

IN THE MATTER of an Adjudication  
pursuant to the Construction Contracts  
(Security of Payments) Act 2004 (NT) ("**The Act**")

BETWEEN:

[Redacted] ("**Applicant**")

and

[Redacted] ("**Respondent**")

### **REASONS FOR DECISION**

1. On 24 June 2019 I was appointed Adjudicator to determine a payment dispute between the Applicant and the Respondent by the Resolution Institute (**Institute**) as a Prescribed Appointer under r.5 of the *Construction Contracts (Security of Payments) Regulations 2005* (**Regulations**). I received the Letter of Appointment and the Application documents electronically from the Institute that same day 24 June 2019.
2. On 29 June 2019 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I sought submissions until 3:00pm CST on Tuesday, 2 July 2019, should either party object to the appointment. There were no objections to my appointment.
3. In my letter of 29 June 2019 I confirmed that, on the basis of service of the Application on the Appointer 20 June 2019, which is the date the Application was made, by my calculations the Response would be due on or before 4 July 2019. I requested that the parties let me know immediately if that was not the case.

4. In my letter of 29 June 2019 I also confirmed that I would accept service of the Response by email with any attachment documents to be made available through a drop box accessible by all parties to the adjudication and that service by electronic means would comply with ss.8 and 9 of the *Electronic Transactions (Northern Territory) Act 2000*. I requested the parties confirm in writing their acceptance or otherwise of the electronic service process by 3:00pm CST on Tuesday, 2 July 2019.
5. On 1 July 2019 both the Applicant and the Respondent sent me an email advising that they had no objections to my appointment as Adjudicator and confirmed acceptance of service of the Response and document attachments by electronic means.
6. The Application was served on the Respondent on 19 June 2019 and then on the Appointer on 20 June 2019, however neither party raised this as an issue.
7. Service of the Application on the Respondent establishes the date the Application was made under s.28 of the Act and the Response under s.29 of the Act is therefore due on or before 3 July 2019.
8. On 3 July 2019 and within time the Respondent served the Response, including the attachments, via email and copied all parties to the Adjudication.
9. On 5 July 2019 I confirmed receipt of the Response and within time under s.29 of the Act.

### ***Introduction***

10. This Adjudication arises out of a “Memorandum of Collaboration” (**MOC**), relevantly a construction contract entered into between the Applicant and the Respondent where they jointly engaged in providing a rooftop solar power installation for [*project details and location redacted*] in the Northern Territory of Australia (**Project**). The MOC required the Applicant to provide the technical and engineering expertise for the solar installations and required the Respondent to provide the service delivery of the Project under a contract the Respondent had entered into with [the principal] (**Contract**).

11. The MOC holds terms, including recitals of the responsibilities held by each party, such that it is a formal agreement for the “...*complete design, manufacture, supply, installation, commissioning and warranty required to complete the Project...*”.
12. The MOC also sets out the method for the financial remuneration of each party based upon principles where:
  - (i) The Respondent managed the financials for the Project through their business accounting system on a “*cost accrual*” model;
  - (ii) All costs would be charged to the Project; and
  - (iii) Final Project Profit (**FPP**) would be reconciled and distributed on the basis of 66.6% to the Respondent and 33.4% to the Applicant.
13. Under the terms the FPP would only become available once all obligations had been performed under the Contract.
14. There are no detailed payment terms in the MOC.
15. The Applicant claims that it is entitled to be paid the sum of \$11,330.00 (including GST) for project management, engineering and design of the solar installation for the Project, including the deliverable documentation.
16. A total claim of **\$11,330.00 (including GST)**.
17. The Applicant seeks interest on its claim at the small business rate of 12.0% per annum on the unpaid claim.
18. The Applicant seeks costs of the adjudication to be paid in full by the Respondent due to the punitive and frivolous nature of the dispute.
19. The Respondent submits that the Applicant’s payment claim is not a valid claim due to the following reasons:
  - (a) insufficient information provided with the claim;

- (b) the Respondent not being given an opportunity to verify the hours spent on the Project;
  - (c) The Respondent has not signed the time sheets accepting the accuracy of the time spent on the Project; and
  - (d) The work carried out by the Applicant was not fit for purpose.
20. The Respondent also submits, in the alternative, a counterclaim comprising two invoices, the first being a claim for overpayment in the contract in the sum of \$8,536.00 (including GST) and the second being a counterclaim for rectification works to the Applicant's work in the sum of \$45,535.62 (including GST).
21. I note at this time that the Respondent's second component of counterclaim was made on a "*without prejudice*" basis, however that correspondence is provided in the adjudication documents by the Respondent and referred to by the Applicant. It is clear that the Applicant and the Respondent waived any rights to confidentiality to the counterclaim documents and have sought to have these included and considered in this adjudication.
22. A total counterclaim of **\$54,071.62 (including GST)**.
23. The Respondent does not seek interest on the counterclaim.
24. The Respondent seeks costs of the Adjudication to be paid by the Applicant.

### ***Procedural Background***

#### The Application

25. The Application was served on the Respondent on 19 June 2019 and then served on the Appointer on 20 June 2019 and comprises a general submission and 19 attachments (APPENDIX 1 to APPENDIX 19) with exhibits in each attachment. The attachments, *inter alia*, include:
- (a) a copy of the MOC agreement;

- (b) a copy of the termination for convenience correspondence;
- (c) copies of settlement proposal, letter of demand and dispute notice;
- (d) a copy of the Applicant's Invoice No. INV-0075;
- (e) a copy of the documents for a previous adjudication, including a response and the determination; and
- (f) supporting evidence, including statutory declarations, email correspondence between the parties and design certificates relied upon in the general submission.

26. The Applicant's claim was submitted to the Respondent on 12 March 2019.

27. The Application was served on the Respondent on 19 June 2019 and on the Appointer on 20 June 2019 pursuant to s.28 of the Act.

#### The Response

28. The Response dated 1 July 2019 comprises a general submission and 15 attachments (APPENDIX 1 to APPENDIX 15) with exhibits in each attachment. The attachments, *inter alia*, include:

- (a) copies of various tax invoices relating to the overall dispute;
- (b) the Applicant's recorded hours for engineering, design and management of the Project;
- (c) a copy of the Respondent's letter setting out the reasons for rejecting the Applicant's payment claim; and
- (d) additional supporting evidence, tax invoices and email correspondence between the parties relied on in the general submission.

29. The Response was served on 3 July 2019 pursuant to s.29 of the Act.

**Adjudicator's Jurisdiction and the Act**

30. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.
31. Section 4 of the Act – **Site in the Territory** – the site is a site at [address redacted] in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of s.4 of the Act.
32. Section 5 of the Act - **Construction Contract** - the MOC agreement is a contract agreement which sets out the agreement made between the Applicant and the Respondent for the delivery of the Project which is a construction project. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the MOC. I am satisfied that the MOC is a construction contract for the purposes of the Act as prescribed under s.5(1)(a) of the Act.
33. Section 6 of the Act – **Construction Work** – the work is to design, supply and install solar power systems to buildings at the [site details redacted]. That work falls within the provisions of s.6(1) of the Act and I am satisfied that the work is construction work for the purposes of the Act.
34. Section 4 of the Act - **Payment Claim** – means a claim made under a construction contract:
- “(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations; or
- (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.”
35. The Applicant says that it made a valid payment claim on 12 March 2019 in the form of a tax invoice INV-0075 and attachments for the project management, engineering services, completion of designs and documentation completed under the MOC.

36. The Applicant submits that on 22 March 2019 the Respondent rejected the payment claim tax invoice which caused the "*Triggering Event*" for a payment dispute for adjudication.
37. The Respondent says that the Applicant has invoiced identical amounts in three separate invoices over a period of six months being for work allegedly done but which is unable to be verified.
38. The Respondent submits in its letter of 22 March 2019 that the payment claim is not signed and is therefore invalid.
39. The Respondent also submits that there is insufficient information provided with the payment claim that would enable a proper evaluation of the hours claimed as being relevant to the tasks required for the performance of the Applicant's obligations under the contract.

#### The validity of a payment claim under the Contract

40. For there to be a valid payment claim to adjudicate, the claim must be made under the stipulations of the construction contract for the claim to comply with the provisions of s.4 of the Act. A construction contract need not be in writing (see s.5(1) of the Act), however the parties to a construction contract are required to be consistent with the agreement they have made or any agreed variation to the contract.
41. The Respondent has argued that the payment claim is not signed and is therefore invalid. A signature on the payment claim is not a requirement of the MOC and while the implied provisions of the Schedule at s.5(1)(h) requires a payment claim to be signed I am not with the Respondent on this point as that argument has only been advanced as a last resort in the Response to the Application. As I have pointed out in my earlier determination on the MOC, which has been included in the Application at Appendix 8, prior to the Applicant making an application for adjudication, invoices were submitted by the Applicant for consideration and payment by the Respondent. That process was followed by both parties for some three months during which the work in the Project was performed and invoiced and payment was made within 21 days

on average. The parties, by their conduct, varied the MOC and established a payment process, albeit in an ad-hoc manner, whereby the Applicant's payment claims were dealt with under the MOC.

42. The MOC also contains payment terms at clause 2 where costs are recorded and managed under the Respondent's accounting system using a unique numbering convention and costs are charged to the Project for various services at an agreed rate. Upon completion of the Project, distribution (payment) of the FPP is to occur in accordance with the rules set out in the MOC.
43. While the MOC does not necessarily follow all the conventions one normally encounters in a standard form construction contract, the Objective of the Act (see s.3 of the Act) is to "...*promote security of payments under construction contracts...*" and the Objective of adjudication (see s.26 of the Act) is to "...*determine the dispute fairly and as rapidly, informally and inexpensively as possible...*". In so doing an adjudicator is required to consider the agreement made between parties to a construction contract in a broad sense and not narrowly restrict the terms or their operation by the use of the Act, particularly where the parties have conducted themselves so as to be bound by a certain process that may not necessarily be written into the contract terms.
44. An agreed process followed by the parties to the construction contract, that can be recognised by the documentation of that process, would not allow the Act to step in and invalidate that process.
45. Neither party sought to include the provisions set out in ss.5 and 6 of the Schedule of the Act for the making of and responding to payment claims made under the MOC. I am not convinced by the Respondent's argument requiring the payment claim to be signed such that the implied provisions of the Act are now introduced so they might be beneficial to the Respondent and that the prior conduct between the parties to the MOC should be set aside in favour of the implied provisions of the Act. To do so would invalidate and unwind at least eight prior payment claims that have been made, assessed and paid under the MOC by agreement between the parties.



### Making a payment claim under the Contract

46. The parties to the MOC have followed a process of making a payment claim by way of a tax invoice and associated documents for work carried out in the Project. That invoice is then assessed and issues discussed by *to* and *fro* email or meetings between the parties and payment is then made when agreement on each particular payment claim is reached. This process has taken twenty-one days on average.
47. The Applicant made a payment claim in the form of a tax invoice on 12 March 2019.
48. By letter dated 22 March 2019 the Respondent rejected the payment claim stating that there was “...*insufficient information provide [sic] on the attachment to the invoice to establish the specific time periods the services relate to, the particulars and substance of the services provided and how the quantities of the service claimed are applicable to the contract, therefore to enable [the respondent] to evaluate the hours spent as being relevant to tasks required to be carried out in accordance with your obligations under the contract.....*”. The Respondent also stated in the Response at paragraph 9 that “.....*it seems inconceivable that each invoice amount covering a period of 6 months for varying work scope, would result in the invoices, issued on 3 separate occasions over several months being for identical amounts....*”.

### Repeat Payment Claims

49. As set out in paragraph [33] above, the Respondent says that the Applicant has invoiced identical amounts in three separate invoices over a period of six months being for work allegedly done but which is unable to be verified.
50. In so doing the Respondent raises the argument that this is a possible repeat claim. This argument would follow the appellant decision of Mildren J, Southward J and Riley J in agreement in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) NTCA 4 at 16 (**Mac-Attack**) which found that the adjudicator had erred in consideration of hire invoices that had claimed the same amount for the same equipment hire as an earlier invoice.

51. Turning to the three tax invoices, each in the sum of \$11,330.00 (including GST), in conjunction with the timesheet attached to the tax invoice, it can be seen that the total sum calculated for the engineering, design and management for the Project is \$34,960.00 (including GST) from which three invoices have been raised, relevantly INV-0045, INV-0060 and INV-0075 all made in the same sum of \$11,330.00 (including GST).
52. The Applicant says that the payment claim, tax invoice INV-0075 “...*is the third in a line of three invoices for \$11,330 issued for the project management, engineering services, completion of designs and documentation completed under the MOC. The budget for this work was set at \$20,000 per the project total of \$60,000....*”.
53. While the Applicant fails to clearly show how the claimed sum has been calculated from the timesheets attached to the invoice, it is clear that this payment claim is not a repeat claim process similar to that seen in *Mac-Attack*, but follows a standard construction contract process of a rolling claim that is regularly reconciled against the work done at the time of the claim. The MOC provides for this reconciliation process against the budget. That the Applicant has not provided detailed calculations with the payment claim showing which hours were specifically expended in the provision of the contracted services at each invoiced event, is a matter for the merits of the determination.
54. In *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1 (***K & J Burns***) at 121 to 124 Kelly J dealt with the issue of ‘repeat claims’ and ‘rolling claims’ with respect to an adjudicator’s jurisdiction, where her Honour said:
- “...[121] As *Southwood J* made clear, the contract in question in ***AJ Lucas*** (*AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another* (2009) 25 NTLR 14) [my emphasis] *provided for monthly invoices and made no provision for “repeat claims”*.”

[122] *In this case, the contract contained a form of provision for the making of payment claims which is common in construction contracts. It provided for what is effectively a “rolling claim”. That is to say, each payment claim is to specify the whole of the value of the work said to have been performed, from which must be deducted the amount already paid, the balance being the amount claimed on that payment claim. It is readily apparent that if any payment claim is not paid in full:*

*(a) a payment dispute will arise in relation to the part unpaid when the claim is due for payment under the contract; and*

*(b) despite that, each subsequent payment claim must include a “repeat claim” for that unpaid part.*

[123] *There is nothing in the Act which renders this form of contractual provision unenforceable – or takes it outside the power of an adjudicator to adjudicate upon. What the adjudicator is obliged to do when faced with a payment claim under a contract of this kind is the same as he does for any other contract: he should look at the contract and determine whether the payment claim complies with the provisions of the contract, when the amount claimed would be due for payment under the contract (if payable), and whether the application has been lodged within 90 days of that date.*

[124] *I agree with Southwood J (in his reasons on this appeal) that a payment dispute does not come to an end – or a fresh payment dispute necessarily arise – simply because a further claim is presented seeking payment of precisely the same amounts for the performance of precisely the same work. However, I also agree with Olsson AJ that there is no reason why a contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. In each case one must look to the contract to determine when a payment was due and hence when the payment dispute arose.....”.*

55. The payment claim made as tax invoice INV-0075 and attachments on 12 March 2019 was reconciled by the Applicant against the amount budgeted in the Project.

56. I am of the view that, together with the reconciliation, this tax invoice and attached documentation comprised a payment claim made under the process that was followed by the parties in their performance of the MOC agreement.
57. In reaching this conclusion I rely on the decision of Kelly J in *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors* [2017] NTSC 1 at 30 which compels an adjudicator to first determine “.....*whether the contractor has made a claim under the contract for payment of an amount in relation to the performance by the contractor of its obligations under the contract...*” and to then look to the terms of the construction contract and ask “....*whether what purports to be a payment claim is capable of giving rise to a liability on the part of the principal to pay.....*”. While the adjudicator’s determination in that case was ultimately set aside on appeal, the adjudicator’s obligations when considering a claim for payment set out by Her Honour remain sound and this follows a similar finding in *K & J Burns*.
58. The payment claim is not out of time to be adjudicated and I am satisfied that the Applicant’s payment claim made on 12 March 2019 complies with the stipulations of the construction contract, relevantly the MOC for making a claim for payment for work done in the Project. The parties clearly establish this process in the MOC and the Applicant’s payment claim is therefore a valid payment claim for the purposes of s.4 of the Act.
59. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:
- “(a) *a payment claim has been made under a contract and either:*
- (i) *the claim has been rejected or wholly or partly disputed; or*
- (ii) *when the amount claimed is due to be paid, the amount has not been paid in full; or*
- (b) *when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*
- (c) *when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.”*

60. The Applicant made a valid payment claim on 12 March 2019 in the form of a tax invoice and attachments for work that the Applicant says was carried out on the Project under the provision of the construction contract, relevantly the MOC.
61. Unlike a standard construction contract, the MOC is a collaborative agreement between two contractors to provide the construction work to the Principal under a second contract entered into by only one of the contractors, the Respondent. The MOC more relevantly resembles that of a partnership where each party provides work into the Project under the Contract. The MOC requires each party to account for its costs into the Respondent's accounting system using a unique job number convention. Those costs are then reconciled and paid to each party according to a process agreed under the MOC, including variation by conduct to the MOC. The final profit for the Project is shared between the parties on an agreed percentage basis at the end of the Contract when all services have been provided and all obligations discharged in accordance with the Contract.
62. The Respondent's letter of 22 March 2019 clearly disputed and rejected the Applicant's payment claim in that letter as follows:
- “.....[the Respondent] formally gives notice to [the Applicant] on 22 March 2019 that it disputes the [Applicant's] Invoice No 0075 issued on 12 March 2019....”.*
63. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that that payment dispute commenced on 23 March 2019 under section 8(a)(ii) of the Act.
64. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application served on the Respondent on 19 March 2019 and the Institute on 20 March 2019.
65. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.

66. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 1 July 2019, served on the Applicant and the Adjudicator on 3 July 2019.
67. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 7.
68. Having now considered the relevant sections of the Act and the Regulations and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

***Merits of the Claim***

69. The Payment Claim made by the Applicant on 12 March 2019 is in the form of Tax Invoice INV-0075 and attachments (**Invoice 75**) for labour hours for project management, sales, engineering, drafting and procurement and logistic services for the Project in the sum of a total claim of **\$11,330.00 (including GST)**.
70. The Respondent has lodged a counterclaim in the form of two tax invoices containing the following components:
- (i) A Tax Invoice INV-515 for an overcharge by the Applicant for labour hours for project management, sales, engineering, drafting and procurement and logistic services for the Project in the sum of **\$8,536.00 (including GST)**; and
  - (ii) A Tax Invoice INV-516 for rework to the earthing system due to cabling design size issues for the Project in the sum of **\$45,535.62 (including GST)**.

A total counterclaim of **\$54,071.62 (excluding GST)**.

71. I deal with each component of the Applicant's and Respondent's claim below.

Tax Invoice INV-0075 a claim for labour hours expended on the Project in the sum of \$11,330.00 (including GST)

72. The Applicant submits that “...[the Applicant] believes the main and possibly only matter to be determined in this adjudication is whether or not specific services carried out by [the Applicant] under the scope of works in the MOC are payable by [the Respondent] on presentation of an invoice regarding those specific works.....”.
73. The Applicant also submits that Invoice 75 “.....is the third in a line of three invoices for \$11,330 issued for the project management, engineering services, completion of designs and documentation completed under the MOC. The budget for this work was set at \$20,000 per the project total of \$60,000....”.
74. The Respondent says that there is “....insufficient information provide [sic] on the attachment to the invoice to establish the specific time periods the services relate to, the particulars and substance of the services provided and how the quantities of the service claimed are applicable to the contract, therefore to enable [the Respondent] to evaluate the hours spent as being relevant to tasks required to be carried out in accordance with your obligations under the contract.....”.
75. The Respondent also states in the Response at paragraph 9 that “.....it seems inconceivable that each invoice amount covering a period of 6 months for varying work scope, would result in the invoices, issued on 3 separate occasions over several months being for identical amounts....”.
76. While it appears that the Applicant has undertaken some work in relation to the project management, engineering services, completion of designs and documentation completed under the MOC, it is entirely unclear as to precisely what hours are being claimed in Invoice 75 from the timesheets as there is simply no correlation between the amount claimed and the two components on the invoice.
77. The two components on Invoice 75 are as follows:

<b>Description</b>	<b>Quantity</b>	<b>Unit Price</b>	<b>G</b>	<b>S</b>	<b>GST</b>	<b>Amount AUD</b>
<b>Project Management, Sales Application and Services</b> engineering	30.00	105.00	1	0	10%	3,150.00
<b>Drafting, Documentation, Procurement management and further services</b> and logistic	110.00	65.00	1	0	10%	7,150.00
<b>Please refer to timesheets attached for details</b>						
<b>Subtotal</b>						<b>10,300.00</b>
<b>TOTAL GST 10%</b>						<b>1,030.00</b>
<b>TOTAL AUD</b>						<b>11,330.00</b>

78. The timesheet attachments to Invoice 75 have entries in hours worked between the period 27 November 2017 to 15 November 2018 for a total of 439.5 hours that have been shared between two people whose initials are 'SH' and 'NT'. Of the 140 hours claimed in Invoice 75, there is no information available that would identify precisely what hours could be attributed to the work done in the Project at that time.
79. By reference to the earlier two tax invoices INV-0045 and INV-0060, it is evident that each invoice has also claimed 140 hours of work done on the Project. By calculation over the three invoices the Applicant has made a claim for 420 hours worked in the Project, but on each occasion has included the same time sheets expecting the Respondent to identify and pay the relevant hours from those time sheets.
80. The Respondent raised this issue with the Applicant in the dispute letter dated 22 March 2019 and requested detailed supporting information for the Payment Claim as follows:
- “.....a. *Detailed list of the actual works carried out;*  
b. *Areas within the MOC that required the work to be carried out;*  
c. *Documents produced as a result of the hours spent,*  
i. *Drawings,*  
ii. *Specifications,*  
iii. *Evaluations,*  
d. *Qualifications of the personnel carrying out the engineering function,*  
e. *Other elements that may assist in the evaluation of your claim.....”.*



81. There is no evidence provided in the Application that shows any attempt on the part of the Applicant to reconcile the hours expended with the deliverables under the MOC to arrive at the amount claimed in the Payment Claim (Invoice 75).
82. I am not with the Applicant on the Payment Claim as the information requested by the Respondent was entirely relevant to enable proper assessment of the Applicant's Payment Claim to be undertaken. It was essential for the Applicant to clearly identify the components of claim against the supporting evidence sought by the Respondent for each component of claim. The Applicant failed to do this when making the Payment Claim.
83. I value the Applicant's Payment Claim at "**NIL**".

Tax Invoice INV-515 a counterclaim for overpayment of the labour hours claimed by the Applicant in Tax Invoice INV-0045 in the sum of \$8,536.00 (including GST)

84. The Respondent submits that the Applicant's payment claim invoice INV-0045 was overpaid in the sum of \$8,536.00 (including GST) for a total of 80 hours of the 140 hours claimed and paid by the Respondent on 3 October 2018.
85. In support of this counterclaim, the Respondent submits a letter dated 22 March 2019 which sets out dates and claim amounts for labour hours which the Respondent says has been made by the Applicant as an overclaim for work in the Project.
86. The Applicant says that this counterclaim has been dealt with in an earlier determination dated 30 April 2019 which has "*....expressly rejected this claim and the letter from [the Respondent] did not include any new information or reference to the Adjudication....*".
87. My determination number 26.19.01 dated 30 April 2019 between the parties is included in the Application at Appendix 8. In that determination at paragraphs [93] to [96] I have determined a counterclaim by the Respondent in the sum of \$9,894.50 (including GST) relating to tax invoice INV-0045 as follows:

“.....93. *The Respondent seeks the repayment of the sum of \$9,894.50 (including GST) due work done in the Project by the Applicant prior to signing the MOC.*

94. *Under the process that the Applicant and the Respondent adopted to vary the MOC for making, assessing and paying payment claims, Tax Invoice INV-0045 is a valid payment claim. The Respondent has treated this payment claim as a valid payment claim for the purposes of arguing for the non-payment of the Applicant’s project management and engineering costs in the Adjudication.*

95. *The Respondent has claimed that payment of Tax Invoice INV-0045 was paid to the Applicant as an advance against the FPP for the Project. It cannot now be recharacterised to be an overpayment.*

96. *I am not with the Respondent on this counterclaim and value the claim at “NIL”.....”.*

88. The Respondent’s letter dated 22 March 2019 again attempts to recharacterise the advance as an overpayment, but adds little new evidence other than a series of unsubstantiated calculations in the text of the letter deducting 80 of the 140 hours claimed by the Applicant.

89. I am not with the Respondent in this counterclaim as the Respondent has failed to substantiate the deductions made with any real evidence such as site work logs, supervisors’ diaries and/or site gate entry records.

90. I value this component of the Respondent’s Counterclaim at “NIL”.

Tax Invoice INV-516 a counterclaim for Earthing Rework due to cable sizing issues in the sum of \$45,535.62 (including GST)

91. The Respondent has made this counterclaim in a letter dated 13 June 2019 on a “*without prejudice*” basis and I have dealt with the waiver of confidentiality by the parties at paragraph [21] of this determination.

92. The Respondent submits that the Applicant's design failed to allow for sufficient cable sizing, relevantly 16 square mm as opposed to the 4 mm identified in the Applicant's materials list for the Project.
93. The Applicant denies the counterclaim and says that the work is outside the scope of work agreed in the MOC.
94. It is entirely unclear as to whether the line item in the materials list is a cable that is 4mm in diameter or a 4 square mm cable consistent with the cable sizing standards of AS/NZ 5033:2014. A cable with a diameter of 4mm would, by calculation, be a 13 square mm cable. The Respondent has failed to provide any supporting evidence on this point other than a list of materials.
95. The Respondent in the letter of 13 June 2019 states that a "*....third party identified that the Australian Standard AS/NZ 5033 clause 4.4.2.1 dictates that earthing installation in areas of high lighting density be a minimum cross-sectional area of 16mm<sup>2</sup>.....*". The Respondent failed to provide any third-party evidence on this point, such as a report by the third party.
96. The Applicant has stated that the work is outside the scope of work agreed in the MOC.
97. The MOC at 'Appendix A' provides that the overall engineering requirements for the Project is a shared responsibility and, presumably, the Respondent has had equal input into the design and overall approval of the design prior to it being implemented into the Project for their client. The Respondent cannot now seek to shift that responsibility to the Applicant as a counterclaim as the Respondent was equally responsible for any sizing deficiencies in the cabling for the Project.
98. I am not with the Respondent on this counterclaim and I value the counterclaim component at "**NIL**".

***Interest on the claim***

99. I have determined that there is no payment to be made by either party and, as such, there is no interest component available in the dispute.

100. I award no interest in this determination.

### **Summary**

101. In summary of the material findings, I determine:

- (a) The contract to be a construction contract under the Act;
- (b) The work to be construction work under the Act;
- (c) The site to be a site in the Northern Territory under the Act;
- (d) The claim to be a valid payment claim under the Act;
- (e) The dispute to be a payment dispute under the Act;
- (f) The Application to be a valid application under the Act;
- (g) The Response to be a valid response under the Act;
- (h) The Applicant's project management and engineering payment claim to fall;
- (i) The Respondent's counterclaim to fall;
- (j) There is no award of Interest.

102. I determine that there is no amount to be paid by either party in relation to the Applicant's Payment Claim or the Respondent's Counterclaim.

### **Costs**

103. The normal starting position for costs of an adjudication is set out in section 36(1) and section 46(4) of the Act is that each party bear their own costs in relation to an adjudication.

104. The Act at section 36(2) gives Adjudicators discretion to award costs:

*"...if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs..."*

105. I have not found either the Application or the Response without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.
106. The test for determining whether a proceeding is vexatious is set out by Roden J in Attorney General v Wentworth (1988) 14 NSWLR 481 at 491 where:
- “1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
- 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
- 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.”*
107. I have not found either the Applicant or the Respondent to have made any unfounded submissions or caused additional costs due to vexatious or frivolous conduct and I am not persuaded that either party has acted in a way that requires me to apply the provisions of s.36(2) of the Act.
108. I make no decision under s.36(2) of the Act.
109. I determine that the parties bear their own legal costs under s.36(1) of the Act and the parties pay the cost of the adjudication of the dispute in equal shares under s.46(4) of the Act.

**Confidential Information**

110. The following information is confidential:
- (a) the identity of the parties;
  - (b) the identity of the principal; and

(c) the location of the works.

***Closing Remarks***

111. This is already a lengthy set of reasons, necessarily in light of the fact that the claim and several arguments I have had to consider each involved factual consideration unique to that item. I have focused on what have seemed to me to be those submissions that are most central. But I have considered all the material put before me, and the parties should not assume that my not reciting any particular piece of submission or evidence means that I have overlooked any material in this adjudication.

DATED: 17 July 2019

Reference: 080.

Rod Perkins  
Adjudicator No. 26