**Adjudication Decision: 58.20.01**

*Construction Contracts (Security of Payments) Act* (NT)

**Adjudicator** (Registration No.) : Chris Lenz (58)

**Applicant’s Name** : [*redacted*]

ACN/ABN :

Address :

**Respondent’s Name** : [*redacted*]

ACN/ABN :

Address :

**Work**

Nature of work : Subcontract for an upgrade to [*redacted*]

Applicant’s trade : Trade Contractor for pavement construction

Location of the construction site : [*redacted*] in the NT

**Payment claim**

Dates : 30 September 2019

Due date for payment for claims : 20 November 2019

Amount of payment dispute : $ 859,290.33 (incl GST)

**Application Detail**

Application service date : 14 January 2020

Appointment date : 17 January 2020

Response Date : 29 January 2020

**Adjudicator’s Decision No jurisdiction** **pursuant to** **s33(1)(a)(ii)** **of the Act**

Amount to be paid : **N/A**

Date payable : **N/A**

Amount of interest : **N/A**

Claimant’s adjudication costs : 50%

Respondent’s adjudication costs : 50%

**Decision Date** : **6 February 2020**

**Confidentiality : N/A**

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# DECISION

I have made a decision under the *Construction Contracts (Security of Payments) Act* ("the Act”), and in respect of the claimant’s adjudication application, all the details of which are shown

on the first page of this decision.

# REASONS

## Background

1. [*The claimant*] was engaged by [*the respondent*), for construction of pavement works for the upgrade of [*details of the works redacted*] at [*site details redacted*] in the NT (the “work”).
2. The work involved the construction of pavement works.
3. There was a written subcontract (Agreement Number 8094U806) executed by the parties on 31 July 2019.
4. A payment claim dated 30 September 2019 was served on the respondent on 1 October 2019.
5. The respondent sent a Notice of Dispute to the claimant on 16 October 2019.
6. The claimant lodged its adjudication application with RICS on 14 January 2020.
7. On 29 January 2020, the respondent provided its adjudication response.
8. The response contained 2 jurisdictional objections prohibiting me determining the matter, as well as providing additional submissions explaining that the claimant had no entitlement.
9. The 2 jurisdictional objections were that:
	1. the application was not served in accordance with the Act (“**wrong** **appointer submission**”);
	2. there was no payment dispute (“**no payment dispute submission**”).
10. On 29 January 2020 I requested submissions from the claimant about the **wrong** **appointer submission** as well as from the respondent in reply, and both parties provided me the submissions within the time requested.

## Material provided in the adjudication

**Application**

1. I received an electronic copy of the application documents from RICS received from the claimant. The documents were divided into:
	1. The signed adjudication application on the RICS form dated 14 January 2020;
	2. Tab A - 12 pages of Submissions together with a copy of a High Court Authority of *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37, and an extract of page 224 from *Brooking on Building Contracts*;
	3. Tab B – Statutory declaration of [*GPF*] declared on 10 January 2020;
	4. Tab C – Annexure GF01 to GF23 to [*GPF’s*] statutory declaration.
2. I find that the adjudication application was made on 14 January 2020, as this was accepted by the respondent in paragraph 1.2 in its submissions.

**Response**

1. The respondent served its adjudication response on 29 January 2020 in 2 folders. It consisted of:
	1. One folder containing:
		* 1. Tab A - 35 pages of legal submissions;
			2. Tab B - The Subcontract;
			3. Tab C – The payment claim
			4. Tab D – The payment schedule;
			5. Tab E – Statutory declaration of [*LI*] dated 24 January 2020 with 18 attachments;
			6. Tab F – Statutory Declaration of [*NR*] with 17 attachments.
	2. One folder containing 12 Case authorities and an extract from the Macquarie Dictionary.

## Jurisdictional objections

1. Before making a determination of the adjudication application merits, it was necessary to consider the “*jurisdictional objections*”.
2. At paragraph 8.1 of its submissions, the respondent submitted in support of its first jurisdictional objection that a claimant was required to **comply in all respects** with the adjudication process, citing the Court of Appeal Northern Territory decision of *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Anor* (2009) 25 NTLR 1 (“*AJ Lucas*”), 34 per Southwood J with Riley J agreeing.
3. The respondent provided the Supreme Court decision and not the Court of Appeal decision in its response, but I was able to find the Court of Appeal decision referenced by the respondent and read it closely.
4. It is appropriate to extract paragraph [34] of Southwood J’s judgement in *AJ Lucas* to demonstrate the tension in the Act between:
	1. facilitating timely payments, to have a rapid resolution of payment disputes [**Objects and its achievement** section 3(2)(a) and (b) of the Act]; and
	2. dismissing an application if the requirements of section 33(1)(a) of the Act are not fulfilled.
5. Southwood J held:

*“[34] Such a construction of s 33(1) of the Act is based in the first instance upon the text of the section. Subsection 33(1)(a) expressly provides that the adjudicator must dismiss the application without making a determination of its merits if the criteria set out in s 33(1)(a)(i) to (iv) are not fulfilled. The criteria themselves are aimed at ensuring the application to be adjudicated is about a payment dispute in respect of a payment claim made under a construction contract, the application has been commenced reasonably promptly and the subject matter of the application is not too complex and its resolution will not take too long. The express purpose of the Act is confined to promoting the security of payments under construction contracts. The object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts; providing for the rapid resolution of payment disputes arising under construction contracts; and providing mechanisms for the rapid recovery of payments under construction contracts. The object of the adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.*

1. The jurisdictional objections bedevil the process of adjudication because they slow the rapid resolution of a payment dispute. However, it is fundamental that an adjudicator has jurisdiction to make a determination, and the analysis of submissions in deciding jurisdiction need to be very carefully carried out.
2. I turn to the first jurisdictional objection.

### Wrong appointer submission

***Respondent’s submissions***

1. Under heading C and at paragraph 10.2 of its submissions the respondent stated that section 28 of the Act required that the applicant served the application on the prescribed appointer, and in contravention of section 28 (1)(c)(ii) of the Act it had made the application to RICS DRS.
2. Earlier at paragraph 7.2 of its submissions, the respondent stated that the subcontract recorded that the Institute of Mediators and Arbitrators Australia (sic) (now the Resolution Institute) was the prescribed appointer for the purposes of the Act.
3. At paragraph 9.1 of its submissions, the respondent identified that clause 22.7 of the contract in the third paragraph provided:

*“The parties agree that any adjudication application under the Security of Payment Legislation must be made to the Authorised Nominating Authority of Prescribed Appointer”.*

1. At paragraph 9.2 of its submissions, the respondent referred to the subcontract definition for the “Security of Payment Legislation” which was defined as the *Construction Contracts (Security of Payments) Act 2004 (NT)*.
2. Its paragraph 9.2 submissions also identified the subcontract definition of the “Authorised Nominating Authority or Prescribed Appointer” as being the local chapter of the *Institute of Arbitrators and Mediators Australia* in the Northern Territory.
3. At paragraph 8.3 of its submissions, the respondent referred to section 33(1)(a)(ii) of the Act which provided that I **must dismiss the application** without making a determination on its merits if the application had not been prepared and served in accordance with section 28 of the Act.
4. At paragraph 8.4 of its submissions, the respondent emphasised that I **must dismiss** the application if it had not been served in accordance with section 28 of the Act.
5. It was evident that the claimant was not aware of this jurisdictional objection until receiving the adjudication response. As a matter of natural justice, I considered it imperative that the claimant be afforded the opportunity to provide its submissions on this important jurisdictional point. Accordingly, on 29 January 2020, I requested that the claimant respond to the respondent’s paragraph C jurisdictional submissions to which I now turn.

***Claimant’s submissions and the respondent’s reply submissions (where applicable)***

1. The summary of the claimant’s submissions was that.
	1. The parties had not appointed a prescribed appointer for the purposes of section 28(c) of the Act [expanded upon in paragraphs 4 to 6 inclusive];
	2. the *Resolution Institute* and the *Institute of Arbitrators and Mediators Australia* are not synonymous;
	3. the *Resolution Institute* was not a prescribed appointer [paragraphs 11 and 12];
	4. the local chapter the *Institute of Arbitrators and Mediators Australia* was not a prescribed appointer [paragraph 7]; with the consequence that:
	5. by serving on RICS, it had not contravened the contract, nor served the wrong prescribed appointer; and
	6. section 33(1)(a)(ii) of the Act was not invoked.
2. I carefully considered each of the claimant’s submissions in detail.

*No prescribed appointer* [paragraphs 4 to 6 of the claimant’s submission inclusive]

1. The thrust of the claimant’s submissions was that clause 22.7 of the contract was not an exhaustive statement as to the process by which the parties had agreed to have payment disputes adjudicated.
2. In support of this submission, the claimant extracted the first paragraph of clause 22.7 which specifically stated that:

“*Nothing in the Subcontract will affect, restrict or limit the Subcontractor’s Right to:*

*(a) make an adjudication application in relation to a payment dispute under the Security of Payments Legislation; and*

*(b) suspend the WUS under the Security of Payments Legislation.*

1. The claimant also extracted the third paragraph of the clause to which the respondent had already referred and extracted in paragraph 9.1 of its submissions.
2. At paragraph 5, the claimant argued that to construe clause 22.7 as a mandatory appointment for a prescribed appointer for the purpose of section 28(c) of the Act would *deprive* it of the right to choose a prescribed appointer in accordance with section 28(c)(iii) of the Act.
3. The claimant submitted that such a *deprivation* necessarily affected, restricted or limited its rights to make an adjudication application in relation to a payment dispute under the Act.
4. With respect, I cannot agree that clause 22.7 creates the *deprivation* identified by the claimant. Whilst I accept that nothing in the subcontract will affect, restrict or limit the claimant’s right to make an adjudication application, the parties specifically agreed in the third paragraph of clause 22.7, that the adjudication application **must be made** (my emphasis) to the Authorised Nominating Authority of (sic) Prescribed Appointer.
5. The claimant identified a *right* to choose a prescribed appointer in accordance with section 28(c)(iii) of the Act, and that this right was being *deprived*. In my view such a *right* only arises if section 28(c)(i) and (ii) are not enlivened by the parties’ contract.
6. In my view if the parties had agreed to appoint a registered adjudicator who consented, or they appointed a Prescribed Appointer, then the *right* identified in section 28(c)(iii) of the Act would never arise because of the presence of the word “**otherwise**” at the start of section 28(c)(iii) of the Act.
7. I note that the respondent took issue with the *deprivation* point in paragraphs 7.4 through to 7.9 of its reply submissions in which it emphasised the parties’ freedom of contract to accept all procedural requirements, and in so doing, the claimant’s rights to make an adjudication application remained unaffected. I agree with this argument, because the parties agreed on a particular Authorised Nominating Authority or Prescribed Appointer, which means that s28(c)(ii) of the Act was enlivened, *providing such an entity existed*. This proviso is an important one, and forms the nucleus of the claimant’s further submissions, which are considered below.
8. I find that the *right* that the claimant submitted as having been being *deprived*, was only a right contingent on the parties not falling within s28(c)(i) or (ii) of the Act, and I have found that s28(c)(ii) of the Act may be enlivened because of the nomination of a Prescribed Appointer, subject to the proviso of the entity’s existence.
9. I revisited the respondent’s response submissions about the parties’ agreement to make the adjudication application to the Prescribed Appointer in the Northern Territory, with which the claimant did not directly engage. I am satisfied that clause 22.7, together with the definitions in clause 2 of the subcontract required the claimant to apply to the *local chapter* of the Institute of Arbitrators and Mediators Australia (“IAMA”).
10. At paragraph 6 of its submissions, the claimant submitted that even if the definition of Authorised Nominating Authority or Prescribed Appointer were accepted (which it refuted), the language in the contract was not one of *appointment*, but at best an agreement on the identity of a prescribed appointer.
11. I am not satisfied that this fine distinction hinders the operation of an adjudication application, because if an application is made to an Authorised Nominating Authority (“ANA”) or a Prescribed Appointer, then an appointment of an adjudicator must take place for the application to be considered and determined under the Act.
12. I accept the respondent’s reply submissions in paragraph 8, that the agreement of the identity of the appointer is indistinguishable from appointment, particularly when the Macquarie dictionary definition meaning of appointment is, “*the act of fixing by mutual agreement.*”
13. Having considered the submissions, the subcontract and the Act, I find that the *local chapter* of IAMA was the agreed ANA or prescribed Appointer.
14. The claimant’s further arguments focussed on IAMA and its local chapters not fulfilling the function of a prescribed appointer, and that the Resolution Institute could not be a prescribed appointer, to which I now turn.

*The Institute of Arbitrators and Mediators Australia and its local chapters do not fulfil the function of a prescribed appointer and Resolution Institute is not a prescribed appointer to which an adjudication application can be made*

1. The claimant provided company search evidence that IAMA exists as an entity.
2. Paragraph 7 of the claimant’s submissions provided that:

“The Contract’s reference to *“Northern Territory, the local chapter of the Institute of Arbitrators and Mediators Australia”* together with the consequential provision in clause 22.7 are invalid and unenforceable. Clause 40.1 of the Contract requires their severance in the Northern Territory.”

1. This submission alone did not explain why severance was necessary, and I presumed it was necessary to consider the claimant’s further submissions up until paragraph 18 where severance was again agitated.
2. I considered that parties’ contending submissions (including the respondent’s reply submissions), and the issues arising on this very important jurisdictional point had to be carefully listed so that a careful analysis of the underlying merits could progressively occur. I list them as follows, under issue headings in simple language, not necessarily used by the parties:

*Institute of Arbitrators and Mediators Australia = Resolution Institute*

1. In paragraph 7.2 of the response submissions, the respondent submitted that the subcontract clearly recorded the parties’ agreement to the Institute of Arbitrators and Mediators Australia (now the Resolution Institute) as a Prescribed Appointer.
2. In paragraph 9.3 of the response submissions, the respondent submitted that the application should have been made to the local chapter of the Institute of Arbitrators and Mediators Australia, now operating under the name “Resolution Institute”.
3. In paragraph 8 of the claimant submissions, the claimant took issue with this approach on the basis that the respondent was treating the Institute of Arbitrators and Mediators Australia and Resolution Institute interchangeably.
4. In paragraphs 9 and 10 of the claimant’s submissions, the claimant provided company search evidence of the Institute of Arbitrators and Mediators Australia and the Resolution Institute.
5. In paragraph 9 of the claimant submissions, it submitted that Clause 5 of the *Construction Contract (Security of Payments) Regulation 2015* (the “Regulations”) stated that the Institute of Arbitrators and Mediators of Australia was a Prescribed Appointer in section 4 of the Act.

*Finding on this issue*

1. I agree with the claimant that it is not appropriate to consider the two entities interchangeably because the evidence provided by the claimant identified two separate corporate entities.
2. The Institute of Arbitrators and Mediators of Australia is a Prescribed Appointer under Clause 5 of the Regulations, but the Resolution Institute is not on the list.
3. I note that in the reply submissions, under the heading of “**Overwhelming Evidence of Acceptance and Policy Issues** ”at paragraphs 6.1 and 6.2, the respondent referred to the Northern Territory’s government website identifying the Resolution Institute (formerly IAMA) as a Registered Appointer.
4. The respondent also referred to a telephone conversation the respondent had with the Construction Contract’s Registrar of the Northern Territory as further evidence that the Resolution Institute is accepted as having been appointed by IAMA to administer its role as prescribed appointer.
5. I appreciate that section 34(1)(b) of the Act provides that I am not bound by the rules of evidence and may inform myself in any way I consider appropriate.
6. However, when confronted with a vitally important jurisdictional objection to an adjudication, I consider it inappropriate to pay much attention to evidence provided on websites, hearsay evidence or submissions that the entire industry and government is aware of the Resolution Institute’s role. In my view such evidence is either not admissible or it should be given little weight.
7. Adjudicators are obliged to consider jurisdictional objections very seriously, and careful evaluation of the submissions and facts to reach a correct decision according to law. I refer to the decision of Justice Southwood (with whom Riley J agreed) in *AJ Lucas* at paragraph [33] as follows:

*“[33] The statutory criteria set out in s 33(1)(a)(i) to (iv) are of such a nature that the satisfaction of the adjudicator as to whether they have been fulfilled or not must be both reasonable and founded upon a correct understanding of the law. A reasonable and legally correct state of satisfaction is a necessary jurisdictional fact. If such a jurisdictional fact does not exist, an adjudicator would be acting in excess of jurisdiction if he made a determination of an application on the merits. The adjudicator cannot give himself jurisdiction by erroneously deciding that the fact or event exists. “*

1. I appreciate that in *AJ Lucas,* the adjudicator erroneously made 5 findings which were found to be errors of law by misinterpreting relevant provisions of the Act [paragraph 44 of *AJ Lucas*]. In that regard the adjudicator made findings of jurisdictional facts which did not exist.
2. It is in no parties’ interest for an adjudicator to find jurisdiction when none exists, but in deciding jurisdiction, in my view it is critically important for an adjudicator to carefully analyse legally admissible evidence of facts and carefully and correctly apply the law to those facts. In so doing, it is appropriate to strictly apply the common law rules governing contracts as well as the rules regarding statutory interpretation.
3. Clause 5 of the Regulations identifies IAMA as a Prescribed Appointer in relation to section 4 of the Act. There is no evidence to suggest that that the Resolution Institute is a Prescribed Appointer under the Act.
4. Accordingly, I accept the claimant’s paragraph 14 submissions and reject the respondent’s submissions that the adjudication application should have been made to the Resolution Institute.
5. However, at paragraph 13 of its submissions, the claimant identified that the subcontract referred to the local chapter of IAMA as the appointer, and that local chapters were an organisational feature of IAMA, and the Resolution Institute did not record continued existences of any local chapters.
6. To my mind this approaches the nub of the issue in this case, which is how to construe clause 22.7 regarding the Prescribed Appointer when no local chapters exist.
7. At paragraph 18 of its submissions, the claimant stated that the parties had not appointed a Prescribed Appointer under section 28(1)(c)(i) of the Act. It added that, based on its submissions in paragraphs 7 to 17, the purported appointment of a Prescribed Appointer had to be severed.
8. Unfortunately, the claimant provided no submissions regarding the analysis and criteria required for *severance* of a clause of the contract, apart from its reference to clause 40.1 of the subcontract regarding a provision of the subcontract as being invalid and unenforceable.
9. Clause 40.1 reads as follows:

*“If any provision of the Subcontract is or becomes illegal, invalid, unenforceable or void in a particular jurisdiction, the legality, validity and enforceability of the Subcontract will not be affected (unless the Subcontract is rendered incapable of operation in the absence of such provision) and the subcontract will be read as if the part has been deleted in that jurisdiction only.”*

1. One of the critical issues is to decide the extent of invalidity or unenforceability in carrying out the *severance*.
2. The respondent’s reply submissions touched on *severance* from paragraphs 10.1 through to 10.7 and emphasised that there should not be wholesale severance of entire clauses which manifestly change the intended operation of the subcontract citing the House of Lords case of *Esso Petroleum Co Ltd v Harpers Garrett (Stourport) Ltd* [1968] AC 269 (“*Esso*”).
3. Unfortunately, the respondent did not refer to any passages of the case in support of this proposition. My reading of *Esso* discovered that it was considering the issue of a restraint of trade, and I could not find a declaration of law dealing with *severance*.
4. Given the importance of this issue of *severance*, and the lack of authority provided by either party, and being allowed by s34(1)(b) of the Act to inform myself in any way, I researched the *Laws of Australia*[[1]](#footnote-1) (“*LOA*”) which identified that an inessential uncertain term or word(s) may be severed from the contract citing (inter-alia) *Fitzgerald v Masters* (1956) 95 CLR 420 (“*Masters*”).
5. In Masters, Dixon CJ and Fullagar J stated:

*“6. The argument cannot, in our opinion, be sustained. It depends, in the last analysis, on an inference that the parties did not intend to contract otherwise than by reference to the terms of a document which they mistakenly believed to exist. It is only putting the same thing in another way if we say that the question is whether cl. 8 is severable from the rest of the instrument. No effect can be given to cl. 8, but there is good reason, in our opinion, for saying that cl. 8 is severable. No inference can be drawn that the parties did not intend to contract unless effect could be given to cl.8. It seems indeed almost absurd to say that the parties, having agreed on everything essential, intended that that agreement should be nullified if effect could not be given to cl. 8. Authority is not needed to support this view…”*

1. *LOA* expanded upon the principle and stated that the test for severance was really a test of **essentiality** and was the same as that used in illegality cases citing *Brew v Whitlock [No 2]* [1967] VR 803 (Brew”) which was affirmed on appeal by the High Court, and reaffirmed in the case of *Humphreys v Proprietors “Surface Palms North” Group Titles Plan Number 1955* (1994) 179 CLR 597.
2. In *Humphreys*, McHugh J, in the majority which found that severance of clause 8 was not possible, reaffirmed the test:

*“38. In my opinion, in cases where a provision in a contract is void, is not for the exclusive benefit of the party seeking to enforce the contract, and is part of the consideration for an indivisible promise of the defendant, the proper test for determining whether the void provision is severable from the indivisible promise is that formulated by the Full Court of the Supreme Court of Victoria in Brew v. Whitlock (No.2) ((48)*[*[1967] VicRp 102*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VicRp/1967/102.html)*; (1967) VR 803.). In that case, the Full Court said that ((49) ibid. at 813.) "once the conclusion is reached that the invalid promise is so material and important a provision in the whole bargain that there should be inferred an intention not to make a contract which would operate without it", the invalid promise should be treated as inseverable from the contract.”*

1. I apply this test to clause 22.7 and the definitions clause 2 about the ANA or Prescribed Appointer, which states *Northern Territory, the local chapter of the Institute of Arbitrators and Mediators Australia*.
2. I have already noted that in paragraph 7 (and restated in paragraph 18) of the claimant’s submissions, the claimant asserted that clause 22.7 was invalid and unenforceable, and clause 40.1 of the contract required its severance in the Northern Territory.
3. I have already identified the respondent’s reply submissions regarding *severance.* I now refer to paragraph 10.6 of the reply submissions, where the respondent submitted that the words *local chapter of* the Prescribed Appointer could be redacted to give certainty to the parties and effect to the objective intention of the subcontract.
4. In *LOA* the authors clearly explained that there is a reluctance of courts to strike down contracts.[[2]](#footnote-2) The effect of the claimant’s submissions is to sever the entire reference to the Northern Territory Prescribed Appointer provision.
5. In the circumstances, it is necessary to be satisfied that the entire Prescribed Appointer mechanism was so important to the parties that they would not have contracted without it.
6. Clearly there were no *local chapters* for IAMA. There is a similarity with *Masters*, where the parties had contracted with the mistaken belief that a term of contract existed.
7. In this case the parties had contracted about *local chapters* which did not exist. IAMA still exists, and it is just that their chapters do not.
8. I am constrained by the law, and I find that to sever the entire reference to the Prescribed Appointer IAMA is inappropriate because the parties had agreed to it, and it is not for an adjudicator to rewrite the contract.
9. What I can I find that it was not essential to the bargain that there be reference to a *local chapter* because no such chapter existed in the Northern Territory. Applying the *Masters* test, I cannot find that having agreed that the Prescribed Appointer was IAMA, that this should be nullified because of the lack of existence of *local chapters*.
10. Accordingly, I am satisfied that, as expressly allowed in clause 40.1, but only to the extent allowed by the law regarding *severance*, severance of the words, “*the local chapter of”* can take place whilst preserving the parties’ bargain of making an application to IAMA.
11. This then raises the issue identified in paragraph 15 of the claimant’s submission that if the application was to be served on IAMA then that provision was unenforceable because it was no longer operating as a Prescribed Appointer because the Resolution Institute now reported to do so.
12. I am not satisfied from the submissions and the evidence that IAMA is not a Prescribed Appointer. It is identified as one in clause 5 of the Regulations. It still exists as an entity with its registered office at level 1, 13 – 15 Bridge Street Sydney.
13. I agree with the claimant’s submissions that the websites of the Northern Territory and the Resolution Institute are wrong as a matter of law regarding the status of the Resolution Institute as a Prescribed Appointer, and I rejected that evidence earlier.
14. However, that leaves the position that the adjudication application, with the local chapter words severed, should have been served on IAMA.
15. I note in paragraph 5.6 of the reply submissions there is information regarding the genesis of the Resolution Institute and that it has been appointed by the board of IAMA to administer its operations. In addition, at paragraph 5.2 of the reply submissions, the respondent asserted that IAMA had the implied power to delegate its authority to exercise its legislative powers.
16. It is not necessary for me to decide whether IAMA had appointed the Resolution Institute to administer its operations, nor to decide whether it had the implied power to delegate its statutory authority.
17. To my mind how IAMA carries out its functions as a Prescribed Appointer under the Act is entirely a matter for IAMA. The parties have simply agreed that IAMA is the Prescribed Appointer.
18. This leads to the most unfortunate consequence for the claimant that it had failed to adhere to section 28(1)(c)(ii) of the Act because it did not serve the application on the Prescribed Appointer agreed by the parties.
19. I am constrained by what Southwood J held in *AJ Lucas* as regards the operation of the Act, “*that Subsection 33(1)(a) expressly provides that the adjudicator must dismiss the application without making a determination of its merits if the criteria set out in s 33(1)(a)(i) to (iv) are not fulfilled.”*
20. Unfortunately for the claimant, I am obliged to find that the application has not been prepared and served in accordance with section 28, which is required by section 33(1)(a)(ii) of the Act.
21. Accordingly, under section 33(1)(a)(ii) of the Act, I must dismiss the application without making a determination of its merits and it was unnecessary to consider the second jurisdictional objection.

## Date payable

1. I have no jurisdiction to decide whether there is any amount payable.

## Rate of interest

1. I have no jurisdiction to make any determination about interest.

## Confidentiality

1. I have made no determination on the merits, so this provision is not applicable.

## The costs of the adjudication

1. s46(4) of the Act provides that the parties are jointly and severally liable to pay the costs of the adjudicator in equal shares, But this can be altered under s36(2) of the Act if I am satisfied that a party has incurred costs of the adjudication because of unfounded submissions by a party, in which case I may decide that the other party pay some or all of those costs.
2. I had to very carefully analyse the first jurisdictional point raised by the respondent which was successful after considerable deliberation, analysis and research.
3. Both parties had provided proper and useful submissions which assisted me in reaching this difficult decision. However, the AJ Lucas case provided by the respondent was not the Court of Appeal decision, and its reference to Esso regarding severance of the contract, was with respect incorrect, which required me to research the law myself.
4. In the circumstances, I saw no need to exercise my discretion to alter the default position that the claimant and respondent are equally liable to pay 50% of my fees as provided by s46(4) of the Act.

Chris Lenz



Adjudicator

6 February’s 2020

1. Thomson Reuters Westlaw AU: Laws of Australia: paragraph 7.1 .11410 [↑](#footnote-ref-1)
2. citing *Mercantile Credits Ltd v Comblas* (1982) 56 ALJR 499 [↑](#footnote-ref-2)