

Building & Construction Industry Security of Payment Act 1999 (as amended)

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INTRODUCTION

The construction industry is well known for costly and lengthy disputes which often result in the withholding of payments due by an owner to a contractor or a contractor or a subcontractor or a subcontractor to a subcontractor.

Traditionally the resolution of construction disputes are time consuming, expensive and despite successful negotiated or litigated outcomes, there is no certainty of payment. Often it is the case that a resolution may only be a “hollow victory” due to the dissipation of funds by an unsuccessful party.

Against this background and as a result of an unacceptable industry practice of delaying payment to subcontractors, the Government introduced the Building and Construction Industry Security of Payment Act 1999 (“the Act”) which came into effect on 26 March 2000 and was amended in March 2003.

The Act was inspired from the model of adjudication in the United Kingdom.

When originally implemented the Act introduced new standards of business which included the use of progress payments, the quick adjudication of disputes over progress payment amounts and the provision of security for disputed payments while a dispute is being resolved

The remedies contemplated the Act were unique, were not found in legal text books¹ and were designed to have important implications for building contracts, building supply contracts, architects, engineers and building consultants.

The purpose of this paper is to provide an overview of the amended Act and to consider how the operation of the Act can assist Builders and subcontractors including consultants in the defence and recovery of progress claims.

¹ Philip Davenport “*Security of Payment*” Law Society Journal March 2000 page 46

BACKGROUND

Focus of Government reform

The main goal of the Government in introducing the Act was to reform the manner in which payments are made in the construction industry and to speed up the payment process given the difficulties that subcontractors experienced in obtaining payment.

When first introduced the Act received widespread support from industry including trade associations.

However contrary to the optimistic expectations of the Act in its original form, the Act was the cause of confusion and ambiguity in practice. The Act was not as widely utilised as had been expected due in part to a lack of awareness of its application and in part because of procedural issues and weaknesses, which became apparent in practice.

As a result of a review of the Act; the Act was amended in 2003 to strengthen a Claimant's statutory right to receive progress payments and to streamline the procedures for recovering amounts determined under the Act to be due and payable

The Amendments to the Act commenced on 2 March 2003 and apply to any Payment Claim made after the commencement of the legislation.

As a consequence of the changes the awareness, use of and interest in the Act and its remedies escalated rapidly as did the perception that the amendments would achieve the legislature's goals of protecting cash flow, resolving payment disputes and the enforcement of statutory debts and adjudicated amounts.

OVERVIEW OF ACT AS AMENDED

Generally

The Act is divided into the following four parts and two schedules:

Part 1 Preliminary which deals with the broad objectives of the Act.

Part 1 sets out relevant definitions the most important being "*construction work*" (section 5), "*related goods and services*" (section 6) and "*construction contract*" (section 4).

Part 2 sets out the statutory right to progress claims for work done or goods provided under a construction contract.

Part 2 also provides default provisions dealing with matters such as intervals at which progress claims are made, time for payment following a progress claim and how to value work for progress payments.

Part 3 sets out the procedure for recovering progress claims and describes the adjudication process if a dispute arises over payment.

Part 3 also covers issues such as the appointment of Adjudicators and consequences of adjudication such as the provision of security for payment and rights to suspend work.

Part 4 deals with miscellaneous issues including the regulation making power and that the Act will bind New South Wales State Government contracts, but not contracts with Commonwealth.

PART 1 – Preliminary

Objectives of the Act

The key objectives of the Act are set out in section 3(1) and (2) of the Act as follows:

“... to ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services”.

“The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment in circumstances where the relevant construction contract fails to do so.....”

Scope

The scope of the Act is wide and applies to all contracts (written or oral) for building and “*construction work*”, or the supply of “*related goods or services*” within NSW with the exception of the following:

- Contracts for residential building work for the person who resides in or proposes to reside in the premises on which the work is carried out.

- Employment contracts
- Construction contracts which form part of contracts of insurance or loans or guarantees with recognised financial institutions
- contracts where payment is not for money

Key definitions

What are “construction contracts”

The Act only applies to “*construction contracts*” entered into after 26 March 2000 and provides remedies only where a party to a construction contract has undertaken to carry out “*construction work*” or provide “*related goods or services*.”²

Section 4 defines a “*construction contract*” as:

*‘a contract or other arrangement under which one party undertakes to carry out **construction work** or to supply **related goods or services** to another party.’ (emphasis added)*

A construction contract may be written, oral or partly written and partly oral.³

What is “construction work”

The definition of “*construction work*” appears in section 5 and concerns either “*buildings or structures forming, or to form, part of land*”⁴ or “*works forming, or to form, part of land*”⁵

Construction work is defined broadly and includes activities ranging from construction and maintenance to demolition as well as associated or peripheral activities.

The definition contained in section 5 sets out examples of construction work.

Importantly the Act only applies to construction work carried out in New South Wales.⁶

What are “related goods and services”

The definition of “*related goods and services*” appears in section 6 of the Act

² Section 8(1) of the Act

³ Section 7(1) of the Act

⁴ Section 5(1)(a) of the Act

⁵ Section 5(1)(b) of the Act.

This includes walls, road works, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coastal protection.

To come within the definition of section 6, the “*goods or services*” must be in relation to construction work.

In section 6(1)(a) of the Act “*goods*” are defined as:

“goods of the following kind:

- (i) materials and components to form part of any building structure or work arising from construction work.
- (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work”

Generally Section 6(a)(i) of the Act would apply to such goods that would form permanent works and would include materials such as fill, steel, bricks, cement, doors, plumbing etc as well as items that would be intended to become fixtures.⁷

Section 6(a)(ii) of the Act refers to materials which could be classified as relating to “temporary works” such as hire cranes, shed, scaffolding, fencing etc.⁸

In section 6(b) “*services*” are defined as:

“services of the following kind:

- (i) the provision of labour to carry out construction work,
- (ii) architectural design surveying or quantity surveying services in relation to construction work
- (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work”

Services would include contracts with consultants, project manager or contract administrator administrator employed on contract and not as an employee.⁹

Given the wide meaning given to construction work and related good or services, the Act covers civil engineering, architectural, engineering and electrical work in buildings, maintenance and decorating.

⁶ Section 7(4) of the Act

⁷ Philip Davenport “Adjudication in the NSW Construction Industry” Federation Press page 19

⁸ Philip Davenport *ibid* page 19

⁹ Philip Davenport *ibid* page 20

The Act affects all parties who contract for that work including owners, contractors, subcontractors and consultants and applies to both residential (with exceptions) and commercial work.¹⁰

PART 2 – RIGHTS TO PROGRESS CLAIMS

Entitlement to claim

To be entitled to make a progress payment under the Act, the Claimant must:

- (a) be a party to a construction contract as defined.¹¹
- (b) have undertaken to carry out “*construction work*” in New South Wales or to “*supply related goods or services for construction work*” in New South Wales.¹²
- (c) have a reference date which is defined in s8(2) as the date on which a progress payment may be made or the date by which the amount of a progress claim is to be calculated.¹³

The reference date for making a progress claim is a date determined by or in accordance with the contract or if there is no express provision in the contract, the last day of the month in which work was first carried out and the last day of each subsequent month.

Amount of progress payment and due dates

The amount of the progress payment to which a Claimant is entitled in respect of a construction contract is to be calculated in accordance with the terms of the contract.¹⁴ In the absence of an express provision in the contract, the amount is calculated on the basis of the value of the contract work or related goods or services under the contract.¹⁵

¹⁰ The Act does not affect other rights available to the parties under their contract or apart from the Act, or other civil proceedings (See Section 32 of the Act).

¹¹ Section 8(1)(a) of the Act

¹² See section 8(1)(a) and section 7(4) of the Act.

¹³ See section 8(1) of the Act. Generally the reference date is determined by or in accordance with the terms of the contract. If the contract makes no express provision, the reference date is the date occurring 4 weeks after the previous reference date or (in the case of the first reference date) the date occurring 4 weeks after construction work was first carried out (or related goods and services were first supplied) under the contract. (See section 8(2) of the Act)

¹⁴ Section 9 of the Act

¹⁵ The methodology for valuing the works and or related goods and services is contained in section 10 of the Act.

The due date for payment of the progress claims are prescribed by the Contract, or in the absence of an express provision ten business days after a Payment Claim is made under Part 3.¹⁶

Why make a claim?

The Act provides a useful remedy where the party for who the construction work was done or related goods and services supplied is a slow payer.

Conceivably payment to a Claimant may be slow because of any one of the following reasons:

- (a) the party liable to pay the Claimant has not yet been paid by some other party higher up in the construction claim.

The Act is of assistance because Section 12 of the Act bans “pay when paid” clauses¹⁷.

- (b) there may be some dispute in respect of the Claimant’s entitlement.

In such a case the Act allows the Claimant to obtain an interim decision on the issue of quantum by an Adjudicator.

On the making of a decision by the Adjudicator, the Respondent has to pay the amount determined by the Adjudicator.

Alternatively if the Respondent were to still dispute the amount, the Respondent is required to furnish security under the Act for that amount pending the final determination of the issue by the Court.

- (c) It may simply be that the Respondent is a slow payer without reason.

In such a case, the Act provides the right to suspend work until payment is made.

If there is neither a delay in payment or any dispute, there is no need to make a Payment Claim under the Act.

¹⁶ Section 11 of the Act

¹⁷ A “pay when paid” provision is defined in section 12(2) of the Act.

PART 3 Procedure for recovery

Steps for recovery

The procedural steps to recover progress claims are contained in Part 3 of the Act.

What follows is a summary of those procedural steps.

Step 1 The Payment Claim

Section 13 of the Act provides that a person who is entitled to a progress payment under a construction contract (the Claimant) may serve a Payment Claim on the person who is liable to make the payment under the contract.

To be valid, a Payment Claim must:

- (a) identify the construction work (or related goods and services)¹⁸
- (b) indicate the amount of the progress payment¹⁹
- (c) include the statement:

“This claim is made under the Building and Construction Security of Payment Act 1999”²⁰; and

- (d) be delivered (during normal working hours) faxed or posted to the Respondent’s ordinary place of business.²¹

A record of the time and manner of service of the Payment Claim should be maintained as the date of service will be important in the event that the Claimant wishes to enforce the Act.

Where there is a Superintendent, it is prudent to serve a Payment Claim on both the Superintendent and the principal directly. This is because in assessing Payment Claims the superintendent will be acting as an independent certifier and not as the agent of the principal

¹⁸ Section 13(2)(a) of the Act

¹⁹ Section 13(2)(b) of the Act

²⁰ Section 13(2)C of the Act

²¹ Section 31 of the Act

Step 2 The Payment Schedule – Admitting or denying liability

Where no response

If a party which has received the Payment Claim does not respond in writing within 10 business days, then the Payment Claim will be treated as valid and must be “paid” as required by the contract or the Act.²²

If the amount specified by a Respondent in the Payment Schedule is less than the amount claimed by the Claimant the schedule must indicate why the amount is less. If the Respondent is withholding payment for some reason, the schedule must indicate the Respondent’s reasons for withholding payment.²³

The Payment Schedule must set out all the reasons relied upon by the Respondent to withhold payment otherwise the Respondent will because of section 20(2B) of the Act be precluded from raising any additional reasons in any subsequent adjudication.

If the Respondent does not provide a Payment Schedule with the required time, the Respondent becomes liable to pay the claimed amount on the due date for the progress payment.²⁴

Completion of Payment Schedule

A Payment Schedule must be treated with utmost care and when completed must:

- identify the Payment Claim to which it relates;
- identify the amount which will be paid;
- If the amount identified to be paid on the Payment Schedule is less than the amount claimed then the Payment Schedule must identify the reasons why the Respondent refuses to pay the total amount.

Where a Respondent receives a Payment Claim which bears the endorsement that it has been made under the Act, it is essential that a Payment Schedule be served on the

²² Section 14(4) of the Act

²³ Section 14(3) of the Act

²⁴ Section 14(4)(b) of the Act

Claimant within 10 business days of receipt of the claim stating either that no amount or a lesser amount will be paid and in both cases set out reasons.

The Payment Schedule cannot state that payment will not be made unless and until payment has been received by the Respondent from a third party given that s12 of the Act bans “pay-when-paid” clauses.

Step 3 Disputing a reply to a claim

Where no Payment Schedule has been provided and no payment made or where a Payment Schedule has been provided which indicates an amount the Respondent proposes to pay (ie the schedule amount) and the Respondent fails to pay the whole or any part of the amounts within 10 business days (or any other shorted period prescribed under the contract) then:

- (a) the Claimant may serve a notice on the Respondent of the Claimants intention to suspend carrying out the construction work (or to suspend supplying related goods and services) under the construction Contract²⁵
- (b) the Claimant may either:
 - (i) recover the unpaid portion of the claimed amount as a debt due in a Court. The Respondent is not entitled to bring any cross claim or raise any defence in those proceedings in relation to matters arising under the construction contract.²⁶
 - (ii) make an Adjudication Application under section 17(1) but within the following time frames:
 - where a schedule indicates an amount less than that claimed within 10 business days of receipt of the Payment Schedule
 - where the Respondent fails to pay a schedule amount within 20 business days after the due date for payment
 - where no schedule was provided the Claimant must give a notice of an intention to make an application within 20 business days following the due date for payment. The Respondent may provide

²⁵ Sections 15 and 16 of the Act

²⁶ Sections 15 and 16 of the Act

a Payment Schedule within 5 business days of the notice and the application must be made within 10 business days after expiry of the 5 day period.

Adjudication Application

The Adjudication Application must be made in writing and submitted within the prescribed time frames to an Authorised Nominating Authority²⁷

The Adjudication Application must identify the Payment Claim and schedule to which it relates and may contain submissions relevant to the application.²⁸

The Claimants submissions

The Act does not specify the precise form of the submissions but person acting independently and cannot be an employee of either party.

The Adjudicator is formally appointed when the Adjudicator accepts an Adjudication Application by serving notice of acceptance on the Claimant and Respondent.

Adjudication Response

Section 20 of the Act provides that a Respondent may respond to a Claimant's Adjudication Application within five (5) business days of receipt by the Respondent of the Application or two (2) business days after receiving notice of an adjudication acceptance of the Adjudication Application (which ever expires last) to make an Adjudication Response.²⁹

The Adjudication Response must be in writing, identify the Adjudication Application to which it relates and contain submissions relevant to the response.³⁰

If the Respondent fails to lodge an Adjudication Response, the Adjudicator will simply decide the Adjudication Application on the information provided by the Claimant and perhaps with the benefit of further submissions by the parties³¹ or conference of the parties³² or an inspection as provided by s21(4)(d) of the Act.

²⁷ Refer to section 28 of the Act

²⁸ Section 17(3) of the Act

²⁹ Section 20(1) of the Act

³⁰ Section 20(2) of the Act

³¹ Section 21(4)(a) of the Act

³² Section 21(4)(c) of the Act

A Respondent to an Adjudication Application must therefore act quickly after being served with an Adjudication Application.

A Response cannot include any reasons for withholding payment which were not already included in the Payment Schedule.³³

Step 4 The Adjudicator's Determination

Matters to be considered by Adjudicator

After accepting appointment as an Adjudicator, the Adjudicator has to determine the Adjudication Application as expeditiously, as possible and in any case within 10 business days beginning from the end of the period within which the Respondent may lodge a response³⁴ or within such further time as the Claimant and Respondent agree.³⁵

In determining the Adjudication Application, the Adjudicator can only consider the following matters as prescribed by s22(2) of the Act³⁶:

- (i) the provisions of the Act
- (ii) the provisions of the Construction Contract from which the application arose
- (iii) the Payment Claim to which the application relates together with all submissions including relevant documentation that have duly been made by the Claimant in support of the claim.
- (iv) the Payment Schedule to which the application together with all submissions (including relevant documentation) that have been duly made by the Respondent in support of the Schedule.
- (v) The results of any inspection carried out by the adjudicator of any matter to which the claim relates.

³³ Section 20(2B) of the Act

³⁴ Section 21(1) of the Act.

³⁵ Section 21(3)(b) of the Act

³⁶ For the purposes of determining an application for adjudication an adjudicator may pursuant to section 21(4) of the Act:

- Request further submissions from either party and give the other party an opportunity to comment on those submissions; and
- Set deadlines for further submissions and comments by the parties; and
- call a conference of the parties; and
- carry out an inspection of any matter to which the claim relates

It should be noted that the Adjudicator 's scope as to what he can consider is severely limited. Any challenge to the Adjudicator's determination will most likely relate to Adjudicator considering matters outside of s22(2) of the Act.

The Adjudicator's Determination

The Adjudicator is only required to determine³⁷:

- (i) the amount of the progress payment (if any) to be made by the Respondent to the Claimant (the adjudicated amount); and
- (ii) the date on which any such amount became or becomes payable.

The determination must be in writing³⁸ and must only include reasons or the basis of any amount to be paid if either the Claimant or Respondent requests the adjudicator to include these matters in the determination.³⁹

The amount of the progress payment is to be calculated in accordance with the terms of the contract. If there is no express provision with respect to the matter the amount is to be calculated on the basis of the value of construction work carried out in accordance with section 10 of the Act and having regard to:

- the contract price
- any other rates or prices in the contract
- any variation agreed to by the parties by which the price is to be adjusted by a specific amount
- the estimated cost of remedying any defect
- in the case of materials and components that form part of any work they may only be included in the valuation if they have become the property of the party for whom the construction work is being carried out.

Once an Adjudicator has determined the value of the work or related goods and services this value will be applied in any subsequent adjudication unless either party satisfies the Adjudicator that the value of the work has changed since the previous determination.⁴⁰

³⁷ Section 22(1) of the Act

³⁸ Section 22(3) of the Act

Step 5 Enforcement

A Respondent's obligations after a determination is made, are contained in s23 of the Act.

Where an Adjudicator determines that the Respondent is not liable to make any progress payment, or any further progress payment in respect of an adjudication amount the Respondent has no obligations except possibly to pay half the Adjudicator's fees.

If the Adjudicator determines that the Respondent is liable to pay the claimed amount, the Adjudicator must also decide when the payment is due.

If payment is made by the Respondent on the due date determined by the Adjudicator, the Respondent has fulfilled his obligations.

If however the Respondent either fails to pay the amount THEN:

- (1) the Claimant can request an Adjudication Certificate from the authorised Nominating Authority⁴¹
- (2) the certificate needs to specify the name of the Claimant and Respondent, the amount to be paid (whether the whole amount or that part still owing) and the due date on which the payment was due.⁴² The certificate if applicable may also include any interest that is due and payable and the Respondents unpaid share of the adjudication fees.
- (3) the Adjudication Certificate may be filed in a Court of competent jurisdiction and becomes enforceable as a judgement of that Court⁴³. There are a number of enforcement options available to a Claimant. These include:
 - Writ of Execution
 - Garnish of a Respondent's bank account if bank details are known
 - A Summons to examine the financial position of the Respondent

³⁹ Section 22(3) of the Act . The request for a statement of reasons or explanation of the basis for a decision must be made before the Determination is made.

⁴⁰ Section 22(4) of the Act

⁴¹ Section 24(1) of the Act

⁴² Section 24(3) of the Act

⁴³ Section 25(1) of the Act

- In some limited cases the winding up of the Respondent, although the Supreme Court is expressing an increasingly reluctance to support such a remedy

If the Respondent commences proceedings to have the judgement set aside the Respondent is not entitled to bring any cross claim, raise any defence in relation to matters arising under the construction contract or to challenge the Adjudicators determination the Respondent is also required to pay into Court as security the unpaid portion of the adjudicated amount pending final determination of the proceedings.⁴⁴

- (4) The Claimant may serve a notice to the Respondent of the Claimant's intention to suspend construction work.⁴⁵ The Claimant may suspend work 2 business days after notice has been given.⁴⁶ The Respondent is liable to pay any loss or expenses incurred as a result of the Respondent removing from the contract any part of the work or supply.

The Claimant is also not liable for any loss or damage suffered by the Respondent as a consequence of work not being carried out during the suspension.⁴⁷

Importantly, where a Claimant suspends construction work in accordance with s27, subsection (3) provides that a Claimant who suspends work is not liable for any loss or damage suffered by the Respondent or any person claiming through the Respondent for not carrying out construction work or providing related goods or services during the period of suspension.

This means that a Claimant would not be liable for damages or liquidated damages during the delay period.

⁴⁴ Section 25(4) of the Act

⁴⁵ Section 15(2)(b), section 16(2)(b), section 24(1)(b) of the Act

⁴⁶ Section 27

⁴⁷ Section 25(3)

IMPACT OF THE ACT

Valuable Statutory Rights

A determination in favour of a Claimant can produce serious, substantial and coercive legal consequences for a Respondent.

Indeed as stated by Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1740 “rights may be given to the Claimant which the Claimant did not previously have and rights which the Respondent previously had may be taken.”

For example section 23(1) of the Act provides that if an Adjudicator determines that a Respondent to a Payment Claim is required to pay an adjudicated amount, then the Respondent must pay that amount to the Claimant on or before the expiration of five business days after the date of service of the determination of the Respondent.

A statutory right to payment within a prescribed time is thereby created, regardless of what the contract may on its true construction provide and a corresponding statutory obligation to pay is created.

***Walter Constructions Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266**

The impact of the Act was demonstrated in the decision of the Supreme Court of New South Wales in *Walter Constructions Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266.

In that case a Payment Claim for the sum of \$13.96m was served under the original Act on 20 December 2002.

The Respondent failed to lodge a Payment Schedule.

The Claimant argued that as a consequence of the Respondent failing to provide a Payment Schedule, the Respondent became liable to pay the unpaid portion of the claimed amount being the sum of \$13,962,904 pursuant to section 15(1) and (2)(a) of the Act.

The Payment Claim was challenged on several bases

The Court held that the Respondent was liable to pay the amount claimed to the Claimant under section 14(4) of the Act and because it failed to pay the whole or any part of the claimed amount before the due date for the progress payment.

Consequently the Court awarded judgement for the full amount in favour of the Plaintiff.

Lucas Stuart Pty Limited v Council of the City of Sydney

More recently, in the decision of *Lucas Stuart Pty Limited v Council of the City of Sydney* [2005] NSWSC 840 ("*Lucas Stuart*") decided in August 2005, His Honour Justice Einstein also upheld the strict provisions of the Act with respect to the failure to serve a Payment Schedule.

In *Lucas Stuart* the Council of the City of Sydney failed to serve a Payment Schedule on the builder within the time specified in the Act.

The Builder, Lucas Stuart Pty Ltd, commenced proceedings in the Supreme Court seeking an order for summary judgment against the Council pursuant to section 15 of the Act for the total amount of its Payment Claim of \$3,952,474 (incl GST).

His Honour Justice Einstein, awarded the Builder an order for summary judgment of the total amount of the Payment Claim once satisfied that the pre-conditions of section 14 and 15 of the Act had been satisfied.

Lucas Stuart confirms that the Act is a very powerful tool that can be used by contractors in recovering moneys payable pursuant to a construction contract.

Lucas Stuart also confirms that the effect of sections 14 and 15 can be used very effectively in making an application for summary judgment, as opposed to the more common use of the Act, in the making of Adjudication Applications.

The Act and its intrusion into Contract

Since the commencement of the *Building and Construction Industry Security of Payment Act* (the Act) a great deal of activity has occurred in the Supreme Court NSW as a consequence of challenges made to the determinations of Adjudicators.

What is distinctive about these challenges is that they have highlighted a tension between the objects of the Act to ensure the movement of cash flow on the one hand and the constraints imposed by prescriptive contracts on the other.

Within this tension are a number of ancillary questions which have been the focus of the Supreme Court's attention and which include:

- a) the extent by which the Act can interfere and vary the bargain reached by the parties; and

b) the extent of the power that is given to an Adjudicator under the Act.

Both of these questions have been considered by the NSW Court of Appeal which consistent with the objects of the Act confirmed the legislature's intrusion into the contractual relations between the parties.

Although it must be accepted that a determination under the Act is not final and that the rights of the parties to ventilate contractual disputes in another forum are preserved, it is confirmed at least from anecdotal experience that the involvement of the Adjudicator does and must alter the contractual expectations of the parties.

The most obvious way in which this occurs is the manner in which the procedures available under the Act can overtake the arrangements that have been agreed to by the parties with respect to claims for payment, the valuation of works and time of payment.

As a consequence, contracting parties must look outside of the Contract and to the Act in order to obtain some wider appreciation of their respective obligations.

Where this leaves the Contract is somewhat unclear in a number of respects.

Against this background the challenge for users of the Act is to be aware that with the increasing application of the Act, contractual shields and defences cannot provide any real security or comfort if they offend the Act and limit the rights of a Claimant.

The Trend – Intrusion into the bargain

There are at least three areas in which the intrusive nature of the Act into the Contract has been identified by the Court of Appeal.

The role of the Superintendent?

Firstly in *Transgrid v. Siemens Ltd & Anor* [2004] NSWCA 395 the Court of Appeal suggested that the method of valuing works under the Contract may despite a certification by the superintendent, be exercised by the Adjudicator.

In that decision the Court of Appeal considered the earlier decision of Master McCreedy in *Transgrid v Siemens & Anor* [2004] NSW SC87 where Master McCreedy had to determine whether the Adjudicator could carry out his own valuation of the works or whether the Adjudicator was bound by the valuation of the Superintendent.

Master McCready stated:

“the preferable construction of the Act is that the Adjudicator does not step into the shoes of the superintendent”.

Master McCready’s decision would suggest that the Superintendent’s Certificate was not capable of being challenged by an Adjudicator.

The view of Master McCready however, was not supported by the Court of Appeal, which preferred the interpretation of the Act that would allow the Adjudicator to review the valuation of the works despite the existence of a Superintendent’s Certificate.

What is the last Payment Claim opportunity?

A second example of the Act’s intrusion into the Contract is where the Contract has been terminated by an accepted repudiation or where Payment Claims have continued after the obligations of the parties under the Contract have been discharged.

These issues were considered in *Brodyn Pty Limited trading as Time Cost and Quality v Davenport and Anor* [2004] NSWCA 394 and which referred to the earlier decision of *Holdmark Developers Pty Limited v G.J Formwork Pty Limited* [2004] NSWSC 905.

In Brodyn, the Court of Appeal decided that a right to a progress payment survives the termination of the Contract. In particular, (Hodgson JA with whom Mason P and Giles JA) said at paragraph 63

“section 8 (2) of the Act does not provide that reference dates cease on termination of a Contract or cessation of work. This may be the case under section 8 (2)(a) if the Contract so provides but not otherwise.... In my opinion the only non Contractual limit to the occurrence of reference dates is that which in effect flows from the limits of section 13(4): reference dates cannot support the serving of any Payment Claims outside these limits”.

The effect of Brodyn is that the Act provides for a payment regime which may overtake the regime provided under the Contract and continue the entitlement of the Claimant to make 12 further Payment Claims after the completion of the Contract works.

This may mean that it could still be possible for a subcontractor to make Payment Claims for a period of up to 24 months after the date of practical completion and up to 12 months after the expiration of a 12 months defect liability period if it can be established that rectification of defective works are construction works or related goods and services under the Act.

When are Contractual provisions rendered void?

A third example of where the Act intrudes into the Contract is in respect of the application of section 34 of the Act which provide:

- (1) *"The provisions of this Act have effect despite any provision to the contrary in a Contract.*

- (2) *Provision of any agreement (whether in writing or not):*
 - a) *under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*

 - b) *that may reasonably be construed as an attempt to deter a person from taking action under this Act is void".*

Section 34 was the subject of the decision of McDougall in *Minister for Commerce v The Contrax Plumbing and Anor* [2002] NSWSC 823 where his Honour was required to consider the finding of the Adjudicator that contractual provisions disentitling the contractor of a disputed payment until the implementation of a dispute resolution procedure (which could of taken up to 6 months) were void under section 34 of the Act.

His Honour Justice McDougall accepted the finding of the Adjudicator that the clauses were void on the basis that *"if relied upon, they defer the entitlement given by section 8 (1) of the Act to be paid from a reference date for construction work carried out prior to that reference date"*.

The *Contrax* decision was the subject of a judgment of the Court of Appeal handed down on 6 May 2005. The matter for consideration by the Court of Appeal was whether an alleged error in the construction of the Contract and application of section 34 could invalidate the Adjudicator's Determination.

Hodgson JA said:

[49] In my opinion, an error of fact or law, including an error in interpretation of the Act or of the Contract, or as to what are the valid and operative terms of the Contract, does not prevent a determination for being an Adjudicator's determination within the meaning of the Act. Section 22 (2) does require the Adjudicator to consider the provisions of the Act and the provisions of the Contract; but so as long the Adjudicator does this, or at least bona fide the addresses the requirements of section 22 (2) as to what is to be considered, error on these matters does not render the determination invalid.

[50] Accordingly, even if section 34 does not invalidate the relevant parts of clause 42, the Adjudicator's determination would not be invalid and it is not necessary for me to express a final view as to whether section 34 has that effect in this case".

Although his Honour preferred not to finally determine the section 34 issue because it was not necessary to do so, he did comment that where the provisions of a Contract were so inimical to the objects of this Act for e.g. the provisions in the Contract for a yearly reference date or that progress payments be calculated on the basis of 1% of the value of work done those provisions could be avoided under section 34 of the Act.

Summary

What seems to be clear from the trend demonstrated by the Court of Appeal is a recognition that the Act is not always a servant of the Contract nor does the Act always run in parallel to the contract.

As the cases referred to suggest, the Act does have its own regime outside of the contract to give effect to its objects even where the contract may provide otherwise.

Where that leaves the parties degree of certainty in respect of their contractual position and obligations is not entirely clear.

What is clear however, is that:

- a) the Act can modify the parties contractual positions and expectations.
- b) the Superintendent's certifying role can in many cases be redundant in the assessment of the value of work performed under the Act.

- c) the Supreme Court is becoming increasingly reluctant to interfere with the determinations by Adjudicator's which is consistent with the scheme of the Act.
- d) Users of the Act need to be educated in respect of their exposure under the Act and in the proper administration of the Acts procedures.

CONCLUSION

The law regarding the application of the Act and its effects is still evolving.

The Act is under Review and it is anticipated that further amendments will be made to address any of its current shortcomings.

The lesson to be learnt however from the application of the Act is that time is of the essence in dealing with the Act and its procedures. Failure to comply with the requirements of the Act can lead to serious consequences for a Respondent.

Although the Act was to provide an efficient and timely solution to a subcontractors cashflow the other lesson arising from the cases is that the application of the Act is becomingly increasingly, more complex and therefore the need for diligent contract administration and compliance ever more critical.