

## SECURITY OF PAYMENTS UPDATE NO. 2

### The Chase Oyster Bar Decision

## A radical re-assessment of Security of Payments Legislation – Brodyn overturned

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The South Australian version of the Security for Payments Legislation, the Building and Construction Industry Security of Payments Act 2009 (“**SA Act**”) now looks like coming into force in about April 2011.

One of the key questions which has concerned those considering the impact of the SA Act is the ability of any party to be able to contest a decision by an adjudicator made in accordance with the SA Act.

The terms of the New South Wales Legislation (the Building and Construction Industry of Security of Payment Act 1999 (NSW)) (“**NSW Act**”) has been adopted to a greater extent in the drafting of the SA Act.

It is therefore likely that South Australian Courts will be heavily influenced by the decisions of the New South Wales Court of Appeal in this area.

The decision of *Brodyn Pty Ltd v Davenport* (2002) NSW SC 254 (“*Brodyn*”) had stood for the general proposition that it was almost impossible for a party to seek a review of a decision of an adjudicator even in circumstances where the adjudicator had made errors of law and fact. In short, it meant that even where the adjudication was manifestly incorrect the court would not overturn it.

The decision in *Brodyn* identified that the court would only intervene in circumstances where:

- The adjudicator had failed to make a bona fide attempt to exercise his or her power;
- There had been a denial of natural justice;
- Certain basic and essential requirements of the NSW Act had not been complied with; namely, the existence of a contract subject to the NSW Act, the delivery of a payment claim, reference of the dispute to an eligible adjudicator and the delivery of a determination by the adjudicator within the nominated timeframe.

The New South Wales Courts have consistently upheld and followed *Brodyn* and have refused to review adjudications which are obviously incorrect on their face.

Following the High Court’s decision in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, the New South Wales Court of Appeal reconsidered *Brodyn* in the decision of *Chase Oyster Bar v Hamo Industries* (2010) NSW CA 190 (“*Chase*”).

The Court has overturned *Brodyn* and held that the Supreme Court of New South Wales may review an error which undermines the adjudicator's jurisdiction to hear a dispute.

In *Chase*, the adjudicator sought to accept the appointment as an adjudicator outside of the period nominated by the NSW Act for the applicant to make application for an adjudication i.e. 20 days after the delivery of the payment schedule.

The New South Wales Court of Appeal held that it is possible for a party disputing a decision of an adjudicator to bring an application known as a writ of "Certiorari". That application or writ permits a court to review the decision of an adjudicator as a person exercising a judicial function.

The Court held it had the power to review an error which goes to the jurisdiction of the adjudicator. The Court said that *Brodyn* was wrong in so far as it had held that the Court could only review a few nominated matters specified by the NSW Act and that the writ of Certiorari was not available.

It is not yet clear whether the decision will be interpreted as permitting a review of the adjudicator's decision for an error of law or fact.

However what is important is that the decision now seems to indicate that the NSW Court will be taking a closer look at the review of adjudications generally.

If in due course it becomes possible to review an adjudicator's decision not only for jurisdictional issues but also errors of law or fact then that will have a tremendous impact upon the effectiveness and use of the NSW and SA Acts.

It is expected that the case law in this area will develop very quickly as litigants rush to test how far the Court is willing to extend the principles set out in *Chase*.

If you would like further information, please contact Jamie Watts Partner of the Cowell Clarke Building Construction and Infrastructure practice group on T +61 8 8228 1111.

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