**Security of Payments - Differences along the Eastern Seaboard**

Michael Heaton QC [[1]](#footnote-1)

Differences have arisen between the Eastern States on a number of issues:

**First: Is identification of a reference date a jurisdictional fact?**

1. The New South Wales Court of Appeal has accepted that a reference date is a non-jurisdictional fact so *certiori* for an erroneous reference date will be not lie to invalidate an adjudication determination.
2. In *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd [[2]](#footnote-2)* (***Lewence***) theCourt of Appeal allowing an appeal from a decision of Ball J held the existence of a reference date under s. 8 of the *Building and Construction Industry Security of Payment Act 1999 (NSW)* (s. 9 in Victoria) to support a claim is not a jurisdictional fact. The Court of Appeal relied upon the distinction between s.8 (NSW) s.9 (VIC) and s.13 (NSW) s.14 (VIC). The Court of Appeal noted that under s.8 (s.9 (VIC)) it was on and from each reference date which makes reference to the entitlement to progress payments but s.13 (s.14 (VIC)) refers to the person referred to in s.9 (who is or who claims to be entitled to a progress payment). The Court of Appeal also relied upon the judgment of Hodgson JA in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*[[3]](#footnote-3)*.* The Court of Appeal also relied upon the judgment of McDougall J in *Kembla Coal & Coke v Select Civil [[4]](#footnote-4).*
3. McDougall said in *Kembla* at [37]:

*“It is one thing to say that s 8 of the Act specifies the entitlement to a progress payment as something existing “[o]n and from each reference date under a construction contract.” It is quite something else to say that the reference date is thereby made a jurisdictional fact if the matter goes to adjudication. If the payment claim has no reference to a reference date, that may be a valid basis of opposition. But it does not mean that the claimant is anything other than “a person who ... claims to be entitled to a progress payment”.*

1. At [52] Ward JA said:

*“[52] What must be borne in mind is that the fundamental distinction between ss. 8 and 13 of the Act is between the entitlement to a progress payment under the Act (dealt with in the former) and the right or entitlement to make a claim for a progress payment (dealt with in the latter). The consequence of making a valid payment claim is that it then falls to the adjudicator to determine the claim and, absent jurisdictional error, entitlement to such a payment on the particular facts of a particular case is not for the court to determine.”*

1. Ward JA concluded at [60]:

*“[60] I consider that McDougall J was correct in Kembla in concluding that the existence of a reference date to support a payment claim is not a jurisdictional fact or essential pre-condition for the making of a valid payment claim (and hence if there is a dispute about that issue it is for the adjudicator to determine).”*

1. Emmett JA agreed saying at [119]:

*“[119] I have had the advantage of reading in draft form the proposed reasons of Ward JA. I agree with her Honour that, for the reasons proposed, the words “on and from each reference date” specify the time on and from which a payment claim can be made. They do not specify characteristics of the person who is or claims to be entitled to a progress payment. The Contractor was a person who fell within the terms of either s 8(1)(a) or s 8(1)(b) and who claimed entitlement under the Contract to progress payments in the sense contemplated by the Act. Whether that claim was valid, including whether it was valid because it was supported by a reference date, is not a jurisdictional fact.”*

1. Sackville AJA stated:

*“[132] It is a strained interpretation of the introductory words to s 13(1) of the BCI Act (“[a] person referred to in section 8(1) who is or who claims to be entitled to a progress payment”) to read them as referring to a claimant who not only satisfies either sub-par (a) or sub-par (b) of s 8(1), but who is also able to show that the relevant reference date under the construction contract has in fact arrived. The very point of the procedure created by Pt 3 of the BCI Act is to establish a mechanism, in the event of a dispute, for an adjudicator to determine precisely that question.”*

1. *Lewence* was heard on 29 June 2015 in the Court of Appeal and the judgment was given on 25 September 2015.
2. In Queensland it can be inferred that a reference date is a jurisdictional fact. In *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Receivers and Managers appointed)(Administrators appointed) & Ors.[[5]](#footnote-5)* it was accepted by the parties that a reference date is essential to jurisdiction and Applegarth J proceeded on that basis. At [20] Applegarth J regarded as critical to the statutory entitlement to make a payment claim was “a reference date under a construction contract.”
3. He referred to *Bolton Constructions (QLD) v Corrosion Control Technology Pty Ltd [[6]](#footnote-6)* where Justice Peter Lyons identified significant differences between the Queensland definition of “reference date” and the New South Wales provision and where His Honour further stated the Queensland definition gave greater primacy to the provisions of the contract dealing with the making of a claim for a progress payment than does the language of the New South Wales Act. I doubt this suggested distinction. This statement by Justice Peter Lyons was made in the context of the conclusion that a reference date does not arise after termination of the contract being consistent with the general nature of the payments for which provision is made by the *BCIP* Act. Further, Applegarth J at [27] made further reference to *Walton* *McNabb NQ Pty Ltd v Walkrete Pty Ltd & Ors* [[7]](#footnote-7) illustrating that the Court made clear an adjudication decision is void for jurisdictional error where a purported claimant payment claim lacks a supporting “reference date”. Again at [44] Applegarth referred to *Walton v McNabb* establishing that a reference date will not arise for the purposes of the Act after termination unless the contract expressly provides for one.
4. In Victoria *Saville v Hallmarc Construction Pty Ltd* [[8]](#footnote-8)was decided on 27 November 2015 two months after *Lewence* but heard on 7 May 2015. It does not appear that *Lewence* was referred to the Court of Appeal. The Court of Appeal decided that the identification of a reference date was a jurisdictional fact.
5. Warren CJ and Tate JA with whom Kaye JA agreed said at [97]:

*[97] Here, Saville’s right to a progress payment was dependent upon the fixing of a reference date. In turn this required a characterisation of whether the first payment claim was a final payment claim or not. If it was not (as the adjudicator found) the requirement under s 9(2)(b)* *applied and required a calculation of the reference date as a date occurring 20 business days after the commencement of construction work under the construction contract. If it was (as the judge found) the requirement under s 9(2)(d) applied and the reference date was relevantly the date immediately following the day that construction work was last carried out under the construction contract. These matters involved questions of evaluation in relation to the scope of the construction contract and the timing of work undertaken within that scope. In our view, the need for evaluation by the adjudicator, by reference to the evidence, does not preclude the fixing of a reference date under s 9(2) from being a jurisdictional fact and thus reviewable.*

1. The Court of Appeal in Victoria dealt with the concept of what constituted a jurisdictional fact being an event, fact or circumstance which as Dixon J observed in *Parisienne Basket Shoes Pty Ltd v Whyte[[9]](#footnote-9) is “made a condition upon the occurrence or exercise of which the jurisdiction of a court shall depend[[10]](#footnote-10)”.* Further at [62] WarrenCJ and Tate JA drew the distinction between jurisdictional fact and errors of fact withinjurisdiction stating:

*“[62] Errors made with respect to a jurisdictional fact are thus to be distinguished from, relevantly, errors of fact-finding made by an administrative tribunal within the course of an enquiry properly embarked upon. Errors made within jurisdiction (non-jurisdictional errors) are unreviewable in a proceeding for judicial review* *save where the error amounts to an error of law on the face of the record. As the High Court observed in Refugee Review Tribunal; Ex parte Aala:*

*The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly). The former kind of error concerns departures from limits upon the exercise of power. The latter does not.”*

1. There is therefore conflict between NSW on the one hand, and Victoria and Queensland on the other on this point.
2. Southern Han *(the Lewence case)* has however obtained special leave to appeal to the High Court. This was obtained on 28 July 2016. One of the questions going to the High Court is whether the existence of a reference date is a jurisdictional fact.
3. I consider the Victorian Court of Appeal has moved along traditional lines of reasoning. The New South Wales Court of Appeal hasput the *Security of Payments Legislation* in a special category following the judgment of Hodgson JA in *Brodyn*. In *Lewence* at [55]the Court of Appeal referred to the judgment of Hodgson JA in *The Minister for Commerce v Contracts Plumbing (NSW) Pty Ltd* at [49]:

*“In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator’s determination within the meaning of the Act.”*

1. Thisis indicative of the way the New South Wales Court of Appeal up till now at least considers the legislation should be viewed. That is errors of fact or law being non- jurisdictional should not be subject to review.

***Second: Reference Dates – “calculated by reference to that date” S9(1)(Vic) compared with s. 8 (NSW) and s. 12 (QLD)***

1. It is clear from the judgment of McDougall J in *Broadview Windows Pty Ltd v Architectural Project Specialists Pty Ltd [[11]](#footnote-11)* at [36]–[51] that provided there continues to be reference dates under the Act irrespective of whether work has ceased or the contract determined, a payment claim can be made for work whether previously claimed and not paid or for new work possibly subject to any restriction in the contract. McDougall J relied upon statements of Hodgson JA in *Brodyn* at [63] and [64], *Falgat Construction Pty Ltd v* *Equity Australia Corp Pty Ltd* [[12]](#footnote-12) and Hammerschlag J in *Olympia Group Pty Ltd v* *Tyrenian Group Pty Ltd* [[13]](#footnote-13). Thus according to this line of authority it is a simple application in New South Wales of whether there is, under the Act, a further reference date in respect of which any payment claim can be made including for work previously done and not paid. There would be no breach of NSW s.13(5) and in Victoria s. 14(8).
2. In Victoria however in *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd* *& Ors* [[14]](#footnote-14)and *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd* [[15]](#footnote-15) Vickery J applied a factual analysis to ascertain the applicable reference date to which the payment claim related: see at [70]-[73] and [84]-[88]. This seems to me to be a different approach to that adopted by McDougall J in *Broadview*. Vickery J then found that s.14(8) was breached in both *Jotham* and *Commercial & Industrial Group*: see his comments at [94]-[98].

*“[94] Absent the application of s 14(9), the terms of s 14(8) provide for a prohibition. They indicate a clear statutory intention that what may be advanced by a claimant as a payment claim that is in respect of the same reference date as a previous claim, is not to be treated as a payment claim made under the Act, and is invalid.*

*[95] The scheme of the Act is such as to render it impermissible to claim only some part of the work performed in relation to a particular reference date, only to make a further claim for further work at a later time, where the further work performed and claimed for is in respect of the same earlier reference date.*

*[96] If such conduct was to be permitted, a claimant could serve more than one payment claim in respect of each reference date for different items of work, resulting in the potential for multiple payment claims being made in respect of each reference date, each requiring individual assessment by a respondent on construction projects.* *Further, and contrary to a key objective of the Act, this may in turn result in multiple adjudication applications being made in relation to different parts of what is in effect, or should be, the same payment claim.*

*[97] Section 14(8), when read with the exception in s 14(9), is designed to address this mischief and should be given a construction which supports its statutory purpose. The privileges conferred on claimants by the Act are appropriately addressed with the balancing facility provided by s 14(8).*

*[98] It follows that an adjudication determination founded upon an invalid payment claim, is also an invalid exercise under the Act. A payment claim served in contravention of s 14(8) is incapable of providing a jurisdictional basis for a valid adjudication conducted under s 23 of the Act.”*

1. Under the heading “No new work” in *Commercial & Industrial Construction Group,* Vickery J said at [100]-[101]:

*“[100] However, in my opinion, the fact that an item of work could have been claimed as part of a payment claim served in respect of an earlier reference date, but was not, is not a bar to it being claimed in a later payment claim made in respect of a later reference date, provided that s 14(8) is not breached. The time when the work is done may be relevant to a determination as to the correct reference date which applies to a payment claim served in respect of that work. However, the time when the work is done is not a factor which per se determines the validity of the payment claim.*

*[101] The text ‘calculated by reference to [the relevant reference date]’ in s 9(1) of the Act simply means that a payment claim for a progress payment made under the Act is to be calculated in respect of work done up to and including the relevant reference* *date and not beyond it. Payment for all such work is claimable, regardless of whether or not the work had been performed since the preceding reference date or prior to the preceding reference date.”*

1. Vickery J then went on to say that the equivalent provisions in New South Wales s. 8 and Queensland s. 12 omit the phrase “calculated by reference to” the [relevant reference date] but that it makes no difference to the meaning or operation of the subsection when considered against its counterpart provisions in New South Wales and Queensland referring to *Fyntray Constructions Pty Ltd v* *Macind Drainage & Hydraulic Services Pty* Ltd *[[16]](#footnote-16); Doolan v Rubickon* (QLD) Pty Ltd & Ors *[[17]](#footnote-17)* and *Spankie & Ors v James Trowse Constructions Pty Ltd & Ors [[18]](#footnote-18).*
2. If the mischief to be avoided and the proviso referred to by Vickery J and the application of s.14(8) VIC: s. 13 (5) NSW and s. 17(5) QLD is confined to successive identical claims as in *Jotham, Dualcorp* and *Doolan* then there may not be a significant difference between the states. However Vickery J does not appear to so confine s. 14(8) Vic. See at [19] above. I consider the mischief referred to by His Honour is, in practical terms overstated. Further take the situation where are subcontractor does not put in a claim to the contractor until after the relevant reference date relating to that work. Are the subcontractor and the contractor precluded from claiming for that work in the next payment claim on the next reference date? In Victoria the answer may well be yes, whereas – in NSW and Qld [[19]](#footnote-19) the answer is most probably no because the only limit is the time to bring the claim s.13(4)(b) NSW and s.17 A(2)(b) or (3)(b) or (c) QLD.
3. This highlights some of the difficulties where decisions in respect of similar legislation are divergent in each state.

***Third: Can there be a reference date after a contract is determined?***

1. The Queensland authorities have been referred to above. They acknowledge that primacy is given to the contract which may be different to New South Wales and Victoria. It is necessary to apply the Act in New South Wales and Victoria in precedence to the contract.
2. In New South Wales *Broadview Windows Pty Ltd* v *Architectural Project Specialists Pty Ltd* [[20]](#footnote-20) was decided on the date of hearing on 9 July 2015 very shortly before the decision of Vickery J in *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd [[21]](#footnote-21)* in which judgment was given on 21 August 2015. *Broadview* proceeded on the basis that s.8(2)(b) applied i.e. the contract did not provide the reference date or any restriction or limitation on the reference date.
3. I consider *Broadview* stands for a number of propositions.
4. First, the reference dates continue to accrue under the Act (not necessarily the contract) even when work ceases or the contract terminates: see at [43], [48] and [49] unless the contract provides a restriction.
5. Second, the concept of a reference date is not tied to the performance of work in any given month see at [36] unless the contract so provides under S8(2)(a).
6. Third, provided there is a new reference date, the Act permits successive payment claims to be made for the same work: see at [41], [48] and [51] and distinguishing *Dualcorp Pty Ltd v Remo Constructions Pty Ltd [[22]](#footnote-22).*
7. Fourth, the only limit on such claims is s. 13(4)(b)(NSW), in Victoria s. 14(4)(b) or S14(5)(b), Qld 17A (2)(b) or (3)(b) or (c): see at [42], [48] and [52].
8. There is therefore a divergence between Queensland and New South Wales. The issue is whether there can be a reference date after the contract is determined. McDougall J gives primacy to the Act whereas the Queensland cases give primacy to the contract between the parties. I am not aware of any Victorian authority on the point.
9. This issue is also off to the High Court, the question being whether a reference date arises after termination of contract where the contract makes no provision for it.

***Fourth: Does Certiori lie for non-jurisdictional error of law?***

1. Another question for which special leave was obtained in *Lewence* is whether *certiorari* is available for non-jurisdictional error on the face of the record. Presumably this refers to non-jurisdictional error of law on the face of the record.
2. This question is going to the High Court because contrary to what had generally been the accepted position in New South Wales, [[23]](#footnote-23)a recent judgment of Emmett AJA moved the goal posts to the more traditional approach. That case is *Probuild Constructions* *(Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770. The effect of *Probuild* is to move towards the traditional approach referred to by the Victorian Court of Appeal in *Saville.*
3. In *Probuild* Emmett AJA said at [56]-[57]:

*“[56] The process of adjudication in Part 3 of the Security of Payment Act involves the exercise of public powers, in that it is a statutory power conferred by legislation. Accordingly, in principle, a determination by an adjudicator is amenable to judicial review under s 69 of the Supreme Court Act and there is no reason why the Court would not have power to quash a determination by an adjudicator that involves an error of law [[24]](#footnote-24)**[7].*

*[57] However, the provisions of s 69 do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those provisions, effective to prevent the Court from exercising its powers to quash or otherwise review a decision [[25]](#footnote-25)[8]. Thus, if one can find a clear legislative intention to exclude the availability of judicial review in the case of non-jurisdictional error on the face of the record of a determination made by an adjudicator under the Security of Payment Act, relief under s 69 would not be available to quash the determination. Shade Systems contends that, on the proper construction of the Security of Payment Act, relief under s 69 of the Supreme Court Act is not available to Probuild, even if the Adjudicator made such an error of law.”*

1. Further at [62] Emmett AJA stated:

*“[62] Hodgson JA expressed the opinion that the reasons that he had stated for excluding judicial review on the basis of non-jurisdictional error of law justified the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements of the Security of Payment Act was essential to the existence of a determination [[26]](#footnote-26)[13]. His Honour said that what was intended to be essential was compliance with the basic requirements, a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to that power, and no substantial denial of natural justice that the Security of Payment Act requires to be given. If the basic requirements are not complied with, his Honour said, or if the purported determination is not a bona fide attempt or if there is a substantial denial of the relevant measure of natural justice, a purported determination will be void because there will not then have been satisfaction of the requirements that the legislature has indicated as essential to the existence of a determination[[27]](#footnote-27)[14].*

1. In the light of the *Kirk v Industrial Court of New South Wales* [[28]](#footnote-28) and *Chase Oyster Bay* and on His Honour’s construction of the Act, he rejected the proposition that non- jurisdictional errors of law on the face of the record were not reviewable.
2. At [74] Emmett AJA stated:

*“[74] I do not consider that there is a clear indication or implication to be found in the Security of Payment Act that the jurisdiction conferred by s 69 of the Supreme Court Act is intended to be excluded. It is by no means clear that a claimant who has not been paid the adjudicated amount and who has served a notice of intention to suspend work, and then takes that step, would be liable for any loss or damage from which the claimant would otherwise be protected by s 27(3). In circumstances where the determination is later quashed by the court in the exercise of the jurisdiction conferred by s 69, the inference, if any, that may be drawn from the language of s 27(3) is insufficient to demonstrate an intention to remove the court’s jurisdiction[[29]](#footnote-29)[21]. I consider, on balance, that judicial review under s 69(3) is available to quash a determination made by an adjudicator where an error of law that leads to an adjudicated amount that is different from the amount that would have been determined but for the error of law appears on the face of the record."*

1. Emmett AJA concluded there was an error of law by the Adjudicator and it appeared on the face of the record such that the proceedings leading to the determination and as a consequence the determination made by the Adjudicator be quashed.
2. One can see there appears to be a u-turn in the way the legislation is now being seen by one Supreme Court Judge in New South Wales. The decision of Emmett AJA is consistent with the Court of Appeal decision in Victoria in *Saville.* It is consistent with other decisions particularly of Vickery J in the Supreme Court of Victoria in relation to the Victorian legislation.
3. We need to await the determination of the High Court.

**Conclusion**

1. Until there differences are finally determined, careful attention has to be paid to the law in the jurisdiction in which the payment claim and adjudication determination are taking place.

21 September 2016

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2. [2015] NSWCA 288 [↑](#footnote-ref-2)
3. [2004] NSWCA 394; (2004) 61 NSWLR 421 [↑](#footnote-ref-3)
4. [2004] NSWSC 628 at [37] [↑](#footnote-ref-4)
5. [2013] QCS 269 [↑](#footnote-ref-5)
6. [2012] 2 Qd R 90 [↑](#footnote-ref-6)
7. [2013] QSC 128 [↑](#footnote-ref-7)
8. [2015] VSCA 318 [↑](#footnote-ref-8)
9. (1938) 59 CLR 369 [↑](#footnote-ref-9)
10. Ibid 391. [↑](#footnote-ref-10)
11. [2015] NSWSC 955 [↑](#footnote-ref-11)
12. (2006) 23 BCLR 292 at [36] [↑](#footnote-ref-12)
13. [2010] NSWSC 319 at [32] [↑](#footnote-ref-13)
14. [2013] VSC 552 [↑](#footnote-ref-14)
15. [2015] VSC 426 [↑](#footnote-ref-15)
16. [2002] NSWCA 238 at [53]. [↑](#footnote-ref-16)
17. [2008] 2 Qd R 117; See at 120-122; [2007] QSC 168 [↑](#footnote-ref-17)
18. [2010] QCA 355 at [20] [↑](#footnote-ref-18)
19. See Doolan at 121 [↑](#footnote-ref-19)
20. [2015] NSWSC 955 [↑](#footnote-ref-20)
21. [2015] VSC 426 [↑](#footnote-ref-21)
22. 74 NSWLR 190

 Fn 7 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [[2010] NSWCA 190](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/190.html); [(2010) 78 NSWLR 393](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%282010%29%2078%20NSWLR%20393?stem=0&synonyms=0&query=title() [↑](#footnote-ref-22)
23. See [16] – [17] above [↑](#footnote-ref-23)
24. [↑](#footnote-ref-24)
25. Fn 8 *Supreme Court Act 1970 NSW*, s 69(5). [↑](#footnote-ref-25)
26. Fn 13 See Pro*ject Blue Sky Inc v Australian Broadcasting Authority* [(1998) 194 CLR 355](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281998%29%20194%20CLR%20355?stem=0&synonyms=0&query=title(), 390-391 [↑](#footnote-ref-26)
27. Fn 14 *Brodyn Pty Ltd v Davenport* [[2004] NSWCA 394](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2004/394.html); [(2004) 61 NSWLR 421](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%282004%29%2061%20NSWLR%20421?stem=0&synonyms=0&query=title(), [55] [↑](#footnote-ref-27)
28. (2010) 239 CLR 531 [↑](#footnote-ref-28)
29. Fn 21 Basten JA in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [[2010] NSWCA 190](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/190.html); [(2010) 78 NSWLR 393](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%282010%29%2078%20NSWLR%20393?stem=0&synonyms=0&query=title(), [95] [↑](#footnote-ref-29)