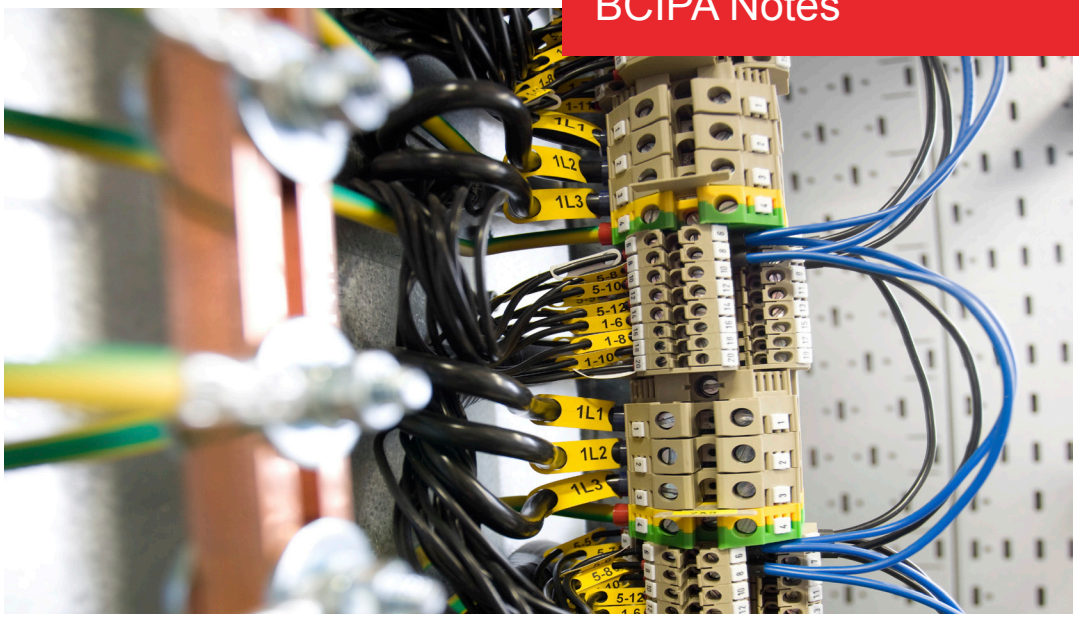
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BCIPA Notes | November 2015



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"Watt" do you mean I can't claim? No licence, no pay for engineering and electrical work under BCIPA

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Mark Kenney, Special Counsel

The Supreme Court of Queensland recently handed down a decision that further clarifies the licensing requirements necessary for engineers and electrical contractors to make a claim for payment under the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**). This decision highlights the importance of having an appropriate licence when carrying out construction work.

Background

Queensland Engineering & Electrical Pty Ltd (**QE&E**) was contracted by Agripower Australia Limited (**Agripower**) to provide electrical engineering works at a site at Charters Towers. QE&E provided modified power plant drawings to Agripower. QE&E agreed to carry out the commissioning of the power plant works which included starting and stopping each part of the plant and proving that each stop and start button worked as required. QE&E drafted step by step procedures on what to do and how to start each part of the plant. QE&E agreed to carry out the preliminary electrical design portion of the works and the new plant, each of which involved the carrying out of an audit on a number of second-hand switchboards intended to be used at the granulation plant. Q&E later agreed to provide drawings for the location of conduits for a switch room. The drawings were completed in accordance with Australian Standards AS3000 and AS3008 for the relevant electrical works.

QE&E was awarded payments under BCIPA. Agripower applied to the court for a declaration that the adjudication decision made under BCIPA was void. Agripower argued that the adjudication decision was illegal and unenforceable because the contract was in breach of two statutory provisions, namely:

- Section 56(1) of the *Electrical Safety Act 2002* (Qld) (**ESA**) which provides that a person must not conduct a business that includes the performance of electrical work unless the person is a holder of an electrical contractor licence that is in force; and

  Section 56(2) of the ESA which provides that a person conducts the business or undertaking that includes the performance of electrical work if it advertises, notifies, states that or makes a statement to the effect that, the person carries on the business of performing electrical work.

- Section 115(1) of the *Professional Engineers Act 2002* (Qld) (**PEA**) which provides that a person who is not a practicing professional engineer must not carry out professional engineering services.

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> ***Professional engineering service*** means an engineering service that requires, or is based on, the application of engineering principles and data to design, or to a construction, production, or operation or maintenance activity, relating to engineering, and does not include an engineering service that is provided only in accordance with a prescriptive standard.

QE&E argued that all the works they carried out or caused to carried out were performed in accordance with a prescriptive standard so that a practising professional engineer was not required to supervise the works.

> ***Prescriptive standard*** means a document that states procedures or criteria:
>
> a. For carrying out a design, or a construction, production, operation or maintenance activities, relating to engineering; and
>
> b. The application of which, to the carrying out of the design, or the construction, production, operation or maintenance activity, does not require advanced scientifically based calculations.

Decision

Douglas J held that the contract was illegal and that QE&E was not entitled to progress payments under BCIPA and the adjudication decision was void for jurisdiction error. In coming to this decision, Douglas J found:

- QE&E breached s 56(1) of the ESA, which made the contract illegal:
    - The use of the name *'Queensland Engineering & Electrical Pty Ltd*', statements made by the director that it carried on the business or providing electrical engineering and electrical works and his responses to the applicant in agreeing to perform such work made it sufficient for an objective conclusion to be made that the first respondent breached s 56 of the ESA by holding itself out as carrying out electrical work, by reason of conduct.
    - Although there is an exception under s 56 of the ESA, that there is not a contravention if the person contracts for the performance of work that includes electrical work if it is to be performed by others, that exemption did not apply here both because QE&E did the work themselves and because it represented to the public that it was willing to do the work.
    - The work QE&E performed was '*electrical*' work as defined in s 18 of the ESA. It involved at least the connection of electricity supply wiring to electrical equipment and the installation, testing, alteration or maintenance of electrical equipment or an electrical installation.
    - The object of the ESA to provide electrical safety of members of the public through the proper licensing of persons, who perform electrical work, strongly indicated that a contract entered into with an unlicensed person is prohibited.
- The contract was illegal as it was contrary to s 115(1) of the PEA:
    - The evidence established that QE&E was performing '*professional engineering services*' in breach of the PEA. The work did not involve a *'prescriptive standard'* because it left significant room for professional judgment and required advanced scientific calculations.

This decision is consistent with the principle decided in *Cant Contracting Pty Ltd v Casella* [2007] 2 Qd R 13, which held that an unlicensed building contractor (under the *Queensland Building and Construction Commission Act 1991* (Qld)(**QBCCA**)) is not entitled to progress payments under the BCIPA.

Outcome

In order to be entitled to claim for payments under BCIPA a claimant will need to consider if they have met the appropriate licensing requirements. This is no longer just the case for building work as defined under the QBCCA but also for electrical work and engineering work.

Where a claimant performs or holds itself out to be carrying out the business of performing electrical work then the claimant must be the holder of an appropriate electrical contractor licence.

For the performance of professional engineering services then those works must be carried out under the supervision of a practicing professional engineer under the PEA.



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Courts quash adjudicator's determination!

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The recent decision of the Supreme Court of Western Australia in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation*[1] has provided some helpful insight on the willingness of the courts to quash determinations of adjudicators made under the *Construction Contracts Act 2004* (WA) (**Act**). In most state jurisdictions, applicants applying to have an adjudicator's determination quashed, will be tasked with the onerous exercise of establishing that:

- The decision was made as a result of jurisdictional error;
- There has been a denial of natural justice;
- The decision was given in bad faith;
- The decision was procured by fraud; or
- The decision was one which the adjudicator had no power to make.

An adjudicator's decision will remain binding, and create a statutory liability to pay unless one of the above can be proved.[2] If the award remains unpaid, the successful party may seek the leave of the court to register the adjudicator's decision and enforce it as a judgment.[3] In this case the court had to consider whether the adjudicator had fallen into jurisdictional error by misapplying the terms of the construction contract.

Brief factual overview

In February 2014, Samsung C & T Corporation (**Samsung**) and Laing O'Rourke Australia Construction Pty Ltd (**LORAC**) entered into a contract in which LORAC agreed to undertake construction work at the Roy Hill Iron Ore Project in Pilbara (**Contract**). The Contract incorporated amended AS 4902-2000 general conditions of contract for design and construct, and contained the following terms relevant to the dispute:

- Clause 37.1, which enabled LORAC to make progress claims under the Contract for completed works;
- Clause 39A.1, which gave Samsung the right to terminate the Contract *"at any time for its sole convenience"*; and
- Clause 39A.2, which made provision as to LORAC's rights and obligations where the Contract was terminated under cl 39A.1. Clause 39A.2 was expressed to survive termination of the Contract under cl 39A.1.

In February 2015, Samsung terminated the contract for convenience, and subsequently both parties entered into a deed, which provided that Samsung would make certain payments to LORAC. A payment of $45 million was made *on account* under the deed.

After Samsung paid the $45 million sum, LORAC submitted an adjudication application under the Act, and was successful in obtaining two separate determinations with the effect that Samsung had to pay LORAC $44,140,518.

Samsung commenced Supreme Court proceedings seeking writs of certiorari to quash the adjudicator's determinations on the basis of jurisdictional error. Conversely, LORAC sought leave to enforce the determinations as judgments of the Supreme Court.

Issues

In determining the matter, Mitchell J considered the following three issues:

Should the first adjudicator's determination be quashed because there was no payment dispute, or alternatively because the adjudicator did not properly form an opinion that there was a payment dispute?[4]

Samsung advanced the argument that there can be no *payment dispute* under the Act[5] until the date for payment under the Contract had elapsed. To that end, Samsung contended that there was no *payment dispute* in circumstances where (at the time of making the adjudication application) LORAC's only right to payment existed under 39.2A, and the due date for payment in that clause had not passed.

His Honour rejected Samsung's position, preferring the interpretation that a *payment dispute* arose when a payment claim was rejected or disputed, even if the time for payment provided for in the relevant contract had not arrived. Accordingly jurisdictional error was not found on this ground.

Should both determinations be quashed because the adjudicator failed to exercise or understand his adjudicative function, adopted illogical and irrational reasoning or made an unreasonable decision?[6]

This argument was premised on the fact that, in respect of the first adjudication application, the adjudicator in making his determination had not referred to cl 39A.2 of the Contract, but referred to cl 37, which did not survive termination.

His Honour later made a finding that LORAC's entitlement to any payment under the Contract could only exist through cl 39A.2, but that the first payment claim was not a claim made under cl 39A.2. Accordingly, his Honour found that the adjudicator had failed to determine the payment dispute by reference to the terms of the Contract, had failed to engage in the task which the Act required him to undertake, and consequently provided a determination which was not authorised by the Act.

In making the second determination the adjudicator did refer to cl 39A.2(a) of Contract, but failed to provide a determination on the value of the adjusted contract sum. By determining that Samsung was liable to pay without finding that the adjusted subcontract sum would not be

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exceeded, the adjudicator failed to apply the standard of proof required by the Act, and failed to apply the concluding words of cl 39A.2(a) in determining the dispute.

In the circumstances, his Honour held that in respect of both determinations the adjudicator had failed to exercise or understand his adjudicative function, and so had committed jurisdictional error.

Should leave to enforce the determinations be refused because the determinations are invalid or because the payments on account required by those determinations have already been made under the Deed?[7]

In determining this question his Honour cited the established principle that the court ought to grant leave to enforce a determination of an adjudicator as a judgment of the court, unless it is satisfied that a valid reason exists to refuse a grant of leave.[8]

In refusing leave, his Honour found that the payment of $45 million under the deed was a payment on account by Samsung to LORAC in respect of Samsung's liability to make a termination payment under cl 39A.2(a), and that Samsung had already made the payment which would have been required under the first and second adjudications (if those determinations were validly made).[9] In those circumstances, his Honour refused to exercise his discretion to grant leave to enforce the determinations as a judgment.

What does this mean?

The decision provides helpful guidance on when a payment dispute arises under the Act. Contracting parties should be aware that a payment dispute, for the purposes of the Act, may arise irrespective of whether the liability for payment under the relevant contract has arisen at the point in time that the payment claim is issued. Focus is instead placed on whether the payment claim is wholly or in part in dispute.

The decision also provides helpful insight into what the courts will consider in determining whether an adjudicator's decision may be quashed and more specifically what matters may lead to a finding of jurisdictional error.

Undertaking such an exercise will involve identification of the limits of the authority conferred on the adjudicator, and an analysis of the facts to determine whether those limits have been exceeded. Courts in other jurisdictions have found that the incorrect construction of a contractual provision by an adjudicator, who erroneously decides the value of a progress payment, will not necessarily result in jurisdictional error.[10] While the present case does not contradict that principle, it does confirm that the incorrect construction of a contractual provision might amount to a jurisdictional error in circumstances where the error gives rise to an inference that the adjudicator has misunderstood the nature or scope of his or her statutory function.[11]

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[1] [2015] WASC 237.
[2] Section 38 and 39 of the Act.
[3] Section 43 of the Act.
[4] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 [92].
[5] Section 6 of the Act.
[6] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 [92].
[7] Ibid.
[8] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304.
[9] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 [274 - 276].
[10] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346 [8], approved in *Watpac Construction (Qld) Pty Ltd v KLM Group Ltd* [2013] QSC 236.
[11] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 [218].

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