceedings under the State law, the right under the Commonwealth Act is withdrawn.

⁴³ *Bitannia* (2006) 67 NSWLR 9, 41–2 [116] (Basten JA); [2006] NSWCA 238.

⁴⁴ Section 75(1) of the *Trade Practices Act 1974* (Cth) (‘*TP Act*’) was in similar terms to s 131C(1) of the *Competition and Consumer Act 2010* (Cth). It may also be noted that s 75(3) of the *TP Act* was in similar terms to s 131C(4), providing as follows: ‘Except as expressly provided by this Part, nothing in this Part shall be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted.’

⁴⁵ *Bitannia* (2006) 67 NSWLR 9, 41–2 [116] (Basten JA); [2006] NSWCA 238.

⁴⁶ Ibid 42 [118], referring to *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394.

⁴⁷ *Bitannia* (2006) 67 NSWLR 9, 42 [119] (Basten JA); [2006] NSWCA 238.

not prohibited under s 15(4)(b)(ii).⁴⁹ Hodgson JA characterised the basic complaint of the appellants as being that one element of the cause of action relied upon — namely the non-service of a payment schedule — was the result of a breach of s 52 of the *TP Act*. He found that it was not in accordance with the intention of the *TP Act* that a corporation ought to obtain a judgment on a cause of action, one essential element of which has been caused by the misleading conduct.⁵⁰

61 Hodgson JA also agreed with Basten JA that to place significant procedural obstacles in the way of obtaining relief provided by the *TP Act* would make s 15(4)(b) inconsistent with that Act, but on his analysis, ‘there are no such obstacles relevant to this case’.⁵¹ Rather the judge erred in precluding the appellants from relying on arguable *TP Act* remedies. Relevantly, Hodgson JA then said:

I should stress that this is a case where the alleged misleading conduct was relevant to the claimant’s entitlement to a judgment pursuant to s 15. In a case where the alleged misleading conduct is not relevant to that entitlement, but only to the final entitlements of the parties, s 15(4)(b) would not in my opinion place obstacles in the way of obtaining [*TP Act*] relief, and there would be no constitutional reason why it could not operate in accordance with its terms.⁵²

62 Tobias JA also agreed that the appellants could raise as a defence that the failure to provide a payment schedule was induced by the misleading or deceptive conduct.⁵³ In such circumstances his Honour considered that it was ‘unnecessary’ to consider the inconsistency argument.⁵⁴

Birdon

63 The plaintiff, Birdon Pty Ltd, and the first defendant, Houben Marine Pty Ltd, were in dispute in relation to the plaintiff’s hire of a back hoe dredge vessel from the first defendant. The first defendant sought to invoke the procedure for the adjudication and enforcement of progress payments under the *NSW SOP Act* by making a payment claim in respect of outstanding hire payments. However, the plaintiff then commenced a proceeding in the Federal Court claiming that it had no obligation to make payments for hire of the dredge. Instead it claimed repayment of money paid to it by reason of the first defendant’s misleading and deceptive conduct, invoking the *Admiralty Act 1988* (Cth) (*Admiralty Act*) and the *ACL*. The plaintiff also sought to restrain the first defendant from pursuing its application for an adjudication of its payment claim under the *NSW SOP Act* (which was made the day after commencement of the Federal Court proceeding).

48 Ibid 12 [1].

49 Ibid 16 [12].

50 Ibid 15 [8].

51 Ibid 16 [13].

52 Ibid 16 [14].

53 Ibid 17 [17].

54 Ibid 17 [19].

- 64 After interlocutory orders were made by consent to restrain the determination of the adjudication, a special case was reserved for the consideration of the Full Court of the Federal Court in circumstances where the plaintiff argued, inter alia, that the provisions of the *NSW SOP Act* were inconsistent with the Commonwealth Acts.
- 65 The Full Court by a majority (Keane CJ and Buchanan J) found that the interlocutory injunction should be dissolved.⁵⁵ In so finding, the Court rejected an argument that there was inconsistency between the *NSW SOP Act* and the Commonwealth Acts.⁵⁶
- 66 The Full Court considered a number of questions, which included whether the *NSW SOP Act* was invalid because it fell foul of the principle in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*').⁵⁷ However, the plaintiff also raised an issue as to whether provisions of the *NSW SOP Act* relating to the enforcement of a statutory claim for progress payments were inconsistent with the federal jurisdiction invoked under the *Admiralty Act* and the *ACL*.⁵⁸
- 67 Keane CJ identified that one of the questions for determination included question 1, which was:

Whether due to the plaintiff having invoked federal jurisdiction under s 4(3)(f) and 9 of the *Admiralty Act* and the [*ACL*] in proceedings in the Federal Court, the adjudication procedure under Pt 3 of the [*NSW SOP Act*] may not proceed.⁵⁹

- 68 Keane CJ explained:

The plaintiff's principal focus under this heading is upon the proposition that the [*NSW SOP Act*] purports to impair, negate or detract from the operation of a federal law. In that regard, the plaintiff argues that the provision which the [*NSW SOP Act*] makes in relation to the enforceability of the adjudication certificate impairs, or is apt to impair, the operation of federal law in respect of the claims which arise outside the [*NSW SOP Act*].⁶⁰

- 69 Before dealing with question 1, Keane CJ dealt with the *Kable* issue, but made a number of relevant comments concerning the scope of the *NSW SOP Act*. He found that the provisions created a 'novel statutory right to receive a provisional payment of an adjudicated amount'⁶¹ and stated:

The provisions of the [*NSW SOP Act*] establish the content of a new statutory right created by that Act, including the quantification of the entitlement (ss 9 and 17 to 25), the incidents of the right (s 23), and the enforcement of the right (ss 25 and 32). That is, they define the incidents of the novel right. Critically,

⁵⁵ *Birdon* (2011) 197 FCR 25, 44 [83] (Keane CJ), 66 [177] (Buchanan J); [2011] FCAFC 126.

⁵⁶ *Ibid* 43 [76] (Keane CJ), 63 [161] (Buchanan J).

⁵⁷ (1996) 189 CLR 51; [1996] HCA 24.

⁵⁸ *Birdon* (2011) 197 FCR 25, 28–9 [4] (Keane CJ); [2011] FCAFC 126.

⁵⁹ *Ibid* 29 [5].

⁶⁰ *Ibid* 43 [73], citing *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 78 [31] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); [1999] HCA 12 ('*Telstra*').

⁶¹ *Birdon* (2011) 197 FCR 25, 40 [62] (Keane CJ); [2011] FCAFC 126.

the existence and quantum of the new statutory right depends not on the true state of underlying facts as regulated by the charter agreement, but on the assessment of the adjudicator who is not required or authorised to make any findings about those facts.⁶²

70 His Honour concluded that there was not a single matter or controversy which encompassed both the maritime claim and the claim for adjudication of the quantum of provisional progress payments under the *NSW SOP Act*. Rather, ‘[s]eparate and distinct matters arise’.⁶³

71 Keane CJ also considered s 32 of the *NSW SOP Act*,⁶⁴ which enabled the Federal Court to order restitution if it found that the plaintiff’s liability was less than the amount paid under the *NSW SOP Act*. He considered that the ‘provisional and defeasible right’ created by the *NSW SOP Act* did not create an ‘inextricable link’ between liability arising on filing an adjudication certification and the final determination by the Federal Court of the underlying dispute.⁶⁵ As will be seen below, this conclusion differed from the views of the dissenting judge, Rares J.

72 More specifically in relation to question 1, Keane CJ stated:

It is not easy to identify any federal law which forbids what the [*NSW SOP Act*] allows. No federal law requires that there be no entitlement under State law for any party to seek progress payments on a provisional basis in respect of any claim which might be brought in federal jurisdiction. Nor is it possible to identify a federal law which evinces an intention to enter upon, much less cover, the field occupied by the [*NSW SOP Act*].⁶⁶

73 Keane CJ considered that nothing in the *NSW SOP Act* was apt to ‘impair or detract’ from the exercise of Commonwealth judicial power. Nothing in the *NSW SOP Act* provided for resolution of the controversy of which the Federal Court was seized,⁶⁷ nor did it prevent the Federal Court giving such judgment as reflected its determination of the respective entitlements of the parties, having regard to the substantive rights under contract and the true operation of the *ACL*.⁶⁸

74 Keane CJ adverted to the possibility that a payment made pursuant to an adjudication certificate might not ultimately be recoverable if the builder becomes insolvent but said:

⁶² Ibid 41 [63], citing *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* (2005) 226 ALR 362, 381–2 [97], 383 [101] (Campbell J); [2005] NSWSC 1143.

⁶³ *Birdon* (2011) 197 FCR 25, 41 [64] (Keane CJ); [2011] FCAFC 126.

⁶⁴ In similar terms to ss 47(1)–(3) of the Victorian *SOP Act*.

⁶⁵ *Birdon* (2011) 197 FCR 25, 42 [68] (Keane CJ); [2011] FCAFC 126, citing *Commonwealth v McCormack* (1984) 155 CLR 273, 276 (Murphy, Wilson, Brennan, Deane and Dawson JJ); [1984] HCA 57.

⁶⁶ *Birdon* (2011) 197 FCR 25, 42 [72] (Keane CJ); [2011] FCAFC 126, citing *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388, 398 (Toohey and Gaudron JJ); [1994] HCA 17; *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J); [1930] HCA 12.

⁶⁷ *Birdon* (2011) 197 FCR 25, 43 [74] (Keane CJ); [2011] FCAFC 126.

⁶⁸ Ibid.

To the extent that such a prospect threatens the efficacy of the final judgment of the Federal Court, then the Federal Court may meet that risk by granting an injunction to restrain the parties from asserting rights pursuant to the adjudication process. Thus in the present case, the plaintiff might obtain an interlocutory injunction to restrain the defendant from prosecuting an application for an adjudication under the [*NSW SOP Act*] if it were able to establish that it has a sufficiently strong case that the defendant is not entitled to rely upon that Act and that the balance of convenience favours that course.⁶⁹

75 He therefore found that question 1 should be answered in the negative because there was no relevant inconsistency.

76 Buchanan J also found no relevant inconsistency. He considered that the *NSW SOP Act* scheme bore all the hallmarks of an administrative arrangement for a speedy adjudication which will operate without prejudice to ultimate legal rights and, to the extent necessary, on an interim basis.⁷⁰ His Honour stated:

The State Act establishes an administrative procedure for claiming, determining and recovering progress payments. It does so, in my view, without disclosing any intention, or having any operative effect, of intruding upon the exercise of the jurisdiction of this Court or the exercise of federal judicial power generally ... [N]either the effective exercise of that jurisdiction (in whatever court it might have been invoked) or the effective exercise of the authority of this Court is affected by the provisions or operation (to date or potentially) of the State Act. Nothing done, or to be done, in the adjudication procedure will alter, impair or detract from, or should be seen as reflecting a legislative attempt to alter, impair or detract from, the exercise of the jurisdiction of this Court.⁷¹

77 Writing in dissent, Rares J rejected the suggestion that the effect of the *NSW SOP Act* was to create a separate, stand-alone right to payment.⁷² His Honour considered instead that s 32(3)(a)⁷³ recognised that the rights created by pt 3 were part of one controversy and created an ‘integral connection’ between the rights under adjudication and the ‘underlying controversy’.⁷⁴

78 Rares J cited *Bitannia* and considered that Basten JA correctly held that if a claim under the *TP Act* could not have been raised as a defence then this would create an ‘operational inconsistency’ between federal and State laws.⁷⁵

⁶⁹ Ibid 43 [75], citing *RJ Neller Building Pty Ltd v Ainsworth* [2008] 1 Qd R 390, 390 [40]–[41] (Keane JA, Fraser JA agreeing at 402 [51], Fryberg JA agreeing at 402 [52]); [2008] QCA 397.

⁷⁰ *Birdon* (2011) 197 FCR 25, 61 [154] (Buchanan J); [2011] FCAFC 126.

⁷¹ Ibid 63 [161], citing *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); [1937] HCA 82; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508; [2011] HCA 33 (*‘Jemena’*).

⁷² *Birdon* (2011) 197 FCR 25, 47 [97]–[98] (Rares J); [2011] FCAFC 126.

⁷³ Section 32(3)(a) provided that a court must make allowance for moneys paid under the *NSW SOP Act*, in any proceeding in relation to a matter arising under a construction contract, similarly to s 47(3) of the Victorian *SOP Act*.

⁷⁴ *Birdon* (2011) 197 FCR 25, 47 [98] (Rares J); [2011] FCAFC 126.

⁷⁵ Ibid 50 [109].

- 79 Rares J focused on the operation of s 25(4)(b) which imposed an obligation to pay the unpaid adjudicated amount into court as a condition of applying to set aside a judgment.⁷⁶ He considered that the effect of this provision would be to create a potentially impossible financial barrier to the debtor commencing proceedings to set aside that judgment.⁷⁷ He compared this with the Commonwealth laws which did not impose a mandatory precondition of payment into court to invoke the exercise of the federal jurisdiction they created. He considered that such an inflexible precondition imposed by State law was operationally inconsistent with the rights of all persons to apply to a court exercising the judicial power of the Commonwealth for relief under the laws made by the Parliament.⁷⁸
- 80 Rares J ultimately determined that ss 25 and 32 alter, impair or detract from the operation of federal law by substantially, if not completely, proscribing the right of a person in the same proceedings to set aside a judgment under s 25 or to raise a cross-claim relying on rights under federal law.⁷⁹
- 81 In relation to question 1, Rares J therefore concluded that for the reasons he had given, ss 25 and 32(3) were ‘operationally inconsistent’ with the exercise of jurisdiction in a matter of federal law.⁸⁰

Façade Treatment

- 82 The applicant, Façade Treatment Engineering Pty Ltd, entered into a contract to supply and install façade work for the respondent, Brookfield Multiplex Constructions Pty Ltd. The applicant issued a number of payment claims under the *SOP Act*, two of which were not paid, or not paid in full. The applicant was thereafter placed into liquidation. The applicant commenced proceedings seeking judgment on the outstanding payment claims. However, the respondent alleged that the applicant was liable to it under a proposed counterclaim for completion costs and liquidation damages which exceeded the applicant’s claim. This raised the question of whether s 553C of the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) applied which, in the context of a winding up, allowed a party to whom the company owed a debt to set off that debt against any sum it owed to the company.
- 83 A trial judge dismissed the applicant’s proceeding, and this Court dismissed the applicant’s appeal.
- 84 This Court held that the applicant was not entitled to claim progress payments under s 9(1) of the *SOP Act* because the payment regime under the *SOP Act* was not available to companies in liquidation.⁸¹ It was therefore unnecessary to consider a

⁷⁶ Similarly to s 28R(5)(b) of the Victorian *SOP Act*.

⁷⁷ *Birdon* (2011) 197 FCR 25, 51 [111] (Rares J); [2011] FCAFC 126.

⁷⁸ *Ibid* 51 [112].

⁷⁹ *Ibid* 56–7 [134].

⁸⁰ *Ibid* 57 [135].

⁸¹ *Façade Treatment* (2016) 337 ALR 452, 470–4 [76]–[90] (Warren CJ, Tate and McLeish JJA); [2016] VSCA 247. Although this part of the decision has been subject to criticism: *Seymour Whyte*

further issue raised as to constitutional inconsistency. However, the Court further held (in obiter) that as the applicant's winding up attracted s 553C of the *Corporations Act*, the claims of the respondent would be set off under s 553C against the sum in respect of which the applicant sought judgment, with no need for the lodgement of a proof of debt. An order by a court for summary judgment under s 16 of the *SOP Act* would therefore alter, impair or detract from the operation of the *Corporations Act*.⁸²

85 In reaching this conclusion, the Court considered a number of decisions, including *Bitannia*. The Court focused on the scope of s 553C, highlighting that the effect of liquidation was that s 553C was automatically attracted to any mutual dealings between the parties.⁸³

86 The Court found that the effect of s 553C in this case was that, as at 6 February 2013 (the date of liquidation), any unpaid portion of the relevant payment claims ceased to exist, as did the sum claimed by the counterclaim. What replaced them instead was a single claim that represented the balance between them. The Court explained:

For the purpose of ascertaining the balance between them, the sum claimed and the counterclaim are taken to exist separately, but the automatic effect of s 553C is that what remained after 6 February 2013 was a claim to a net balance. The automatic effect of s 553C was anterior to the commencement of the proceedings before the judge.⁸⁴

87 The Court made reference to Basten JA's decision in *Bitannia*, which suggested that close attention ought be given to the practical effect of the *SOP Act* upon rights and duties conferred under Commonwealth law. The Court considered that the practical effect of the summary judgment procedure made available by s 16(2)(a)(i) of the *SOP Act* on the right to a set-off conferred by s 553C was 'direct and significant in that it interferes with the rights made available under the *Corporations Act*'.⁸⁵

88 The Court therefore concluded that ss 16(2)(a)(i) and (4)(b)(i)–(ii) of the *SOP Act* 'alter, impair or detract from' the operation of s 553C of the *Corporations Act* and were inconsistent with s 553C.⁸⁶

1559HS's submissions

89 1559HS submitted that the majority judgments in *Birdon* did not address the issue raised in this case and are not relevant to its disposition. Rather, the argument in

Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) (2019) 99 NSWLR 317; [2019] NSWCA 11, it is unnecessary for us to consider this issue in the present case.

82 *Façade Treatment* (2016) 337 ALR 452, 486 [138] (Warren CJ, Tate and McLeish JJA); [2016] VSCA 247.

83 *Ibid* 495 [164].

84 *Ibid* 500 [176] (citations omitted).

85 *Ibid* 500 [177].

86 *Ibid* 501 [179]–[180].

Birdon appears to have been directed to the effect of the *SOP Act* on the court's exercise of judicial power to resolve the parties' claims under federal law.⁸⁷

90 1559HS submitted that only Rares J in *Birdon*, albeit in dissent, addressed the issue before this Court, and his Honour's reasoning is contrary to the present judge's conclusion. 1559HS referred particularly to Rares J's positive reference to Basten JA's reasons in *Bitannia* in considering the practical effect of the *SOP Act* on Commonwealth law.⁸⁸ The fact that the majority in *Birdon* did not make any reference to *Bitannia* further suggested that the majority was considering a different issue to the one raised in *Bitannia*.

91 1559HS submitted that Basten JA's reasoning in *Bitannia* directly addressed the issues in this case. The 'abridgment of rights' identified by Basten JA was on all fours with the practical impairment of rights under Commonwealth law suffered by 1559HS.⁸⁹ That practical impairment was said to manifest in two ways:

- (a) first, 1559HS was prevented from raising its *ACL* claims as a defence or cross-claim in proceedings under s 28R(1) because of s 28R(5) and the fact that those proceedings in the County Court were conducted *ex parte*; and
- (b) secondly, 1559HS suffered loss 'in a summary way' because judgment was given against it and it was deprived of the use of \$1,879,174.07 until its *ACL* claims were heard and determined.

92 1559HS submitted that the judge did not grapple with these issues and did not explain why the operation of ss 28M, 28O and 28R(1)–(4) of the *SOP Act* did not 'vary, detract from, or impair the operation of a law of the Commonwealth'.⁹⁰

93 1559HS also submitted that, in distinguishing *Bitannia*, the judge misapplied the reasoning of Hodgson JA, who agreed with Basten JA's decision.⁹¹

94 1559HS also submitted that in the present case the judge erred in distinguishing *Façade Treatment* in two ways:

- (a) it was the entry of judgment that caused the inconsistency which led the Court to its decision, not the fact of insolvency, but the judge distinguished *Façade Treatment* on the basis that Camillo is not in liquidation; and
- (b) the judge's approach to distinguishing *Façade Treatment* as part of her consideration of 'issue 1' precluded the proper consideration of that authority in the context of the entry of the County Court judgment (under issue 2).

⁸⁷ Citing *Birdon* (2011) 197 FCR 25, 38 [49]–[51], 43 [73]–[74] (Keane CJ), 59 [146]–[147], 62 [158], 63 [161] (Buchanan J); [2011] FCAFC 126.

⁸⁸ Citing *Birdon* (2011) 197 FCR 25, 50 [109] (Rares J); [2011] FCAFC 126.

⁸⁹ Citing in particular *Bitannia* (2006) 67 NSWLR 9, 40–1 [112], 42 [117], [118] (Basten JA); [2006] NSWCA 238.

⁹⁰ Citing *Stock Motor* (1932) 48 CLR 128, 136 (Dixon J); [1932] HCA 40.

⁹¹ Citing *Façade Treatment* (2016) 337 ALR 452, 491 [149] (Warren CJ, Tate and McLeish JJA); [2016] VSCA 247.

- 95 1559HA submitted that *Bitannia*, Rares J's dicta in *Birdon* and this Court's reasoning in *Façade Treatment* apply with the result that ss 28M, 28O and 28R(1)–(4) of the *SOP Act* practically impaired 1559HS's 'rights under the *ACL* to prevent the entry of judgment for the adjudicated amount'.
- 96 In oral submissions, senior counsel for 1559HS sought to support both grounds 1 and 2 by submitting that the practical effect of ss 28M, 28O and 28R was to 'impair [its] rights to raise an *ACL* claim either before or after the summary judgment is entered' and that this gave rise to an inconsistency.
- 97 Counsel submitted that the *ACL* claim was 'entirely relevant' to the entitlement to a progress claim and was 'part of the controversy'.
- 98 Counsel contended that the majority decision in *Birdon* was not relevant. The majority considered the question in terms of whether the *NSW SOP Act* prevented the Federal Court from the hearing and determination of final rights under the *ACL* or *Admiralty Act* in circumstances where the adjudication process had not even started.⁹² This was to be compared with the more specific issue raised in the present case which is concerned with whether the *SOP Act* impaired the interim process; more particularly, whether it prevents a 'right to bring an *ACL* claim, or defence, to prevent judgment being entered' under the *SOP Act*.
- 99 Counsel also submitted that the 'accrued right' was on any view 'suspended' as described by Dixon J in *Stock Motor*.⁹³
- 100 Counsel also highlighted the remarks of Basten JA in *Bitannia* to the effect that a stay would likely be refused.⁹⁴ He submitted that what arose in this case was not insolvency (as Keane CJ dealt with in *Birdon*), but that 1559HS was being 'held out of [its] entitlement to run [its] *ACL* claim'.
- 101 Counsel ultimately submitted that *Bitannia*, particularly the reasons of Basten JA, *Façade Treatment* and Rares J's dissent in *Birdon* were all directly relevant. The observations of Hodgson JA in *Bitannia* also needed to be understood on the basis that this was a case where the alleged misleading conduct was also 'relevant' to the claimant's entitlement to judgment.⁹⁵

Camillo's submissions

- 102 Camillo submitted that ss 28M, 28O and 28R(1)–(5) simply define the limits of Victorian courts' jurisdiction in proceedings concerning statutory entitlements under the *SOP Act*, while leaving intact their jurisdiction under other regimes such as the *ACL*. 1559HS had failed to genuinely identify any material detriment or impairment of its federal rights by the *SOP Act*. Camillo otherwise adopted the judge's reasoning.

⁹² In so doing he highlighted the broad nature of the question asked. He also highlighted *Birdon* (2011) 197 FCR 25, 43 [74] (Keane CJ), 63 [161] (Buchanan J); [2011] FCAFC 126.

⁹³ Citing *Stock Motor* (1932) 48 CLR 128, 136 (Dixon J); [1932] HCA 40.

⁹⁴ Citing *Bitannia* (2006) 67 NSWLR 9, 42 [118] (Basten JA); [2006] NSWCA 238.

⁹⁵ Referring to *Bitannia* (2006) 67 NSWLR 9, 16 [14] (Hodgson JA); [2006] NSWCA 238.

- 103 A number of further reasons were given for rejecting 1559HS's submissions, including that:
- (a) a judgment to enforce an interim statutory entitlement under the *SOP Act* does not alter any final rights;
 - (b) the courts' remedial powers under ss 232, 234, 236 and 237 of the *ACL* are wide enough to ensure that if 1559HS succeeds in its *ACL* claim then it will be compensated for any loss to it, including as a result of Camillo having had the benefit of the statutory amount in the interim;
 - (c) the *SOP Act* places no inhibition upon 1559HS making a claim under the *ACL*, as it has now done in the Trial Division — the entry of judgment in the County Court posing no impediment to prosecuting that *ACL* claim; and
 - (d) section 131C of the *Competition and Consumer Act* was relevant to the s 109 issue.

Analysis

- 104 1559HS's submission was that the relevant *SOP Act* provisions 'vary, detract from, or impair' the operation of a law of the Commonwealth, relying on a 'direct inconsistency'. As explained by the High Court in *Bell Group NV (in liq) v Western Australia ('Bell Group')*:

Where there is an alleged conflict between a Commonwealth law and a State law, 's 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in favour of the Commonwealth'.

A conflict may arise in a number of ways. The State law, if valid, might 'alter, impair or detract from the operation of a law of the Commonwealth Parliament'. If so, then to that extent it will be invalid because of what sometimes is described as 'direct inconsistency'. As the Court said in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*:

The crucial notions of 'altering', 'impairing' or 'detracting from' the operation of a law of the Commonwealth have in common the idea that a State law *conflicts* with a Commonwealth law if the State law undermines the Commonwealth law.

(Emphasis added.) The conflict may also arise from the laws' legal operation or from their practical effect.

'[A]ny alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial'. The question of whether any alteration or impairment of, or detraction from, a Commonwealth law is significant is 'always one of fact and degree'. The starting point is an analysis of the laws in question and their true construction. The extent of the

inconsistency ‘depends on the text and operation of the respective laws’.⁹⁶

105 A number of 1559HS’s submissions may be rejected at the outset.

106 First, we consider that the decision of the majority in *Birdon* is relevant to the present application. The majority expressly considered the question whether there was a conflict between federal law and the *NSW SOP Act*. As highlighted by Keane CJ, the principal focus of the argument considered in this regard was whether the provisions of the *NSW SOP Act* concerning the enforceability of an adjudication certificate purported to ‘impair, negate or detract from the operation of a federal law,’ which included the *ACL*. More particularly, the case considered whether the *NSW SOP Act* was apt to impair the operation of federal law in respect of claims arising outside that Act.

107 The majority was therefore examining a substantially similar issue as arises here. It is inconsequential that the issue arises in the present case in circumstances where the adjudication process is complete and that 1559HS’s specific complaint is that it was not permitted to run its *ACL* claims as part of that process. As explained in *Bell Group*, the issue of inconsistency is concerned with an analysis of the laws in question and their true construction.

108 We therefore consider that the majority’s consideration in *Birdon* of key equivalent provisions has direct relevance.

109 Secondly, given the importance of considering the particular laws in question, the decision in *Façade Treatment* does not assist in the resolution of the present case. This is because, as this Court explained in *Façade Treatment*, the particular effect of s 553C of the *Corporations Act* in the case of a liquidation is that where there are relevantly mutual dealings, the right to the unpaid portion of a payment claim, and any separate sum claimed by set-off, are replaced with a single claim to a net balance. In preventing reliance upon cross-claims or defences which might be characterised as mutual dealings the *SOP Act* therefore clearly interferes with rights provided under s 553C. This may be compared with rights under the *ACL*, which, as correctly recognised by the judge, remain ‘unaltered’ by the adjudicator’s determination and entry of judgment under the *SOP Act*.

110 Thirdly, we do not accept that the alleged misleading conduct was ‘relevant’ to the claimant’s entitlement to judgment in the sense used by Hodgson JA at 16 [14] of his reasons in *Bitannia*. His Honour found that the defence relying on misleading conduct

⁹⁶ *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 521–2 [50]–[52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); [2016] HCA 21, citing *Jemena* (2011) 244 CLR 508, 523 [37], 524 [39], 525 [41] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ); [2011] HCA 33; *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); [1937] HCA 82; *Telstra* (1999) 197 CLR 61, 76 [27]–[28] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); [1999] HCA 12; *Dickson v The Queen* (2010) 241 CLR 491, 502 [13]–[14] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); [2010] HCA 30; *Metal Trades Industry Association v Amalgamated Metal Workers’ & Shipwrights’ Union* (1983) 152 CLR 632, 642–3 (Gibbs CJ, Wilson and Dawson JJ), 651 (Mason, Brennan and Deane JJ); [1983] HCA 28; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 399–400 [202]–[206] (Gummow J); [2005] HCA 44.

was not prohibited under s 15(4)(b)(ii) of the *NSW SOP Act* and, in this sense, was ‘relevant’ to the claim. By way of contrast, in this case, the unchallenged finding of the judge is that the claim based on misleading conduct was prohibited by s 28R(5)(a)(ii) of the *SOP Act* and, in that sense, is ‘not relevant’ to the *SOP Act* entitlement.

111 The present case is therefore within the category of case described by Hodgson JA where the misleading conduct is relevant only to the final entitlements of the parties. His Honour’s view in such a case was that there is ‘no constitutional reason’ why the *SOP Act* could not operate on its terms, with the result that only Basten JA came to a contrary view in *Bitannia*.

112 There remains a divergence of views between the majority in *Birdon* and Basten JA in *Bitannia* and Rares J in *Birdon*. However, for reasons expressed below, we prefer the approach of the majority in *Birdon*, and particularly that of Keane CJ.

113 The starting point in considering the question of inconsistency is an examination of the text and operation of the relevant laws in question. Focusing then, first, on the Commonwealth law, the *ACL* is applied as a law of the Commonwealth by operation of div 2 of pt XI of the *Competition and Consumer Act*. By s 131C(1) the relevant Part is expressly ‘not intended to exclude or limit the concurrent operation of any law of a State or Territory’. By s 131C(4) nothing in the Part is taken to ‘limit, restrict or otherwise affect any right or remedy’ a person would otherwise have if the *ACL* was not enacted.

114 The parties before us did not address substantive submissions to s 131C. It also seems not to have been raised before the primary judge. The predecessor provision, s 75 of the *TP Act*, was addressed by Basten JA in *Bitannia*, who found it to be of ‘limited assistance’. The application of s 131C did not arise in *Birdon* and was not considered in the obiter observations of Rares J. There was no equivalent provision in *Façade Treatment*.

115 Since *Bitannia* was decided, the High Court has addressed the operation of provisions such as s 131C. In *Momcilovic v The Queen* (*‘Momcilovic’*),⁹⁷ s 300.4 of the schedule to the *Criminal Code Act 1995* (Cth) (*‘Criminal Code’*) arose for consideration. The Court considered its previous decision in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*,⁹⁸ which concerned s 75 of the *TP Act*. Mason J, with whom Barwick CJ, Gibbs, Stephen and Jacobs JJ agreed, said:

[A]lthough a provision in a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object, it may nevertheless validly evince an intention on the part of the statute to make exhaustive or exclusive provision on the subject with which it deals, thereby bringing s 109 into play. Equally a Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent

⁹⁷ (2011) 245 CLR 1; [2011] HCA 34 (*‘Momcilovic’*).

⁹⁸ (1977) 137 CLR 545; [1977] HCA 34 (*‘General Motors’*).

with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law.

... [W]here there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive.⁹⁹

- 116 In *Momcilovic*, Heydon J applied this dictum directly to s 300.4 of the *Criminal Code*, having noted its similarity to s 131C.¹⁰⁰ Other members of the Court adopted slightly different approaches which variously eschewed the language of ‘direct’ and ‘indirect’ inconsistency and ‘covering the field’. So, Gummow J, with whom French CJ and Bell J agreed, stated that the ‘first task in any application of s 109 is to construe the federal law in question’.¹⁰¹ As to the role in that task of a provision such as s 300.4, he said:

The result is that a provision such as s 300.4 of the Code requires the federal law in question to be read and construed in a particular fashion, namely as not disclosing a subject matter or purpose with which it deals exhaustively and exclusively, and as not immunising the rule of conduct it creates from qualification by State law. To the federal law so read and construed, s 109 then applies and operates to render inoperative any State law inconsistent with it. But by reason of the construction to be given to the federal law, there will be greater likelihood of a concurrent operation of the two laws in question.¹⁰²

- 117 To similar effect, Crennan and Kiefel JJ said, referring to the expression of intention in s 300.4:

Although not determinative of relevant inconsistency for the purposes of s 109, such an expression of intention assists in resolving, as a matter of statutory construction, whether the Commonwealth law covers the subject matter exhaustively or exclusively. In the present case the statements of intention found in s 300.4 accord with the intention of Pt 9.1 ascertained by a process of construction. There is no reason why effect should not be given to these statements.¹⁰³

- 118 We shall return to s 131C shortly. It is first necessary to consider the operation of the *SOP Act*. In that regard, we respectfully agree with Keane CJ that the *SOP Act* defines and creates a ‘novel’ statutory right to receive a provisional payment of an adjudicated amount. The existence and quantum of that right does not depend on the true state of underlying rights under the building contract, nor is it affected by rights arising under

⁹⁹ Ibid 563–4 (Barwick CJ, Gibbs and Stephen JJ agreeing at 552, Jacobs J agreeing at 565).

¹⁰⁰ *Momcilovic* (2011) 245 CLR 1, 189 [472], 192–4 [484]–[486]; [2011] HCA 34.

¹⁰¹ Ibid 115 [258] (Gummow J)

¹⁰² Ibid 121 [272] (Gummow J, French CJ agreeing at 74 [111], Bell J agreeing at 241 [660]).

¹⁰³ Ibid 239 [654] (citations omitted).

the *ACL*. Rather, the rights under the *SOP Act* depend on the assessment of an adjudicator who is not required or authorised to make a finding about those other rights. Section 47 also expressly states that nothing in pt 3 (ss 14–47, procedure for recovering progress payments) affects other rights a party might have in respect of the construction contract, while s 3(4) further confirms that the *SOP Act* is not intended to limit any other remedy a claimant may have for recovering entitlements under a construction contract.

119 We therefore also agree with Keane CJ that the right to receive a provisional payment under the *SOP Act* is ‘separate and distinct’ from other rights which arise under the contract, or under the *ACL*. Such a new and separate statutory right has its own criteria unaffected by rights arising under the *ACL*. We respectfully disagree with Rares J that an ‘integral connection’ is created between the separate rights by reason of the fact that account is later taken of moneys paid provisionally under *SOP Act*. The taking into account of a provisional payment will not impair a court from giving such judgment as reflects its determination of the substantive rights of the parties under the *ACL*. The rights remain separate and distinct.

120 However, the analysis of Basten JA appears to proceed on the basis that the *SOP Act* effected some abridgment or direct impact on ‘rights’ under the *TP Act*. Rares J also similarly considered that the *SOP Act* provisions proscribe an ability to rely on ‘rights under federal law’ in a *SOP Act* proceeding (which he considered to be part of a single ‘same’ proceeding or controversy).

121 For reasons explained already, we would respectfully disagree with the premise of such analysis. The statutory entitlement to judgment on the basis of an adjudicator’s determination is separate and unrelated to the rights under the *ACL* (or the *TP Act*). There is hence no direct conflict between the two statutes.

122 Further, it is clear from *Momcilovic*, which was decided after *Bitannia*, that s 131C can no longer be regarded as being of ‘little assistance’. Section 131C provides that the *ACL* is not intended to address the rights of the parties exhaustively. Instead, paraphrasing the conclusion of Gummow J, there is a greater likelihood that the *ACL* is to be construed as intended to operate concurrently with the *SOP Act*.

123 Finally, insofar as a suggestion was made that the *SOP Act* process might, in a practical way, operate so as to prevent the running of an *ACL* claim, the court retains its wide powers to order a stay of execution. Although a judge would be entitled to consider the policy of the *SOP Act* that progress payments be made, the power to grant a stay would extend (but not be limited) to cases where there would otherwise be irreparable harm rendering other rights nugatory.¹⁰⁴

124 It therefore follows that the separate and distinct rights recognised under ss 28M, 28O and 28R of *SOP Act* do not alter, impair or detract from the operation of the *ACL*. The result is that the judge was correct and grounds 1 and 2 must be rejected.

¹⁰⁴ See also *Black Label Developments Pty Ltd v McMenemy* [2025] NSWCA 114, [105]–[106] (McHugh JA, Bell CJ agreeing at [1], Griffiths AJA agreeing at [174]).

PART D: PROPOSED GROUND 3 — RELEVANT DATE UNDER S 28M(2)

125 1559HS's proposed ground 3 is as follows:

Ground 3 — The Corrected Determination applied from the date of the Original Determination

- a. The trial judge erred in law in finding in the Reasons at [152]–[153] that the adjudicator's determination as corrected under s 24 of the *SOP Act* applied from the date of the original determination.
- b. The trial judge erred in law in finding in the Reasons at [135] that s 24 of the *SOP Act* applies similarly to how the slip rule applied to court orders.
- c. The trial judge ought to have found that:
 - i. the corrected determination reset the time for payment under s 28M of the *SOP Act*;
 - ii. the certificate issued under s 28Q was irregular or void; and
 - iii. the County Court judgment, which was entered into based upon the irregular certificate under s 28R(2), was also irregular.
- d. If the trial judge had so found, then the County Court judgment was affected by jurisdictional error and amenable to an order in the nature of certiorari.

126 In order to understand this ground, it is convenient to repeat the relevant terms of s 23(1) and s 28M:

23 Adjudicator's determination

- (1) An adjudicator is to determine—
 - (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the *adjudicated amount*); and
 - (b) the date on which that amount became or becomes payable; and
 - (c) the rate of interest payable on that amount in accordance with section 12(2).

28M Respondent required to pay adjudicated amount

- (1) Subject to sections 28B and 28N, if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.
- (2) In this section *relevant date* means—

- (a) the date that is 5 business days after *the date on which a copy of the adjudication determination is given to the respondent under section 23A*.¹⁰⁵

127 1559HS submitted that a copy of the ‘adjudication determination’ was not ‘given’ to it until the corrected determination was issued on 26 September 2023, being only one business day prior to the adjudication certificate being provided on 27 September 2023. It thereby followed that there was no ‘amount payable under section 28M’ for the purposes of the adjudication certificate and judgment obtained on the basis of that certificate (under ss 28Q and 28R, respectively).

128 However, Camillo submitted that the ‘relevant date’ in s 28M(2) was five business days after the date the original determination was given ‘under s 23A’, which was on 19 September 2023, with the result that 1559HS was liable to pay the amount certified at the time of the issue of the adjudication certificate and judgment.

129 The key issue was therefore the meaning of the requirement that ‘a copy of the adjudication determination is given to the respondent under s 23A’ pursuant to s 28M(2).

130 The judge dealt with this issue by stating:

When the court amends an order under a slip rule, the correction speaks from the date of the original order. The essential purpose of the slip rule is to give effect to the intention which the court would have had, if it were not for the failure which lead to the accidental slip or omission. The legal operation of the later order is simply to correct a previous mistake.

Having regard to the text and purpose of the *SOP Act*, in my view, s 24 operates similarly to the slip rule applied to court orders, such that in this case the Corrected Determination speaks from the date of the Original Determination. My reasons for this conclusion are as follows:

- (a) Section 28M sets the time by which the respondent must pay the adjudicated amount by express reference to the determination given under s 23A. Had parliament intended the clock to restart with any correction, a reference to a corrected determination delivered under s 24(3) could have been included in s 28M but it was not.
- (b) Such a construction is consistent not only with the text but also the purpose of the *SOP Act* to give effect to the determination the Adjudicator would have made, if it were not for the failure which lead to the accidental slip or omission, and to provide for the speedy enforcement of it.¹⁰⁶

¹⁰⁵ Emphasis added.

¹⁰⁶ Reasons, [152]–[153] (citations omitted).

Submissions

131 1559HS submitted that the judge's construction produced consequences that were at odds with a sensible operation of the *SOP Act*. For example, 1559HS would be in immediate default upon provision of the corrected determination even if it had paid the original determination amount, and so it would be susceptible to an ex parte judgment.

132 1559HS submitted that s 28M must also apply to adjudications that have been corrected by s 24, which was consistent with the reasoning of McDougall J in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* ('*Chase Oyster*') as follows:

The [*NSW SOP 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 [*NSW SOP 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.¹⁰⁷

133 In oral submissions 1559HS's case was framed somewhat differently. It submitted that when an adjudicator makes a 'corrected' adjudication determination under s 24 that adjudicator is also making an 'adjudication determination' under s 23. That is, a (corrected) determination under s 24 was also an 'adjudication determination' for the purposes of s 23. It thereby followed that, for the purposes of s 28M(2), 'a copy of the adjudication determination [was] given ... under s 23A' at the time that the corrected determination was given.

Analysis

134 In order to consider this ground it is necessary to have regard to some further provisions of the *SOP Act*.

135 Thus, while 'adjudication determination' is defined in s 4 to mean a determination made by an adjudicator under s 23, there is no definition of a 'determination' or of a 'corrected adjudication determination'.

136 Section 23A appears immediately after s 23 (set out above). It provides that an 'adjudication determination' is to be given to the parties as follows:

23A Adjudication determination to be given to parties and Authority

The authorised nominating authority to whom the adjudication application was made must give a copy of the adjudication determination—

- (a) to the claimant and the respondent, as soon as practicable after it is made; and

¹⁰⁷ (2010) 78 NSWLR 393, 437 [209] (McDougall J); [2010] NSWCA 190.

- (b) to the Authority within 5 business days after it is made.

137 Section 24 then relevantly provides:

24 Correcting mistakes in determinations

- (1) An adjudicator may correct a determination made by him or her if the determination contains—
- (a) a clerical mistake; or
 - (b) an error arising from an accidental slip or omission; or
 - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination; or
 - (d) a defect of form.
- ...
- (3) If a correction is made to a determination under this section, the authorised nominating authority to whom the adjudication application was made must give a copy of the corrected determination to the claimant and the respondent and the Authority as soon as practicable after the correction is made.
- (4) An adjudicator cannot make a correction of a determination under this section if an application has been made under Division 2A for a review of the determination.

138 The meaning of the relevant phrase in s 28M(2)(a), ‘date on which a copy of the adjudication determination is given to the respondent under section 23A’, is to be discerned by application of ordinary statutory construction principles, having regard to the text, context and purpose of the *SOP Act*.¹⁰⁸

139 In our view, the *SOP Act* makes plain that the ‘relevant date’ under s 28M(2)(a) is the date on which the original determination was given ‘under section 23A’ — and not the date on which the corrected determination was given under s 24(3).

140 First, the text of s 28M(2)(a) says so in plain and unambiguous terms. By making express reference to the determination given ‘under section 23A’ Parliament can be taken to have intended to refer to the date made applicable by s 23A — and not some other date. This is clearly a reference to the date on which a copy of the (original) ‘adjudication determination’ is given to the parties under s 23A. A copy of a corrected determination is required to be given under a different provision, s 24(3). If

¹⁰⁸ *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 149 [20] (Kiefel CJ, Bell and Nettle JJ), 157 [41] (Gageler J), 162–3 [64] (Edelman J); [2018] HCA 55; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); [2009] HCA 41.

Parliament had intended s 28M(2)(a) to extend to the date on which a corrected determination is given under s 24(3) there is no reason why it could not have said so.

141 Next, there is nothing elsewhere in the *SOP Act* to suggest that some different extended meaning ought be given to the words in s 28M(2)(a). As indicated above, an ‘adjudication determination’ is defined to be a determination made ‘under s 23’. The concept of ‘adjudication determination’ in s 28M(2) therefore refers to a determination made under s 23. There is nothing in the language of s 24 to suggest that, despite the express definition of ‘adjudication determination’ in s 4, a ‘determination’ which is corrected is also an ‘adjudication determination’ for the purposes of s 28M(2).

142 Finally, it may be readily accepted that the *SOP Act* lays down strict temporal limitations to ensure a builder’s cash flow, consistent with the observations of McDougall J in *Chase Oyster*. However, this does not advance 1559HS’s construction. It may well be that the time between service of a corrected determination under s 24(3) and entry of judgment will be very short (as in this case). However, ‘extremely abbreviated time frames’ are a feature of the *SOP Act*¹⁰⁹ and cannot justify a construction which is simply not open on the plain words of s 28M(2).

143 Proposed ground 3 is without merit.

PART E: PROPOSED GROUND 4 — ALLEGED DENIAL OF PROCEDURAL FAIRNESS

144 1559HS’s proposed ground 4 is as follows:

Ground 4 — whether 1559HS was denied procedural fairness by the County Court

- a. The trial judge erred in law in finding in the Reasons at [158] that the County Court judgment was not made in circumstances where the County Court failed to accord 1559HS procedural fairness.
- b. The trial judge ought to have found that 1559HS was denied procedural fairness by the County Court.
- c. If the trial judge had so found, then the County Court judgment would have been void and her Honour ought to have made orders in the nature of certiorari.

Judge’s reasons

145 The judge relevantly stated:

I reject the claim that 1559HS was denied procedural fairness by the County Court.

¹⁰⁹ *Saville* (2015) 47 VR 177, 207–8 [80] (Warren CJ and Tate JA, Kaye JA agreeing at 225 [147]); [2015] VSCA 318.

First, the process for enforcing the determination is set out in s 28R. The *SOP Act* is concerned with the enforcement of the statutory entitlement to a progress payment, not the determination of the broader rights of the parties to the construction contract. The court need only be satisfied of the matters set out in s 28R(2) to (4) (see paragraph [107] above). It is intended to be a fast track procedure for the entry of judgment that may proceed *ex parte*. In those circumstances, there is no denial of procedural fairness by the County Court proceeding as provided for in the *SOP Act*.

Second, I am not satisfied that there has been any breach of candour by Camillo in relation to the *ex parte* application for judgment. The obligation on Camillo invoking the s 28R procedure is to file the certificate and an affidavit. It did so. Noting, again, that the *SOP Act* is not concerned with the determination of the broader rights of the parties to the construction contract, it was not necessary for Camillo to raise for the Court's attention 1559HS's claim under the *ACL* unless for example, it was a claim arising from conduct undertaken in service of a payment claim for the purpose of creating the statutory right.

Third, even if there had been a breach of the duty of candour, that is not a breach that strikes at the jurisdiction of the County Court. Rather, it is a matter for the Court to attend to in the exercise of its jurisdiction.¹¹⁰

Analysis

- 146 In its written case 1559HS submitted that it had no opportunity to be heard on any *ACL* claim or defence prior to judgment being entered. However, in oral submissions senior counsel confirmed that the matter 1559HS wished to be heard about was the *ACL* claim. He submitted that the judgment was wrongly entered *ex parte* without giving 1559HS any opportunity to make any argument about its *ACL* claim.
- 147 Consistent with the conclusions we have reached in respect of grounds 1 and 2, Camillo was entitled to recover the unpaid portion of the amount payable under s 28M irrespective of any separate claims that might be made under the *ACL*. Regardless, then, of the precise scope of procedural fairness under the *SOP Act*, the rights 1559HS wishes to be heard about (being rights to bring an *ACL* claim) are not matters which were capable of affecting Camillo's right to enter the judgment under the *SOP Act*. Given that there can be no realistic possibility of a different outcome,¹¹¹ this ground therefore cannot succeed.

PART F: CONCLUSION

- 148 The application for leave to appeal will be granted in respect of grounds 1 and 2, but will otherwise be refused. The appeal will be dismissed.

¹¹⁰ Reasons, [158]–[161] (citations omitted).

¹¹¹ *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80, 92 [1] (Kiefel CJ, Keane and Gleeson JJ), 107 [45] (Gageler J), 113 [63] (Gordon J), 123–4 [95] (Edelman J); [2022] HCA 26.

SCHEDULE OF PARTIES

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Applicant

and

CAMILLO BUILDERS PTY LTD (ACN 618 874 776)

First
respondent

JOHN MCMULLAN

Second
respondent

THE COUNTY COURT OF VICTORIA

Third
respondent