

SECURITY OF PAYMENT ROUNDUP—MAJOR CASES AND LEGISLATIVE UPDATES 2007

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INTRODUCTION

This special report summarises the important decisions and legislative changes to the *Building and Security of Payment Acts* across Australia.

Few areas of law are developing so rapidly, with such immediate impacts on the way industry participants run their business. Many of the decisions reported were made in the NSW courts but are directly relevant to provisions in the Queensland, Victoria, Western Australia and the Northern Territory law. South Australia is now set to join the other states in introducing a legislative regime with the South Australian Parliament currently considering the introduction of security of payment legislation. Major changes were made to the Victorian legislation, commencing in March 2007.

The relevant legislation covered in this publication is:

- *Building and Construction Security of Payment Act 1999* (NSW)—the NSW Act
- *Building and Construction Industry Payments Act 2004* (QLD)—the Queensland Act
- *Building and Construction Security of Payment Act 2002* (Vic)—the Victorian Act

- *Construction Contracts (Security of Payment) Act 2004* (NT)—the NT Act

- *Construction Contracts Act 2004* (WA)—the WA Act

Cases covered:

- *John Holland v RTA* [2007] NSWCA 19
- *Halkat v Holmwood* [2007] NSWCA 32
- *Downer v Energy Australia* [2007] NSWCA 49
- *Baulderstone Hornibrook P/L v QIC* [2007] NSWCA 9
- *Over Fifty Mutual Friendly Society Ltd v Smithies* [2007] NSWSC 291
- *Peekhrst Pty Ltd v Glenzeil Pty Ltd* [2007] QSC 159
- *Downsouth Constructions v Jigsaw Corporate Childcare* [2007] NSWSC 597
- Justice Legislation Amendment Bill (No 2) 2007 (NT)
- *Kell & Rigby v Guardian International Proprieties* [2007] NSWSC 554
- *Veolia Water Systems v Kruger Engineering[No.3]* [2007] NSWSC459
- *Rojo Building Pty Ltd v Jillcris Pty Ltd* [2007] NSWSC 880
- *Doolan v Rubikcon (Qld) Pty Ltd* [2007] QSC 168
- *Justice and Other Legislation Amendment Act 2007* (Qld)
- *Boutique Developments Ltd v Construction & Construction & Contract Services Pty Ltd and Anor* [2007] NSWSC 1042
- *Firedam Civil Engineering v KJP Construction* [2007] NSW SC 1162
- *Victorian Building and Construction Industry Security of Payment Act 2002*
- *Building and Construction Industry Security of Payment Bill 2007* (SA)

ADJUDICATOR'S ERROR IN FAILING TO CONSIDER A SUBMISSION IS NOT A DENIAL OF NATURAL JUSTICE—*John Holland v RTA* [2007] NSWCA 19

Richard Crawford, Senior Associate, Sydney

In *John Holland v RTA* the respondent (RTA) put to the adjudicator that he did not have power to deal with the claimant's payment claim. The claim was for delay of damages based on a disputed extension of time claim that had been referred to expert determination. The RTA argued the NSW Act only empowers an adjudicator to value payment claims, not be the arbiter of complex extension of time claims. The difficulty for the RTA was that the argument was raised for the first time in the RTA's adjudication response, when the legislation clearly requires all reasons for withholding payment to be raised in the payment schedule.

The adjudicator determined for John Holland and the judge at first instance, departing from Brodyn, thought the adjudicator's failure to consider the submission a failure to comply with a basic and essential requirement. In the Court of Appeal the RTA argued that if a point is raised that is objectively fundamental to an adjudicator's jurisdiction, it does not matter how it's brought to his attention, it must be considered (as required by section 22(2) of the NSW Act). The court said the basis of the submission was still a reason for withholding payment and should have been included in the payment schedule. Even if the submission was objectively fundamental it is for the adjudicator to decide whether it had any relevance to his determination.

ADJUDICATOR'S DETERMINATION INVALID DUE TO NON-COMPLIANCE WITH AN ESSENTIAL REQUIREMENT OF THE NSW ACT—*Halkat v Holmwood* [2007] NSWCA 32

Richard Crawford, Senior Associate, Sydney

In *Halkat v Holmwood* the adjudicator acknowledged that he did not have enough information to determine the value of the payment claim and accepted the claimant's submissions without considering the submissions made by the respondent. The adjudicator took this course of action as he believed the respondent lacked credibility. The judge at first instance ruled this was a breach of a basic and essential requirement in failing to follow section 22(2) of the NSW Act, which requires an adjudicator to consider the legislation, the construction contract, and the parties' submissions. The Court of Appeal, applying Brodyn, said that the adjudicator's 'capriciousness' in failing to consider the parties' submissions was not a breach of a basic and essential requirement, but an obvious example of a failure to perform his duties in good faith and therefore upheld the judge's decision.

ADJUDICATORS TO DETERMINE THEIR OWN JURISDICTION—*Downer v Energy Australia* [2007] NSWCA 49

Richard Crawford, Senior Associate, Sydney

In *Downer v Energy Australia* the court determined that the adjudicator had dealt with a different payment claim at adjudication from that which was initially served on the respondent. After reviewing an

expert report served with the respondent's payment schedule, in its adjudication submissions, the claimant broadened (and changed the location of), the latent condition on which it claimed an entitlement to delay damages. On appeal the court held that an adjudication application only has to identify the payment claim and the payment schedule. Submissions in support are not required nor have to be considered. Whether or not the adjudicator believed there had been a change in the basis upon which the claim was made, the adjudicator's reasons showed he had considered the question, and having turned his mind to it that was enough, even if he decided wrongly. It is up to an adjudicator to determine the parameters of a payment claim not a court.

CAN A SOLICITOR OR AGENT PREPARE AND SIGN A PAYMENT SCHEDULE?—*Baulderstone Hornibrook P/L v QIC* [2007] NSWCA 9

Mark Brasher, Lawyer, Melbourne

The Supreme Court was asked to consider whether, under s.14(1) of the NSW Act, a payment schedule that had been prepared and signed by a party's solicitors was valid. The key issue was whether the party's agent had express or implied authority to prepare and submit the payment schedule.

The courts will readily imply that a party's agent is authorised to prepare and deliver payment schedules on its behalf in circumstances where the agent, normally a solicitor;

(a) has been retained to provide general legal services in relation to the project; or

(b) has previously dealt with security of payment matters arising on the project.

Baulderstone Hornibrook (Baulderstone) was engaged by the Queensland Investment Corporation (QIC) to design and construct the Westpoint Shopping Centre redevelopment. On 11 April 2006, Baulderstone served a payment claim on QIC. The payment schedule was signed and delivered by its solicitors, Allens Arthur Robinson (Allens), together with a covering letter on QIC's letterhead. Baulderstone challenged the validity of the payment schedule on the basis that Allens' authority under its retainer with QIC, did not extend to the preparation and provision of payment schedules on behalf of QIC.

The NSW Court of Appeal held it could be inferred that the payment schedule was prepared with the knowledge of, and in accordance with, the express or implied instructions of QIC because:

(a) Allens had been engaged to provide all relevant legal services with respect to the project, which included acting to ensure the provisions of the Act were complied with; and

(b) at the very least, the prior conduct of Allens in providing payment schedules on behalf of QIC on a monthly basis for 16 months prior justified a finding of implied authority.

ACT DOES NOT APPLY TO A CONTRACT THAT FORMS PART OF A LOAN AGREEMENT—*Over Fifty Mutual Friendly Society Ltd v Smithies* [2007] NSWSC 291

Mark Brasher, Lawyer, Melbourne

This case is significant because it establishes that a construction contract will not be regarded as forming part of a loan agreement, and therefore

will not be excluded from the operation of the NSW Act, unless it is included in, or incorporated into, the loan agreement.

Accordingly, financiers who enter into arrangements to pay contractors directly may be liable for claims under the Act if those arrangements sit outside of the loan agreement.

The plaintiffs were the financiers for a property development undertaken by Blueprint Property Developments Pty Ltd (Blueprint) and had entered into Deed of Loan with Blueprint. Under a Supplementary Deed between the plaintiffs and Blueprint, the loans were varied so that the plaintiffs were required to pay the subcontractors directly.

Two subcontractors served security payment claims on the plaintiff, claiming payment under the Supplementary Deed, and made adjudication applications in respect of those claims. The plaintiff argued that the Supplementary Deed, upon which the claim for payment was based, was exempt from the operation of the Act by virtue of s.7(2)(a). This argument was rejected by the adjudicator.

On appeal to the Supreme Court, it was held that for the section 7(2)(a) exception to apply, it was necessary to establish that the 'construction contract' formed part of a loan agreement. Even if the court took a broad view of the words 'forms part of', on the facts, the Supplementary Deed could not be classified as forming part of a loan agreement. The arrangement did not arise from the finance instruments, but from written and oral statements and from actions taken on the part of the plaintiffs, which were subsequent to, and fell wholly outside of the loan agreement.

USE OF THE STATUTORY DEMAND PROCESS UNDER THE CORPORATIONS ACT APPROPRIATE WHERE AN ADJUDICATION DECISION HAD BEEN FILED AS A JUDGMENT DEBT AND LEFT UNPAID—*Peekhrst Pty Ltd v Glenzeil Pty Ltd* [2007] QSC 159

Philip Woods, Law Executive, Brisbane

The applicant developer contracted with the respondent builder to construct a residential marina complex at Runaway Bay on the Gold Coast. The Builder served a payment claim under the Queensland Act (QLD Act) and the developer served a payment schedule, disputing the builder's entitlement to the amount claimed. The builder applied for adjudication of the matter under the QLD Act, and the adjudicator decided that the developer was required to pay a sum to the builder. In accordance with the QLD Act, the builder filed the adjudication certificate in court as a judgment for a debt, obtained judgment and subsequently served a statutory demand under section 459E of the *Corporations Act* in reliance on that judgment.

The developer applied to the Supreme Court seeking an order that the statutory demand be set aside on the basis that it was an abuse of process and that substantial injustice would be caused unless it was set aside.

The court refused to set aside the statutory demand on the basis that it did not constitute an abuse of process for the builder to pursue the debt with a statutory demand. The court said the purpose of the QLD Act was to 'achieve swift and early progress payments' and went on to say:

The intention of the Act is clear in seeking to 'fast track' progress

payments even where it is likely that the parties will continue to dispute the decision made by an adjudicator. Where the party against whom judgment has been given has not sought to set it aside nor commenced civil proceedings pursuant to its rights under s100 [of the QLD Act] ... it does not seem to me to be an oppressive use of a statutory demand made in reliance upon the judgment obtained.

SERVICE OF A NUMBER OF INVOICES IN A BUNDLE DOES NOT NECESSARILY CONSTITUTE A SINGLE PAYMENT CLAIM—*Downsouth Constructions v Jigsaw Corporate Childcare* [2007] NSWSC 597

Pamela Jack, Partner, Sydney

The claimant (Downsouth) submitted a bundle of tax invoices claiming payment in relation to four separate contracts it had entered into with Jigsaw. Payment schedules were provided in response to each invoice, which followed a similar format. The matter proceeded to adjudication. Only 21 of the 40 invoices were referred to adjudication. The adjudicator considered these invoices but refused to consider overpayments made in respect of some of the invoices not referred to in the adjudication because the reasons were not expressly contained in the payment schedule.

The matter went to the Supreme Court where the argument that the 40 invoices comprised one payment claim and could not be separated was rejected. The reason given was because each invoice was a separate claim so that part of a bundle could be referred to adjudication.

The court agreed with the adjudicator's application of section 20(2B) of the NSW Act as

to the cross claimed amounts. The payment schedule had not expressly stated how Jigsaw was to reduce the claimed amount and reference to a 'cross claim' was not enough.

PROPOSED AMENDMENTS TO NT SECURITY OF PAYMENT LEGISLATION WILL EXTEND TIME LIMITS—Justice Legislation Amendment Bill (No 2) 2007 (NT)

Cris Cureton, Partner, Darwin

The Justice Legislation Amendment Bill (No 2) 2007 (NT) proposes to amend certain time limits under the *Construction Contracts (Security of Payments) Act 2004* (NT). The amendments will have the following effect:

- the 10 day time limit to issue a notice of dispute in response to a payment claim will be extended to 14 days;
- the 20 day time limit to pay any portion of a disputed claim that is not subject to dispute will be extended 28 days; and
- the 28 day time limit for bringing an application for adjudication will be extended to 90 days.

CONSEQUENCES OF NOT PAYING CLAIMANT WHERE THERE IS NO PAYMENT SCHEDULE—*Kell & Rigby v Guardian International Proprieties* [2007] NSWSC 554

Elizabeth McKechnie, Partner, Sydney

The respondent (Guardian) failed to provide a payment schedule to the claimant (Kell & Rigby) within the required ten business days of receiving a payment claim. Guardian provided a payment schedule, but not within the specified timeframe. Essentially all liability was denied

with a cross claim for a general overpayment. Kell & Rigby made an adjudication application, even though it was not in compliance with section 17(2) of the NSW Act. Section 17(2) requires a claimant to notify the respondent of its intention to apply for adjudication within 20 business days of the due date for payment. The adjudicator declined to deal with the adjudication application, after both parties acknowledged that section 17(2) had not been complied with.

Kell & Rigby then applied to the court for summary judgment to recover the unpaid portion of the payment claim under section 17(1) on the basis that Guardian failed to provide the initial payment schedule within the prescribed time. The court held that by failing to comply with the mandatory notice requirements of the Act the adjudication application was not valid. This in effect meant that no election had been made to proceed to adjudication under section 17(2) of the Act. It was then open to Kell & Rigby to recover the outstanding amount as a debt due.

PRINCIPALS CANNOT RELY ON THE INSOLVENCY PROVISIONS OF THE CORPORATION ACT TO EXTINGUISH JUDGMENT DEBTS—*Veolia Water Systems v Kruger Engineering* [No 3] [2007] NSWSC 459

Julian Hill, Partner, Sydney

In this case a payment claim was issued seeking delay costs on the basis of delay in granting site access and a purported suspension of the works. The respondent issued a very short and vague payment schedule but at adjudication presented over 1800 pages of submissions in an attempt to expand its reasons.

The adjudicator determined in favour of the claimant (Kruger). This was challenged by Veolia on the grounds that the adjudicator had failed to consider the submissions as required by section 22(2) of the NSW Act.

The Supreme Court found the adjudicator had sufficiently discharged his duty. The original payment schedule only had the bare details and the adjudication response could not be called upon to cure any deficiencies. The court warned of the dangers of a repetitive and unfocused payment schedule.

MERE NOTICE BY A CLAIMANT OF AN INTENTION TO SEEK ADJUDICATION OF A PROGRESS PAYMENT DISPUTE IS NOT AN ELECTION TO PURSUE ADJUDICATION UNDER THE NSW ACT—*Rojo Building Pty Ltd v Jillcris Pty Ltd* [2007] NSWSC 880

Nick King, Lawyer, Brisbane and Ben Aitken, Lawyer, Sydney

The building company Rojo was contracted by Jillcris to build a beach house on Jillcris' property. A dispute arose over a progress payment claim served by Rojo on Jillcris. The parties agreed that Jillcris had failed to provide a payment schedule within the ten business day period prescribed under s14 of the NSW Act.

Rojo gave notice to Jillcris under section 17(2) of the Act (notice) of its intention to apply for adjudication of the payment claim, unless a payment schedule was received within the following five business days. Before Jillcris received Rojo's notice, Jillcris sent a payment schedule to Rojo in response to the original payment claim. The following day Jillcris received the notice and Rojo had

advised that it did not intend to pursue an adjudication and therefore Jillcris was not required to provide a payment schedule. It was not contended that the payment schedule provided (late) in response to the original payment claim, should be treated as a response to the notice.

Rojo succeeded in obtaining summary judgment for the claimed amount on the grounds of Jillcris' failure to provide a payment schedule within the time allowed by s14 of the Act.

The court found that no election had been made by Rojo as it had withdrawn the notice before Jillcris had responded, and before Rojo had applied for adjudication. The court concluded that it was unclear whether Rojo would have been entitled to withdraw the notice and claim the debt in court, if Jillcris had provided a payment schedule on time in response to the notice.

SUCCESSIVE PAYMENT CLAIMS DO NOT NECESSARILY HAVE TO BE FOR NEW OR ADDITIONAL WORK, BUT THEY CANNOT BE IDENTICAL. IF A PAYMENT CLAIM MERELY REPEATS AN EARLIER CLAIM IT WILL NOT BE VALID AND THEREFORE CANNOT BE ADJUDICATED—*Doolan v Rubikcon (Qld) Pty Ltd & Ors* [2007] QSC 168

Bede Lipman, Senior Associate, Brisbane and Phillip Woods, Law Executive, Brisbane

Rubikcon made a 'final claim' for payment, which was not paid. An adjudicator was appointed and determined that the adjudication was a nullity because the adjudication application was not made within the time required by the Act. Rubikcon then resubmitted the payment claim

in the same form as the earlier claim, except for changing the invoice date and including the words 'Reissued 16 February 2006'.

When the resubmitted claim was not paid, a second adjudicator was appointed. The adjudicator accepted the payment claim as valid. Subsequently, an application was made to the court for a judgment debt to enforce the adjudicator's certificate.

The court considered *Brodyn Pty Ltd v Davenport*, which held that successive payment claims did not necessarily have to be for additional work but distinguished this case on the basis that the second claim was identical to the first. The court held that a previous claim may be included in a later claim, but there was no authority to allow a second claim to be made that was identical to the first. The court conceded that the second claim was not capable of founding the jurisdiction of the adjudicator.

JUDICIAL REVIEW OF SECURITY OF PAYMENT DECISIONS NO LONGER AVAILABLE IN QUEENSLAND—Justice and Other Legislation Amendment Act 2007 (QLD)

Mark Kenney, Senior Associate, Brisbane

The *Justice and Other Legislation Amendment Act 2007* (Qld) (Amending Act) received royal assent on 29 August 2007 and came into force on 27 September 2007. The *Amending Act* reforms the *Judicial Review Act 1991* (Qld), to exclude an adjudicator's decision from judicial review under the *Building Construction Industry Payments Act 2004* (Qld). Parties are still be able to challenge an adjudicator's decision on the basis of a common law judicial review, as in NSW.

EXPERT REPORTS ASSESSING DEFECTS IN COMPLETED CONSTRUCTION WORK ARE NOT WITHIN THE MEANING OF RELATED GOODS AND SERVICES UNDER THE NSW ACT, HOWEVER IT IS FOR THE ADJUDICATOR TO DETERMINE THEIR OWN JURISDICTION—*Boutique Developments Ltd v Construction & Contract Services Pty Ltd & Anor* [2007] NSWSC 1042

Nick King, Lawyer, Brisbane and Ben Aitken, Lawyer, Sydney

This case reinforces the unwillingness of the courts to intervene in adjudications under the NSW Act on jurisdictional grounds.

Boutique Developments sought to restrain Construction & Contract Services from pursuing an adjudication application on the grounds that the work in question was not 'construction work' or 'related goods and services', within the meaning of the Act.

The application related to the provision by Construction & Contract Services of expert engineering reports to Boutique Developments. The reports assessed defects in construction works (completed by others) and costs associated with rectifying those defects, in support of Boutique Developments' claim against third party insurers.

The court held that the reports did not fall within the definition of 'construction work', as the services were not to 'construct' or 'repair' the works. Instead the reports concerned the quality of construction of work done by others and identified the repairs that were necessary to be made by others.

Similarly, the work was not 'related goods and services', which includes architectural, design, surveying or quantity surveying services in relation to construction work. Justice Gzell said that reports 'germane to the performance of construction would fall within the definition, but not engineering expert reports on defects in construction already carried out'. His Honour expressed the view that, 'the adjudicator would act outside the scope of his jurisdiction if he proceeds to deal with the matter'.

Despite this, his Honour dismissed the summons, holding that it was for the adjudicator to determine the question of whether or not he or she has jurisdiction to determine the application. The court was saying that its role was only in respect of enforcement of an adjudication determination, not to prevent the adjudication determination from taking place. The problem with this position is that the recipient of the adjudication application must prepare a response addressing all matters raised in the application not just the jurisdictional point.

PROOF OF NON-RECEIPT OF PAYMENT SCHEDULE IS NOT PROOF OF INEFFECTIVE SERVICE—*Firedam Civil Engineering v Kjp Construction* [2007] NSWSC 1162

Simon Ralton, Lawyer, Sydney and Adrian Poy, Graduate, Sydney

This case looks at the issue of proof of non-delivery as opposed to proof of non-receipt in terms of the effective service of a payment schedule by a principal.

The respondent (Firedam) had posted a payment schedule by express post as evidenced by envelope barcodes. The claimant

(KJP Construction) claimed it was never received.

The adjudicator held that the payment schedule had not been validly served because it had not come into the claimant's possession. However, the court held that the payment schedule was validly served by the respondent proving with envelope barcodes that it had been sent.

The case also considered whether an adjudication determination is void where an error of law leads the adjudicator to disregard a party's submissions. The adjudicator disregarded the respondent's submissions because he erroneously assumed that they had not been served. The court referred to the natural justice ground for judicial review in *Brodyn v Davenport*. Since the adjudicator had erroneously excluded consideration of the plaintiff's submissions contained in its payment schedule and adjudication response (except as to service), his determination was void due to a denial of natural justice. However, the contravention of the Act did not render an adjudicator's determination void and a denial of natural justice where the error was made in good faith.

VICTORIAN BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002

Leighton Moon, Lawyer, Melbourne

Amendments to Victoria's *Building and Construction Industry Security of Payment Act 2002* (Vic) (Act) took effect on 30 March 2007. The key changes were:

What cannot be included in a payment claim

'Claimable variations' can and 'excluded amounts' can not be included in a payment claim.

'Claimable variations' encompass two classes of variation.

The first class of claimable variation is a variation that is wholly agreed to by both parties. This means that the parties agree on all of the following matters:

- (a) the type and amount of work that has been completed;
- (b) the fact that completion of the work constitutes a variation of the contract;
- (c) the fact that the claimant is entitled to a progress payment and that this payment includes an amount in respect of the variation;
- (d) the way in which this payment is to be calculated; and
- (e) the date on which this payment falls due.

The second class of claimable variation occurs when the parties agree that an item of work has been performed, however they are unable to agree on any of the other matters listed in paragraphs (b)–(e).

For the second class, a variation will only be deemed a 'claimable variation' when the contract price is \$5,000,000 or less, or exceeds \$5,000,000, but the contract does not include a dispute resolution clause.

Importantly, whenever the total amount of second class claimable variations claimed exceeds 10% of the contract price, then this \$5,000,000 threshold is reduced to \$150,000.

'Excluded amounts' (i.e. amounts that can not be included in a payment claim) are:

- (f) variations that are not 'claimable variations';
- (g) any amounts relating to:
 - i. latent conditions;
 - ii. time-related costs; or
 - iii. changes in regulatory requirements;

(h) damages for breach of contract or for any claim in connection with the contract; and

(i) any claim arising at law other than under the contract;

Adjudication

Claimants can now pursue adjudication as an easier way to obtain a court order. Previously, it was necessary to apply to a court for summary judgement. Now it is only necessary for the claimant to register an adjudication certificate at a court.

Adjudication applications can now be made when:

(a) the scheduled amount is less than the claimed amount; or

(b) the respondent has not paid any part of the scheduled amount by the due date; or

(c) the respondent has not provided a payment schedule and has not paid any part of the claimed amount by the due date.

Previously, adjudication was only available when the scheduled amount was less than the claimed amount.

Adjudication review

A process of adjudication review has been introduced. This allows parties' limited rights to have an unfavourable adjudication determination reconsidered when the adjudicated amount exceeds \$100,000.

The review adjudicator has the power to either confirm the original adjudication determination or substitute a new adjudication determination.

A claimant may apply for adjudication review if, and only if, the original adjudicator wrongly identified an 'excluded amount' (as defined above).

A respondent may only apply for adjudication review if it correctly served a payment schedule.

In addition, review applications by the respondent are limited to where:

(a) the original adjudicated amount included an 'excluded amount';

(b) the payment schedule and/or adjudication response also identified this 'excluded amount';

(c) the respondent has paid the claimant the original adjudicated amount, except for the amount that is alleged to be the 'excluded amount'; and

(d) the respondent has paid the amount that is alleged to be an 'excluded amount' into a designated trust account.

Liens and suspension of works

If a respondent fails to pay a progress payment on time, the claimant:

(a) is granted a statutory lien over unfixed plant and material; and

(b) may suspend the remaining works.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL 2007 (SA)

Mark Brasher, Lawyer, Melbourne

The Building and Construction Industry Security of Payment Bill 2007 (SA) closely resembles, in its form and function, the existing *Security of Payment Acts* in place in Victoria, NSW and Queensland. Generally, where there are differences between the Victorian regime and the NSW and Queensland regimes, the Bill has adopted the NSW and Queensland provisions. Significantly, the Bill does not pick up the more limiting aspects of the recent amendments to the Victorian Act such as the 'excluded amounts' and 'claimable variations' regimes.

There are three aspects of the proposed South Australian regime that distinguish it from the other East Coast regimes:

1. It provides for a longer period of 15 days for the adjudicator to arrive at a determination.

2. Under the proposed s24, a party can make an application for review to the District Court for a declaration that a determination or purported determination is beyond the power conferred on the adjudicator by or under the proposed act.

This type of provision has not been tested given that no equivalent provision exists in any of the other states' regimes, and it was not discussed in the Second Reading Speech. It appears to provide a broad basis for the review of determinations on jurisdictional grounds, opening a new avenue for disputing determinations.

3. Under the proposed s28, an adjudicator may award a party some or all of its costs if another party has engaged in frivolous or vexatious conduct, or has made unfounded submissions. The adjudicator is required to give written reasons; however, the discretion to award costs is broad.

