



# **Constructions Contracts (Security for Payments) Act (NT) Adjudication Procedure**

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# The Scheme

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The Scheme requires:

- A Construction Contract. s5
- A Payment Claim. s4
- A Response.
- A Payment Dispute. s8
- An Application for Adjudication s28
- A Response to the Application s29
- An Adjudication and Decision

# A Construction Contract

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- **s5 Construction contract**
- (1) A construction contract is a contract (whether or not in writing) under which a person (the **contractor**) has one or more of the following obligations:
  - (a) to carry out construction work;
  - (b) to supply to the site where construction work is being carried out any goods that are related to construction work;
  - (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;
  - (d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work.
- See *Alcan Gove Development Pty Ltd v Theiss Pty Ltd* [2008] NTSC 12; *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5 at [16] – [18]

# A Payment Claim s4

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- **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.

# A Valid Payment Claim

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- The essential requirements of a valid payment claim are as follows:
  - 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.
- *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42 at [67]

# Other Matters – Payment Claim

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- The rendering of a payment claim that contains those elements is an essential requirement of an adjudication. It is not merely a matter for the adjudicator's determination. *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* at [46],[71];
- CONTRAST Independent Firesprinklers v Sunbuild [2008] NTSC 46 at [32] – [48]
- If the contract does not contain provisions as to a payment claim then the terms in Division 4 of the Schedule to the Act are implied. s19

# A Response

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- The response is a matter of contract. Either a term in the contract or terms are implied. s20 and Division 5 of the Schedule.
- Implied terms
- If the respondent does not dispute the payment claim by a notice of dispute then
  - The whole of the sum becomes payable pursuant to the contract.
  - The claimant can sue and obtain summary judgment.
  - Proceed to an adjudication.
- Time Limit of 14 days.

# A Response – Other Matters

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- If the contract provides for when a party must respond but not how are the implied terms for both when and how incorporated into the contract. See *Firesprinklers v Sunbuild* [2008] NTSC 46 at [55]

# A Payment Dispute s8

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- A payment dispute arises when:
  - The amount claimed in the payment claim
  - Is due to be paid under the contract
  - and
  - Has not been paid in full
  - Or
  - The claim has been rejected or disputed wholly or in part

# Payment Dispute – Other Matters

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- Due
- What is meant is that the amount claimed in the payment claim is claimed to be due to be paid under the contract. Whether it is due or not is a matter which may be left to be resolved at another time and possibly in other proceedings. *Firesprinklers v Sunbuild* [2008] NTSC 46 at [52]
- The sum claimed is not paid in full
- Is due to be paid under the Contract.

# Adjudication - Object

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- *Section 26* - The object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.
- *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42 at [41]

# Adjudication – Who can apply

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- If there is a payment dispute any party to the contract can apply for the dispute to be adjudicated – s27
- Exceptions
- If an application has already been made.
- The dispute is the subject of an order judgment or other finding of an arbitrator or other person or a Court or other body dealing with a matter arising under the contract.
- Is the payment dispute jurisdictional?

# Adjudication - Application

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- There must be
- Written application
- Service on each other party
- Service on the adjudicator and consent by adjudicator to adjudicate or other service.
- Payment of a deposit or security as to costs as required by the adjudicator. S46.7 or .8
- Are these jurisdictional matters?



# Adjudication – The Documents

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- Section 28.2
- The application must
- Contain the information required in Regulation 6
- State the details or have attached to it;
  - The contract or relevant extracts
  - The payment claim
  - The information documents and submissions on which the applicant relies
- No mention of the dispute documents?

# Adjudication – Time Limit

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- The application has to be made 90 days after the payment dispute arose.
- 28 days after
  - The amount claimed is due under the contract
  - The amount has not been paid in full
  - Or
  - The claim has been rejected
  - Or
  - The claim is wholly or partly disputed.
- The adjudicator can wrongly decide the time limits have been complied with. *Firesprinklers v Sunbuild* [2008] NTSC 46 at [32]-[48]

# Adjudication – Time limits other

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- It avails the claimant naught to include earlier claims in a payment claim. *Silent Vector Pty Ltd v Squarcini* [2008] WASAT 39
- If you miss the time limit the adjudication has to be dismissed.

# Adjudication – Response s29

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- Time Limit
  - 10 Working Days after a party to the construction contract has been served with the application
  - The response has to be prepared
  - And
  - Served On
    - The applicant and any other party served with the application
    - The adjudicator or appointor
- No response and you pay the lot. *Independent Firesprinklers v Sunbuild* [2008] NTSC 46 at [6]

# Adjudication – Response

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- Content
- The information required in Regulation 7
- The details of any rejection or an attachment of the Response
- State or have attached all the information documents and submissions on which the respondent relies.

# Adjudication – Response - Other

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- The response could be seen as a waiver of an argument. *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42 at [41]
- Failure to put in an argument and you lose. *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42 at [41]

# Adjudication – The Material s34

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- The Adjudicator can look at:
  - The Application
  - The Response
  - Any other information the adjudicator wishes to take into account
- To obtain information the adjudicator can
  - Seek further submissions or information or documents
  - Request a Conference with the parties.
  - Inspect relevant work or things
  - Arrange relevant tests
  - Engage an expert to provide a relevant report



# Adjudication - Material

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- You cannot stop an adjudication by failing to make submissions or providing information or documents within time or by failing to attend a conference. S34.5

# Adjudication – The Decision - A

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- The application has to be dismissed if:
  - The contract is not a construction contract
  - Failure to comply with s28 re the application and service
  - If the matter is in another tribunal and an order has been made concerning the dispute under consideration
  - The arbitrator cannot make a fair determination due to complexity or the time is not sufficient. Re complexity see *Silent Vector* [2008] WASAT 39 at [72]
  - Note – as a matter of advocacy put forward a logical summary of the claim cross referenced to the relevant documents
- If none of these matters arise then.....

# Adjudication – The Decision - B

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- If the Application is not dismissed pursuant to section 33.1.a the Adjudicator must :
- Determine the application on its merits and so
- On the balance of probabilities decide
- Whether any party to a payment dispute is liable to make a payment and if so ...
- Determine
  - The amount
  - The interest payable
  - The date of the payment

# Adjudication – Other Matters

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- The adjudicator has to make an honest attempt to decide whether the application should be dismissed under s33.1.a otherwise it will be void.
- The adjudicator has to provide the parties with natural justice. *Independent Firesprinklers v Sunbuild* [2008] NTSC 46 at [49]
- All the essential requirements of the process must be fulfilled or there is not adjudication. *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42 at [42][43]; refers to *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; refers to *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521

# Adjudication – not within time s33.2

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- If the decision is not made
- within 10 working days after
- The date of the service of the response or the last date the response was supposed to be served or
- The expiration of the extension of time obtained pursuant to s34.3.a
- It is deemed to be dismissed.



# Adjudication - Costs

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- Section 36



# Adjudication - Interest

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- Section 35

# Adjudication – The Decision s38

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- The decision has to be
  - In writing
  - Comply with Regulation 8
  - State
    - the Amount to be paid
    - The date on which it must be paid
    - Reasons for the determination.
    - Identify non publishable information
    - Served on the parties and the Registrar
- Section 38 only applies to a determination under s33.1.b

# Adjudication – The Decision

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- If there is a dismissal the decision has to be sufficient to help the applicant decide whether to appeal or not.
- The speed of the process militates against detailed reasons
- The decision must be sufficient for the party to determine if there should be a challenge to the decision and therefore should disclose the intellectual process by which the relevant conclusions have been reached.
- In a determination on the merits the reasons have to be sufficient for a determination of whether there has been a bona fide consideration of the issues
- *Silent Vector*; *Trysams v Club Constructions* [2007] NSWSC 941

# Adjudication – The Fallout

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- The amount determined has to be paid.
- The contractor can suspend the works if not paid on time.
- The determination can be registered in a Court and recovered as part of the Court process.
- An adjudication does not stop a challenge to a 459H Corporations Act Statutory Demand – Boutique Venues Pty Ltd v JACG Pty Ltd [2007] NTSC 5
- The determination can support a winding up.



# Conclusion

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- This Act is a minefield.
- There is much to be argued over in the meaning of the provisions of the Act.