

I, Merran Kathleen Short, Construction Contracts Registrar of the Northern Territory certify this to be a true copy of this document sent electronically to the official email address of the Constructions Contracts Registry of the Northern Territory and sighted by me.

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**Merran** Digitally signed by

Merran Short

**Short**

Date: 2026.05.25

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**CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT, 2004****AMENDED DETERMINATION****(Amended on 12 May 2025)**

Adjudication Identification Number:	26-07-01
Adjudicator:	DS ELLIS
Address	Level 25, Allendale Square 77 St Georges Tce Perth Western Australia
Phone Number	(08) 9220 0511
Fax Number	(08) 9220 0572
Applicant's Name:	<b>[Redacted]</b>
ABN:	<b>[Redacted]</b>
Address	<b>[Redacted]</b>
Phone Number	<b>[Redacted]</b>
Fax Number	N/A
Respondents' Name:	<b>[Redacted]</b>
ACN:	<b>[Redacted]</b>
Address	<b>[Redacted]</b>
Phone Number	<b>[Redacted]</b>
Date of Adjudication Application:	3 April 2026

Pursuant to s 33 of the Act, I determine that the amount payable by the respondent to the applicant in respect of the adjudication application made on 3 April 2026 is:

- 1     \$~~1,505,526.93~~ ~~1,542,863.89~~ together with applicable GST;
- 2     \$~~30,68831,449.06~~ interest on \$1,542,863.89 from 6 February 2026 to the date of the determination; and
- 3     the applicant's contribution to my costs of \$7,714.75.

Reasons for determination

The determined amount is payable forthwith, ie on 12 May 2026.

The reasons for my determination are annexed as Schedule 1.

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2.

Date: 11 May 2026



—  
DS Ellis  
Registered Adjudicator no 07

## Schedule 1: Reasons for Determination

### Overview

- 1 The applicant seeks payment of \$ ~~\$1,505,526.93~~~~1,542,863.89~~ excluding GST<sup>1</sup> from the respondent. The applicant alleges this sum is due to it pursuant to a subcontract with the respondent, then known under a different name, dated 4 January 2022 (contract).
- 2 The applicant was a subcontractor on a site upgrade project. It was a 'principal' within s 4 of the Act. The respondent was a subcontractor to the applicant.
- 3 The applicant contends that:
  - (a) it delivered a payment claim to the respondent on 24 December 2025 seeking \$~~1,505,526.93~~~~1,542,863.89~~ (excluding GST);
  - (b) the contract does not contain a provision dealing with how and when a respondent must respond to a payment claim within s 20(a) of the Act, with the consequence that the provisions of Schedule 1, Division 5 about responding to a payment claim are to be implied in the contract;
  - (c) the respondent failed to give the applicant a notice of dispute by 16 January 2026, with the consequence that the respondent became obliged to pay the applicant's payment claim.
- 4 For the reasons given below, I accept that:
  - (a) clause 6 of Schedule 1 to the Act applies to the contract';
  - (b) the respondent did not give a notice of dispute within 10 working days after the payment claim was given to it, with the consequences that:
    - (i) a payment dispute arose on 6 February 2026;
    - (ii) the respondent was precluded from disputing its liability in respect of the payment claim; and
    - (iii) the respondent became liable to pay the whole of the place amount claimed, \$~~1,505,526.93~~~~1,542,863.89~~ (plus applicable GST), to the applicant.

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<sup>1</sup> Unless otherwise stated, all amounts are exclusive of GST.

34 The payment claim should have been paid within 20 working days it was given, ie 6 February 2026. The applicant is entitled to interest thereafter. This comes to ~~\$30,68831,449.06~~.

5 The respondent should pay the applicant the contribution to my costs made by it. This comes to \$7,714.75.

### **Procedural Background**

45 The application was made electronically to Resolution Institute (RI). The documents delivered by the applicant were:

(a) the Subcontract between the parties (TAB 1); (b)

the payment claim comprising:

(i) a letter dated 24 December 2025; and

(ii) a payment certificate under clause 22 of the contract (comprising an excel spreadsheet; and

(iii) the covering email dated 24 December 2025 (TAB 2);

(c) statutory declaration of Declarant 1 dated 2 April 2026 (TAB 3);

(d) statutory declaration of Declarant 2 dated 1 April 2026 (TAB 4) (Byun Declaration); and

(e) expert report dated 2 April 2026 (TAB 5) (the Versed Report).

56 RI appointed me as adjudicator on 8 April 2026. I wrote to the parties on 20 April 2026 requesting details of service on RI and the respondent. The applicant informed me that the application was lodged on 11.14 am Australian Central Standard Time on 7 April 2026 and served on the respondent at 4.03pm on 7 April 2026. The respondent did not dispute these details of service. The parties agreed to my hourly rate.

67 The response was also given electronically, but via 'Dropbox' on 28 May 2026. I downloaded the response the same day. The response comprised a substantive response, together with 22 Tabs or 'folders' of material.

78 On consideration of the response, I noted that the respondent had raised a number of matters which it identified as counterclaims. I formed the view that I could not take those matters into account as counterclaims. Counterclaims cannot be advanced in a payment claim so as to result in a determination that the applicant is liable to pay the respondent.<sup>2</sup> However, matters identified as counterclaims may operate to reduce

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<sup>2</sup> *Alliance Contracting Pty Ltd v James* [2014] WASC 212

the amount of the respondent's liability by way of set offs. To deal fairly with that question, I considered that the counterclaims should be treated as possible set offs and that it was necessary to obtain further information from the parties.

[89](#) By letter dated 1 May 2026, I requested both parties to make further submissions in the following terms:

Pursuant to s 34(2) of the Act, I request that both parties provide submissions to me in relation to the question whether there are any matters, including clause 6(2) of Schedule 1 to the Act (if it is part of the contract) which preclude me taking paragraphs [102] to [108] into account by way of set off. I draw the parties' attention to the judgment of Pritchard J in *Total Eden Pty Ltd v Charteris* [2018] WASC 60 at [59] to [63]. I request that the parties provide submissions on this issue by 5pm (ACST) on 5 May 2026. If a party wish to respond to the other's submissions on this issue, it may do so by 5pm on 6 May 2026.

In addition, I request that the applicant provide me with submissions as to the merits of the matters raised at paragraphs [102] to [108] by 5pm on 5 May 2026.<sup>3</sup>

[910](#) The applicant requested a very short extension of time to provide its materials about the merits of the set offs, to which I agreed.

[1011](#) I received the following further submissions:

- (a) applicant's further submissions responding to paragraphs [1] to [4] of adjudicator's request dated 5 May 2026;
- (b) respondent's submissions dated 5 May 2026;
- (c) applicant's further submission responding to respondent's submissions in respect of adjudicator's request dated 6 May 2026;
- (d) respondent's submissions in response dated 6 May 2026; and

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<sup>3</sup> I note that I referred to paragraphs [102] to [108] of the response. Although paragraph [103] of the response refers to the three heads of counterclaim/set off advanced by the claimant, the reference to [108] was an error. It should have been [118]. As it happens, this error was not material.

- (e) applicant's further submissions responding to paragraph 5 of adjudicator's request dated 6 May 2026.

The parties made submissions in relation to these matters within the time limits set.

[1112](#) In my letter of 1 May 2026 I foreshadowed that I did not envisage affording the respondent the opportunity to reply to the applicant's materials going to the merits of the set offs. I proceeded on the basis that the respondent should be taken to have provided all its material in its response. By email dated 6 May 2026, the respondent requested the opportunity to provide further submissions in response to the Applicant's further submissions responding to paragraph 5 of adjudicator's request dated 6 May 2026, particularly in relation to the fencing issue. I declined that request.

### The issues

[1213](#) The outcome of these proceedings depends on three substantive issues:

- (a) what are the relevant terms of the contract, and in particular, does s 20 of the Act apply, so that clause 6 of Schedule 1 forms part the contract?
- (b) was the application for adjudication made within 65 working days after the relevant payment dispute arose or was the payment claim of 24 December 2025 an impermissible 'repeat claim'?
- (c) is the respondent precluded by the terms of the contract from raising matters that go to the amount payable by it to the applicant?

[1314](#) I deal with jurisdictional issues at paragraph [35] to [37] below. Except in relation to the question service of the application within 65 working days, jurisdiction was not disputed.

### Operation of s 20 and clause 6 of the Act

[1415](#) The contract was described as a 'Long Form Subcontract'. It was 168 pages long. Nevertheless, the applicant contended that an additional term was implied in the contract by virtue s 20.

[1516](#) Section 20 provides:

#### **Responding to payment claims and time for payment.**

The provisions in Schedule 1, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:

- (a) when and how a party must respond to a payment claim made by another party;
- (b) by when a payment must be made.

1617 There is only one clause in Division 5. It reads:

**6 Responding to payment claim by notice of dispute or payment**

- (1) This clause applies if:
  - (a) a party receives a payment claim under this contract;  
and
  - (b) the party:
    - (i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or
    - (ii) disputes the whole or part of the claim.
- (2) The party must:
  - (a) within 10 working days after receiving the payment claim:
    - (i) give the claimant a notice of dispute; and
    - (ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
  - (b) within 20 working days after receiving the payment claim, pay the whole of the amount of the claim.
- (3) The notice of dispute must:
  - (a) be in writing; and
  - (b) be addressed to the claimant; and
  - (c) state the name of the party giving the notice; and (d) state the date of the notice; and
  - (e) identify the claim to which the notice relates; and
  - (f) if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract; and
  - (g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and
  - (h) be signed by the party giving the notice.
- (4) If under this contract the principal is entitled to retain part of an amount payable by the principal to the contractor:
  - (a) subclause (2)(b) does not affect the entitlement; and

- (b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of an amount retained under the entitlement.

[1718](#) The applicant contended that the contract did not have a written provision about the matter of when and how a party must respond to a payment claim made by another party within s 20(a).

[1819](#) The applicant's payment claim was made pursuant to clause 22 of the contract. Clause 22.1 provides for the respondent to make claims under the contract which are then assessed by the applicant. The applicant is required to issue a progress certificate evidencing the moneys due from the applicant to the respondent. The applicant may issue a progress certificate even if no payment claim is made by the respondent. It may issue a progress certificate certifying that money is due from the respondent to the applicant. A negative certificate may form the basis of a 'payment claim' within the meaning of that expression in the Act.

[1920](#) If the progress certificate shows an amount due by the respondent to the applicant, clause 22.2(a) requires the amount of the certificate to be paid by the respondent within five business days.<sup>4</sup> However, the contract does not contain any provision dealing with how the respondent might dispute or respond to the applicant's negative progress certificate. The contract simply provides for payment of the negative certificate.

[2021](#) The applicant contends that the lack of any ability for the respondent to substantively respond to a negative certificate issued by the applicant means that the contract 'does not have a written provision about ... when and how a party must respond to a payment claim made by another party' within s 20 of the Act. If correct, it would mean that clause 6 is implied in the contract.

[2122](#) The applicant makes this submission notwithstanding that the contract contains clause 22.3, a provision about how and when the *applicant*, as principal, must respond to the *respondent's* payment claims, as contractor. The contract does not contain a provision about how and when the *respondent* must respond to the *applicant* claims. Clause 22 of the contract does not touch on this matter.

[2223](#) I accept that s 20 should be interpreted so that it applies to the extent that the contract does not contain a written provision dealing with how *each* party is to respond to a payment claim. This approach reflects that taken by Raymond SM of the WA State Administrative Tribunal in relation to ss 16 and 17 and Divs 4 and 5 of Schedule 1 of

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<sup>4</sup> Clause 22.2(e)

the *Construction Contracts Act 2004* (WA) (as it then was) in *Croker Constructions (WA) Pty Ltd and Stonewest Pty Ltd*<sup>5</sup>. The respondent proceeded on the basis of this interpretation of clause 6 at [48] of the response.

[2324](#) This approach means that clause 6 of Schedule 1 of the Act applies to the contract. It is the whole of clause 6 which applies, not just parts of it. The Court of Appeal in *JKC Australia LNG Pty Ltd v Inpex Operations Australia Pty Ltd*<sup>6</sup> said: ‘s 20 applies to import the whole of Division 5 if the construction contract did not have a written provision about the matter in either placitum (a) or (b), or both.’

[2425](#) I conclude that s 20 applies and makes the whole of clause 6 applicable as a contractual term in respect of claims by the applicant against the respondent.

#### **Date the payment dispute arose**

[2526](#) Under s 8 of the Act, a payment dispute arises if a ‘payment claim’ is rejected or not paid when it is due. Section 28 of the Act requires that an application for adjudication be made within 65 working days after the payment dispute arises. Section 33(1)(a) requires that I dismiss an application for adjudication if it is not made in accordance with the requirements of s 28 of the Act.

[2627](#) The applicant contends that a payment dispute arose when the respondent failed to pay its payment claim dated 24 December 2025. The payment claim of 24 December 2025 demanded payment by 16 January 2026, which the applicant contends was the date the payment dispute arose.

[2728](#) The respondent said that:

- (a) the claim the subject of the payment claim of 24 December 2025 had been advanced on two previous occasions, first by way of letter dated 15 June 2023 and again by way of letter dated 23 May 2025;
- (b) these two documents were ‘payment claims’ within the meaning of that expression in the Act;
- (c) the payment dispute had arisen on 16 June 2023 (for the letter of 15 June 2025) or, alternatively, on 10 June 2025 (for the letter 23 May 2025); and
- (d) the application for adjudication had not been made more than 65 days after either of 16 June 2023 or 10 June 2025, and so did not comply with s 28(1) of the Act.

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<sup>5</sup> [2014] WASAT 19 t [31], 32] and [36]

<sup>6</sup> (2018) 334 FLR 314

The respondent characterised the 24 December 2025 payment claim as a ‘repeat claim’ and argued that repeat claims were not permitted under the Act.

[2829](#) The respondent relied on and quoted from an Issues Paper dated 27 October 2017 prepared by the Department of the Attorney General and Justice of the Northern Territory in connection with what the respondent described as the 3 February 2020 amendment. The Issues Paper referred to *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd (Mac-Attack)*.<sup>7</sup> That decision held that once a claim had been made and a payment dispute had arisen, the time limit for making an application started running. It was not possible to create a new payment dispute and start time running afresh by resubmitting a claim that had already been made. A payment dispute only arises once.

[2930](#) The respondent’s argument does not, however, take into account s 7A(2) of the Act, which was included in the Act by s 8 of *The Construction Contracts (Security of Payments) Legislation Amendment Act, 2019*. Section 7A(2) reads:

- (2) A payment claim may include a matter:
  - (a) that was included in a previous payment claim; and
  - (b) that has not been the subject of a determination under section 33(1)(b).

[3031](#) Given that a payment claim may include matters that have been the subject of earlier payment claims by virtue of s 7A(2), the introduction of s 7A amounts to a legislative reversal of *Mac-Attack*. Under s 7A, the 24 December 2025 payment claim was an effective payment claim even if the letters of 13 June 2023 and 23 May 2025 were also ‘payment claims’.<sup>8</sup> A new payment dispute may arise in respect of the matters the subject of the 24 December 2025 payment claim even if it is essentially a repetition of the payment claim made in the earlier letters of 15 June 2023 and 23 May 2025. The matters included in the letter of 13 June 2023 and 23 May 2025 had not been the subject of a determination and could be included in the payment claim of 24 December 2025.

[3132](#) The respondent did not identify any other reasons why the 24 December 2025 payment claim was not a ‘payment claim’ for the purposes of the Act. I find that it was a payment claim capable of giving rise to a payment dispute within s 8 of the Act.

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<sup>7</sup> [2009] NTSC 48 and on appeal at [2009] NTCA 4.

<sup>8</sup> It is not clear that the letters of 13 June 2023 and 23 May 2025 were claims for payment, rather than correspondence informing the respondent of alleged entitlements. The letter of 23 May 2025 closed by suggesting a meeting rather than the transfer of money.

[3233](#) Using clause 6 to create a time line:

- (a) the payment claim was served on 24 December 2025;
- (b) a notice of dispute and any partial payment, had to be given 10 working days after 24 December 2025. Ten working days after 24 December 2025 is 21 January 2026 (excluding the period between 25 December 2025 and 7 January 2026 as required by the definition of 'working days' in the Act);<sup>9</sup>
- (c) the respondent did not give a notice of dispute or make any payment by 21 January 2026;
- (d) the due date for payment of the payment claim was 20 working days after the date of service: 5 February 2026 (excluding the period between 25 December 2025 and 7 January 2026, and Australia Day, 26 January 2026).

[3334](#) The payment dispute arose on 5 February 2026. The application was made within 65 working days thereafter.

#### *Other jurisdictional requirements*

[3435](#) The respondent accepted, correctly, that the other jurisdictional requirements identified in s 33(1)(a) were met.

[3536](#) Based on the materials provided to me, I am satisfied that the contract was a construction contract. I am satisfied that the application was otherwise prepared and served in accordance with s28 of the Act, the contract and works are contracts and works to which the Act applies and that the dispute identified in these proceedings has not been determined or dismissed. It is possible to make a determination within the time limited under the Act.

[3637](#) There is no basis to dismiss the application under s 33(1)(a).

#### **The effect of clause 6**

[3738](#) I turn now to consider the effect of clause 6(2)(b). The issue is the extent to which clause 6 prevents the respondent raising matters which dispute its liability to the applicant or reduce the amount of that liability.

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<sup>9</sup> The letter of 24 December 2025 forming part of the payment claim required payment by 16 January 2026. However, the provisions of the contract (ie clause 6 of Schedule 1) require payment within 20 working days after delivery of the payment claim ie on 5 February 2026. The letter of 24 December 2025 cannot alter the contractual date for payment.

[3839](#) In the response, the respondent raised a number of matters which, it contended, had the consequence that the applicant was not entitled to the sum claimed. In very general terms, it argued that:

- (a) the applicant had comprehensively mismanaged the project;
- (b) the applicant's remeasure of the work done was not accurate and took into account matters where the applicant had assumed the risk, such as the setting out of the works;
- (c) the applicant was responsible for delays on the project, so it was not entitled to liquidated damages. The respondent gave notices of the delays to the applicant;
- (d) the applicant was not entitled to claim refunds in relation to negative or descoping variations because the descoping had been agreed between the parties;
- (e) the applicant did not identify how the claims in respect of variations were calculated; and
- (f) the applicant was not entitled to claim for over certification of the assessment of the respondent's payment claim of 14 April 2023 because the assessment exactly reflects the field assessment of its site representative at the time.

[3940](#) In addition, the respondent identified three 'counterclaims' at paragraph [103] of the response:

- (a) return of the retention of \$356,301;
- (b) payment in respect of use of the temporary fencing procured by the respondent, after the respondent was directed to leave site totalling \$758,800; and
- (c) costs for providing draw wires in two sites of \$97,200.

The respondent expanded on these matters at [104] to [119] of the response.

[4041](#) A respondent is not able to bring a counterclaim as part of an adjudication, that is, seek a determination that the applicant must pay the respondent. A respondent may, however, raise facts or circumstances which reduce the liability of the respondent to the applicant. The matters which the respondent described as counterclaims might operate by way of a set off or defence to the applicant's payment claim.

[4142](#) The applicant contended that it was not open to the respondent to raise any matters, including the set offs so as to reduce the respondent's liability. It relied on clause 6(2) and the respondent's undisputed failure to give a notice of dispute within 10 working days after delivery of the payment claim. It contended that, as a result, the

respondent was required to pay the whole of the payment claim and that the respondent was precluded from disputing that entitlement.

[4243](#) Although the applicant clearly raised this issue in the application,<sup>10</sup> the respondent did not address it in its original response. I considered that some distinction might be drawn between matters raised in a response which went to the merits of an applicant's claim and matters which reduce by way of set off a respondent's liability for the applicant's claim. Consequently, I requested the further submissions referred to at paragraph [9] above.

[4344](#) The respondent did not address the effect of clause 6 in its submissions of 5 May 2026 either. In its responsive submissions dated 6 May 2026, the respondent pointed out that jurisdiction under the Act arises when a payment dispute arises, and that the intention of the Act was that payment should be received for work actually done. The dispute should be resolved by an assessment of the dispute 'on the merits'.<sup>11</sup>

[4445](#) The fundamental difficulty with the respondent's position is that the 'merits' depend on the terms of the contract. If the contract between the parties contain clause 6 of Schedule 1 and the effect of clause 6(2) is to preclude the recipient of a payment claim, in this case the respondent, disputing the underlying factual basis for the claimant's claim, a determination giving effect to that clause reflects the merits of the parties entitlements.

[4546](#) Kelly J made the point in *Inpex Operations Australia Pty Ltd v JKC Australia LNG Pty Ltd*.<sup>11</sup>

I do not agree that an adjudicator must always look into the underlying "merits" of whether or not an amount claimed in a payment claim was "due" in the sense that the underlying work had been performed and correctly valued under the contract. As has been said many times in cases connected with this Act, the focus of the Act is on the contract. If the contract between the parties provides for a claim to be paid in full if not disputed within a given time, then

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<sup>10</sup> At [6(c)] and [57]

<sup>11</sup> At [9].

<sup>11</sup> [2017] NTSC 45 at [58].

there is no reason why an adjudicator ought not give effect to that provision in making a determination on the merits under s 33(1)(b), and every reason why he should.

The Court of Appeal in the same case said:

As the court below effectively determined, where the contract between the parties (as found) provides for a claim to be paid in full if not disputed within a specified time, then in giving effect to that provision an adjudicator is making a determination as required by the merits of the case.<sup>12</sup>

The adjudicator had, in the *Inpex* matter, concluded that clause 6 of Schedule 1 was implied in the contract between the parties. He applied it and determined that the respondent was liable to pay the amount claimed in the adjudication, notwithstanding that the respondent had disputed the payment claim after the 10 working day period.

[4647](#) It is arguable that a different position applies in respect to claims for set offs, or at least set offs which do not contest or dispute the primary liability of the respondent to the claimant. So, in the present case, it might be argued that the respondent's claim for return of the retention consequent on achieving practical completion is independent of its liability for liquidated damages arising from delay in achieving practical completion. Setting off return of retention does not involve a dispute about the liability for liquidated damages.

[4748](#) The references in the judgement of Kelly J at first instance and in the Court of Appeal to 'payment in full' suggest that clause 6(2) should be approached on the basis that no debate about the extent of the respondent's liability is permitted, and that no reduction in the net payment by the recipient of a payment claim should be allowed.

[4849](#) However, the decision of Pritchard J of the Supreme Court of WA in *Total Eden Pty Ltd v Charteris*<sup>13</sup> suggests a narrower operation for clause 6. That case concerned sections 17 and 18 of the *Construction Contracts Act, 2004* (WA) and clause 7 of that Act. Those provisions are similar to, but different from, s 20 and clause 6 of Schedule 1 of the Act. In broad terms, s 17 of the WA Act deals with implication of provisions about 'when and how a party is to respond' to a payment claim and s 18 deals with 'when a payment must be made'. The WA Act effectively splits up s 20 of the Act into two separate matters, so that (WA) clauses 7(1) and (2), which deal with 'when and how a party is to respond', might be implied while (WA) clause 7(3), which deals with

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<sup>12</sup> Sub Nom *JKC Australia LNG Pty Ltd v Inpex Operations Australia Pty Ltd* [2018] NTCA 6 at [69].

<sup>13</sup> [2018] WASC 60.

payment, might not be implied. The language of clause 7(3) is similar to that of clause 6(2). Both clauses require payment of the 'whole of the amount of the claim'.

[4950](#) In *Total Eden*, there was a written provision dealing with when payment is to be made, so the provisions of (WA) clause 7(3)(b) dealing with when payment was to be made,<sup>14</sup> were not implied into the contract.<sup>15</sup> It was not, therefore, necessary for Her Honour to consider the operation of WA clause 7(3). However, Her Honour went on to deal with the situation if the whole of WA clause 7 was implied into the contract (ie the provisions dealing with responding to a payment claim) and clause 7(3). She said:

... even if clause 7(3) was properly implied into the Contract in this case, it either could not or did not exclude Total Eden's recourse to a claim of set off'.

Pritchard J approach the matter from the following position:

The right to claim an equitable set off can be excluded by contract between the parties. However, the usual principle of contractual construction is that clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of the contract which arise by operation of law.<sup>40</sup> Accordingly, a contractual term would need to very clearly express, whether by express words, or possibly by necessary implication, the parties' intention that any right to an equitable set off was excluded.<sup>41</sup> Subclause 7(3) does not deal expressly with the entitlement of a party to a construction claim to dispute its liability to make a payment claim, nor does it expressly exclude any rights to claim an equitable set off. Nor, in my view, do the words 'unless the claim has been rejected or wholly disputed in accordance with subclause (1)' convey with the necessary clarity an implication that failure to dispute a claim within the time frame specified in cl 7(1) is intended to preclude reliance on equitable remedies.<sup>17</sup>

[5051](#) The applicant contended that the approach of Pritchard J in *Total Eden* was not applicable to claims under the Northern Territory legislation. I accept this contention.

[5152](#) Firstly, the remarks of Pritchard J set out above were did not, strictly form part of the reasoning of the decision — she held that (WA) clause 7(3) did not apply.

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<sup>14</sup> The approximate equivalent of NT clause 6(2)(b).

<sup>15</sup> At [49].

<sup>17</sup> At [60].

[5253](#) Second, the operation ss 17 and 18 of the WA Act are relevantly different from the operation of s 20 of the NT Act. The WA Act permits implication of part of clause 7. The NT Act does not permit implication of only part of clause 6.<sup>16</sup>

[5354](#) Third, the language used by Kelly J and the Court of Appeal is broad and emphatic. Remarks by Southwood J in *K&J Burns*<sup>17</sup> at to similar effect.

[5455](#) Fourth, the interpretation of (NT) clause 6 advanced by the applicant is consistent with the purpose of the Act. The purpose of the Act is to maintain cash flow within the contracting chain, in general, the flow of cash from principals to sub-contractors. Although the Act permits principals to use the Act, the clause must have the same effect and operation whether it is relied on by a principal or a contractor. Permitting a principal to raise new grounds for non-payment by way of set off after the 10 day 'dispute period' does not assist cash flow.

[5556](#) It should also be recalled that clause 6(2)(b) occurs in the context of a process for resolution of payment disputes. Dispute resolution is assisted by requiring the recipient of a payment claim to articulate its grounds for non-payment at an early stage and giving real consequences for a failure to do so.

[5657](#) It is also relevant that giving a broad effect to clause 6(2) does not prevent the recipient of a payment claim ever relying on claims of set off. It may do so if the dispute proceeds to Court. The exclusion of the right to raise a set off is not permanent exclusion. In the present case, for example, the respondent could pursue its claim for the retention in court proceedings or, by way of payment claim against the present applicant.

[5758](#) I consider that, properly construed, the contract, particularly, clause 6(2) of Schedule 1, has the effect that the respondent is obliged to pay the whole of a payment claim made against it, without deduction for set offs, where the respondent does not give notice of dispute as contemplated by clauses 6(1) of Schedule 1.

### **The merits**

[5859](#) Because of the operation of clause 6, determination of the merits of the payment claim requires me to determine whether:

- (a) the applicant made a payment claim against the respondent;
- (b) the respondent gave a notice of dispute in respect of that payment claim; and

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<sup>16</sup> JKC at [48].

<sup>17</sup> At [78].

- (c) if the respondent did not give a notice of dispute, whether the amount claimed has been paid.

5960 The applicant made a payment claim for \$~~1,505,526.93~~ ~~1,542,863.89~~ on 24 December 2025. The respondent did not give a notice disputing the payment claim by 21 January 2026. The respondent has failed to pay the amount of the payment claim by 5 February 2026. It is liable to pay the amount of the claim.

6061 It is not appropriate for me to consider or express views about the various matters raised by the respondent in its response.

### Interest

6162 The applicant is entitled to interest on the GST free component of the payment claim from 7 February 2026 to the date of this determination at interest is payable pursuant to Schedule 1, Division 6 of the SOP Act and the Construction Contracts (Security of Payments) Regulations 2005 (the Regulations. The prescribed rate is equal to that prescribed under section 85 of the Supreme Court Act 1979 (NT), ie 8% per annum.

6263 Interest comes to \$~~31,449.06~~ 30,688.

### Costs

6364 The usual rule is that each party bears its own costs. In this case, however, the application was associated with the respondent's failure to provide a notice disputing the payment claim.

6465 The respondent ought to pay the whole of my fees. Both parties provided security for my fees, which I will use to pay my account. The respondent should reimburse the applicant for its contribution. This comes to \$7,714.75.

Date: 11 May 2026



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DS Ellis  
Adjudicator

## Schedule 2: Confidential Information

The following information is confidential:

- 1 The names of the parties and their representatives; and 2  
The location of the works.

A handwritten signature in blue ink, appearing to be "B. Li.", is located to the right of the list. The signature is written in a cursive style with a period at the end.