



SECURITY OF PAYMENT QUICK GUIDE

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INTRODUCTION

Our objective is to arm industry participants with the key themes to be aware of when coming into contact with the regime - starting with a summary of the Building and Construction Industry Security of Payment Act (SOPA) 1999 (the Act).

Written in hybrid form, the document is in part a summary, in part a practical guide (or 'dos and don'ts'), and in part an opinion piece. It is not intended to be comprehensive and should not be relied on it as legal advice. There are various commentaries on security of payment legislation, most notably Jacobs.

A list of links to relevant cases has been included, with links to where they can be downloaded from.

Please get in contact if you have any questions.

JOCK HAMILTON

PRINCIPAL



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OVERVIEW

SECURITY OF PAYMENT

Security of payment refers to the legislation conferring jurisdiction on a third-party adjudicator to determine, on an interim basis, disputes in relation to payment under construction contracts.

Since its introduction with the Building and Construction Industry Security of Payment Act 1999 (the Act), there has been a broad adoption of the concept in the main Australian jurisdictions (albeit in varying forms), legislative reform and case law developments.

THE ACT

Under the Act, a person who provides construction work or related goods and services pursuant to a construction contract is entitled to receive a progress payment. This requires the person claiming the progress payment to submit a payment claim.

The respondent to the payment claim (the contractor up the line) is then required to provide a 'payment schedule' to the claimant setting out how much the respondent says it will pay and, if there is a discrepancy, providing its reasons for the difference.

THE ACT CONT.

If there is a discrepancy, the claimant can, within 20 business days, refer the amount in dispute to a third-party adjudicator to determine whether the respondent is required to pay that amount to the claimant.

If the respondent fails to provide a payment schedule within the time required (10 business days), the claimant can either sue the respondent for a judgment statutory debt or alternatively apply for adjudication (although the latter course requires providing the respondent with an opportunity to provide a payment schedule within a further five business days).

The respondent is not entitled to raise a defence or bring a cross-claim if a claim for a statutory debt is made to the court by the applicant. Note that once a judgment debt is obtained, the plaintiff will still need to commence enforcement proceedings if the respondent fails to pay.

Assuming the claimant refers any disputed amount to adjudication by way of adjudication application to an authorised nominating authority, the adjudicator must either accept or reject the appointment. Then the respondent must submit an 'adjudication response', usually within five business days although the timeframe is subject to change depending on when the adjudicator accepts an appointment.

In the adjudication response, the respondent cannot raise any reasons it did not include in the initial payment schedule.

The adjudicator's determination is due within 10 business days after the respondent lodges an adjudication response (or when the adjudication response was required to be lodged).

Note the above summary references the NSW legislation. There are generally two models of SOPA, the "East Coast" and the "West Coast". The East Coast model, adopted by Queensland, New South Wales, Victoria, Australian Capital Territory, Tasmania, South Australia (and to a more recent extent, WA), follow a similar format (particularly South Australia's adoption of the NSW drafting). Whereas the Northern Territory and previously Western Australia^[1] under the "West Coast" model have given adjudicators broader powers to determine disputes.

THE ACT CONT.

Participants need to be aware of the differences and nuances of each of the regimes if engaging with a security of payment regime outside of their home jurisdiction.

Under the West Coast model, adjudicators can determine amounts owed by subcontractors to head contractors, whereas under the East Coast model adjudicators can only make awards for payment in one direction on the supply chain (head contractors to subcontractors).

The West Coast model is also designed to be a gap filler where the contract does not specify rights to progress payments whereas the East Coast model overrides the contract to specify an entitlement to progress payments.

There are other differences, for example, the Queensland model does not have authorised nominating authorities but instead appointments are made by the government body (QBCC), in an effort to remove a perceived conflict of interest of authorised nominating authorities.



PAYMENT CLAIMS

The validity of a payment claim is a threshold issue to any adjudication determination being valid. It is a jurisdictional issue.

Without a valid payment claim, any adjudication determination made on the back of that invalid payment claim will in turn itself be invalid.

There has been an amendment to the legislation in NSW, having effect to construction contracts entered into from 21 October 2019 which touches on this point. The amendments were made to address recommendations made by John Murray AM in his Review of Security of Payment Laws.

Pre-amendments, the legislation provided that individuals were entitled to submit payment claims on and from 'reference dates'. A claimant was only entitled to submit one payment claim on and from a reference date. That language was considered confusing and so the concept of reference dates was removed. It has been replaced with a statutory entitlement to make a payment claim once per month on the last day of the month, and a right to make an additional final claim after termination. This change applies to contracts entered into after 21 October 2019.

A payment claim needs to sufficiently identify the construction work to which the payment claim relates. The payment claim also needs to be served within the time required time. If it is not, there will be a jurisdictional error, discussed further below.[2]

HOW TO PREPARE A PAYMENT CLAIM

The best approach to preparing payment claims is to use an Excel sheet that reconciles all contract sum amounts claimed to date and the amount of each contract sum item claimed in that payment claim.

Variations and Extensions of Time should be set out separately, although still in an Excel sheet. All possible contractual entitlements to variations and EOTs should be identified, expressly, together with a short submission as to why the contractor is entitled to the monies under that clause identified. This will be the backbone of any subsequent adjudication application.

A covering letter/submission can also be issued with a payment claim if the contractor is intent on adjudicating. Invariably such a submission with a payment claim will alert the respondent party that an adjudication is forthcoming however that will often be reasonably obvious to most contracting parties regardless of whether a covering submission is included. The covering submission can deal with categories of claims or each discrete claim with more detail than may be offered by the Excel submission. There is a strategic consideration here of whether the payment claim should be presented in a "legalistic" manner or not, which will again have the effect of alerting the respondent (or not) of future intentions to adjudicate, which will depend on the circumstances of each claim.

PAYMENT SCHEDULES

Payment schedules need to be provided within 10 business days or as required by the relevant construction contract, whichever is the earlier. There are two concepts for a payment schedule:

- the statutory payment schedule;
- the payment certificate (as variously named under the construction contract).

Payment certificates under the contract may not necessarily constitute the required Payment Schedule under the Act with respect to the time when a Payment Schedule needs to be provided. The construction contract needs to make express reference to the time for the statutory Payment Schedule to be provided. I.e., unless there's expressly clear words to displace the 10 business days under the Act.[3]

If the amount that the respondent proposes to pay is less than the amount claimed in the payment claim, the respondent should set out a list of reasons for non-payment. The adjudicator can only consider those submissions duly made. A respondent should at least cross refer to correspondence rejecting the claim; provide more than a bare denial which is no reason at all.

"Pay-when-paid" provisions (contractual clauses which seek to make the subcontractor's entitlement to payment contingent on the head-contractor's receipt of payment from upstream) are not valid reasons to withhold payment. Such provisions are void under section 12 of the Act. Some more sophisticated contracts (for example in PPP arrangements), make some claims by a subcontractor conditional on a successful claim by a head contractor (often referred to "Linked Claim", which if disputed is usually deemed to be a "Linked Dispute" under the relevant project agreements).

Whether a Linked Claim falls foul of section 12 is yet to be tested by the courts. Whether a clause is a pay-when-paid provision will depend on whether there are "monies owing", as defined in section 12, and the drafting of the Linked Claim clause.[4]

Contractual rights of set-offs can be valid grounds for refusing to make payment provided amounts owing under the construction contract can be valued by including set-offs under the contract.

PAYMENT SCHEDULES CONT.

HOW TO PREPARE A PAYMENT SCHEDULE

Use the contractor's Excel document to assess amounts proposed to be paid by the respondent and identify the reason why payment will not be made for any disputed items.

A matrix/key can be used to identify reasons with the corresponding number applied next to each claim, to avoid unnecessary duplication. Be careful that the reasons are not too general so as to provide no indication as to the reason at all. Also include a covering submission to the payment schedule which will form the backbone to the Adjudication Response in due course.

Where available, payment schedules should include attachments such as:

- statements detailing the extent of the work completed;
- completion certificates;
- delivery dockets;
- photographs;
- correspondence (as relevant);
- other contract documentation as may be required by contract.

Service should occur during normal business hours^[5], at the claimant's ordinary place of business or as otherwise required by the contract. In the absence of a contrary contract provision, the safest way of ensuring service is to serve by courier with instruction to obtain a signed receipt.

Respondent parties should be careful of contractual deeming provisions as to service (e.g. if contract notice received after 4pm, it is deemed to have been received the following day). It is critical to consider how deeming provision affects your payment schedule which is due within 10 business days of the payment claim.

A respondent should also keep a record of the time, date and manner of service on the claimant. A claimant may deny receiving a payment schedule in which case the respondent must be able to evidence the date of service. The best practice is to prepare service receipt or affidavit of service as proof of delivery.

ADJUDICATION APPLICATIONS

Include in an adjudication application the following content:

- overview of the project;
- objectives of the Act (to promote cash flow and make decisions on an interim basis);
- any overarching, broad submissions;
- submissions as to why the adjudicator has jurisdiction to determine the application (eg, that the payment claim is valid);
- submissions on individual claims;
- submissions on what is said in any lay evidence (witness statements or statutory declarations) and, if procured, expert evidence and how that supports each claim.

As for layout, the claimant should present its case in the first and then address any replies to the payment schedule secondly, as a responsive position. Address submissions in the order that the individual claims appear in the payment claim. Sometimes it may be efficient to categorise claims where they have an obvious commonality.

Help the adjudicator by providing a table of the parties' positions as a schedule to the adjudication application. Usually the respondent's payment schedule should suffice however payment schedules can sometimes unhelpfully be spread out over several Excel pages, so consolidate the information into a single sheet.

As for supporting documents, include as annexures or exhibits, consider including the following to the extent they are relevant:

- contracts;
- claims registers (Excel files);
- claims (underlying claim submissions made under the contract documents);
- responses to claims;
- emails / correspondence;
- site records (i.e. employee timesheets / daily records);
- programmes, if delay is claimed.

Usually some lay evidence will be required to support the application. Only take statements which are relevant to the issues claimed. Cut unnecessary evidence, it too frequently finds its way into statements and goes nowhere. Statements are usually required from the project engineer (to set out what happened on the ground), a programmer (if claims relate to costs associated with an extensions of time) and a commercial manager (to give evidence as to costs incurred). Lay statements are not necessary but are helpful.

Expert evidence is sometimes served in addition to lay statements. For EOT claims, a programming expert might opine on the estimated amount of delay that will be incurred as a result of a particular event which the claimant says it is entitled to time and money, for example. That is assuming some form of prospective delay analysis is required by the contract. A quantum expert might opine on reasonable costs incurred where there is no applicable contract rate, for example.

CHARGES

When applying for adjudication, a claimant can also serve a 'payment withholding request' (under s26A of the Act) on a principal (being the contracting party upstream from the respondent to an adjudication application).

The effect of a payment withholding request is to preserve any monies in the hands of the principal for the benefit of the claimant, that might otherwise be paid by the principal to the respondent. That is, the payment withholding request requires the principal to withhold funds from the respondent contractor to pend the adjudication determination, such that those funds might instead be used to pay the claimant, leapfrogging the respondent.

Furthermore, under Contractors Debts Act 1997, a claimant can:

- apply to the court for a 'debt certificate' – either following summary judgment application if no payment schedule, or following receipt of an adjudication certificate after the adjudication has been determined. The claimant can then issue a 'notice of claim' to assign the judgment debt to the principal, who then must pay the claimant (not the respondent contractor).[6] This process has the effect of assigning the judgment debt to the principal when it would otherwise be payable by the respondent. The liability leapfrogs the respondent.
- if proceedings commenced (i.e. for summary judgment application), apply for an 'attachment order', being a court order that money is to remain in the hands of the principal until judgment (note some conditions).[7]



ADJUDICATION RESPONSES

Respondents have an exceptionally short timeframe to respond to applications. In my opinion it is too short. I have seen applications serving no less than 18 lever arch folders of materials necessitating an adjudication response within the time required by the Act.

The timeframe for a response is the later of 5 business days after the respondent receives a copy of the application or 2 business days after an adjudicator accepts appointment for the application. Respondents hope an adjudicator will take extra time to accept the application to buy the respondent precious working days, but this leads to uncertainty. For larger applications, it is usually nigh impossible to address all issues raised in that time at all or with any detail so decisions are required as to how to address issues. Categorisation is often helpful.

At a minimum, the adjudication response should elaborate on the reasons given in the payment schedule for refusing to pay any amounts and attach relevant documents necessary to evidence or support those reasons for withholding payment. This may include expert reports and photographs evidencing defective work and lay statements.

The adjudication response should also set out any jurisdictional issues which the respondent asserts to the extent they are foreseeable at that point in time before a determination has been made.

WHAT AN ADJUDICATOR MAY DO

Under the Act, an adjudicator may:

- ask for further written submissions with very tight timelines (i.e. 1 business day), and responsive submissions;
- call a conference between the parties;
- requests extensions of time for further time to make a determination;
- carry out an inspection of the site.

There may be some strategy in agreeing to provide the adjudicator with an extension of time, if it is requested. We have seen requests accepted and rejected by parties and there are pros and cons to both approaches.

ADJUDICATION RESPONSES CONT.

ADJUDICATION DETERMINATIONS AND ENFORCEMENT

Under section 21(3) of the Act, adjudication determinations are due 10 business days after the adjudication response is submitted. The adjudicator must determine the amount of the progress payment to be paid, the date on which the payment is due and the rate of interest. The determination must be in writing, provide reasons and be served on the parties (section 22(3)).

Often the adjudicator will direct that the claimant is to pay the adjudicator's fee to release adjudication determination. An alternative is that the adjudicator directs both parties to pay his or her fees before the determination is released. Once the determination is released, there may be a separate direction for a particular party to compensate the other for fees.

If the claimant is awarded money in the determination, it is usual for the claimant to issue an invoice to the respondent for the determined amount. Time for payment will be as determined by the adjudicator or 5 business days (s 23(1)).

If monies are unpaid, the claimant can ask the relevant authorised nominating authority to provide an "adjudication certificate" which can then be filed as a judgment debt, although an affidavit needs to accompany that application to the court setting out that the monies have been unpaid.

Once the determination has been effected as a judgment debt, enforcement proceedings can be commenced (e.g. the claimant could seek a garnishee order from the respondent's bank accounts).

OVERTURNING AN ADJUDICATOR'S DETERMINATION

JURISDICTIONAL ERROR

Adjudication determinations will only be overturned if the Court finds that the adjudicator made a jurisdictional error in making his or her determination.

The legislation confers jurisdiction on third party adjudicators with conditions on how an adjudicator must make decisions. For example, that the adjudicator makes a determination in respect of a payment claim and that the adjudicator only consider submissions in an adjudication response which have been made in a payment schedule. If the adjudicator purports to wield power beyond the power conferred on the adjudicator under the legislation, his or her decision will be infected with a jurisdictional error and liable to be overturned.

ADJUDICATION RESPONSES CONT.

OVERTURNING AN ADJUDICATOR'S DETERMINATION CONT.

A non-exhaustive list of issues which may affect the adjudicator's jurisdiction:

- if there was no 'construction contract'[8];
- if the payment claim is invalid, perhaps because:
 - it was served out of time;
 - it failed to identify the construction work;
 - it was not served in respect of a "reference date" (pre-Oct 2019 amendments) or there were two payment claims served in respect of that reference date (where only one could be served)[9];
- If the adjudication application was not properly made (perhaps because it was made out of the time proscribed under the Act);
- if the adjudicator failed to provide reasons for his or her determination;
- if the adjudicator failed to determine the amount payable;
- if the adjudicator failed to consider submissions made by one party (and therefore failed to provide procedural fairness to that party);[10]
- the adjudicator otherwise denied one party natural justice (perhaps because the adjudicator determined the matter on a basis not advanced by either party).[11]

There is some distinction in jurisdictional errors where an assumed fact, going to the core of the adjudicator's jurisdiction, is wrong. That is, the adjudicator's jurisdiction may depend on the fact existing (e.g. the fact asserted being a fact; being true and correct) or simply that the adjudicator forms the requisite lawful opinion that the fact exists and is correct (whether it is or not).[12]

Whether a payment claim is served within the 12 months required by the Act has recently been held to be a creature of the second category as described above; that is, that the adjudicator simply needs to satisfy himself or herself of the fact (although in due course, such a fact could, in fact, be no fact at all).[13]

- A jurisdictional error need not be raised in the adjudication submissions, to the extent it is able to be identified in advance (e.g. where the payment claim is said to be invalid).
- Also note that there is some element of 'materiality' in a jurisdictional error. If the jurisdictional error is insignificant in that it does not materially affect the decision the adjudicator made, it may not necessarily attract an order for the determination to be overturned.[14]

ADJUDICATION RESPONSES CONT.

OVERTURNING AN ADJUDICATOR'S DETERMINATION CONT.

NON-JURISDICTIONAL ERROR OF LAW

A jurisdictional error is distinguished from a non-jurisdictional error of law on the face of the record. A non-jurisdictional error of law is an error made by an adjudicator with respect to the parties' rights under the contract, for example. If an adjudicator erroneously determines that a party has a particular entitlement, such an error is an error of law for which the adjudicator has the jurisdiction to make; there is no scope to seek to quash the adjudicator's determination (or part of that determination as now provided under the October 2019 amendments).

SEEKING TO OVERTURN AN ADJUDICATOR'S DETERMINATION

If a jurisdictional error is suspected, the aggrieved party can apply to the Supreme Court, Equity division, Technology & Construction List, to quash the determination. Such a proceeding is commenced with a Summons and List Statement.

The plaintiff applicant will commence against the party who succeeded at adjudication (as first defendant) and the adjudicator will be joined as a passive second defendant (and file a submitting appearance only).[15]

The plaintiff (usually the respondent in the adjudication process) will usually seek an urgent interim order to restrain the defendant from enforcing the adjudicator's determination, pending resolution of the plaintiff's proceeding to quash the determination as a whole. That interim order is sought using a notice of motion filed at the same time as the originating process.

If the court is to order a restraint on the judgment debtor enforcing the judgment, the court may also order that the applicant pay the determined amount (in the adjudication) into court, as well as give an undertaking as to damages, pending a decision on whether the adjudicator committed a jurisdictional error. The payment into court is required by section 25(4)(b) of the Act as security and it is rare that the usual order for payment will not be adopted.[16]

ADJUDICATION RESPONSES CONT.

OVERTURNING AN ADJUDICATOR'S DETERMINATION CONT.

The content of the Summons and the List Statement is set out below.

The Summons should set out the interim relief sought, usually being for an interim injunction such that the respondent cannot:

- request an adjudication certificate under section 24 of the Act;
- file any adjudication certificate as a judgment debt;
- commence any enforcement proceedings;

The Summons should also set out the final relief sought, usually that:

- the determination is void or is quashed;
- there be a permanent injunction from the defendant being able to request an adjudication certificate in respect of the determination and commencing enforcement proceedings on any judgment debt; and
- costs and any other order as the court deems fit (as is usual).

The accompanying List Statement must follow the court precedent, which includes prescribed headings, and should set out:

- the nature of the dispute (eg, whether the adjudication determination is valid or infected with jurisdictional error);
- the issues likely to arise (being the specific questions for the court to address such as whether procedural fairness was afforded to the plaintiff, probably being the respondent in the adjudication process);
- the contentions, which should include a summary of:
 - the project, the construction contract and the parties;
 - the payment claim and the payment schedule;
 - the adjudication application and the adjudication response, and what each party contended in the adjudication application and adjudication response in respect of the contentious issues the subject of the court Summons;
 - the adjudication determination and a summary of the reasons stated in the adjudication determination;
 - the grounds on which the plaintiff says the determination is void;
- a short note that mediation is not appropriate in circumstances where the matter concerns a question of law only (insofar as it relates to the adjudicator's jurisdiction, not to be confused with whether the determination contains an error of law) and also a note that there is nothing appropriate for referral on the same basis.

ADJUDICATION RESPONSES CONT.

OVERTURNING AN ADJUDICATOR'S DETERMINATION CONT.

Draft orders should be prepared setting out the interim orders sought together with a hearing date and some procedural orders for provision of documents to be served.

The court will either decide that the adjudicator's determination is infected with a jurisdictional error, in which case the adjudicator's determination will be null and void, as if it was never made. If the construction contract was entered into after October 2019, the most recent version of the legislation will apply and the Court has an express power under section 32A(2) of the Act to set aside only the part of the adjudicator's determination which was infected with the jurisdictional error. In that circumstance, there will be an order for the money paid by the plaintiff into court (which was to pend the decision), to be repaid to the plaintiff (or part thereof).

If however the plaintiff is unsuccessful in its application to overturn the adjudication determination, an order will be made for the payment of those funds to the first defendant.

It is not uncommon for the unsuccessful plaintiff, at this point, to foreshadow an application for a stay of payment of those funds (essentially being a stay of enforcement), perhaps on the grounds that the first defendant has solvency concerns. The October 2019 amendments prevent a party in liquidation from being entitled to press an adjudication or enforce an adjudication determination (new section 32B).

However the October 2019 amendments are silent in respect of if insolvency is suspected; it only applies to corporates in liquidation.[17]

Costs orders will be made in the usual course, but for the avoidance of doubt note that the second defendant adjudicator won't have a costs order made against him or her.

ADJUDICATION RESPONSES CONT.

OVERTURNING AN ADJUDICATOR'S DETERMINATION CONT.

THE TREND OF APPROACHING THE COURT

Generally, the number of applications to the courts has been reasonably steady over the past five years or so. If anything, it has been on the slight decline, perhaps by reason of the High Court authority with respect to the availability of judicial review for non-jurisdictional errors of law.[18] The number of security of payment decisions reported by the Supreme Court of New South Wales over time, generated from imperfect data,[19] is below:

SOPA DECISIONS OVER TIME - NSW SUPREME COURT



ADJUDICATION RESPONSES CONT.

OVERTURNING AN ADJUDICATOR'S DETERMINATION CONT.

AN ALTERNATIVE: SUING FOR THE MONEY BACK

For non-jurisdictional errors, the available recourse is to commence ordinary proceedings to seek to recover the funds which the plaintiff was required to pay under the adjudication determination. That is, the respondent in the adjudication proceeding will be the plaintiff in a fresh proceeding in the Technology & Construction List of the Supreme Court of New South Wales. A Summons and List Statement are to be filed and served and the proceeding will progress through the ordinary process of the T&C List.

The Summons will merely set out the final relief sought. There is no need to seek any interim relief because the respondent will already have been required to abide the adjudicator's decision by making the payment of the amount determined to be owed by the adjudicator.

In the List Statement, the plaintiff's contractual entitlement to the monies (or any other cause of action) should be set out as well as details of the circumstances of the payment pursuant to the adjudication determination.



CLOSING

What is evident from the cases is that overturning an adjudicator's determination has become increasingly difficult. That continues to be the trend, as with several cases towards the end of 2021.

Furthermore, the amendments from October 2019 which expressly allow a determination to be severed (new section 32A(2)), such that only the affected parts of the determination be overturned, provide more clarity to contracting parties, providing a valuable opportunity for the parties to seek to agree parts of a determination that are infected with jurisdictional error and those which are not. Consequently, the legislation will continue to be the subcontractor's guardian during the infrastructure boom but we might expect proportionately fewer approaches to the courts.

REFERENCES

[1] See 2021 amendments to the WA regime.

[2] EQ Constructions Pty Ltd v A-Civil Aust Pty Ltd [2021] NSWSC 1604.

[3] Thiess Pty Ltd & Anor v Lane Cove Tunnel Nominee Company Pty Ltd & Anor [2009] NSWCA 53.

[4] See Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5, although the pay when paid provision was referred to in the context of retention monies.

[5] Claimants have till midnight however best practice should dictate that ordinary business hours or hours proscribed by the construction contract are used.

[6] See Part 2 of the Contractors Debts Act 1997.

[7] See National Plant and Equipment Pty Ltd v Subzero Services Pty Ltd [2014] NSWSC 1321.

[8] See IWD No 2 Pty Ltd v Level Orange Pty Ltd [2012] NSWSC 1439.

[9] See Kitchen Xchange Pty Ltd v Formaon Building Services [2014] NSWSC 1602; see also Reitsma Constructions Pty Ltd v Davies Engineering Pty Ltd t/as In City Steel [2015] NSWSC 343.

[10] See Lahey Constructions Pty Limited v Newbold Bulk Haulage Pty Limited [2013] NSWSC 215 from [20].

[11] See Musico v Davenport [2003] NSWSC 977; see also Quasar (Constructions) Commercial Pty Limited v Trilla Group Pty Limited [2017] NSWSC 860.

[12] Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd [2018] NSWCA 339 at [13].

[13] EQ Constructions Pty Ltd v A-Civil Aust Pty Ltd [2021] NSWSC 1604 at [45].

[14] Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd (No 2) [2020] NSWSC 1788 at [38].

[15] See QC Communications NSW Pty Ltd v CivComm Pty Ltd [2016] NSWSC 1095 for an example where the adjudicator was not joined and which did not affect the outcome of the hearing. SC 343.

[16] See for examples Cobar Shire Council v Castlereagh Construction Group Pty Ltd [2017] NSWSC 86.

[17] See Quasar (Constructions) Commercial Pty Limited v Trilla Group Pty Limited [2017] NSWSC 860 from [29].

[18] See Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4; see also Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5.

[19] Not all decisions relate to judicial review - some relate to procedural matters such as stay of enforcement and some decisions are secondary decisions to a principal judgment, which slightly skews the results as it overstates the number of issues reported.

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