SQUIRE PATTON BOGGS

CONSTRUCTION MATTERS

February 2016 Edition

The start of 2016 has seen a large number of adjudications, and we expect this trend to continue as the year goes on. This edition provides a timely refresher on adjudications in Western Australia.

In this month's edition of Construction Matters:

- Refresher on Adjudications in Western Australia
- Revisiting "Recycled" Claims
- The "Mining Exclusion" Exception: Will You Be Caught Out?

Refresher on Adjudications in Western Australia

In an industry where cash flow is critical to project completion and keeping construction businesses afloat, security for payment legislation is paramount. The legislation in Western Australia, namely the *Construction Contracts Act 2004* (CCA), provides a mechanism for parties to bring progressive claims for payment on account, and a rapid adjudication process for resolving payment disputes. The checklist below outlines some important considerations to bear in mind during the course of an adjudication.

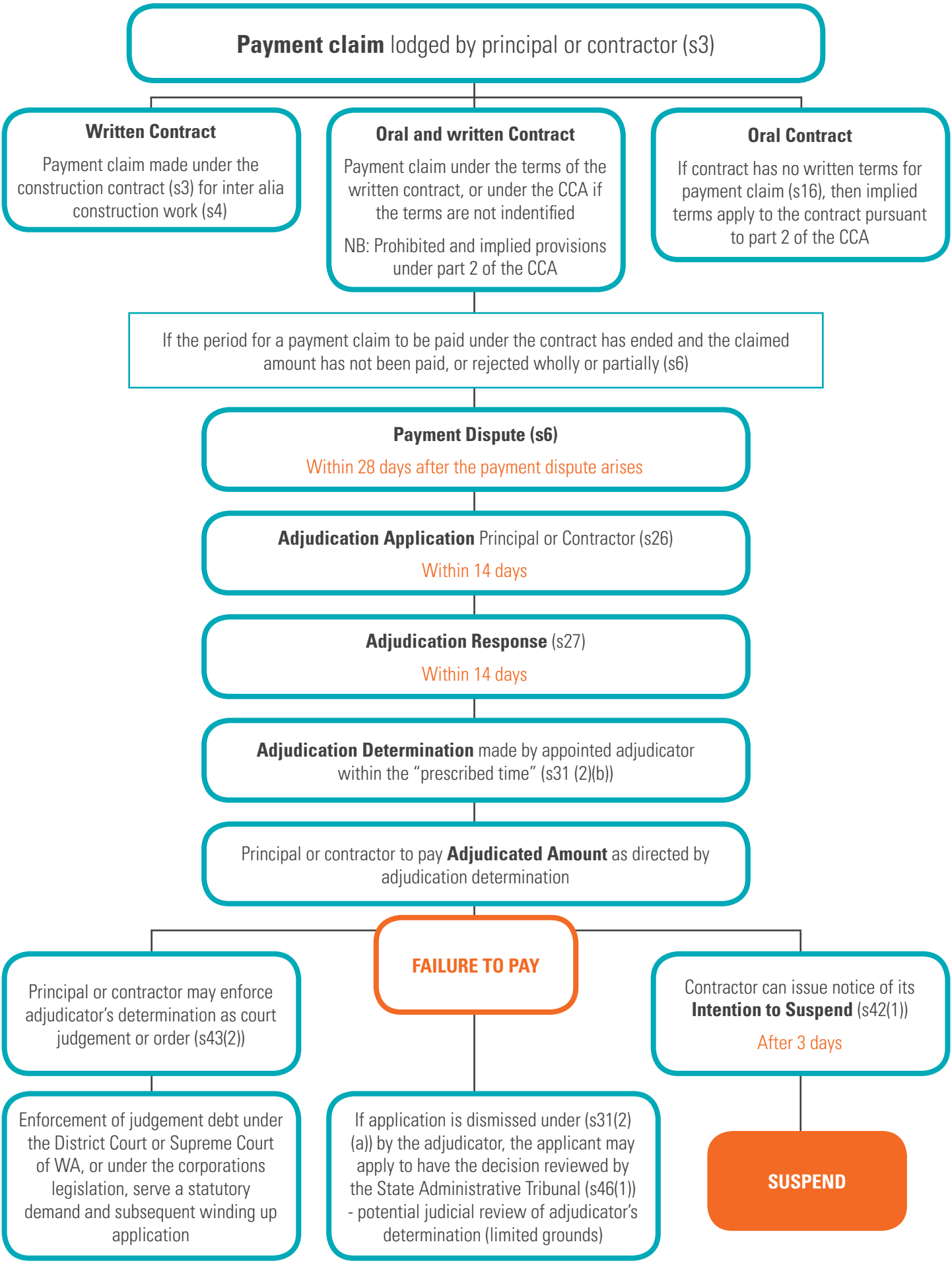
- Be particularly careful of date, time and form requirements for the submission and certification of payment claims, as this may affect the date by which an adjudication application may be commenced or responded within.
- Each party to the adjudication application, as well as the appointed adjudicator or prescribed appointor, must be correctly identified, including full name and ABN (or ACN, if there is no ABN). A company search should also be conducted to confirm the company is still registered and the details provided are correct.
- An address, telephone and fax number must also be provided for each party to the adjudication to the extent such details are known.
- The date of the application, and date of response (if you are the respondent), should be clearly stated in the adjudication application.
- The application or response must be served on each other party, as well as on the appointed adjudicator or prescribed appointor.
- Ensure adequate records of dealings with external parties, particularly with respect to payment, are maintained. This will be beneficial during the course of adjudication, particularly in facilitating instructions to lawyers if they are engaged.

If you are an applicant:

- It is vital that the adjudicator or prescribed appointor (and ABN if relevant), postal address, phone and fax number, as well as required deposit or security accompanying the application has been specified.
- The application should:
  - Outline the details of the construction contract involved (or relevant extracts).
  - Include the payment claim that has triggered the dispute.
  - Attach any information, documentation and submissions which the applicant will be relying on in support of its adjudication application.

- If you are a respondent, the response must:
  - Include the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute.
  - Attach any information, documentation and submissions which the respondent will be relying on in support of its response.

Process and timeframe for adjudications under the *Construction Contracts Act 2004*



Revisiting "Recycled" Claims

The Supreme Court of WA's decision in *NRW Pty Ltd v Samsung C&T Corporation*[1] is the latest in the series of cases which consider the concept of a "recycled" or "repeat" claim under the *Construction Contracts Act 2004* (WA) (**CCA**).

In a departure from previous WA authorities, Mitchell J held that even if payments had been claimed and recovered for particular subcontract works, a claim made for those works on a different basis did not amount to a "recycled" or "repeated" claim.

NRW Pty Ltd v Samsung C&T Corporation

This decision concerned an application by Samsung C&T Corporation to quash a determination made by an adjudicator under the CCA, requiring Samsung to pay NRW Pty Ltd the sum of AU$17,467,884.10. The subject adjudication application related to a subcontract for the performance of earthworks and drainage works associated with 320 km of railway between Port Headland and the Roy Hill iron ore mine in the Pilbara.

The terms of the subcontract provided for NRW to deliver a written progress claim on the last day of each calendar month, in a form approved by Samsung and including "*the value of WUSC completed by [NRW] in accordance with the subcontract up to the date of the progress claim.*" The value was to be ascertained by "*multiplying the rates and prices set out in the Bill of Quantities by the corresponding quantities actually performed.*" NRW's progress claims were also required to include "*sufficient evidence of the WUSC to enable the contractor's representative to assess the subcontract value thereof*" as well as the "*details of other moneys then due to [NRW] pursuant to the provisions of the subcontract.*"

The subcontract also provided for Samsung's representative to issue a progress certificate within 10 days after receiving a progress claim. NRW was also required to issue a payment claim within two days after the issue of the progress certificate for the amount of the progress certificate relating to "*the value of the WUSC performed in the month prior to the month of the payment claim.*"

NRW submitted progress claim no. 21 on 30 April 2015, for the total sum of AU$91,560,968.45, which included a claim for AU$10,280,381.99 for "*[r]emeasurement of the light vehicle road,*" AU$4,033,504.64 for batter trimming and AU$2,678,284.66 for constructing drains in rock. On 10 May 2015, Samsung issued a progress certificate assessing the value of the work done by NRW in April 2015 at AU$3,744,521.79, which, after the application of set offs for flights and accommodation, resulted in a zero amount certification.

The adjudicator determined that Samsung must pay to NRW the amounts claimed for light vehicle road, batter trimming and constructing drains in rock, as well as costs in respect of rail service maintenance.

Among the issues brought before Mitchell J in the Supreme Court of WA was whether there was a payment dispute and, if so, whether the adjudication application was made within 28 days after the payment dispute arose.[2] Samsung contended that the claims for light vehicle road, batter trimming, and drains in rock were "recycled" claims which the adjudicator had no grounds to determine.[3]

NRW accepted Samsung's contention that most of the work being the subject of progress claim no. 21 had been carried out over previous months, and had been the subject of previous progress claims under the subcontract.[4]

Mitchell J found that, although there was uncontested evidence that progress claims had been made for roads, batter trimming and surface drains between October 2013 and March 2015, there was no evidence that NRW had previously made the particular payment claims advanced for that work in progress claim no. 21.[5]

Significantly, Mitchell J found that NRW's claim for payment in respect of approximately 3.3 million m^2 of light vehicle road and based on item 1.1.8.2 of the relevant Bill of Quantities (BOQ) constituted a new claim, despite NRW conceding that it previously claimed payments for approximately 2.2 m^2 of light vehicle road under the separate item 1.1.8.1 of the BOQ.

This was on the basis that:

(a) Although NRW had previously claimed payment under item 1.1.8.1 for the same 330 km of construction access road, there was no evidence that any of the previous claims under item 1.1.8.2 of the Bill of Quantities related to the light vehicle road.

(b) The first occasion on which NRW had claimed an entitlement to payment of an additional AU$10 million for the light vehicle road under item 1.1.8.2 of the Bill of Quantities was 30 April 2015.

(c) The first occasion on which NRW's claim to receive such payment was disputed was 10 May 2015, when the progress certificate was issued in relation to progress claim no. 21.

(d) There was no evidence of a payment dispute arising at any earlier time.[6]

1 *NRW Pty Ltd as trustee for NRW Unit Trust v Samsung C&T Corporation* [2015] WASC 369.

2 Ibid, at [2].

3 Ibid, at [26].

4 Ibid, at [38].

5 Ibid, at [44].

6 Ibid, at [49].

Accordingly, the claim for light vehicle road in progress claim no. 21 was found to be a new claim, despite relating to work which had previously been completed, and was the subject of a claim on a different contractual basis.

Georgiou Group Pty Ltd v MCC Mining

The reasoning in *NRW v Samsung* may be compared to the prior decision in *Georgiou v MCC,*[7] where the State Administrative Tribunal of WA considered whether claims for excavation of substantially the same volume of rock fill could be repeated, if:

(a) supplemented with additional information to support the claim; and

(b) a different rate of charge for the work was applied,

so as to create a fresh payment dispute.

In making its decision, the Tribunal considered the opposing views of the Court of Appeal of the Northern Territory (NTCA) in relation to the recycling of claims under the Northern Territory Construction Contracts Act (CCNT), namely:

(a) *Mac-Attack,*[8] where Mildren J, Riley J and Southwood J decided that the CCNT did not permit repeat claims; and

(b) *K & J Burns,*[9] where Kelly J and Olsson J formed the view that a contract may allow for a contractor to repeat claims for the same construction work undertaken.

The Tribunal also considered obiter comments made *in Merym,*[10] which raised the possibility that a claim, which had never been considered on its merits due to insufficient supporting material being provided, might be repeated and be considered a new claim when supported with sufficient material enabling it to be assessed.

Ultimately, the Tribunal found the views of the majority in *Mac-Attack Equipment*, as further developed by the minority in *K & J Burns*, to be more persuasive. The Tribunal also found that the decision in *Merym* could not be relied upon to support a general proposition that a claim can be regarded as a new claim if supported by new information.

The Tribunal concluded that the predominant feature of a payment claim, relevant to the circumstances of the matter, was a claim for payment for the carrying out of work under the contract. This meant a particular amount claimed for particular work, such that the making of a later claim for the same work, even if claimed at a different rate, would in substance be a claim in respect of the same contractual obligation.

Further, the Tribunal found that a payment dispute arose when the claim for that work was not paid in full when the amount became owing, or the claim had been rejected, or wholly or partly disputed. The mandatory time limit within which it was necessary to make an application for adjudication, non-compliance of which required the application to be dismissed, would be rendered otiose if a claim for the same work could be repeated.

Accordingly, the Tribunal found that a definition of "payment claim" and "payment dispute", which permitted the characterisation of a new claim simply by varying the rate charged, would not advance the purpose of the CCA.

On this basis, the Tribunal concluded that, on a proper construction of the CCA, a repeated claim for the same work is not permitted, whether or not they are supported by additional material or information.

To Recycle or Not To Recycle

Although Mitchell J acknowledged the above earlier decisions, he did not attempt to distinguish the facts before him from those in *Georgiou v MCC*.

As at the date of publication, the decision in *NRW v Samsung* has not been appealed. Therefore, it is unclear when the WA Court of Appeal will have the opportunity to provide guidance as to whether a claim can be repeated if supplemented with additional information to support the claim, or if a different rate is applied for the work.

In the meantime, contractors should continue to act out of an abundance of caution and ensure that appropriate processes are maintained for tracking claims and cut-off dates for commencement of adjudication applications. This will ensure that the opportunity to make adjudication applications on time is not lost and mitigate against the dismissal of applications on jurisdictional grounds.

Contractors should also be conscious of the fact that issues of jurisdiction are merely the first hurdle in the determination of an adjudication application, and adjudicators will still have to determine the merits of an applicant's claims, during which "recycling" remains a relevant consideration.

In *NRW v Samsung*, Mitchell J found that the concept of a "recycled" claim may also go to the determination of the merits of a payment dispute under section 31(2)(b) of the CCA, where the conclusion that a claim is repeated or recycled may inform the question of whether a party to a construction contract is entitled to receive a payment claimed under the contract, and may lead to the determination that no further payment is due.[11]

7 *Georgiou Group Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASAT 120.

8 *AJ Lucas Operations v Mac-Attack Equipment Hire* [2009] NTCA 4; (2009) 25 NTLR 14.

9 *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1.

10 *Merym Pty Ltd v Methodist Ladies College* [2008] WASAT 164.

11 *NRW Pty Ltd as trustee for NRW Unit Trust v Samsung C&T Corporation* [2015] WASC 369, at [34].

The "Mining Exclusion" Exception: Will You Be Caught Out?

The majority of contracts in the construction industry of Western Australia will fall within the scope of the *Construction Contracts Act 2004* (CCA). Generally, parties can quickly establish whether their contract is covered by the CCA or not. However, the scope of the "mining exclusion"' in the CCA can make the question of applicability difficult. If the mining exclusion is triggered, the contracting parties will be unable to utilise the adjudication process under the CCA to determine payment disputes.

Colloquially referred to as the "mining exclusion", section 4(3) of the CCA excludes various "construction work" contracts from the CCA's ambit. These include:

(a) "Drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not.

(b) Constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance.

(c) Constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance.

(d) Constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals.

(e) Work prescribed by the regulations not to be construction work for the purposes of [the CCA]."

Determining the scope of subsections 4(3)(d) and 4(3)(e) are of little difficulty. As subsection 4(3)(d) relates to "wholly artistic works", works that fall under this subsection can generally be easily identified. Furthermore, subsection 4(3)(e) of the CCA can easily be dealt with as the *Construction Contract Regulations 2004* does not currently exclude specific "construction works" from the CCA.

We have prepared the following quick reference guide to identify whether particular "construction works"' will fall within the scope of subsections 4(3)(a) to 4(3)(c):

Quick Reference Guide

Particular works	Case	*Does the work fall within the mining exclusion?*	Reasons
Constructing a plant, the purpose of which falls outside the mining and resources sector	*Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* [2012] WASAT 13	Yes (under s4(3)(c))	• Case involved the construction of a desalination plant. • Salt is a mineral, and as such, the desalination plant was processing a "*mineral bearing… substance*" and therefore fell within the mining exclusion. • Whether s 4(3)(c) is applicable depends on the **purpose of the construction of the plant** rather than the proposed purpose of the oil, gas or mineral bearing substance being processed or extracted.
"Construction works" that only relate to part of the construction process	*Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* [2012] WASAT 13	Yes (under s4(3)(c))	• "Construction works" in dispute only related to part of the plant's construction. • Whether the works are excluded depends on the purpose of the plant being constructed. • Hence, the construction of only part of the plant can still fall within the "mining exception" if the purpose of the construction of the plant falls within the "mining exclusion".

Quick Reference Guide			
Particular works	**Case**	***Does the work fall within the mining exclusion?***	**Reasons**
	Alliance Contracting Pty Ltd v Tenix SDR Pty Ltd [2014] WASAT 136	Yes (under s4(3)(c))	• Case involved construction works to upgrade the Karratha Wastewater Treatment Plant. • Works included, "*construction of anaerobic ponds, oxidation ponds, storage ponds and sludge drying beds.*" • The "mining exclusion" applied, as the water treatment occurring in the ponds constructed were "*clearly a significant and essential part of the process of creating the wastewater treatment plant.*"
Constructing a pipeline to transport water to mine site where the pipe's function is purely for transportation of a substance	*Re Graham Anstee-Brook: Ex Parte Karara Mining Ltd* (2012) WASC 129	No	• Whether a pipeline construction falls under the mining exclusion "*depends upon whether the pipeline, and* ***the function performed by it, is so related to the extraction or processing of iron ore*** *that it warrants being åheld to be a plant.*" • The "mining exclusion" did not apply as the function of the pipeline was merely to transport water, and did not process or extract the iron ore.
Constructing a pipeline to transport natural gas	*Field Development Solutions Pty Ltd v SC Projects Australia Pty Ltd* [2015] WASC 60	No	• The "mining exclusion" did not apply. • Even where the physical properties of the gas are regulated (such as its temperature, pressure and moisture), this does not amount to "processing" under s 4(3)(c) of the CCA but is rather a "*necessary part of its transport.*"

It is clear that the "mining exclusion" exception in section 4(3) of the CCA does not just cover mining, but may apply to the construction of plants which are not used for mining. In particular, it is important to bear in mind that the phrase "*processing… any mineral bearing… substance*" is not necessarily restricted to substances associated with the mining or resources industry.

When performing "construction works", parties should consider the purpose of the plant or structure that the "construction works" relate to, as that might dictate whether the CCA will apply to their contract or not.

Upcoming Events

Client CPD Day 2016

We are hosting a Continuing Professional Development (CPD) day for legal practitioners on Friday, 4 March 2016 at our Perth office. A range of topics will be presented covering all competency areas, including practice management, professional skills, ethics and professional responsibility, and substantive law.

For further details please contact Isla Rollason on +61 8 9429 7624 or isla.rollason@squirepb.com.

Construction Breakfast Briefing

The next breakfast briefing will be held on Wednesday, 30 March at our Perth office. Invitations will be issued shortly.

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