

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

BETWEEN:

(“**Applicant**”)

and

(“**Respondent**”)

### **REASONS FOR DECISION**

1. On 9 June 2015 the Applicant served its Application dated 7 June 2015, on the Master Builders Northern Territory (“MBNT”) as prescribed appointer under the Act. The Respondent has confirmed it was also served a copy of the Application on 9 June 2015. By letter from MBNT dated 9 June 2015, I was appointed Adjudicator to determine the payment dispute between the parties. I received the letter and the Application from MBNT’s offices on 9 June 2015.
2. On 14 June 2015, and during the course of the Adjudication, the Respondent wrote to the Applicant as follows:

*“Dear [sir]*

*We act for [the Respondent].*

*We have a copy of [your] application for adjudication of an alleged payment dispute with HSEC. It is not clear from our copy which document is intended to be the payment claim satisfying the requirements of the Act. Could you please identify and describe the precise document you say is the payment claim upon which your application is based? If you are able to attach it that would be preferable so as to clear up and avoid any confusion.*

*Our client reserves its rights in respect of the validity of this adjudication.*

*Thank you and regards*

*[redacted]”*

3. While it is entirely unhelpful to the adjudication process and inappropriate for the parties to contact each other during the course of an adjudication, the Respondent apparently confused as to the Applicant's payment claim failed to comply with the requirement to direct all contact to the Adjudicator in such circumstances.

4. On 15 June 2015 I wrote to the Respondent with a copy to the Applicant advising them as follows:

*"Dear [sir],*

*Please refrain from further contact direct with the Applicant in respect of the Application Documents. If you have questions please direct them to me.*

*In the event that further submissions are necessary I will call for those submissions under section 34(2) of the Construction Contracts (Security of Payments) Act.*

*I will also write to the parties later today and set out the administrative conduct of the Adjudication.*

*Thank you for your assistance."*

5. On 16 June 2015 I received a further email from the Respondent claiming prejudice in preparing the Response because I had not identified nor clarified the Applicant's payment claim. The content of that email is as follows:

*"We refer to your email to the parties of 15 June 2015 below. We have not received anything further from you to date. Our client has a short time frame in which to prepare and serve its response. Our client is prejudiced in preparing its response by being unaware of the document that is the payment claim relied on by the applicant.*

*The adjudication application refers to "The Payment Claim in the sum of \$99,952.73 (GST inclusive)". There is no such document in the copy of the application served on the respondent. There are a large number of separate invoices attached to the application, however they are dated after the contract was terminated, they do not describe what the applicant has done in sufficient detail, they are not signed and there has been no agreement to adjudicate 2 or more payment disputes simultaneously. It is not clear whether the applicant is relying on one or more of those invoices as the payment claim, some other document or whether there is another document that has not been included in the copy of the application served on the respondent.*

*The lack of clarity is prejudicing our client by limiting the time within which it has to respond. While we acknowledge your email of yesterday, in our view the existence of the payment claim is fundamental to your jurisdiction and we cannot presently identify the document referred to in the application. That is why we first wrote to the applicant yesterday.*

*We request clarification as a matter of urgency.”*

6. On 16 June 2015 I also received an email from the Applicant attempting to clarify the Payment Claim as follows:

*“To assist you, I believe that [the Respondent’s representative] is reading the claim incorrectly.*

*The total amount is in the Statement attached in the appendix which was sent to [the Respondent] about early May. It is a summary of invoices outstanding.*

*Yes my invoices are dated after I have left [the Respondent] but they are for work done by me whilst I was there.*

*The 3 subsequent folders (numbered on the side) are giving you evidence of the documents that I had signed whilst I was still the nominee at [the Respondent].*

*The last folder has all the jobs that I could not invoice because of the lack of information that I require from [the Respondent] to complete.*

*Trust this clarifies the situation for you. Should you require any further information please let me know.*

*Regards [the Applicant’s representative]”*

7. On that same day 16 June 2015 I responded to the parties as follows:

The Applicant

*“Dear [sir],*

*Thank you for your email below.*

*I did not call for this information or further submissions under section 34(2) of the Construction Contracts (Security of Payments) Act.*

*Accordingly, while I had fully understood your claim, I cannot take into consideration the information in your email below for the purposes of the Adjudication.*

*Again, I remind the parties to refrain from contacting each other direct and or continually engaging in unsolicited correspondence.*

*I will contact the parties should I have any questions or require further submissions on a particular issue.”*

### The Respondent

*“Dear [sir],*

*Thank you for your email below.*

*I fail to see how your client is prejudiced in its Response.*

*The Construction Contracts (Security of Payments) Act is unambiguous.*

*In this respect, I remind the parties that it is my role to adjudicate the dispute. It is not to provide advice to either party to the dispute for to do so would require my withdrawal as adjudicator.”*

8. Later that same day 16 June 2015 I wrote to the parties seeking any objections to my appointment and setting out the administrative conduct of the adjudication.
9. On 17 June 2015 I received another email from the Respondent which attempted to raise issues with the adjudication procedure I had set out in my letter of 16 June 2015. Rather than engage in another round of to and fro email correspondence, I invited the Respondent to undertake a careful reading of my letter of 16 June 2015.
10. On 18 June 2015 I received a further unsolicited email from the Respondent and it was apparent that the Respondent was now attempting to argue and restrict the Adjudicator’s powers under the Act to induce a dismissal of the Application. In the email the Respondent also raised serious allegations of collusion and apprehended bias in my appointment as Adjudicator. The content of that email is as follows:

*“We read all correspondence very carefully; however, we sought clarification because of three things, which remain unclear.*

*First, it is not clear to us what power you have under the Act to request submissions on objecting to your appointment. Your power to request submissions is generally limited to obtaining sufficient information to make a determination (s 34(2)). Hence we were concerned to ensure you were not requesting submissions in relation to any aspect of the determination itself, including whether to dismiss the application under s 33.*

*Secondly, assuming you are indeed requesting submissions on objecting to your appointment, it is not clear to us what power you would have to reverse your appointment in any event, when you have already accepted the appointment and decided that you have no conflict of interest, as stated in your letter of 16 June 2015. If a party wants to object on that ground, he or she applies to the Registrar under s 31(3) and [the Respondent] reserves its right to do so at any time before a decision or determination is made. There does not appear to be any other provision in the Act under which a party can object to an appointment. Further, it is not clear why you would invite “either party” to say why they object to your appointment, when the applicant personally requested your appointment.*

*That brings us to the third point and [the Respondent’s] submissions in relation to your appointment. It is not clear why the applicant specifically requested you to be appointed as the adjudicator of this purported payment dispute. Nor is it clear why the MBANT appears to have acceded to that request without consideration. The obvious inference that can be made however is that, for some reason, the applicant believed that he might get a more favourable result if you are the adjudicator, but also, and just as importantly, that the independent safeguard in the Act of the prescribed appointer could be circumvented. We note that the applicant is, or has recently been for a number of years, a member of the MBANT’s Executive Committee and has also lectured in its courses and judged in its award ceremonies. The MBANT’s letter to HSEC of 9 June 2015 advising of your appointment was not strictly accurate when it said it had been served with an application “requesting MBANT to appoint an adjudicator”; in fact, the applicant’s letter to the MBANT states that he had already “appointed” you and merely tells the MBANT to contact you to engage your services. The parties had not agreed to appoint you, the applicant made no attempt to procure HSEC’s agreement before purporting to appoint you and we advise that HSEC would not have agreed to appoint you for this case.*

*In HSEC’s submission, the mechanism in the Act of the prescribed appointer is there to ensure a fair and independent appointment. Otherwise, the Act would have allowed a party to appoint any adjudicator it wished directly. However, that is what has in effect occurred in this case. The safeguard appears to have been circumvented. These grounds, along with apprehended bias from the automatic appointment of the applicant’s favoured adjudicator, will impugn this adjudication, and those involved, in a subsequent judicial review in the event you proceed to make a determination in the applicant’s favour.*

*For these reasons, in HSEC’s submission, the appropriate course is for the present application to be withdrawn. Alternatively, if you consider you have the power to now withdraw from your appointment (which is implicit in your request for submissions) then we invite you to do so.”*

On that same day 18 June 2015 and following the reasoning of Barr J in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20 at [42] to ensure there was no denial of natural justice and no absence of evidence upon which a determination is to be made, I called for further submissions from the parties on the issues of conflict of interest and apprehension of bias as follows:

*“Dear [sirs]*

*It is not for an Adjudicator to enter into a debate with respect to a party’s interpretation of the law or the Act.*

*I am not with [the Respondent’s representative] on points 1 and 2 raised in his email below and I will deal with those issues in my determination.*

*Should either party wish to raise an objection on the basis of conflict of interest or apprehension of bias, as is alleged by the Respondent’s representative] below, please clearly set out the grounds on which you rely.*

*I will provide the parties further time until **3:00pm Friday, 19 June 2015** for these submissions and I call for these submissions under s34(6) of the Act.*

*My letter dated 16 June 2015 confirmed the Application was served on 9 June 2015 and, by my calculations, the Response is due on or before 23 June 2015.*

*Thank you for your continued assistance.”*

11. I received no further submissions from either party as to the issues of conflict of interest and apprehension of bias that were raised by the Respondent in its email of 18 June 2015.
12. On 23 June 2015 I received by courier the Response documents dated 23 June 2015.
13. Having attended to both the Application and Response, and due to the numerous and complex issues of the matter, I wrote to the Construction Contracts Registrar, with a copy to the parties, on 3 July 2015 and sought some additional time in which to make my decision under section 34(3)(a).

14. On 6 July 2015 the Construction Contracts Registrar approved my request for additional time, which gave me up to and including 17 July 2015 to determine the payment dispute in relation to the Applicant's payment claim. There were no objections from the parties.

### ***Introduction***

15. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to provide [*professional construction related services*] in the Northern Territory of Australia ("Contract").
16. The Applicant claims that it is entitled to be paid its Payment Claim, dated 3 May 2015, in the sum of \$99,952.73 (including GST), which is the remaining balance of the outstanding invoices in the Contract. The Applicant has not been paid any of the outstanding invoices in the Contract. The total remaining contract value is \$99,952.73 (including GST).
17. The Applicant also seeks interest on its Payment Claim at the applicable rate of interest under section 35 of the Act or such other amount determined by the Adjudicator.
18. The Applicant seeks Costs of the Adjudication and the Application fee be paid in full by the Respondent, plus costs associated with the preparation of the Application and` such other amount determined by the Adjudicator.
19. The Respondent submits that I should dismiss the Application because it has not been properly made under the provisions of section 28 of the Act in that:
  - (i) the contract was terminated and, absent a construction contract at the time of making the payment claim, there can be no payment dispute upon which an application for adjudication could be grounded;

- (ii) there is no identifiable valid payment claim that complies with section 19 of the Act and the Schedule Implied Provisions, Division 4, section 5 that could give rise to an adjudication application; and
  - (iii) there has been an improper appointment of the Adjudicator that attempts to circumvent the independent safeguards of the Act.
20. The Respondent submits that I should dismiss the Application without making a determination on the merits under section 33(1)(a)(i) or, alternatively, section 33(1)(a)(ii), or determine that the Respondent is to make a reduced payment to the Applicant in relation to the 3 May 2015 Payment Claim in the sum of \$27,451.18 (including GST).
21. The Respondent is silent on the question of Interest and Costs of the Adjudication.

### ***Procedural Background***

#### The Application

22. The Application is dated 7 June 2015 and comprises five folders enclosing a general submission and four appendix attachments in the first folder, and four other folders. The five folders include:
- (a) a copy of the outstanding invoices and associated documents;
  - (b) a copy of the payment claim;
  - (c) a copy of job sheets with associated documents; and
  - (d) supporting evidence including certificates, permit documents, some design documents, emails and correspondence between the parties relied upon in the general submission.
23. The Payment Claim was submitted to the Respondent on 3 May 2015. The Respondent has not paid the Payment Claim.



24. The Application was served pursuant to section 28 of the Act.

#### The Response

25. The Response is dated 23 June 2015 and comprises a general submission and 40 listed annexure attachments. The attachments include:

- (a) a statutory declaration dated 23 June 2015;
- (b) copies of the Applicant's Tax Invoices and associated documents;
- (c) inspection records and a corresponding register;
- (d) email correspondence between the parties; and
- (e) correspondence from third parties.

26. The Response was served pursuant to section 29 of the Act.

#### ***Adjudicator's Jurisdiction and the Act***

27. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.

28. Section 4 of the Act – **Site in the Territory** – the various sites at which the work was conducted are sites physically located within the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

29. Section 5 of the Act - **Construction Contract** - the Contract is oral thereby fully engaging the implied provisions of Part 2, Division 2, sections 16 to 25 and the Schedule Implied Provisions ("Implied Provisions"). The parties agree that they entered into a construction contract in the terms set out by the Applicant in section 2, paragraphs 2.1 to 2.3 of the Application. I am satisfied that the Contract is a construction services contract for the purposes of the Act as prescribed under section 5(1)(c) and (d) of the Act.

30. Section 6 of the Act – **Construction Work** – the work is to provide [*construction related*] services (“Services”) to various construction projects located in the Northern Territory. I am satisfied that the work is construction work for the purposes of the Act.
31. 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.”*
32. The Applicant says that it is entitled to payment on account of its payment claim, which includes various Tax Invoices and a Statement showing the listing of those invoices, dated 3 May 2015. The Application submits that the oral agreement the Applicant had with the Respondent and the previous conduct of that agreement are grounds for an entitlement to be paid for the Services the Applicant performed.
33. The Respondent disagrees and says that there is no identifiable valid payment claim as the unsigned Statement of 3 May 2015 merely refers to a number of previous unsigned invoices. The Respondent submits that the Implied Provisions are engaged in the Contract and that the Applicant’s payment claim does not comply with section 5(1)(h) of Division 4 of the Schedule Implied Provisions as it was “*not signed by the claimant*”.
34. The Respondent also submits that the Applicant terminated the Contract on 21 January 2015 and therefore the Applicant’s Payment Claim of 3 May 2015, made after the Contract was terminated, cannot be a valid payment claim under section 4 of the Act that could cause a payment dispute upon which an application for adjudication could be made under section 28 of the Act.

35. I deal with each of these issues, bearing in mind that an adjudication is triggered by a *Payment Dispute* pursuant to section 8 of the Act, which first requires a validly made payment claim made under a construction contract for the purposes of section 4 of the Act.

#### Termination of the Contract by the Applicant

36. Attending to Annexure 3 of the Response, there is an email dated 22 January 2015 from the Registrar Building Practitioners Board to the Respondent stating:

*“Please be advised [the Applicant’s representative] has advised the Building Practitioners Board he no longer works for your company, and has been removed as a nominee for your company effective from yesterday.”*

37. On the basis of this email the Respondent says that the contract was terminated many months before the Applicant issued its 3 May 2015 payment claim and, as such, that payment claim cannot cause a payment dispute under the Act, which is the essential precondition to an application for adjudication.
38. The issue of making a payment claim seeking payment for the work performed prior to termination of a contract was considered by the Court in *McNab NQ Pty Ltd v Walkrete Pty Ltd & Ors* [2013] QSC 128 which upheld the decision of Lyons J in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors* [2011] QSC 67 in that a valid termination of a contract will have the effect of extinguishing a party’s ability to successfully use the Act to recover payment. These cases, however, deal with Queensland legislation which has a ‘reference date’ provision in relation to the making of payment claims. The Northern Territory legislation has no such provision other than to define, at section 4 of the Act, that a payment claim is to be made under a construction contract.

39. There is one further difference between this matter and the above cited cases: in those cases it was the Respondent Principal who terminated the contract thereby severing the opportunity for the Applicant Subcontractor to apply for adjudication for non-payment, whereas in this matter it is Applicant who has purportedly terminated the contract.

40. In reaching a landing on this issue, I turn to the section 3 'Object' of the Act which states:

“... (1) *The object of this Act is to promote security of payments under construction contracts.*

(2) *The object of this Act is to be achieved by:*

*(a) facilitating timely payments between the parties to construction contracts; and*

*(b) providing for the rapid resolution of payment disputes arising under construction contracts; and*

*(c) providing mechanisms for the rapid recovery of payments under construction contracts....’*

Each objective looks to a 'construction contract' to satisfy the timely resolution of payment disputes by recovering payments under "*construction contracts*". Absent a construction contract, the Object of the Act cannot be achieved and the opportunity to recover payment subsequently falls.

41. I am satisfied that the Contract was terminated by the Applicant on 22 January 2015 and this much is confirmed by another email from the Applicant to the Respondent dated 13 February 2015, at Appendix D of the Application, where it is clear that the Applicant now works for another company. As a result, the Applicant cannot bring a payment claim under the construction contract after this date as the construction contract has been terminated by the Applicant and is no longer on foot.

#### The Validity of the Payment Claim under the Implied Provisions

42. The parties have agreed that the Contract was wholly oral and I have already established that the Implied Provisions of the Act operate in the Contract.

43. To fulfil the payment claim definition under section 4 of the Act a claim must be made subject to the conditions of the construction contract. This requirement was discussed by Olsson AJ, and agreed with by Kelly J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [232] to [238] where His Honour said:

*[232] It is tantamount to asserting that any specific contractual provisions regulating how and when monies are to become payable under a construction contract are irrelevant to the question of when a party to that contract may raise what can properly be categorised as a payment claim, with a view to generating a payment dispute. i.e. the statute confers jurisdiction on an adjudicator to adjudicate a claim in any case in which a claim is made for payment of monies in relation to a construction contract, there being no requirement to even prima facie relate a payment claim to any specific contractual pre-requisites for such payment.*

*[233] On that argument such pre-requisites only become relevant merits considerations after the adjudicator actually embarks upon the process of adjudication.*

*[234] In my opinion such an approach has the practical effect of ignoring the existence and significance of the word "under" in the statutory definition of "payment claim".*

*[235] According to its normal English connotation, that word signifies "in accordance with", "governed or controlled or bound by", "on condition of" or "subject to", to list but a few of the many applicable dictionary expressions of meaning.*

*[236] Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for monies in accordance with or subject to the conditions of a construction contract.*

*[237] In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction contract is plainly not what is in contemplation by the legislation.*

*[238] Moreover, as a matter of simple logic, a dispute can only arise under s 8 of the statute when a payment claim is properly said to be due to be paid under the relevant construction contract and has been disputed and/or not fully paid. That situation can only arise in relation to a payment claim that purports to be of a genus recognised and provided for by the contract."*

44. In this Contract the terms for making a payment claim are set out under the Schedule Implied Provisions, Division 4, section 5(1) which sets out the “*Content of claim for payment*” as follows:

“(1) *A payment claim under this contract must:*

- (a) *be in writing; and*
- (b) *be addressed to the party to which the claim is made; and*
- (c) *state the name of the claimant; and*
- (d) *state the date of the claim; and*
- (d) *state the amount claimed; and*
- (e) *for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and*
- (f) *for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and*
- (g) *be signed by the claimant; and*
- (i) *be given to the party to which the claim is made.”*

45. The Applicant submits in its Application that the current Statement together with copies of the unpaid invoices is the claim for payment under the oral contract agreed between the parties.

46. The Respondent says that the Implied Provisions of the Act are engaged and that the Payment Claim “...*Statement No. 007 is not signed by the claimant, as required by s. 5(1)(h) of Division 4 of the Schedule of the Act, nor were any of the invoices listed in it...*” and as such is not an identifiable valid payment claim under the Contract for the purposes of the Act.

47. The Act is concise in setting out the content of a claim for payment in that it uses the words, at section 5(1) of Division 4 of the Schedule “...*under this contract **must** [my emphasis added]...*” and as such compliance is mandatory.

48. Attendance to the Statement at Appendix C of the Application and the associated Tax Invoices at Appendix B of the Application shows that they are not signed by the Applicant when claiming for payment.
49. I am therefore of the view that the Payment Claim is not a valid payment claim as stipulated under the terms of the Contract for the purposes of section 4 of the Act.
50. 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.”*
51. The Applicant made a payment claim on 3 May 2015 in the form of a Statement and accompanying Invoices for the provision of Services at various construction sites in the Northern Territory.
52. The 3 May 2015 claim in the sum of \$99,952.73 (including GST) was due to be paid, rejected or disputed under the Contract Implied Provisions of Division 5, section 6 of the Schedule within either 14 days by notice of dispute or 28 days if paying whole or part of the claim.
53. The Respondent disputed the claim on 5 May 2015 advising that no further payment would be made until an issue of an Occupancy Permit was resolved on another Project Site.

54. While I am satisfied that there is a dispute over payment between the parties. However, unless there is a valid payment claim that complies with the Contract and that claim is made under a construction contract for the purposes of section 4 of the Act, there can be no payment dispute for the purposes of section 8 of the Act. As I have reasoned at paragraphs 31 to 49 above there is no valid payment claim in this matter that complies with the Contract or a construction contract for the purposes of section 4 of the Act and therefore there can be no payment dispute to adjudicate.
55. I am satisfied that there is no payment dispute for the purposes of section 8 of the Act to adjudicate.
56. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant’s documents, the Application dated 7 June 2015 was served on the Prescribed Appointer, MBNT, on 7 June 2015 and on the Respondent and Adjudicator on 9 June 2015.
57. Before I deal with the Application for Adjudication, the Respondent submits that I should dismiss the Application because it has not been properly made (presumably under the provisions of section 28 of the Act) in that:
- (i) the Application for Adjudication specifically requested my appointment as the Adjudicator which raises an apprehension of bias; and
  - (ii) the Appointer, in making the appointment, has stepped around the independent safeguards in making its appointment.

The Respondent says that the Application should be dismissed under section 33(1)(a)(ii) for being improperly prepared and served in an attempt to circumvent the provisions of the Act.



### Appointment of an Adjudicator

58. When served with an application for adjudication, a Prescribed Appointer must within 5 working days appoint a registered adjudicator to adjudicate the dispute or, if the appointer does not make an appointment, refer the dispute to the Registrar. Section 30 of the Act states:

- “(1) If an application for adjudication is served on a prescribed appointer, the appointer must, within 5 working days after being served:*
- (a) appoint a registered adjudicator to adjudicate the payment dispute concerned; and*
  - (b) send the application and any response received by it to the adjudicator; and*
  - (c) give written notice to the parties and Registrar accordingly.*
- (2) If a prescribed appointer does not make an appointment under subsection (1), the Registrar may appoint a registered adjudicator to adjudicate the payment dispute concerned.*
- (3) If the Registrar makes an appointment under subsection (2), the Registrar must:*
- (a) give written notice to the prescribed appointer accordingly and require the appointer to serve the application and any response received by it on the adjudicator appointed by the Registrar; and*
  - (b) give written notice to the parties accordingly.”*

59. Once an adjudicator is appointed, the role of the Prescribed Appointer ends, that is, it is *functus officio*, and the Adjudicator must then establish his or her jurisdiction, including any conflict of interest, under the provisions of the Act.

60. The Act at section 31 specifically deals with the disqualification of an adjudicator on the grounds of conflict of interest, first as a test applied by the Adjudicator under sections 31(1) and 31(2) as follows:

- “(1) An appointed adjudicator is disqualified from adjudicating the dispute if the adjudicator has a material personal interest in:*
- (a) the payment dispute concerned; or*

(b) *the construction contract under which the dispute has arisen; or*

(c) *any party to the contract.*

(2) *If an appointed adjudicator is disqualified, the adjudicator must give written notice to the parties and Registrar of the disqualification and the reasons for it.....”*

61. Once the appointed Adjudicator establishes that there is no material conflict of interest, a second test may be applied by the parties under section 31(3) by notice to the Registrar and the Registrar may then give a disqualification notice to the Adjudicator, the Act as sections 31(3) through to 31(6) prescribe this process as follows:

“(3) *A party to a payment dispute may apply to the Registrar for, and the Registrar may make, a declaration that the appointed adjudicator is disqualified under subsection (1) from adjudicating the dispute.*

(4) *The application must be made before the person is notified of a decision or determination made under section 33(1).*

(5) *If the Registrar makes the declaration sought, the Registrar must give written notice to the adjudicator and the parties of the declaration.*

(6) *If a notice (a **disqualification notice**) is given by or to an appointed adjudicator under subsection (2) or (5), the adjudicator's appointment ends 5 working days after the date of the disqualification notice unless, before the end of that period, each party gives the adjudicator written authority to continue as the appointed adjudicator.....”*

62. On 16 June 2015 I wrote to the parties declaring no conflict of interest and seeking any objections to my appointment. On 18 June 2015 I received a lengthy email from the Respondent which challenged the power of an adjudicator to seek any objections to his or her appointment as an adjudicator and which further raised a very serious allegation of collusion between the Applicant, the Prescribed Appointer and the Adjudicator.

63. Notwithstanding the express power of an adjudicator under section 34(6) of the Act to determine the adjudicator's own procedure and practice in an adjudication, a point on which the Respondent appeared to be either unfamiliar or unaware, in responding to the allegation I sought further submissions from the parties as to the issues of conflict of interest and apprehended bias raised by the Respondent as follows:

*"Should either party wish to raise an objection on the basis of conflict of interest or apprehension of bias, as is alleged by [the Respondent's representative] below, please clearly set out the grounds on which you rely...."*

64. I received no further submissions from either the Applicant or the Respondent.

65. In establishing my jurisdiction, I attended to the letter in the Application addressed to the MBNT which stated:

*"We also appoint Rod Perkins as Adjudicator for this claim. Please contact Rod Perkins to engage his services."*

66. While it is unusual for an applicant to seek to appoint an adjudicator, the Act certainly does not provide for such circumstances, unless the parties have already agreed and appointed a registered adjudicator who is available, under the construction contract.

67. In the circumstances of this Application, a respondent could seize a tactical advantage in the adjudication to press for a dismissal of the application because the applicant has sought to 'appoint' an adjudicator. However, this is not the prescribed process set out in the Act and, if an adjudicator finds he or she is disqualified either by the first test in section 31(1) of the Act or by the second test in section 31(3) of the Act, then a disqualification notice is given either by the Adjudicator or by the Registrar.

68. Once a disqualification notice is given by either the Adjudicator or the Registrar, then the Applicant under section 31(6A)(a) may make a further application for adjudication under section 28 of the Act. In this Application it appears that the Respondent sought to avoid this process and continued to press the Adjudicator for a dismissal of the Application.
69. I am satisfied that, while the Applicant may have been misguided in its approach to the appointment of an adjudicator, the Respondent did not seek to avail itself of section 31(3) of the Act but chose instead to press for a dismissal of the Application.
70. I do not share the Respondent's view that the independence of the appointment process has been circumvented either through the Applicant in misguidedly seeking to 'appoint' an adjudicator or through the Applicant's membership of MBNT. To subscribe to this view would also mean that the appointment as adjudicator by a Law Society of a lawyer, a member of that Law Society, would automatically give rise to an apprehension of bias or a conflict of interest.
71. In relation to my appointment as the Adjudicator in this case, I am regularly appointed as adjudicator by MBNT, the Housing Industry Association Northern Territory ("HIA"), the Law Society Northern Territory and the Institute of Arbitrators and Mediators Australia ("IAMA"). While I am not a member of either MBNT or HIA, I am a member of both the Law Society Northern Territory and IAMA and I declared there to was no conflict of interest after undertaking the prescribed checks set out in section 31(1) of the Act.
72. I am satisfied that there has been no conflict of interest or bias in my appointment as the Adjudicator of this payment dispute.

### The Application for Adjudication

73. The Applicant says the Application has been prepared and served in accordance with section 28 of the Act.
74. The Respondent says that because there was no construction contract at the time the Applicant made its claim there could not be a payment dispute upon which an application for adjudication could be made.
75. The Respondent also says that a valid payment claim is an essential precondition for a payment dispute and as the claim made by the Applicant did not comply with the Contract it cannot be valid under the Act.
76. As reasoned in paragraphs 31 to 55 above, the Applicant terminated the construction contract before it made its payment claim. The payment claim made was, in any event, not a valid payment claim under the Contract and there was no payment dispute under the Act to cause an adjudication.
77. Based upon these findings, I am satisfied that the Application has not been prepared and served in accordance with section 28 of the Act. The Application has failed the threshold test set out in section 28(1) of the Act in that there was no construction contract at the time the payment claim was made and therefore a payment dispute cannot arise to be adjudicated for the purposes of section 8 of the Act.
78. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to the Respondent's documents in the Response dated 23 June 2015, served on the Applicant and the Adjudicator on 23 June 2015. 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 by Regulation 7.

### The Adjudicator's jurisdiction

79. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the Response and further submissions, I find that I must dismiss the Application without making a determination of the merits under section 33(1)(a)(ii) on the following grounds:

1. the Application has not been prepared and served in accordance with section 28 of the Act in that there was no construction contract at the time of making the payment claim to cause a payment dispute that could be adjudicated by an application made under section 28(1) of the Act; and
2. the Payment Claim made in the Application under section 4 of the Act was not recognised by the Contract or a construction contract, and could not have triggered a Payment Dispute under section 8 of the Act.

### ***Merits of the Claims***

80. I make no finding on the merits as I have dismissed the Application. The Respondent's assessment of payment of a lesser sum for the Services provided by the Applicant cannot be considered in this dismissal.

### ***Interest on the claims***

81. There is no requirement to consider interest as the Application has been dismissed.

### ***Summary***

82. In summary of the material findings, I determine the Application to be dismissed under section 33(1)(a)(ii) of the Act.

83. 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 it.

**Costs**

84. 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.

85. I make no decision under section 36(2) of the Act. The parties must bear their own costs.

***Confidential Information***

86. The following information is confidential:

- (a) the identity of the parties;
- (b) the identity of the principal; and
- (c) the location and nature of the works.

DATED: 17 July 2015

Reference: 080

Rod Perkins  
Adjudicator No. 26