(In)Security of payments

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For the first time since their enactment in 2004, an appellate court has spoken on the construction security of payment legislation of Western Australia and the Northern Territory. In AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd (2009) 25 NTLR 14, the Northern Territory Court of Appeal has expanded the scope for attacks on adjudicators' determinations and has arguably made a far-reaching ruling rendering of no effect provisions in contracts allowing claims to include amounts outstanding from earlier claims.

COURT OF APPEAL NARROWS APPLICATION OF SECURITY OF PAYMENTS ACT

Five years after the enactment of the *Construction Contracts (Security of Payments) Act 2004* (NT) (the NT Act),[1] the Northern Territory (NT) Court of Appeal[2] has had an opportunity to consider its operation in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 (*Mac-Attack*). Several first instance decisions of judges,[3] a magistrate[4] and the Western Australian (WA) State Administrative Tribunal (SAT)[5] have dealt with the Act and its WA counterpart[6] but this is the first occasion those statutes have been considered by an appellate court.

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[1] The *Construction Contracts (Security of Payments) Act 2004* (NT) (the NT Act), also referred to as "the Act" and together with the *Construction Contracts Act 2004* (WA) referred to as "the western legislation", "the western Acts" or "the western statutes".

[2] Mildren, Riley and Southwood JJ, with Mildren J and Southwood J writing separate judgments agreeing in the result, and with Riley J agreeing with Southwood J generally and with Mildren J on one point.

[3] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* (2008) 36 WAR 379; *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19; *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5; *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123.

[4] *GRD Building Pty Ltd v Gallaugher and Total Development Supplies Pty Ltd* (unreported, NT Mag Ct, Cavanagh SM, 10 March 2008).

[5] *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture* [2005] WASAT 269; *Merym Pty Ltd v Methodist Ladies College* [2008] WASAT 164; *Silent Vector Pty Ltd v Squarcini* [2008] WASAT 39; *Diploma Construction Pty Ltd v Esslemont Nominees Pty Ltd* [2006] WASAT 350; *Match Projects Pty Ltd v Arccon (WA) Pty Ltd* [2009] WASAT 62; *Moroney v Murray River North Pty Ltd* [2008] WASAT 111; *Match Projects Pty Ltd & Arccon (WA) Pty Ltd* [2009] WASAT 134; *Blackadder Scaffolding Services (Aust) Pty Ltd & Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133.

[6] *Construction Contracts Act 2004* (WA) (the WA Act) (together with the NT Act referred to as "the western legislation", "the western Acts" or "the western statutes").

Summary

The Court of Appeal in *Mac-Attack* held that there was implied in the NT Act a prohibition against making more than one payment claim for the performance of each contractual obligation. It was prohibited, the court said, from including in a later payment claim an amount claimed earlier and still unpaid, even where the contract expressly permitted that inclusion.

Because of this implied provision in the NT Act, an adjudicator's ruling that a previously claimed amount could be included in a later claim and be the subject of an adjudication application was a misinterpretation of the Act going to his or her jurisdiction resulting in invalidity of the determination. The majority[7] went further to hold that, for an adjudicator's determination to be valid, his or her state of satisfaction as to certain criteria (including the time for making applications) must be both reasonable and founded on a correct understanding of the law. Since the time for making the application in this case depended on whether unpaid amounts could be included in later payment claims, a ruling that that was possible involved a misinterpretation of the law as to the existence of that criterion.

In coming to those conclusions, their Honours' held that:

1. the Supreme Court may review an adjudicator's determination notwithstanding the privative clause in s 48;
2. an error in interpreting the Act will invalidate a determination if it goes to jurisdiction;
3. an error as to the existence of a jurisdictional fact will invalidate a determination if it is unreasonable or involves a misinterpretation of the Act;
4. it is the adjudicator's state of satisfaction as to the existence of the criteria in s 33(1)(a) that is the jurisdictional precondition, rather than the objective existence of those matters;
5. the Supreme Court may entertain reviews of determinations on whether the criteria in s 33(1)(a) have been established;
6. there was implied in the Act a prohibition on making valid payment claims for amounts unpaid from previous payment claims, and from bringing applications for adjudication based on those subsequent payment claims;
7. provisions in construction contracts permitting payment claims for amounts unpaid from previous payment claims are of no effect;
8. the existence and validity of a payment claim goes to the jurisdiction of an adjudicator.

Addressing those rulings in order, this article respectfully suggests:

1. it is clear the privative clause does not prevent the Supreme Court from reviewing a determination;
2. authority supports the contention that a misinterpretation of the Act will invalidate a determination if it goes to jurisdiction;

[7] Southwood J, with Riley J agreeing and Mildren J expressing no opinion.

3. although jurisdictional error has been rejected as a basis for review in New South Wales (NSW),[8] it seems that an error as to the existence of a jurisdictional fact will invalidate a determination if it is unreasonable or involves a misinterpretation of the Act;
4. on a review in the Local Court of the criteria in s 33(1)(a), the adjudicator's satisfaction is only the precondition to the matters in subpara (iv). In relation to the preceding subparagraphs, it is the objective existence of those matters which is relevant, not the adjudicator's satisfaction as to their existence;
5. another view is that, because there is the statutory right of review in the Local Court of the existence of the criteria in s 33(1)(a), a legislative intent is apparent to restrict review of those matters in the Supreme Court;[9]
6. there was no necessity or warrant to imply such a prohibition into the Act against payment claims for amounts unpaid from previous payment claims;
7. since there was no necessity to imply the prohibition, such provisions in contracts have effect;
8. in the absence of the implied prohibition, it is contrary to weighty and indistinguishable authority to hold that payment claims go to jurisdiction or to the basic and essential requirements of the Act.

The Court of Appeal unanimously held in *Mac-Attack* that the adjudicator committed jurisdictional error in determining that the applicant was permitted under the contract to deliver more than one payment claim for the same work, and, inferentially, that the Act permitted an application within time founded on the later payment claim. Because these findings involved a misinterpretation of the Act, they lead to errors going to jurisdiction and were not merely errors within jurisdiction. Identifying errors as jurisdictional or non-jurisdictional is therefore crucial.

These issues will be considered under the following headings:

1. Outline of the Act;
2. The facts of *Mac-Attack*;
3. The trial decision;
4. The appeal decision and the points listed above;
5. Conclusion.

OUTLINE OF THE NT ACT

Modelled on the *Construction Contracts Act 2004* (WA) (the WA Act),[10] the NT Act sets up a scheme for rapid determination of payment claims under construction contracts,[11] which are widely defined.[12] A party may apply for

[8] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [54]-[55]; *Coordinated Construction Co Pty Ltd v JM Hargreaves* (NSW) Pty Ltd (2005) 63 NSWLR 385; *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [61]. See also *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 at [87]-[88].

[9] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19.

[10] See Northern Territory, Legislative Assembly, *Parliamentary Record No 22* (14 October 2004) (Second Reading Speech of the Minister of Justice and Attorney-General, Dr Peter Toyne, on the *Construction Contracts (Security of Payments) Bill 2004* (NT)).

[11] *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5 at [16] (Southwood J); *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12 at [19] (Angel J).

adjudication of a disputed payment claim.[13] A payment claim is any claim for payment under the contract[14] and need not be in a particular form unless the contract makes no provision as to how a claim for payment is to be made.[15]

A payment dispute arises when the amount claimed is due to be paid under the contract but has not been paid in full, has been rejected or wholly or partly disputed.[16] It is therefore the contract and not the NT Act that determines when a claim is due and when a payment dispute can arise. Even where the contract contains no terms about the contractor's entitlement to be paid,[17] the entitlement to progress payments,[18] how payment claims are to be made,[19] responded to and paid,[20] the contract still determines those matters because the NT Act fills the gaps by implying terms into the contract rather than by simply legislating what those terms will be.[21]

Applications must be made within 90 days after a payment dispute arises.[22] Any application made after that time must be dismissed by the adjudicator without determining its merits.[23] An application must also be dismissed summarily if the contract is not a construction contract,[24] if an application has not been prepared and served in accordance with all of the requirements of s 28,[25] or if the dispute is ruled upon by a court, arbitrator or other body.[26]

The way in which payment disputes arise under the NT Act[27] is significantly different from that in the security of payment legislation of the eastern States[28]

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[12] NT Act, s 5; WA Act, s 4.

[13] NT Act, s 27.

[14] NT Act, s 4.

[15] NT Act, s 19. If there is no such provision, the payment claim must be in the form of the Sch, Div 4, which is implied into the contract.

[16] NT Act, s 8.

[17] NT Act, s 17.

[18] NT Act, s 18.

[19] NT Act, s 19.

[20] NT Act, s 20.

[21] Not directly relevant here, other terms are implied into a contract which is silent on variations (s 16), interest (s 21), ownership of goods (s 22), duties as to unfixed goods on insolvency (s 23) and retention money (s 24).

[22] NT Act, s 28.

[23] NT Act, s 33(1)(a)(ii).

[24] NT Act, s 33(1)(a)(i).

[25] NT Act, s 33(1)(a)(ii).

[26] NT Act, abbreviating s 33(1)(a)(iii).

[27] And its WA equivalent on which it was modelled.

[28] *Building and Construction Industry Security of Payment Act 1999* (NSW) (the NSW Act), *Building and Construction Industry Security of Payment Act 2002* (Vic) (the Vic Act), *Building and Construction Industry Payments Act 2004* (Qld) (the Qld Act), *Building and Construction Industry Security of Payment Act 2009* (SA), *Building and Construction Industry Security of Payment Act 2009*

and Singapore.[29] Under that legislation, an adjudicable payment dispute only arises after the claimant's delivery of a payment claim under the Act containing the prescribed information[30] or in the prescribed form,[31] and the respondent's failure after the legislated time to respond with a payment schedule (also containing the prescribed information[32] or in the prescribed form)[33] accounting for all of the amounts claimed. A payment claim under the eastern legislation may only be served after an amount becomes due under the contract, that is, after following the contractual procedure for making a claim (eg invoice, progress claim etc), where there is a contractual procedure.[34]

In other words, an adjudicable payment dispute does not arise under the eastern legislation immediately an amount is due but unpaid under the contract.[35] There are the further requirements of a statutory payment claim being delivered after an amount is due and unpaid, and of no fully responsive statutory payment schedule being delivered. While an amount being due but unpaid under the contract is a precondition, it is not the only one. In the NT and WA, a payment dispute for the purposes of the Act can occur without the parties intending and without their realising that time has started to run for making an application. It can simply occur when an amount is due and unpaid under the contract following an ordinary invoice.

This difference assumes importance when considering the reasoning in *Mac-Attack*.

THE FACTS OF MAC-ATTACK

A payment claim and dispute

An owner of hire equipment rendered invoices to a hirer which, under the contract, were to be paid within 30 days after the end of the month in which they were rendered. They were not paid and later the owner delivered a document headed "Tax Invoice No 1461" which was a summary or accounting of the total amount outstanding under all previously rendered tax invoices. That later invoice demanded payment within seven days.

Eleven appendices were attached to Tax Invoice No 1461, each containing a schedule of payment claims for a particular piece of equipment, or a charge for a particular period of time, with copies of the supporting invoices including the unpaid invoices.

(Tas) and *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (together with the Singapore legislation referred to as "the eastern legislation", "the eastern Acts" or "the eastern statutes").

[29] *Building and Construction Industry Security of Payment Act 2004* (Sing) (the Singapore Act) (together with the legislation of the eastern States referred to as "the eastern legislation", "the eastern Acts" or "the eastern statutes").

[30] NSW Act, s 13; Vic Act, s 14; Qld Act, s 17; Singapore Act, s 10.

[31] Vic Act, s 14; Singapore Act, s 10.

[32] NSW Act, s 14; Vic Act, s 15; Qld Act, s 18; Singapore Act, s 11.

[33] Vic Act, s 15; Singapore Act, s 11.

[34] NSW Act, s 11(1); Vic Act, s 12(1); Qld Act, s 15(1); Singapore Act, s 8(1) and (2).

[35] Where the contract states when payment is due: NSW Act, s 11(1); Vic Act, s 12(1); Qld Act, s 15(1); Singapore Act, s 8(1) and (2).

An application for adjudication

The hirer responded to Tax Invoice No 1461 with a payment schedule[36] disputing the amounts claimed, following which the owner applied for adjudication of the dispute under the Act. That application included a document headed "Tax Invoice No 1461" but it was different from its eponymous predecessor and had not been seen previously by the hirer.

The adjudicator's determination

The hirer resisted the application on two bases – that the application was defective and should have been dismissed summarily because the first Tax Invoice No 1461 was not attached to the application as required by s 28(2)(b)(ii), and that that invoice and the one attached to the application claimed amounts previously invoiced and which were out of time for an application.

Dismissing the first point, the adjudicator determined that attaching a similar but not identical invoice to the application with the appendices was sufficient compliance with the requirement in s 28(2)(b)(ii) that the application "state or have attached to it any payment claim that has given rise to the payment dispute".[37]

As to the argument that the invoices claimed amounts previously invoiced and outside the 90-day application period, the adjudicator held that, since the contract did not expressly exclude the delivery of further invoices for amounts previously claimed, the owner was contractually entitled to deliver invoices for previously claimed amounts. In so holding, he purported to follow a decision of a magistrate which he believed to be authority for that point.

Granting the application, the adjudicator found that the first Tax Invoice No 1461 was a payment claim within the meaning of the Act and that it was sufficient to ground an adjudicable payment dispute. He did so on the basis that, even though it only claimed amounts previously claimed and unpaid, the contract did not expressly exclude the delivery of further invoices for amounts previously claimed.

Because the contract did not expressly preclude the redelivery of unpaid invoices, the delivery of the first Tax Invoice No 1461 created a fresh payment claim, and failure to pay created a fresh payment dispute on which an application for adjudication could be grounded. In this way, the owner was able to enliven claims for adjudication where the time for making an application had passed.

So ruling, the adjudicator felt obliged to follow a decision of a magistrate[38] on an earlier determination of the same adjudicator in which he understood the court to hold that, because there was no limitation in the contract in that case on

[36] A payment schedule is not required by the NT Act and has no special statutory significance other than evidencing a dispute for the purposes of s 8.

[37] See *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 1 at [13] (trial decision).

[38] *GRD Building Pty Ltd v Gallaugher and Total Development Supplies Pty Ltd* (unreported, NT Mag Ct, Cavanagh SM, 10 March 2008).

the number of times the claimant could lodge the same claim, each claim had to be considered separately on its merits. Kelly J disagreed that the magistrate had made such a ruling.[39]

The significance of this ruling is that the NT Act requires an application for adjudication to be made within 90 days of a payment dispute arising.[40] A payment dispute arises when an amount claimed remains unpaid in full when due to be paid under the contract, or is wholly or partially disputed.[41] In this case, payment disputes for the earlier invoices arose on their non-payment 30 days after the end of the month in which they were rendered. The time for making an application commenced to run from that date. Any application more than 90 days later would be out of time and bound to be rejected by the adjudicator.[42]

If the contract precluded, or did not permit, delivery of invoices for previously claimed amounts, the owner did not have a contractual right to deliver Tax Invoice No 1461 to refresh the claims and trigger a new payment dispute on which to found an application.

THE TRIAL DECISION

Kelly J ultimately held[43] that, even though the adjudicator had made an error of law in finding that the application was made within time,[44] his determination was not a nullity. This was because an error of law on a non-essential requirement of the Act did not invalidate a determination. It was with this conclusion the Court of Appeal disagreed, holding that "the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction"[45] and "[a] reasonable and legally correct state of satisfaction [as to the existence of the criteria in s 33(1)(a)(i) to (iv)] is a necessary jurisdictional fact".[46]

Her Honour said[47] that the question whether a particular application complied with s 28(2(b)[48] was a question of fact to be determined by the adjudicator and with which the court could not interfere. Her Honour said[49] that the adjudicator properly had regard to the first Tax Invoice No 1461 to determine whether or not the application complied with the NT Act in stating the details of the payment claim. While he may have been wrong in his conclusion that it did in

[39] Trial decision (2009) 25 NTLR 1 at [14].

[40] NT Act, s 28(1).

[41] NT Act, s 8.

[42] NT Act, s 33(1).

[43] Trial decision (2009) 25 NTLR 1 at [34]-[35].

[44] Because he found that the contract did not preclude successive invoices for amounts previously claimed.

[45] *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 at [13] (Mildren J) (*Mac-Attack*).

[46] *Mac-Attack* (2009) 25 NTLR 14 at [33] (Southwood J); Riley J agreeing at [16].

[47] Trial decision (2009) 25 NTLR 1 at [18].

[48] That is, attaching or stating the details of the claim.

[49] Trial decision (2009) 25 NTLR 1 at [19].

fact comply, that was a matter for him and, having asked himself the right question, his conclusion was not reviewable.[50]

Her Honour said[51] that the magistrate's decision relied upon by the adjudicator was not authority for the proposition that unless a contract specifically prohibits the resubmitting of claims, a party can re-start the 90-day period for making an application for an adjudication under the NT Act simply by serving another invoice.[52] If it did so hold, she said, it would plainly be wrong.

The question the adjudicator should have asked, her Honour said,[53] was when did the payment dispute arise, which in turn depended on when the amounts claimed became due under the contract.[54] Since it was common ground most claims were outside the 90-day application period, the adjudicator was wrong to hold that the claims were in time.[55]

But that did not mean the determination was void. That would occur where "there has not been compliance by the adjudicator with the essential requirements for the existence of a determination, or there has not been a bona fide attempt by the adjudicator to exercise the relevant power, or if there has been substantial denial of natural justice".[56] In so ruling, her Honour was following Southwood J and Mildren J in *TransAustralian Construction Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 (*TransAustralian Construction*) and *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 (*Independent Fire Sprinklers*) respectively who had applied this aspect of the NSW Court of Appeal decision in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 (*Brodyn*).

In holding the application not to be a nullity for the adjudicator finding that the application stated the details of the claim, her Honour said:[57]

> I do not agree that actual compliance with the requirements of section 28(2)(b)(ii) was intended by the legislature to be a pre-requisite to the existence of a determination. Unlike the existence of a construction contract to which the Act applies, the existence of a written application for adjudication, and service of that application on the other party, (this list is not intended to be definitive – there may be other essential requirements), it seems to me that the question of whether the application sets out the details of the payment claim giving rise to the payment dispute so as to comply with section 28(2)(b)(ii) – or for that matter the question of whether it sets out the details of relevant extracts of the construction contract so as to

[50] Trial decision (2009) 25 NTLR 1 at [19].

[51] Trial decision (2009) 25 NTLR 1 at [21].

[52] The decision, transcript of ex tempore reasons, does not deal with the issue at all. It considers only whether, as a matter of fact, a document was a payment claim under the contract and concludes that it was not because it was ambiguous, confusing, and did not alert the paying party to its responsibilities under the Act. It may be that this document included amounts previously claimed, but since the document was held not to be a payment claim under the Act, the decision could not be authority for the proposition contended. This author is indebted to Mr Wade Roper, counsel for Mac-Attack, who provided him with a copy of the decision.

[53] Trial decision (2009) 25 NTLR 1 at [22].

[54] Trial decision (2009) 25 NTLR 1 at [24].

[55] Trial decision (2009) 25 NTLR 1 at [24].

[56] Trial decision (2009) 25 NTLR 1 at [29].

[57] Trial decision (2009) 25 NTLR 1 at [32].

comply with section 28(2)(b)(i) – is a matter of detail which the adjudicator is required to decide and which he may decide wrongly without rendering his decision a nullity.

As to whether the application was made within time, Kelly J said:[58]

It is clear, for the reasons set out above, that the adjudicator in the present case did make an error of law in the process of determining that the application was made within 90 days of the payment dispute arising. However, I see no reason to distinguish between factual errors and errors of law made by the adjudicator in determining whether the Application was made within 90 days after the payment dispute arose. As Mildren J said in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* … at [48]:

> If the adjudicator has jurisdiction to determine whether or not the 90 day time limit has been complied with, his decision cannot be void. In *Brodyn*, Hodgson JA specifically held that that the legislature did not intend that exact compliance with that provision was essential to the existence of a determination. I consider that the structure and purposes of the Act do not support a conclusion that an adjudication is void if the adjudicator wrongly concludes that the time limits have been complied with …

The question of whether the Application was served within 90 days of the payment dispute(s) arising is one which the adjudicator was required to decide and the fact that he made an error of law in the process of making that determination does not render his decision a nullity. There is no right of appeal to this Court from the decision of an adjudicator based on error of law.

THE APPEAL

As has been said, the Court of Appeal held that the adjudicator's error of law was one going to jurisdiction and therefore rendered the determination a nullity. This was the principal, but not the only, divergence from the trial judge's reasoning. The other point of difference was in the Court of Appeal's ruling that the NT Act contained an implied prohibition against more than one application for each amount claimed.[59]

This leads to the rulings made by the Court of Appeal.

Supreme Court may declare determination void for jurisdictional error

Mildren J,[60] with the other members agreeing,[61] said that the privative clause in s 48(3) purporting to limit review of determinations cannot prevent the court from reviewing determinations for jurisdictional error where the adjudicator misconstrues the NT Act. This ruling is unexceptional, applying the High Court's approach to privative clauses in *Plaintiff S157/2002 v Commonwealth* (2003) 211

[58] Trial decision (2009) 25 NTLR 1 at [34]-[35].

[59] *Mac-Attack* (2009) 25 NTLR 14 at [11] (Mildren J), [39] (Southwood J); Riley J agreeing at [16].

[60] *Mac-Attack* (2009) 25 NTLR 14 at [13].

[61] *Mac-Attack* (2009) 25 NTLR 14 at [16] (Riley J), [51] (Southwood J).

CLR 476 (*Plaintiff S157/2002*), following the approach of other jurisdictions[62] and single judges in the NT[63] to judicial review of security of payment determinations.

Section 48 of the NT Act says:

Review of adjudicator's decision to dismiss application

(1) A person who is aggrieved by a decision made under section 33(1)(a) may apply to the Local Court for a review of the decision.

(2) If, on the review, the decision is set aside and referred back to the adjudicator, the adjudicator must make a determination under section 33(1)(b) within 10 working days after the date on which the decision is set aside or any extension of that time agreed on by the parties.

(3) Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

In *Mac-Attack*, Mildren J said:[64]

Section 48(3) of the Act contains a privative clause. Except as provided by s 48(1) (which applies only where the adjudicator dismisses the application under s 33(1)(a)), a decision of an adjudicator cannot be appealed or reviewed. However, given the nature of the tribunal which the Act provides for, this provision does not prevent the Court from declaring that a determination is void for jurisdictional error of a kind where the tribunal wrongly construes the Act. I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction. In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*, I held that the decision of an adjudicator who wrongly determined whether the 90 day time limit had been complied with, was not void. The Judge below felt constrained to follow what I then said. But that was a case of non-jurisdictional error. In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits. As Marshall CJ said in *Marbury v Madison* in a passage quoted with approval by Brennan J in *Attorney-General (NSW) v Quin*:

> It is, emphatically the province and duty of the judicial department to say what the law is.

… Whether any other kind of jurisdictional error would vitiate the decision of an adjudicator is a matter which does not have to be decided in this appeal.

His Honour's reference to *Plaintiff S157/2002* was to the statement of

[62] For example, *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [42], [47]-[55] (Hodgson JA), with Mason P and Giles JA agreeing. (It must be noted that the Court of Appeal took the view in *Brodyn* that, although under the NT Act there was not an explicit exclusion of the jurisdiction of the court prior to the obtaining of judgment, an intention was disclosed to exclude curial intervention for errors of law in the adjudicator's determination.) *Walton Construction (Qld) Pty Ltd v Salce* [2008] QSC 235 at [5] (McMurdo J); *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 at [102], [107], [116] (Vickery J); cf *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [122], [128].

[63] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [39]-[47] (Mildren J); *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [42]-[43] (Southwood J).

[64] *Mac-Attack* (2009) 25 NTLR 14 at [13]-[14], citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [57]; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; *Craig v South Australia* (1995) 184 CLR 163 at 179; *Marbury v Madison* 5 US (1 Cranch) 137 at 177 (1803); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

Gaudron, McHugh, Gummow, Kirby and Hayne JJ where their Honours said:[65]

> Thus, even on this general statement, a privative clause cannot protect against a failure to make a decision required by the legislation in which that clause is found or against a decision which, on its face, exceeds jurisdiction.

The general statement to which their Honours were referring was that of Dixon J in *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 where his Honour said:[66]

> The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary *Constitution*, the interpretation of provisions of the general nature of reg 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

Their Honours in *Plaintiff S157/2002* emphasised that Dixon J's comments were not limited to the regulation under consideration, but applied to privative clauses generally.[67]

Extent of review

While the ability of the Supreme Court to review a determination is uncontroversial, the extent of the review is very much so. For example, in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 (*O'Donnell Griffin*), Beech J held that prerogative relief is not available to correct errors regarding compliance with statutory criteria in s 31(2)(a) of the WA Act[68] because review of those errors was available in the SAT under s 46(1).[69] In Singapore, Prakash J held in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 (*SEF Construction*) that the availability of a statutory merits review, with other factors, impliedly restricted judicial review in the High Court. These and other decisions are discussed later.

Statutory misinterpretations invalidate determinations if jurisdictional

Mildren J

Repeating for convenience part of his remarks in *Mac-Attack* quoted above, Mildren J said:[70]

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[65] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [57].

[66] *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 at 614-615.

[67] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [57].

[68] NT Act, s 33(1)(a).

[69] NT Act, s 47(1), granting a right of review in the Local Court.

[70] *Mac-Attack* (2009) 25 NTLR 14 at [13], citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [57]; *Craig v South Australia* (1995) 184 CLR 163 at 179.

> However, given the nature of the tribunal which the Act provides for, this provision does not prevent the Court from declaring that a determination is void for jurisdictional error of a kind where the tribunal *wrongly construes the Act*. … In my opinion, an adjudicator cannot *wrongly construe the Act* on a question going to his jurisdiction to decide the adjudication on the merits. (emphasis added)

Those comments have been highlighted because on their face they appear as though they may conflict with a dictum of Hodgson JA[71] in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 (*Coordinated Construction Co*) where his Honour said:[72]

> It follows there was no error of the kind that, according to *Brodyn Pty Ltd*, could invalidate a decision; and also that there was no unlawful act by an adjudicator which, according to *Project Blue Sky Inc*, could justify the grant of an injunction. I would add that in my opinion, if a determination is valid because the basic and essential requirements of the Act are complied with, an error of law by the adjudicator, *even in interpreting the Act itself*, would not make the determination unlawful and thus liable to restraint by injunction. (emphasis added)

There may not be conflict between the two judicial statements, as Hodgson JA may well have been referring to misinterpretations of the Act which did not involve jurisdictional error. His Honour referred to determinations which complied with the basic and essential requirements of the Act but which erred in interpreting the Act. Invalidating errors according to *Brodyn*[73] are those which offend the basic and essential statutory requirements. There, Hodgson JA, with Mason P and Giles JA agreeing, after listing what he saw as the "basic and essential requirements" of the NT Act[74] said:[75]

> A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

As Basten JA[76] said in *Coordinated Construction Co*,[77] "that description reflects the concept of 'jurisdictional error' under the general law as identified in

[71] Hodgson JA delivered the primary judgment in *Brodyn v Davenport Pty Ltd* (2004) 61 NSWLR 421, with Mason P and Giles JA agreeing.

[72] *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [46] from which special leave to appeal to the High Court was refused with Gleeson CJ giving the judgment of the court saying in part: "The conclusion reached by the Court of Appeal, whilst not inevitable, was well open to it and we are not persuaded that it is likely to be productive of injustice. In those circumstances, we think that there is insufficient reason to doubt the correctness of the decision of the Court of Appeal of New South Wales to warrant a grant of special leave to appeal to this Court": *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2006] HCATrans 9.

[73] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.

[74] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [53].

[75] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [54].

[76] Who appeared in both *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

Craig v South Australia and in *Minister for Immigration and Multicultural Affairs v Yusuf*". While that may be so, it seems clear from his remarks in *Brodyn* quoted above that Hodgson JA intended it to mean something different, something narrower. Indeed, the NSW Court of Appeal has confirmed this in *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 (*Perform*) where Giles JA, with whom McColl and Young JJA agreed, said:[78]

> *Brodyn Pty Ltd v Davenport* disapproved the test of whether an adjudicator's error is jurisdictional or non-jurisdictional. The question is "whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination".

Strong support for the view that Hodgson JA was intending to exclude errors of law in interpreting the Act from the grounds of review is found in the Court of Appeal's judgment in *Perform* where Giles JA said:[79]

> The appellant did not invoke the possible qualification in relation to "misconstruing the terms of the relevant legislation". It could be said that the adjudicator's error was misconstruction of s 14(3), in that he considered that s 14(3) did not permit indication by incorporation by reference. However, I do not think that an argument that such a misconstruction vitiated the determination is consistent with the cases. Underlying the invalidity of a determination only for want of "an essential precondition for the existence of an adjudicator's determination" … is that a determination may be valid although the adjudicator has made an error of fact or law, and it has been accepted that this includes error in the construction of the Act.

After referring to authorities to similar effect,[80] his Honour identified a situation where an error in interpreting the Act would vitiate a determination, saying:[81]

> Construction of the Act necessarily arises in the course of an adjudication, and in accordance with *Brodyn Pty Ltd v Davenport* and subsequent cases incorrect construction does not necessarily invalidate a determination. It could do so if the construction negated an essential precondition as spoken of in *Brodyn Pty Ltd v Davenport*, but the construction of s 14(3) as part of deciding what a payment schedule indicates is not of that nature.

This, then, reconciles the statements of Mildren J with those of the NSW Court of Appeal. Mildren J referred to errors in construing the NT Act on a question going to jurisdiction, while the NSW Court of Appeal used the terminology of negating an essential precondition. A question going to jurisdiction would be an essential precondition.

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[77] *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [71], citing *Craig v South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82].

[78] *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [71]. Giles JA was a member of the court in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 agreeing with Hodgson JA.

[79] *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [71], citing *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [54].

[80] *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [72]-[74], citing *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [49]; *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521 at [33]-[34]; *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [46]; *Plaza West Pty Ltd v Simons Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [27-[28].

[81] *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [75].

Error as to jurisdictional facts invalidates determination if unreasonable or misinterprets Act

We come, then, to a divergence between the reasons of Mildren J and those of Southwood J. Both held that errors of law going to jurisdiction will invalidate a determination,[82] but Southwood J effectively extended the comments to jurisdictional facts as well as law. Since Riley J agreed with Southwood J, that extension is the current law for the NT. However, it will be submitted that the extension was by reference to authority which applies only to subpara (v) but not to subparas (i) to (iii) of s 33(1)(a).

In the passage quoted above, Mildren J confined his comments to errors of law going to jurisdiction.

Southwood J, on the other hand, said the following:[83]

> The structure of subsection 33(1) of the Act is such that the jurisdiction of an adjudicator to embark upon the adjudication of an application on the merits depends upon the adjudicator in fact reaching a state of satisfaction that certain prescribed criteria are met. The prescribed criteria being those set out in s 33(1)(a)(i) to (iv) of the Act. If the criteria are not satisfied, the adjudicator must dismiss the application without making a determination on the merits. The existence of such a state of satisfaction is a condition precedent to an adjudicator embarking upon a consideration of an application on the merits.
>
> The statutory criteria set out in s 33(1)(a)(i) to (iv) *are of such a nature that the satisfaction of the adjudicator* as to whether they have been fulfilled or not must be both reasonable and founded upon a correct understanding of the law. A reasonable and legally correct state of satisfaction is a necessary jurisdictional fact. If such a jurisdictional fact does not exist, an adjudicator would be acting in excess of jurisdiction if he made a determination of an application on the merits. The adjudicator cannot give himself jurisdiction by erroneously deciding that the fact or event exists. (emphasis added)

Those statutory criteria are matters of fact. Using the numbering of s 33(1)(a), they are:

(i) whether the contract concerned is a construction contract;

(ii) whether the application has not been prepared and served in accordance with section 28;

(iii) whether an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) whether the adjudicator is satisfied it is not possible to fairly make a determination –

  (A) because of the complexity of the matter; or

  (B) because the prescribed time or any extension of it is not sufficient for another reason.

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[82] *Mac-Attack* (2009) 25 NTLR 14 at [13] (Mildren J); [33] (Southwood J); Riley J agreeing at [16].

[83] *Mac-Attack* (2009) 25 NTLR 14 at [32]-[33], citing *R v Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125; NT Act, s 33(1)(a); *R v Connell; Ex parte Hetton Bellbird Colleries Ltd* (1944) 69 CLR 407 at 430; *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [127]-[140]; *R v Judges of the Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 214.

Under Southwood J's reasoning, if an adjudicator comes to an incorrect conclusion on one of those matters which is unreasonable or founded on an incorrect understanding of the law, that error is a jurisdictional error.[84] It is not sufficient that there simply be an error as to the fact – the error must also be either unreasonable or founded on an incorrect understanding of the law.

Illustrative of his Honour's view are the matters which he held to be jurisdictional errors in this case. Quoting from his Honour's judgment,[85] they are:

> (1) while the first respondent did not attach the relevant payment claim to the application, the second document described as Tax Invoice No 1461 provided details of the relevant payment claim; (2) the relevant payment claim was the claim made in the original document described as Tax Invoice No 1461; (3) the payment claim was disputed by the appellant on or about 14 May 2009 when the appellant sent Payment Schedule No 8 to the first respondent, Payment Schedule No 8 served as a notice of dispute; (4) the application had been made within the time stipulated by s 28(1) of the Act; and (5) the construction contract did not prevent the applicant from making more than one payment claim in respect of the same payment item.

His Honour described each as an error of law involving a misinterpretation of the relevant provisions of the Act,[86] making each a jurisdictional error.[87] The misinterpretations of the statute for each finding were (using the same numbering as above):

1. the purported payment claim attached to the application was not the payment claim contemplated by s 8, which does not permit more than one application for each item claimed, with the result that the application did not comply with s 28(2)(b)(ii);[88]
2. the purported payment claim on which the application was based was not within the definition of "payment claim" under the Act[89] (because s 8 does not contemplate more than one payment claim for each item of work);[90]
3. s 8 does not contemplate more than one payment claim for each item of work, therefore the real, earlier, payment claim was disputed much earlier than 14 May 2009;[91]
4. again, since s 8 does not contemplate more than one payment claim for each item of work, time for the application expired earlier than the date the application was made;[92]

[84] See also his Honour's judgment in *Australian Crime Commission v LB* (2009) 25 NTLR 30 at [31] where the satisfaction of an examiner under the *Australian Crime Commission Act 2002* (Cth) as to the existence of jurisdictional preconditions such as the reasonableness of issuing a summons arguably had to be reasonable and founded on a correct understanding of the law.

[85] *Mac-Attack* (2009) 25 NTLR 14 at [43].

[86] *Mac-Attack* (2009) 25 NTLR 14 at [44].

[87] *Mac-Attack* (2009) 25 NTLR 14 at [50].

[88] *Mac-Attack* (2009) 25 NTLR 14 at [45].

[89] *Mac-Attack* (2009) 25 NTLR 14 at [46].

[90] *Mac-Attack* (2009) 25 NTLR 14 at [49].

[91] *Mac-Attack* (2009) 25 NTLR 14 at [47].

[92] *Mac-Attack* (2009) 25 NTLR 14 at [48].

5. neither the contract nor s 8 permitted more than one payment claim for each item of work.[93]

It is clear that the same misinterpretation of the Act infected each finding, namely that s 8 permitted more than one payment claim for each obligation under the contract. If the thesis of this article is correct that the Act does not impliedly exclude more than one payment claim for each contractual obligation, there would not have been jurisdictional error, unless the ruling that the contract by its silence permitted more than one such payment claim amounted to jurisdictional error. This will be examined below.

The reasoning of the majority leaves open a challenge to a determination on the basis that a factual error as to the existence of the criteria in s 33(1)(a), while involving no misinterpretation of the Act, was unreasonable and was therefore a vitiating jurisdictional error. This flows from Southwood J's comments quoted above and the authorities he cites. This also qualifies the dictum[94] of Mildren J in *Independent Fire Sprinklers*[95] where his Honour said:

> I consider that the structure and purposes of the Act do not support a conclusion that an adjudicator is void if the adjudication wrongly concludes that the time limits have been complied with.

On the reasoning of the majority in *Mac-Attack*, if the wrong conclusion that the time limits have been complied with is unreasonable or founded on a misinterpretation of the law, that error would be a jurisdictional error.

This is a refinement of Southwood J's comments in *TransAustralian Construction* where he said:[96]

> That does not mean that an adjudicator is free to get the question about whether a payment claim exists wrong. Whether there is a payment claim is a threshold question which an adjudicator has the jurisdiction to determine, but if he makes an erroneous decision in relation to that threshold question, then he steps outside his jurisdiction and any subsequent purported determination is a nullity and is void.

His Honour there did not make the distinction between simply getting the question wrong on the one hand and, on the other, coming to an unreasonable conclusion or applying incorrect law. There is, of course, a difference between time limits referred to by above and the existence of a payment claim being considered by Southwood J. However, both are now effectively jurisdictional since the time limits stem from the criterion in s 33(1)(a)(ii) that the application comply with s 28. One of the requirements of s 28 is that the application be made within 90 days of the payment dispute arising. By deploying the line of reasoning in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 (*Eshetu*), a court is now able to attack an adjudicator's conclusion as to compliance with the time limits by saying his or her state of satisfaction was

[93] *Mac-Attack* (2009) 25 NTLR 14 at [49].

[94] His Honour's comments in that case were obiter since he held in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [57] that the time limits had been complied with.

[95] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [48].

[96] *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [46].

unreasonable or was founded on an incorrect understanding of the law. Theoretically at least,[97] this opens determinations to greater challenge than previously understood.

As to what is an unreasonable state of satisfaction regarding the existence of a jurisdictional fact, in the words of Gummow J in *Eshetu*, paraphrasing Brennan J in *Foley v Padley* (1984) 154 CLR 349 and referring to other authorities:[98]

> the question for the court is not whether it would have formed the opinion in question but whether the repository of the power could have formed the opinion reasonably.

Gummow J then quoted Gibbs J in *Buck v Bavone* (1976) 135 CLR 110 where his Honour said:[99]

> In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached.

Adjudicator's state of satisfaction as to s 33(1)(a) criteria jurisdictional precondition

Enabling the *Eshetu* line of reasoning to be applied, as quoted above, Southwood J found that "[t]he existence of such a state of satisfaction is a condition precedent to an adjudicator embarking upon a consideration of an application on the merits".[100] This was despite the subsection not requiring the adjudicator to be satisfied of the criteria in subparas (i) to (iii), but expressly requiring his satisfaction as to criterion (iv). His Honour said that the *nature* of the criteria were such that the adjudicator's state of satisfaction had to be reasonable and founded on correct law.[101]

It is submitted that these authorities only apply where an Act expressly requires the decision-maker to be satisfied of a fact, to be of a certain opinion, or

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[97] It might be practically difficult to show that a conclusion was unreasonable to the requisite degree or founded on a misunderstanding of the law: see Gibbs J in *Buck v Bavone* (1976) 135 CLR 110 at 118-119 quoted below.

[98] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [134], citing *Foley v Padley* (1984) 154 CLR 349 at 370; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Federal Commissioner of Taxation v Bayly* (1952) 86 CLR 506 at 510; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 57; *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276; *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303, 308.

[99] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [136], citing *Buck v Bavone* (1976) 135 CLR 110 at 118-119.

[100] *Mac-Attack* (2009) 25 NTLR 14 at [32].

[101] *Mac-Attack* (2009) 25 NTLR 14 at [33].

similar. Those authorities do not apply where an Act simply requires the tribunal to find that a fact exists or an event has occurred and does not make the state of satisfaction or the holding of an opinion the precondition.

On occasion, as explained by Isaacs and Rich JJ in *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 and referred to by Gummow J in *Eshetu*,[102] with the object of preventing litigation on questions of jurisdictional fact, the legislature may introduce into the criterion elements of opinion or belief by the decision-maker. Where that occurs, it is not enough to set aside a decision that the conclusion on that matter be wrong, even on a jurisdictional fact. To set aside a decision where the jurisdictional fact is the decision-maker's satisfaction as to a matter, the state of satisfaction must be so unreasonable that no reasonable decision-maker could hold it, or it must be based on an incorrect understanding of the law.

But that principle only applies where the statute expressly requires the decision-maker to be satisfied, or to hold an opinion, or similar. In the words of Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 (*Connell*) quoted by Gummow J:[103]

> where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.

That was the case in each of the decisions referred to by Gummow J, and in *Eshetu* itself, where the section[104] required the Minister to grant a visa "if satisfied" of certain criteria. In *Connell*,[105] the jurisdictional fact turned upon the question whether the decision-maker had been properly "satisfied" as to certain rates of remuneration.[106] In *Bankstown Municipal Council v Fripp* and *Foley v Padley* it was the "opinion of the council" which was the jurisdictional fact. In *Buck v Bavone*, in the sentence immediately preceding the passage quoted by Gummow J and reproduced above, Gibbs J was referring to statutes empowering a body to act "if it is satisfied of the existence of certain matters specified in the statute".[107] In *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, it was the satisfaction of the Commissioner as to the existence of certain facts.

Unlike subpara (iv), the statutory criteria in subparas (i) to (iii) of s 33(1)(a) are not dependent on the adjudicator's satisfaction as to their existence. They are simply stated as matters of fact which must exist. Only when it comes to subpara (iv) is the adjudicator's satisfaction introduced. Section 33(1)(a) says:

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[102] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130].

[103] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133], citing *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430.

[104] *Migration Act 1958* (Cth), s 65(1).

[105] *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407.

[106] Under the *Coal Production (War-time) Act 1944* (Cth). See Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [135].

[107] *Buck v Bavone* (1976) 135 CLR 110 at 118.

(1) An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) –

(a) dismiss the application without making a determination of its merits if –

(i) the contract concerned is not a construction contract;

(ii) the application has not been prepared and served in accordance with section 28;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied it is not possible to fairly make a determination –

(A) because of the complexity of the matter;

(B) because the prescribed time or any extension of it is not sufficient for another reason.

The adjudicator's satisfaction is not expressly necessary for the first three criteria. Decisions on their existence do not fall within the more protected class of decisions which can only be challenged on the basis of unreasonableness or misinterpretation of the law.

In the passage quoted above, Southwood J said[108] that the structure of s 33(1) and the nature of the criteria were such that the existence of the adjudicator's state of satisfaction as to the existence of the statutory criteria is a condition precedent to the adjudicator embarking upon a consideration of an application on the merits. This is true only in the sense that a fact-finder must be satisfied of the existence of facts to make his or her decision. Every decision-maker must be satisfied or not satisfied of the existence of facts. But that does not place those decisions in the class where it is the decision-maker's state of satisfaction which is the condition precedent and the jurisdictional fact. To do so requires words of the statute stating that the decision is dependent on the tribunal's being "satisfied" as to specified matters, or being of a specified opinion, or similar. If such terminology is not used, it is the existence of the fact that is determinative, not the tribunal's state of satisfaction as to its existence. It is respectfully submitted that more in the way of express words is needed to attract the operation of those authorities than the structure of the section and the nature of the criteria.

Telling against this interpretation is the legislature's making the adjudicator's satisfaction a precondition in relation to the two criteria in subpara (iv), but not in relation to the preceding criteria. The word "satisfied" could have been placed before all of the subparagraphs had it been Parliament's intention to make the adjudicator's state of satisfaction the precondition in relation to the first three criteria as well as the last. On ordinary rules of construction, the deliberate placement of the word elsewhere indicates a contrary intention.

It is submitted that Mildren J's approach is to be preferred and that decisions on the existence of the first three criteria may be challenged on the simple basis that they are simply wrong (if they are jurisdictional or part of the basic and essential requirements of the Act).

[108] *Mac-Attack* (2009) 25 NTLR 14 at [32]-[33].

Having said that Mildren J's comments in *Independent Fire Sprinklers*[109] were obiter, it must also be observed that the comments of the majority in *Mac-Attack* as they apply to unreasonable factual findings of jurisdictional preconditions are also obiter, since both Mildren J[110] and Southwood J[111] held that the errors in that case involved a misinterpretation of the Act. However, the statements of Southwood J simply repeat the formula devised by the High Court in the cases cited and there is no warrant to separate unreasonable factual findings from the misapplications of law referred to in that formula. It is suggested that, while admittedly difficult to sustain, challenges to determinations are now clearly open based on unreasonable factual errors about the jurisdictional matters in s 33 (and conceivably wherever else jurisdictional preconditions can be identified in the Act).

Supreme Court may review determinations on s 33(1)(a) criteria

Although not specifically addressed, because the court entertained the challenge on the basis of the s 33(1)(a) criterion, it is obvious the court considered such a review was open. This is contrary to authority in WA and, indirectly, in Singapore.

Western Australia

In WA, Beech J held in *O'Donnell Griffin*[112] that the privative clause in the WA Act excluded prerogative relief in relation to conclusions as to the existence of the criteria in s 31(2)(a) (equivalent to the NT Act, s 33(1)(a)), but permits review in the SAT of dismissals of applications and failures to dismiss applications for non-compliance with those criteria. Availability of review in the tribunal of a decision not to dismiss for alleged failure to comply with the requirements was pivotal to his Honour's conclusion.

This was because the availability of statutory review of decisions dismissing or not dismissing applications for failure to comply with the criteria indicated a legislative intent to exclude prerogative relief.[113] Critical to his Honour's conclusion was his view that a failure by an adjudicator to dismiss an application for non-compliance with the statutory criteria was just as reviewable under s 46(1) (equivalent to the NT Act, s 48(1)) as was a decision to dismiss. Those sections are in pari materia, with the WA Act, s 46 saying:[114]

> (1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.

[109] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [48].

[110] *Mac-Attack* (2009) 25 NTLR 14 at [13], [14].

[111] *Mac-Attack* (2009) 25 NTLR 14 at [44].

[112] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [122], [128].

[113] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [121]-[122].

[114] NT Act, s 48 says: (1) A person who is aggrieved by a decision made under section 33(1)(a) may apply to the Local Court for a review of the decision. (2) If, on the review, the decision is set aside and referred back to the adjudicator, the adjudicator must make a determination under section 33(1)(b) within 10 working days after the date on which the decision is set aside or any extension of that time agreed on by the parties. (3) Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

(2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

(3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

Beech J held that a refusal to dismiss an application for alleged failure to comply with the statutory criteria was a "decision" within the meaning of s 46(1) just as much as a more obvious decision to dismiss for failure to comply.[115] This means that a respondent who fails before the adjudicator to have an application dismissed for failure to comply with the WA Act, s 31(2)(a) or the NT Act, s 33(1)(a) may have that decision reviewed. Such an avenue is significant since a review is de novo[116] and the SAT or Local Court is not therefore confined to the grounds of jurisdictional error.

O'Donnell Griffin is of interest for at least three other reasons. They are that: (1) the alleged error by the adjudicator there could have been described as a misinterpretation of the Act,[117] yet Beech J found that judicial review for jurisdictional error was not available; (2) his Honour made no reference to the adjudicator's state of satisfaction of compliance with the criteria as the determining condition;[118] and (3) his Honour said that the mandatory requirement on an adjudicator to dismiss an application which does not comply with the statutory criteria[119] "reveals an intention that the non-existence of those conditions is fundamental and essential to an adjudication application".[120]

Nothing further need be said about the first two. Holding that the non-existence of the statutory criteria is fundamental and essential to an adjudication application is interesting because (1) that would bring the issue of compliance with time limits[121] squarely within the *Brodyn* formulation of matters which will nullify a determination, yet (2) the NT Supreme Court holds that the time limits are not one of the basic and essential requirements.[122] Confirming this approach in *Mac-Attack*, Mildren J said an error of an adjudicator as to

[115] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [119]-[120].

[116] NT Act, s 60(2); *State Administrative Tribunal Act 2004* (WA), s 27(1). See also *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [122] referring to "merits review" in the SAT.

[117] Namely, does a progress claim that comprises a number of individual claims constitute one payment claim, or a number of payment claims within the definition of the Act? (see *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [68]). A subsidiary question was whether the substance of the definition of "payment dispute" is only to identify the time at which a payment dispute arises, or is it also to identify the content of the dispute? (see *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [75]).

[118] Of course, this may be because it was not argued. It does not necessarily mean his Honour would have disagreed with Southwood J in *Mac-Attack* (2009) 25 NTLR 14.

[119] NT Act, s 33(1)(a); WA Act, s 31(2)(a).

[120] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [120].

[121] NT Act, s 28(1); WA Act, s 26(1).

[122] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [48]; Trial decision (2009) 25 NTLR 1 at [35].

compliance with time limits would be non-jurisdictional error.[123] While possibly this latter comment could be explained on the basis of whatever difference there is between the basic and essential requirements of the Act, and those which go to jurisdiction, this is unlikely. It is more likely that his Honour remained of the view that the time limits were not basic and essential to a valid determination.

Considerable conflict therefore exists between the WA and NT approaches, such as:

1. In the NT, prerogative relief is available to correct errors as to compliance with the statutory criteria in s 33(1)(a).[124] It is not in WA.
2. In WA, a decision not to dismiss an application for non-compliance with the statutory criteria in s 31(2)(a)[125] is reviewable under s 46(1).[126] This has not been decided in the NT, although on the reasoning in *O'Donnell Griffin* this right of review is inimical to the availability of prerogative relief.
3. In WA, the time limits in s 26(1)[127] are "fundamental and essential to an adjudication application" whereas in the NT they are not.

O'Donnell Griffin was not referred to in *Mac-Attack*. Stifling the hearing in the Supreme Court in favour of a review in the Local Court may or may not have assisted the respondent, depending on whether the Local Court would find the Act impliedly excluded amounts being claimed in successive invoices. This may be thought unlikely.

Singapore

The Singapore legislation contemplates two reviews. One is the express right to a full merits review by an adjudicator or panel of adjudicators of determinations over a prescribed value[128] on the application of an unsuccessful respondent.[129] The other is indirect, by the Act's requirement that a party pay into court the amount he[130] is required to pay when he "commences proceedings to set aside the adjudication determination or the judgment obtained" thereon.[131]

While not expressly conferring a right of review, this latter section contemplates reviews on undefined grounds. In *SEF Construction*,[132] Prakash J held that determinations could be set aside for failing to comply with the basic requirements of the Act[133] and for denying natural justice,[134] but not for failing to

[123] *Mac-Attack* (2009) 25 NTLR 14 at [13].

[124] WA Act, s 31(2)(a).

[125] NT Act, s 33(1)(a).

[126] NT Act, s 47(1).

[127] NT Act, s 28(1).

[128] Currently $100,000 under reg 10 of the *Building and Construction Industry Security of Payment Regulations 2005* (Sing).

[129] Singapore Act, s 18.

[130] The Singapore Act uses the masculine pronoun.

[131] Singapore Act, s 27(5).

[132] *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [27], [38], [40]-[42].

[133] Applying *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.

[134] Because according natural justice was expressly required by Singapore Act, s 16(3).

act bona fide. Her Honour said:[135]

> Thus, I consider that an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:
>
> (a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);
> (b) the service by the claimant on the respondent of a payment claim (s 10);
> (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);
> (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);
> (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (ss 17(1) and (2));
> (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
> (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, mutandis mutandi, as under (a) to (f) above.

After reviewing the Australian[136] and the United Kingdom[137] authorities, her Honour came to the conclusion that it was not necessary to import the New South Wales requirement that the adjudicator act bona fide, saying:[138]

> There is no need in the Singapore context to import a duty to act bona fide from administrative law because the SOP Act is very clear in s 16(3) as to the way in which the adjudicator must conduct the arbitration. It mandates that he must act independently, impartially and in a timely manner; avoid incurring unnecessary expense and comply with the principles of natural justice. The legislature having so prescribed the manner in which the adjudicator must behave, it is entirely otiose to add an additional requirement that he must exercise his powers in a bona fide manner.

Although not referring to *O'Donnell Griffin* or expressly to the line of reasoning that a statutory right of review impliedly limits judicial review, the availability to a respondent of a merits review under s 18,[139] the absence of a right of appeal,[140] and the interim nature of determinations,[141] were relevant in coming to the conclusion that judicial review was restricted to the grounds mentioned.

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[135] *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [45].

[136] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; *Timwin Construction Pty Ltd v Facade Innovations Pty Ltd* [2005] NSWSC 548; *Lanskey Constructions Pty Ltd v Noxequin Pty Ltd (in liq)* [2005] NSWSC 963; *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941; *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* [2006] NSWSC 375.

[137] *Ballast plc v Burrell Co (Construction Management) Ltd* [2001] BLR 529.

[138] *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [40].

[139] *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [38], [41].

[140] *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [27].

[141] *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [25].

Act impliedly prohibits multiple claims

Combining and summarising the reasons of Mildren J and Southwood J on this point, the court held:

1. section 33(1)(a)(ii) requires an application to be dismissed unless it is made within 90 days of a payment dispute arising;[142]
2. a payment dispute arises under s 8, relevantly, when a payment claim remains unpaid in full or is disputed when it is due to be paid under the contract;[143]
3. section 8 does not envisage or contemplate the re-triggering of a payment dispute by the resubmission or reformulation of payment claims;[144]
4. the purpose of the Act would be defeated if the 90-day period could be revived by delivering successive payment claims for the same amounts.[145]

Mildren J said:[146]

> In my opinion, the Act does not envisage that a payment claim which includes a claim which has already been the subject of a previous payment claim, but which is out of time for the purposes of s 28 to be available for adjudication. If the Act intended repeat claims could be adjudicated, it would defeat the purpose of the 90 day time limit. Furthermore, the Act makes no provision for an extension of time except where s 39(2) of the Act applies and it is instructive to see what that provision contemplates.
>
> Under s 33(2) of the Act, if an application is not dismissed or determined by an adjudicator within the prescribed time, it is taken to be dismissed when the time ends. section 39(2) provides that in those circumstances, a further application may be made within 28 days. There is no other provision of the Act allowing for a further application in respect of the same payment claim. Furthermore, there is no power given to an adjudicator (or to anyone else) to extend the 90 day time limit.

The critical sentence for present purposes is the penultimate that "[t]here is no other provision of the Act allowing for a further application in respect of the *same payment claim*" (emphasis added). It will be submitted that, while this statement is undoubtedly correct, it is not "the same payment claim" where the contract permits repeat claims for amounts outstanding from previous claims. Such a claim is a fresh payment claim under the contract, recognised by the Act and attended with all of the contractual and statutory consequences of a valid payment claim.

While discussing ss 8, 10 and 28,[147] Southwood J said:[148]

> Section 8 of the Act specifies the time when a payment dispute arises. The time when a payment dispute arises cannot be deferred or retriggered by the inclusion in a construction contract of clauses which make provision for the resubmission or

[142] *Mac-Attack* (2009) 25 NTLR 14 at [2] (Mildren J), [31] (Southwood J).

[143] *Mac-Attack* (2009) 25 NTLR 14 at [3] (Mildren J), [38] (Southwood J).

[144] *Mac-Attack* (2009) 25 NTLR 14 at [11] (Mildren J), [39] (Southwood J).

[145] *Mac-Attack* (2009) 25 NTLR 14 at [11] (Mildren J), [34] (Southwood J inferentially).

[146] *Mac-Attack* (2009) 25 NTLR 14 at [11]-[12] (Mildren J).

[147] *Mac-Attack* (2009) 25 NTLR 14 at [36]-[42].

[148] *Mac-Attack* (2009) 25 NTLR 14 at [39].

> reformulation of a payment claim. section 8 of the Act does not contemplate the re-triggering of a payment dispute by the resubmission or reformulation of payment claims. The section makes no provision for repeat payment claims.

Neither of their Honours relied on express words in the Act to arrive at their conclusion, using instead such phrases as "the Act does not envisage" and "the Act does not contemplate".

It is respectfully submitted that another course was open to the court by relying on express words of the Act and the express intention of Parliament. That course was to say that:

1. an application for adjudication must be made within 90 days after a payment dispute arises;
2. a payment dispute arises under s 8, relevantly, when a payment claim remains unpaid in full or is disputed when it is due to be paid under the contract;
3. what is a payment claim is determined by the contract, by the definition of payment claim;
4. when a payment claim may be made is determined by the contract, again by the definition of payment claim;
5. how a payment claim may be made is determined by the contract;[149]
6. the content of a payment claim is determined by the contract;[150]
7. Parliament has therefore left it to the parties by their contract to determine what may and may not be the subject of a payment claim;
8. if the parties by their contract expressly permit repeat claims to be made for amounts unpaid from previous claims, each repeat claim complying with the contract is a valid payment claim under the contract;
9. a valid payment claim under the contract is a valid payment claim under the Act;
10. each valid payment claim under the contract can give rise to a payment dispute under s 8 which in turn gives rise to an entitlement to apply for adjudication.

The first two points are the same as those from *Mac-Attack* and are unexceptional, being simply statements of the statutory requirements. More, however, needs to be said about the second. As Kelly J emphasised in the trial decision,[151] and Southwood J in *TransAustralian Construction*,[152] the NT Act leaves the question of when a payment dispute arises to the contract (in other words, to the parties). In words worth repeating, Southwood J said:[153]

> If a construction contract contains a written provision about payment claims the Act defines "payment claim" by reference to the terms of the construction contract actually made by the parties (s 4). *It is to that contract that the adjudicator must go to*

[149] Whether the parties make express provision or make no provision and terms are implied into the contract by NT Act, s 19.

[150] Again, whether the parties make express provision or make no provision and terms are implied into the contract by NT Act, s 19.

[151] Trial decision (2009) 25 NTLR 1 at [22].

[152] *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [45].

[153] *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [45].

> *determine whether there is a "payment claim" and hence a "payment dispute" for him to adjudicate*. If the construction contract does not contain such a written provision the Act implies into the contract the relevant contractual provisions in the Schedule of the Act. (emphasis added)

Section 8 says:

> A payment dispute arises if –
> (a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed;
> (b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or
> (c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

It is clear, as all have said, that *the contract* determines when a payment dispute arises, by stating when a payment claim is to be paid.

The contract also determines how, when and in what form a payment claim may be made. If the parties make no provision, the Act implies terms *into the contract*,[154] it does not simply legislate periods and methods. section 4 says:

> **"payment claim"** means a claim made under a construction contract –
> (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or
> (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.

It is evident that the Act leaves to the parties by their contract to determine the timing, form and content of a payment claim.

This is why an ordinary invoice or progress claim often amounts to a payment claim for the purposes of the Act. The only occasion on which such an invoice would not amount to a payment claim under the Act is where the contract does not make provision for "how" a payment claim is to be made,[155] or where it makes such proscriptive provision that an ordinary invoice would not comply. In the former case, s 19 applies which says:

> **Making payment claims**
>
> The provisions in the Schedule, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment.

Division 4 of the Schedule contains quite detailed particulars to be included in a payment claim, namely:

> **Content of claim for payment**
> (1) A payment claim under this contract must –
> (a) be in writing;

[154] NT Act, s 19.

[155] There can sometimes be a question as to whether a clause in a contract does in fact make provision for "how" a payment claim is to be made or responded to. See, for example, *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [23], [54]-[56]; *Adjudicator's Determination 16.09.04* at [113]-[118], [122]-[134], available at http://www.nt.gov.au/justice/policycoord/construction/determinations.shtml viewed 8 March 2010.

(b) be addressed to the party to which the claim is made;
(c) state the name of the claimant;
(d) state the date of the claim;
(e) state the amount claimed;
(f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;
(g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim;
(h) be signed by the claimant; and
(i) be given to the party to which the claim is made.

(2) For a claim by the contractor, the amount claimed must be calculated in accordance with this contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be –
(a) if this contract states that the principal must pay the contractor one amount (the **contract sum**) for the performance by the contractor of all of its obligations under this contract (the **total obligations**) – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations;
(b) if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or
(c) otherwise – a reasonable amount for the obligations performed and detailed in the claim.

(3) Subclause (2) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subclause (2)(a), (b) and (c).

Two things must be remembered about those requirements. They only apply if the contract makes no provision about how a claim is to be made, and they apply by being implied into the contract. It is suggested that this reinforces the impression that Parliament intended to leave the making of payment claims and occurrence of payment disputes as far as possible to the parties.

Eastern claim and dispute procedure significantly different from western

The procedure for creating a payment dispute is very different under the eastern and western legislation. As has been explained earlier, the eastern Acts have a statutory mechanism for making a claim and creating a payment dispute. Under the western Acts, the contract determines how a claim is to be made and when a dispute arises. Even where the contract as made between the parties is silent on how a claim is made, the relevant Act does not directly legislate the method but implies terms into the contract.[156]

This is a significant difference between the two schemes. Under the eastern Acts, an invoice or claim under the contract cannot be a claim for the purposes of the Acts unless it states it is a claim under the relevant Act and contains all of the required information or is in the prescribed form. A simple invoice or progress claim under the contract cannot be a claim under the Acts. Such an invoice or claim must be followed by a claim complying with the statute.

[156] NT Act, s 19.

Thus the eastern legislation intrudes into the claim and dispute area to a far greater degree than does the western legislation. The eastern Acts create a statutory mechanism for making claims and creating disputes for their purposes, while the western Acts leave it to the parties to determine how a claim is made and when a dispute arises.[157]

It is difficult to imagine how a party could accidentally make a security of payment claim under the eastern legislation. While the form complying with the relevant Act might inadvertently be used instead of a simple invoice or claim under the contract, the very heading of the form would alert the claimant to its significance under the relevant Act.

That is different from the western legislation where a simple invoice can frequently and unintentionally amount to a claim under the relevant Act. Parties unaware of the requirements of the Act – or lack of requirements – as to the content of a claim can inadvertently lay the foundation for time starting to run for making an application by delivering a simple invoice. As soon as time for payment passes without payment being made, or the invoice is disputed, a payment dispute arises and time begins to run for making an application. It is not uncommon when advising claimants or when adjudicating disputes to find that time for making an application has expired because a simple invoice has led to a payment dispute beyond the time limit. This is so even given the essential requirements of a payment claim stated by Southwood J in *TransAustralian Construction* as being:[158]

1. The payment claim must be made pursuant to a construction contract and not some other contract;
2. The payment claim must be in writing;
3. The payment claim must be a bona fide claim and not a fraudulent claim;
4. The payment claim must state the amount claimed;
5. The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.

Judges have emphasised the significant differences between the western and the eastern legislation and cautioned applying the reasoning of one to the other. In *Independent Fire Sprinklers*,[159] Mildren J said:[160]

> There are very significant differences between the *Building and Construction Industry Security Payment Act 1999* (NSW) and the *Construction Contracts (Security of Payments) Act* (NT). There is no equivalent s 33(1)(a) of the NT Act and there are a number of other important differences. The NT Act is modelled on the *Construction Contracts Act 2004* (WA). Structurally, the WA Act and the NT Act bear little

[157] The latter by reference to the time payment is due *under the contract* as the critical time for determining when a dispute arises (except, arguably, where it is disputed before it is due). By stating when payment is due, it is therefore up to the parties to determine when a dispute arises for the purposes of the Act.

[158] *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [67].

[159] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [46].

[160] See also *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [57] (Southwood J); Trial decision (2009) 25 NTLR 1 at [27] (Kelly J).

> resemblance to the NSW, Victorian or Queensland Acts. Great care must be exercised in relying on decisions from those jurisdictions as to the interpretation to be given to the NT Act. Nevertheless, I consider that there is much guidance to be had on questions of statutory interpretation and jurisdictional error.

This difference in the way payment claims are made under the two sets of Acts is fundamental and has consequences for *Mac-Attack*. As Kelly J said in the trial decision:[161]

> The precise list of "basic and essential requirements" set out in paragraph [53] of *Brodyn* needs to be treated with some caution when applied to the Northern Territory Act which contains different provisions. In particular, the New South Wales Act is based on a payment claim being made under the Act, whereas the starting point for the Northern Territory Act is a payment dispute as defined in s 8: a payment dispute arises when the amount claimed in a payment claim is due to be paid *under the contract* and it has not been paid in full (or has been rejected or disputed). (original emphasis)

It is the thesis of this article that the western Parliaments, unlike their eastern counterparts, have left it to the parties by their contract to determine the timing, number and content of payment claims, and that if they agree unpaid claims may be repeated, a fresh adjudicable payment claim arises each time a complying invoice is delivered.

Pausing here, it is important to make a distinction between three situations:

1. where the contract expressly permits invoices or claims to include unpaid amounts from previous invoices or claims;
2. where the contract is silent on that point;
3. where the contract expressly forbids such redelivery.

These comments only apply to the first situation. Where the contract is silent or forbids redelivery of previous invoices, the question does not arise because there is no contractual right to redeliver a claim, and s 8 depends on such a contractual right.

When an invoice is delivered in accordance with the contract, it is a payment claim under the Act. When that payment claim is disputed or is not paid when required by the contract, a payment dispute arises under s 8. If a second invoice is delivered in accordance with the contract including an unpaid amount claimed in the first invoice, that is a second payment claim. Leaving the Act aside for the moment, it is a claim authorised by the contract because the parties have expressly agreed that such invoices may be rendered. A second payment dispute arises when the amounts claimed in the second invoice are disputed or not paid in full.

Each disputed or unpaid payment claim, valid under the contract, gives rise to a payment dispute as defined by the Act. Each payment dispute gives rise to an entitlement to make an application for adjudication in respect of that dispute.

Viewed in that way, repeated claims for unpaid earlier claims are not the same payment claim. Each is a fresh payment claim, valid under the contract, giving rise to an obligation to pay under the contract, and therefore giving rise to a payment dispute under the Act if disputed or not paid in full.

[161] Trial decision (2009) 25 NTLR 1 at [27].

Supporting the contention that Parliament in WA and the NT intended to leave to the parties the questions of how and when payment claims were to be made and when payment disputes were to arise are the ministerial comments introducing the legislation. In the Second Reading Speech of the Bill in the NT, the Minister for Justice and Attorney-General said:[162]

> The legislation supports privity of contract between the parties. A party commissioning construction work must pay for the work. The obligation to pay cannot be made contingent upon the party with that obligation being paid first under some separate contract. The legislation prohibits "pay if paid" or "pay when paid" clauses in construction contracts. *Apart from prohibiting these particular practices, the bill does not unduly restrict the normal commercial operation of the industry. The parties to a construction contract will continue to be free to set their own contractual terms, as long as they put those terms in writing and do not include these prohibited terms*. (emphasis added)

Parliament clearly intended minimal intrusion into commercial arrangements between parties. That intention is directly expressed in the definition of "payment claim" and in how a payment dispute arises.

It must be remembered that Parliament had the choice when it enacted the NT Act to adopt all or part of the eastern legislation, with the NSW Act being passed in 1999 and the NT Act in 2004. The legislature could, if it had wished, used the framework of the WA Act but adopted the payment claim and payment dispute mechanism of the NSW Act. In other words, it could have prescribed in detail how a payment claim was to be made and how a payment dispute was to arise. That choice was not merely theoretical – it was patent in the form of the NSW Act and would have been workable within the framework of the WA Act.

While not a recognised guide to construing the NT Act, it is interesting to note the Explanatory Memorandum to the WA Bill,[163] bearing in mind the former was modelled on the latter and follows it closely, particularly in relation to payment claims and disputes. After only a very few introductory words, the memorandum says:

> In particular, [the Bill] is based on enforcing the contract between the parties and does not introduce a separate, and possibly conflicting, statutory right to payment. The Act applies to contracts for the carrying out of construction work and related services. The Act also covers contracts for the provision of related professional services and the supply of goods and materials to the construction site.

This reference to introducing a separate statutory right to payment is a reference to the eastern legislation which does just that. For example, the NSW Act says in s 14(4):[164]

> (4) If:
>
> (a) a claimant serves a payment claim on a respondent, and
>
> (b) the respondent does not provide a payment schedule to the claimant:
>
> (i) within the time required by the relevant construction contract, or

[162] Northern Territory, n 10.

[163] Explanatory Memorandum, *Construction Contracts Bill 2004* (WA).

[164] Vic Act, s 15(4); Qld Act, s 18(5). Singapore does not have an equivalent provision but relies on the date for payment under the contract: see Singapore Act, s 12 and the calculation of the due date for payment under s 8.

(ii) within 10 business days after the payment claim is served, whichever time expires earlier,

the respondent *becomes liable to pay* the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates. (emphasis added)

There can be little doubt that this is a statutory right to payment separate to the contractual right and perhaps conflicting with it in some circumstances. Reference to the due date for the progress payment does not make the obligation imposed by the section contractual; that reference is simply to the date of the contractual obligation for the purpose of fixing the date the statutory obligation arises.

Further support for this interpretation is found in s 15 of the NSW Act[165] which renders the amount a debt due, recoverable in court or by adjudication. The first two subsections say:

(1) This section applies if the respondent:
  (a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
  (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:
  (a) may:
    (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
    (ii) make an adjudication application under section 17(1)(b) in relation to the payment claim, and
  (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

The WA Parliament was therefore at pains not to introduce this aspect of the scheme, and to leave the payment obligations strictly contractual. In other words, it left payment obligations to the parties, including the creation of those obligations by way of payment claims and time for payment.

Continuing with the Explanatory Memorandum in a similar vein to the NT Minister's Second Reading Speech, the following paragraph says:

> This legislation supports the privity of the contract between the parties. Where there is no written contract covering the basic payment provisions of the right to be paid, how to deal with variations, how to claim payment and how to dispute it, or the rate of interest on late payments, the Act provides for fair and effective terms to be implied into the contract. The Act also provides implied terms to deal with the contentious issues of ownership of unfixed goods or materials when a contractor becomes insolvent, and the status of retention moneys. This means the parties should have clear contractual payment rights and obligations so that misunderstanding and disputes are minimised.

Again, the Act leaves it to the contract to determine payment rights and obligations, or implies basic terms into contracts silent on those matters.

[165] Vic Act, s 16(2); Qld Act, s 18(2). Again, Singapore has no equivalent, instead giving in Singapore Act, s 12 the claimant a right to make and adjudication application under s 13.

These clear remarks from the NT and WA Parliaments support the contention that they intended to leave the making of payment claims and the creation of payment disputes to the parties, and did not intend to limit those rights and obligations in any way not expressed in the Acts.

Eastern Acts permit repeat claims

The eastern Acts expressly permit repeat claims for amounts unpaid from earlier claims. It might be argued that the NT Act's silence on that point impliedly excludes such repeat claims. With the emphasis here on the last two subsections, s 13 of the NSW Act says:

> (1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the "**claimant**") may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
>
> (2) A payment claim:
>
> (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
>
> (b) must indicate the amount of the progress payment that the claimant claims to be due (the "**claimed amount**"), and
>
> (c) must state that it is made under this Act.
>
> (3) The claimed amount may include any amount:
>
> (a) that the respondent is liable to pay the claimant under section 27(2A), or
>
> (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
>
> (4) A payment claim may be served only within:
>
> (a) the period determined by or in accordance with the terms of the construction contract, or
>
> (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),
>
> whichever is the later.
>
> (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
>
> (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

The argument might be made that the NT Parliament had the NSW legislation before it at the time it was considering a security of payment scheme and chose not to include an express permission to deliver repeat claims. However, this would overlook the fundamental difference between the two regimes on this aspect. The eastern Acts create a statutory mechanism outside the contract for making payment claims. If repeat claims are to be allowed, that must be expressly stated in the statute creating the mechanism. The western Acts leave payment claims and disputes to the contract. There is therefore no necessity for those Acts to state whether repeat claims are permitted: that is dealt with in the contract.

Section 13 of the NSW Act was considered recently by the NSW Court of Appeal[166] in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69, where the appellant made a payment claim for amounts which had already been

[166] Allsop P, Macfarlan and Handley JJA.

the subject of an adjudication. When the District Court refused summary judgment on the basis of the second payment claim, the appellant appealed to the NSW Court of Appeal where it was naturally held that "the Act was not intended to permit the repetitious use of the adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions".[167]

While their Honours spoke of the Act's intention[168] and matters which would be contrary to the scheme[169] and policy[170] of the Act, they were able to do so on the foundation of express and clear words such as s 13(5) quoted above. That is an unambiguous prohibition against more than one payment claim for each entitlement to make a claim. Such a bedrock provision is a safe basis for impliedly prohibiting more than one adjudication for each payment claim, especially when combined with the "central and pervading tenet of the judicial system … that controversies, once resolved are not to be reopened except in a few, narrowly defined circumstances".[171]

It is respectfully submitted that it is just this type of unambiguous language, in combination with a central tenet of the judicial system, which is lacking to support an implied prohibition in the NT Act against repeating payment claims. On the contrary – it is suggested that the implication offends a central tenet rather than being bolstered by one.

Statutory implications only where necessary

In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, after repeating Dixon CJ's statement that courts should be not fearful about making implications in statutes,[172] Mason CJ said:[173]

> It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the *Constitution* it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.

Two arguments may be founded on that statement. The first is that the implied prohibition against multiple claims is clearly structural and that is neither logically nor practically necessary for the preservation of the integrity of the structure. As explained in this section, the structure of the Act and of the scheme

[167] *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [2] (Allsop P), agreeing with Macfarlan JA with whom Handley JA agreed.

[168] *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [2], [16] (Allsop P), [18], [60], [67] (Macfarlan JA).

[169] *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [60] (Macfarlan JA).

[170] *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [70] (Macfarlan JA).

[171] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[172] *Lamshed v Lake* (1945) 99 CLR 132 at 144.

[173] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135.

it created is better preserved according to the plain meaning of the words, the extraneous materials and the statutory purpose.

The second argument is that, if the implication is not textual rather than structural, the relevant intention is not manifested, on the same materials and for the same reasons advanced above.

Illustration of the level of necessity or intention for an implication may be found in that case and the related ones of *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104. In those three cases, the High Court found a freedom of discussion of government and political matters to be implied in the *Constitution*.[174] Founding that implication was the system of representative government expressed in and created by the *Constitution*, which in the words of Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills*:[175]

> presupposes an ability of represented and representatives to communicate information, needs, views, explanations and advice. It also presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf.

Perhaps even more strongly, Mason CJ said in *Australian Capital Television Pty Ltd v Commonwealth*:[176]

> Freedom of communication as an indispensable element in representative government.

These comments – that the term to be implied was presupposed by or indispensable to the statute – are indicative of the level of necessity or intention for the implication of a provision in an Act. It is suggested that neither applies to imply into the Act a term that only one payment claim may be made for each item of contractual obligation in a construction contract. *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 supports the contention that an implication is only to be made where necessary, with Mason and Wilson JJ referring to "necessary implication".[177]

With respect, the same could be said of the NT Court of Appeal's approach here as was said recently by French CJ, reversing its decision in *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 24 NTLR 33. The Chief Justice said:[178]

> The Court of Appeal in this case construed the Act by reference to an imputed legislative intention reflecting a revenue-maximising approach to taxing statutes which paid insufficient regard to the clear words of the Act.

Fundamental rights not to be curtailed without clear language

Parliament is generally taken to intend the least intrusion into private affairs necessary to effect the statutory purpose. If that purpose can be fulfilled in two

[174] See Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 121-122.

[175] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72.

[176] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138.

[177] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 322.

[178] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [5].

ways, one which impinges on private affairs greater than another, all things being equal the courts will prefer the interpretation involving least intrusion. In *Plaintiff S157/2002*,[179] Gleeson CJ said concerning a privative clause in the *Migration Act 1958* (Cth):

> courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffmann recently pointed out in the United Kingdom, for parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual".

Contenders might fasten on the words "necessary implication" to argue that limiting claims was necessarily implied in the Act. When, however, Parliament has specifically considered which contractual provisions should be prohibited and has chosen not to prohibit this provision,[180] and when the absence of the implication supports the scheme equally as well, and when there is another, less radical and intrusive course open to resolve the instant dispute, that phrase is but a bruised reed. As Mason CJ, Brennan, Dawson, Gaudron and McHugh JJ said in *Coco v The Queen* (1994) 179 CLR 427, those words do little more than emphasise that the test is a very stringent one, referring to *Bropho v Western Australia* (1990) 171 CLR 1 and going on to say:[181]

> As we remarked earlier, in some circumstances the presumption may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless.

It is respectfully suggested that the relevant provisions of the NT Act would not become inoperative or meaningless without the implication that no amount claimed under a contract could be the subject of more than one payment claim.

In *Coco v The Queen*, their Honours said:[182]

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if

[179] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [30], citing *Coco v The Queen* (1994) 179 CLR 427; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115; *Annetts v McCann* (1990) 170 CLR 596.

[180] See a similar line of reasoning by Vickery J in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 at [97].

[181] *Coco v The Queen* (1994) 179 CLR 427 at 438, citing *Bropho v Western Australia* (1990) 171 CLR 1 at 16-17.

[182] *Coco v The Queen* (1994) 179 CLR 427 at 437.

they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

Freedom to contract is a fundamental freedom with Lord Hope of Craighead, speaking for the House of Lords,[183] describing it as a "great principle".[184] To curtail such a freedom by preventing parties from permitting each other to make repeat claims is a significant incursion into commercial contracts. Considerable rights attach to the ability to repeat claims, including to bring proceedings within limitation periods.

Giving that philosophy application here, the approach having least effect on domestic and commercial affairs is that which accords with the express words of the relevant Act and of the Parliament(s), and leaves it to the contracts to determine whether unpaid claims may be redelivered.

Section 10 nullifies offending provisions

Of particular importance in the context of affecting private rights, it is to be remembered that s 10 of the NT Act renders of no effect a provision in a contract "that purports to exclude, modify or restrict the operation of this Act". Section 10 says:

> (1) A provision in an agreement or arrangement (whether a construction contract or not and whether in writing or not) that purports to exclude, modify or restrict the operation of this Act has no effect.
> (2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.
> (3) Any purported waiver (whether in a construction contract or not and whether or not in writing) of an entitlement under this Act has no effect.

This means that the offending provision has no effect for the purposes of the contract as well as for the purposes of the NT Act. So a provision that parties may include unpaid amounts from earlier claims in later claims is not only ineffective for creating a payment dispute under the NT Act, it is also ineffective for all purposes under the contract, such as reviving a limitation period for any of the typical contractual dispute resolution process of negotiation, mediation and arbitration, and it is also ineffective for reviving the limitation period for a cause of action in contract. This is a significant inroad into the parties' freedom to contract and to regulate their own commercial affairs.

It is suggested that this goes much further than Parliament would have intended, bearing in mind the comments of the Minister and the Attorney-General. One would have thought that if Parliament had intended such a drastic effect, it would have included in the list of prohibited provisions those allowing claims to be repeated. Parliament paused and considered those provisions which should be prohibited and stated them in a special division of the Act.[185] It also allowed by s 14 other provisions to be prohibited by regulation. Even with that forethought and facility, the legislature did not see it necessary to prohibit repeat claims.

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[183] Lord Browne-Wilkinson, Lord Jauncey of Tullichettle, Lord Mustill and Lord Steyn.

[184] *Sidhu v British Airways plc* [1997] AC 430 at 453.

[185] NT Act, Pt 2, Div 1, ss 12-14.

All of these indicia, it is suggested, point to the fact that implying a term into the NT Act that repeat claims are not permitted contradicts Parliament's intention.

Effect on non-construction contracts

This is a convenient point to deal with the ramifications of the court's decision beyond construction contracts. Section 10 renders of no effect a provision in a contract "that purports to exclude, modify or restrict the operation of this Act". That prohibition extends beyond construction contracts to all types of contracts by the parenthetical insertion of the words in s 10(1) "whether a construction contract or not and whether in writing or not", however, that is necessarily limited to provisions which purport to exclude, modify or restrict the operation of the Act. A provision could only do so if it was in some way related to a construction contract so that it had an operation on the construction contract, such as a tripartite agreement connected to construction. Otherwise the contract would be unaffected by the operation of the Act and vice versa.

This strengthens the argument that Parliament's intention was not impliedly to restrict claimants to one claim for each contractual obligation where the parties expressly permitted more than one claim. The implied restriction has wider ramifications to other, related contracts, not just to construction contracts. It is suggested Parliament would not have intended such a broad consequence if it did not express it in the NT Act.

Defeating the 90-day time limit for applications

Allowing claims to be repeated where the contract expressly permits would enable applications to be made for claims which had been made earlier and for which the time limit had expired. It might be said that this would defeat the time limit imposed by the NT Act and leave it open to a claimant to redeliver a claim at any time.

The first response is that the NT Act does not expressly forbid repeat claims. They were not something Parliament was troubled to exclude even though it had before it the NSW and other Acts which expressly referred to repeat claims. The second response is that Parliament has left it to the parties to determine when and how claims are to be made and disputes arise. If the parties by their contract have expressly chosen to permit each other to redeliver unpaid or disputed claims, allowing an application for those fresh claims works no injustice to anybody. In fact, quite to the contrary. The Act has greater application and the parties have available to them the statutory dispute resolution mechanism. As Southwood J said in *TransAustralian Construction*, explaining why not every failure to comply with the Act will invalidate a determination:[186]

> The object of the Act is to promote security of payments under construction contracts. The object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts; providing for the rapid resolution of payment disputes arising under construction contracts; and providing mechanisms for the rapid recovery of payments under construction contracts.

It is to be borne in mind that these comments only apply where the contract expressly permits redelivery of unpaid or disputed claims. By agreeing to that

[186] *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [64].

term, the parties must be taken to have contemplated – if not intended – that the security of payment regime would apply to the fresh claims created by any redelivery. A claimant cannot simply redeliver a disputed claim if there is no contractual right to do so. The respondent is already on notice about the claim, having received it and either disputed or not paid it earlier.

The 90-day time limit might be revived for repeat claims, but only where the parties have permitted such claims and in the statutory context of Parliament leaving claim-making to the parties. Having left claim-making to the parties, and having declined to interfere when it had the clear chance to do so, Parliament should be taken to have intended that parties have the right to bring fresh applications for fresh disputes founded on contractually permitted repeat claims.

One matter worth recalling is that Parliament increased the time for making applications over that originally allowed when the NT Act was introduced. Until 2007, the time for making an application for adjudication was 28 days from the date the payment dispute arose. In that year, it was increased to 90 days,[187] a threefold increase, demonstrating a clear legislative intent to make the adjudication facility available in many more situations. Representations had been made by the Construction Contracts Registrar,[188] and to him by adjudicators and industry bodies, to increase the time as the 28-day limit was restricting the adjudication procedure unduly. Parliament's response indicates a general intent to make adjudications more available, not less.

Reading words into statute

What the Court of Appeal effectively did in the *Mac-Attack case* was to imply words into the NT Act to the effect that no amount claimed under a contract could be the subject of more than one payment claim. Those words could be placed in the definition of "payment claim" in the form of an exclusion, in s 8 depriving repeat claims of the power to create a payment dispute, as one of the prohibited provisions in Pt 2, Div 1, in s 28 under the heading "Who may apply for adjudication" as an exclusion, in s 28 under the heading "Applying for adjudication" as an exclusion, or as a stand-alone provision.

The High Court has established clear guidelines for reading words into a statute. In the words of Southwood J in *Director of Public Prosecutions v Ahwan* 17 NTLR 1:[189]

> Words should only be "read into a statute" if three conditions are fulfilled. First the court must know from a consideration of the legislation read as a whole, precisely what the mischief was that it was the purpose of the legislation to remedy. Secondly, the court must be satisfied by inadvertence Parliament has overlooked an eventually which must be dealt with if the purpose of the legislation is to be achieved. Thirdly, the court must be able to state with certainty what words parliament would have used to overcome the omission if its attention had been drawn to the defect: *Mills v Meeking* (1990) 169 CLR 214 at 244.

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[187] By *Justice Legislation Amendment Act (No 2) 2007* (NT), s 4.

[188] Established by NT Act, s 4; WA Act, s 47.

[189] *Director of Public Prosecutions v Ahwan* 17 NTLR 1 at [42] (Southwood J dissenting, but not on this statement of the law). His Honour's comments are not affected by the High Court's refusal of special leave to appeal in *Ahwan v Director of Public Prosecutions* [2006] HCATrans 349.

While there is no doubt the court knew the mischief or purpose of the NT Act, it cannot be said that Parliament has inadvertently overlooked an eventuality. In fact, quite the opposite could be said with some force, relying on the definition of payment claim, how a payment dispute arises, the list of prohibited provisions omitting repeat claim provisions, the absence of regulatory proscription of those provisions, and the Second Reading Speech. Rather than inadvertence, the omission of prohibiting repeat claims appears deliberate.

Those three conditions quoted above are predicated on the basis that the purpose of the NT Act would be frustrated without additional words. Neither can that be said in this case. The purpose of the NT Act is to provide a summary dispute resolution process that facilitates the rapid resolution of payment disputes and to ensure a contractor's cash flow.[190] In *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12, after referring with apparent approval to Southwood J's statement of the general scheme of the Act, Angel J said:[191]

> The object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible: s 26. This is a fast track progress payment dispute resolution mechanism which contemplates a minimum of court involvement.

Southwood J's remarks in *TransAustralian Construction*[192] quoted above are also to be remembered, that the object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts, providing for the rapid resolution of payment disputes arising under construction contracts, and providing mechanisms for the rapid recovery of payments under construction contracts.[193]

It could not be said that permitting adjudication of disputes over repeat claims authorised by the contract would frustrate that purpose. In fact, it would fulfil that purpose to a greater extent than denying parties access to adjudication where they had agreed that each other could deliver repeat claims. As it now stands, even though parties agree they can redeliver unpaid claims, they cannot have those disputes adjudicated – their only avenue is litigation, thus frustrating the purposes of rapid, informal and inexpensive resolutions of disputes with a minimum of court involvement.

The Parliaments enacting the eastern legislation obviously did not consider it would defeat the purpose of their Acts to permit amounts being the subject of more than one claim. Had they done so, they would not have expressly permitted repeat claims. Without further analysis, it is safe to assert that the purpose of the eastern Acts is fundamentally, perhaps exactly, the same as the purpose of the NT Act.[194] Time limits and processes are different under the eastern legislation, but

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[190] *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5 at [16], [18] (Southwood J).

[191] *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12 at [19].

[192] *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [64].

[193] See also the comments of Beech J to similar effect in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* (2008) 36 WAR 479 at [37]-[40].

[194] If there is any doubt, see the objects of the Acts set out in NSW Act, s 3; Vic Act, s 3; Qld Act, s 7; and, in Singapore, the decision of Prakash J in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [15], [51], [58], there being no statement of objects in the Singapore Act.

those differences do not affect the essential purpose, and do not mean that allowing repeat claims under the western legislation would defeat their purpose any more than it frustrates the purpose of the eastern Acts.

Thus the crucial conditions for reading words into an Act have not been satisfied here, where the effect of the court's decision is to import a serious prohibition not expressed in the Act.

Error as to more than one payment claim is jurisdictional

The Court of Appeal in *Mac-Attack* took the view that the question of whether more than one payment claim was permitted for the same work was jurisdictional. Mildren J said:[195]

> Plainly, the question of whether or not a second payment claim for the same or substantially the same claim is a matter of law going to the adjudicator's jurisdiction.

Presumably his Honour meant whether the second payment claim was permitted under the Act rather than under the contract. A misinterpretation of the contract would generally not be jurisdictional, unless it went to whether the contract was a construction contract within the definition of the Act.[196]

Southwood J said that the adjudicator's ruling that the payment claim was valid involved misinterpretations of the Act,[197] that the application was not served within time as a result of which the criterion in s 33(1)(a)(ii) (that the application be served within time and containing the correct information) was not satisfied and the adjudicator "lacked the jurisdiction to determine the payment dispute".[198] All of this flowed from the adjudicator ruling that further claims could be made including previous unpaid claims. His Honour did not state how an error as to the existence of a payment claim (and consequently the time for making application) was jurisdictional in addition to being a misinterpretation of the Act.

The essence of the adjudicator's ruling was that a valid payment claim existed. His reason for that ruling was that the contract did not prohibit further payment claims for previously claimed amounts (and, although he did not consider it, that the Act permitted such claims). But his actual disputed ruling, from which the time for making application flowed, was that there was a valid payment claim. This is the matter which the Court of Appeal held to be jurisdictional. This is contrary to authority in NSW and Singapore.

Eastern courts[199] have consistently held that whether a claim is a payment

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[195] *Mac-Attack* (2009) 25 NTLR 14 at [14].

[196] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [53] (Hodgson JA); *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [45]; *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [49]; *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521 at [33]-[34]; *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [46]; *Plaza West Pty Ltd v Simons Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [27]-[28]; *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [71].

[197] *Mac-Attack* (2009) 25 NTLR 14 at [44].

[198] *Mac-Attack* (2009) 25 NTLR 14 at [50].

[199] Using the same descriptor as for the legislation.

claim is a matter for the adjudicator. Prakash J in *SEF Construction* said:[200]

> Similarly, although the SOP Act requires a payment claim to be served, whether or not the document purporting to be a payment claim which has been served by a claimant is actually a payment claim is an issue for the adjudicator and not the court. In this respect, I agree entirely with Hodgson JA's reasoning in *Brodyn*:
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> > … If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this.

In *Perform*, Giles JA, McColl and Young JJA agreeing, said:[201]

> Whether a payment claim identifies the construction work or related goods and services to which the payment relates, as required by s 13(2) of the Act, is generally a matter for the adjudicator to determine: *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* at [26] per Hodgson JA, [43]-[46], [51] per Basten JA. Section 13(2) requires also that a payment claim indicate the claimed amount, and more generally in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* [2005] NSWCA 409; (2005) 64 NSWLR 462 at [76] Ipp JA said that the merits of a claim including whether the claim complies with s 13(2) "is a matter for adjudication under s 17". In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238; (2006) 67 NSWLR 9 Basten JA said at [71], referring to this observation –
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> > But the merit (or lack of merit) of a claim is, as Ipp JA expressly accepted, a matter for determination by the adjudicator. Similarly, his Honour accepted that the express elements of a valid claim set out in s 13(2) are matters for the adjudicator. As suggested in *Coordinated Construction Co v Climatech (Canberra) Pty Ltd* (at 380 [43]-[46]), (a passage cited without disagreement by Hodgson JA in *Nepean Engineering* (at 473 [32]-[34])), determination of the existence of essential preconditions to a valid claim are matters for the adjudicator, not for objective determination by a court.
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> … In *Downer Construction (Australia) Pty Ltd v Energy Australia* I held, referring to these cases and with the agreement of Santow and Tobias JJA, that determination of the scope and nature of the payment claim was similarly a matter for the adjudicator.

Applying that reasoning to the validity of a payment schedule, his Honour said:[202]

> There is no reason to regard a correct view of what a payment schedule indicates as more basic and essential to a valid determination than an adjudicator's view of what a payment claim identifies or indicates, or whether a submission has been duly made.

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[200] *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [46], citing *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [66].

[201] *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [64], [66].

[202] *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [67].

This accords with the reasoning of Mildren J in *Independent Fire Sprinklers*[203] where his Honour held compliance with time limits to be non-jurisdictional and non-essential, applying *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, in the latter of which McHugh, Gummow, Kirby and Hayne JJ said:[204]

> Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority.

His Honour expressly rejected a submission that "[i]f there was in fact no claim served within 90 days as required by the Act, the determination is void",[205] which rejection goes to both the existence of a claim and the time for making an application within 90 days thereafter.

It is contrary, however, to Southwood J's reasons in *TransAustralian Construction* where, after referring to the "central importance of valid payment claim",[206] his Honour said:[207]

> That does not mean that an adjudicator is free to get the question about whether a payment claim exists wrong. Whether there is a payment claim is a threshold question which an adjudicator has the jurisdiction to determine, but if he makes an erroneous decision in relation to that threshold question, then he steps outside his jurisdiction and any subsequent purported determination is a nullity and is void.

The weight of authority favours treating payment claims, their existence and validity, as non-jurisdictional and non-essential. This is unaltered whether considered against the requirements of the NT Act or the relevant contract.[208] There is no material difference between the eastern and western Acts to render the eastern authorities inapplicable to WA and the NT. In fact, since the validity of a payment claim under the western legislation is determined primarily by reference to the contract, and under the eastern Acts by reference to the Acts, the eastern reasoning should apply a fortiori to the western Acts since errors regarding payment claims under them will mainly be in interpreting the contract rather than the relevant Act.

If the existence of a valid payment claim is not jurisdictional, an error in interpreting the NT Act as to what constitutes a valid payment claim can be no more jurisdictional. And if an adjudicator errs in finding that a payment claim

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[203] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [39]-[48].

[204] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [92].

[205] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [47]-[48].

[206] *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [44].

[207] *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [46].

[208] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [53] (Hodgson JA); *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 at [45]; *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [49]; *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521 at [33]-[34]; *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [46]; *Plaza West Pty Ltd v Simons Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [27]-[28]; *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [71].

exists as a result of misinterpreting the Act, he or she does not give himself or herself jurisdiction by that misinterpretation, because payment claims do not go to jurisdiction.

The appellant in *Mac-Attack* avoided this inconvenience by successfully arguing that it was the adjudicator's state of satisfaction which was the essential precondition, as opposed to the objective existence of a payment claim. If the state of satisfaction was reached as a result of misconstruing the NT Act, then the requisite state of satisfaction would not be reached.[209] However, as we have seen, that principle applies where the statute expressly requires a state of satisfaction, or opinion, or similar to be held.

CONCLUSION

Payments are now less secure as a result of the decision since, even where a contract expressly allows, amounts unpaid from earlier claims cannot be included in later claims, or be the subject of an adjudication application if the first claim is out of time.

The decision also opens the way for other provisions to be implied into the NT Act which, either alone or by the effect of s 10, defeat the parties' agreement and their ability to make claims and applications.

It is respectfully submitted that Kelly J was correct in holding that it is a matter for the parties by their contract to decide whether unpaid amounts may be claimed in successive payment claims and thereby give rise to adjudicable payment disputes. It is also suggested that the Supreme Court may leave questions of compliance with s 33(1)(a) to the Local Court, including determinations that time limits have or have not been satisfied.

[209] *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [47] (Basten JA); *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [70].