

**ENERGY AUSTRALIA V DOWNER CONSTRUCTION (AUSTRALIA) PTY LTD &**

Supreme Court of New South Wales – 15 February 2006

**FACTS**

Energy Australia (“EA”) and Downer Construction (Australia) Pty Ltd (“Downer”) entered into a design and construction contract for a 132kV cable tunnel from a point in the south-western part of the city of Sydney to Surry Hills. Downer served a Payment Claim on EA under section 13 of the Building and Construction Industry Security of Payment Act 1999 (NSW). The Payment Claim included claim for delay, disruption and other costs incurred in relation to water ingress as a consequence of certain ground conditions which Downer alleged to be latent conditions within the meaning of the deed. Energy responded to the payment claim, lodging a Payment Schedule under section 14 of the Act that disputed that any amount was payable on the ground that the conditions described in the payment claim did not constitute latent conditions under the contract.

Downer served an adjudication application on Energy under section 17 of the Act, to which Energy served an adjudication response under s 20 of the Act. The Adjudicator delivered the determination and found that Downer was entitled to be paid.

Energy sought a declaration that the purported adjudication application was not an adjudication application within s 17 and is null and void. Its reasons for this were that it was of the opinion that the adjudication application was for a claim substantially different from the payment claim and was therefore not in accordance with the statute and therefore invalid. It alternatively claimed that the adjudication determination was not an adjudication determination within the meaning of s22 of the Act and was null and void. It was Energy’s submission that the adjudication application differed from the payment claim in that the adjudication application stated the payment claim was different to that claimed in the payment claim, and the submissions that accompanied the adjudication application specified different particulars.

**ISSUES**

Was the adjudication application and adjudication application within section 17 of the Act?

Was the adjudication determination and adjudication determination within the meaning of section 22 of the Act?

**FINDING**

It was found that the adjudication application was properly made under s 17(1) and (3) of the Act. Nicholas J said that the question boiled down to whether the adjudication application identified the payment claim, and not on whether the claim addressed in the accompanying submissions were different to the payment claim, and that a common sense and practical approach should be taken when answering this.

On the matter of the validity of the adjudication application it was found that the determination was void. It was said that the determination lacked the basic and essential requirement for its existence as it was not an adjudication of the payment claim, because the determination was made on a substantially different claim. It

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was also said that the determination was not a bona fide attempt to exercise the statutory power as the adjudicator did not take into consideration the matters referred to in s22, and that there was a denial of the measure of natural justice.

## QUOTE

*“[64] : In my opinion, there is nothing in the language of s17 which requires precise correspondence between the details in the adjudication application with its supporting documentation and the payment claim as essential to the validity of the application, and of the adjudication determination which follows. Had this been its intention no doubt the legislature would have included clear words to express it. ” “[112] : ...it is an essential requirement that the adjudicator must consider and determine whether the specified basis of the payment claim has been established, and a failure to do so is a failure to meet the mandate of s22(2)(c).”*

## IMPACT

The Adjudicator is to take into account only the matters referred to in s22; to make a determination on matters outside of this renders the determination void.

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