

Claimant: Transfield Services (Australia) Pty Ltd

Respondent: Roberts & Schaefer Australia Pty Ltd

Adjudicator's Decision under the Building and Construction Industry Payments Act 2004

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act"), decide (with the reasons set out below) as follows:

1. The adjudicated amount of the adjudication application dated 9 November 2006 is **\$4,815,643.00** excluding GST.
2. The date on which the amount became payable is **10 November 2006**.
3. The applicable rate of interest payable on the adjudicated amount is **10%** simple interest.
4. The Claimant and Respondent are liable to equally pay the ANA's fees of \$165 and the adjudicator's fees

Signed:

Date:.....

Chris Lenz Adjudicator

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Background

1. Transfield Services (Australia) Pty Ltd (referred to in this adjudication as the “Claimant”) was engaged by Roberts & Schaefer Australia Pty Ltd (referred to in this adjudication as the “Respondent”) to undertake construction works in relation to the Oakey Creek Coal Handling and Preparation Plant Upgrade Project (the “project”) to construct, install, erect and commission the upgrade of the existing facilities (“the works”) at Oakey Creek Coal, Tieri in Queensland (the “site”).
2. The Claimant and Respondent entered into a contract, which was partly lump sum, partly schedule of rates and partly cost-plus for carrying out the works (the “contract”). The lump sum component was for management, supervision and the provision of mobile equipment, the schedule of rates component for all direct labour, and cost plus for materials, consumables and subcontract labour.
3. The works commenced on or about 22 March 2006 and practical completion was achieved on 13 July 2006.
4. During this period the Claimant provided electrical, mechanical, scaffolding, civil and ancillary works to the project.
5. The material provided by the Respondent showed that the Claimant had put in a “Payment Claim No. 1” on 8 September 2006 for \$3,667,121.50 as well as “Payment Claim No. 2” on 18 September 2006 for \$165,455.87.
6. In response to “Payment Claim No. 1” and “Payment Claim No. 2” the Respondent provided payment schedules on 22 September 2006 and 2 October 2006 respectively.
7. On 13 October 2006 this payment claim, which the Respondent calls “Payment Claim No. 3” was submitted for the sum of \$6,188,400.76.
8. In response to Payment Claim No. 3 the Respondent provided a payment schedule on 27 October 2006 stating that it proposed to pay nil dollars and the Claimant proceeded to Adjudication.
9. The Claimant made a written application for adjudication on 9 November 2006 (the “application”), and the Respondent’s solicitors provided an adjudication response on 16 November 2006 (the “response”).

Appointment of Adjudicator

10. The Claimant applied in writing to the Institute of Arbitrators and Mediators Australia (“IAMA”) on 9 November 2006 for adjudication. Subject to my finding jurisdiction, which is dealt with below, I find that the application in writing satisfies s21(3)(a) of the Act.
11. I find the application was to IAMA, as an authorised nominating authority, with registration number N1057859, thereby satisfying s21(3)(b) of the Act.
12. By letter dated 10 November 2006 IAMA referred the adjudication application to me to determine, pursuant to s23(1) of the Act. I am registered as an adjudicator under the Act with registration number J622914. I accepted the nomination by facsimile dated

- 13 November 2006 sent to the Claimant and to the Respondent, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.
13. On 15 November 2006 I wrote to the parties requesting an extension of time until 15 December 2006 to provide the adjudication decision. On 15 November 2006 both parties provided me with facsimile confirmation consenting to the extension of time until 15 December 2006.
 14. Accordingly, I now adjudicate the matter, and refer to the material in the adjudication, and the threshold issue of jurisdiction before considering the application and response in detail.

Material provided in the adjudication

15. I list the Claimant's material and the Respondent's material separately.

Claimant's Material

This material comprised the following in lever arch folders:

- (i) VOLUME 0:
 - i. The Adjudication Application dated 9 November 2006 in support of its payment claim for \$6,188,400.76 (excluding GST);
 - ii. The Claimant's submissions in support of the Adjudication Application (the "submissions");
 - iii. Appendix 1:
 - a) TAB 1 to 10 – Various Court Decisions;
 - iv. Appendix 2: Payment Certificate dated 25 August 2006 for \$2,190,329.04;
 - v. Appendix 3: Payment Certificate dated 18 September 2006 for \$10,000,861.14 as moneys due from the Claimant to the Respondent;
 - vi. Appendix 4: Facsimile Clayton Utz to Respondent dated 20 September 2006 and facsimile form Ebsworth and Ebsworth to Clayton Utz dated 29 September 2006 in reply;
 - vii. Appendix 5: Extract from Respondent's payment schedule dated 20 September 2006;
 - viii. Appendix 6: Claimant's comments on Respondent's submission in payment schedule dated 22 September 2006;
 - ix. Appendix 7: Statutory Declarations of:
 - a) Marcus Andrew Patten, Commercial and Project Controls Manager of the Applicant, dated 7 November 2006;
 - b) Nicole Danielle Cowley, Senior Contracts Officer of the Applicant, dated 7 November 2006;
 - c) Trevor James Cohen, General Manager of the Applicant, dated 6 November 2006;
 - x. Appendix 8: Copy of invoice 90384045 with documents supporting the breakdown and details of the amounts comprising the claimed amount;
 - xi. Appendix 9: Copy of invoice 90375857 with documents supporting the breakdown and details of the amounts comprising the claimed amount;
 - xii. Appendix 10: Copy of invoice 90384042 with documents supporting the breakdown and details of the amounts comprising the claimed amount;
 - xiii. Appendix 11: Copy of invoice 90392266 with documents supporting the breakdown and details of the amounts comprising the claimed amount;
 - xiv. Appendix 12: Copy of invoice 90390929 with documents supporting the breakdown and details of the amounts comprising the claimed amount;
 - xv. Appendix 13: Copy of invoice 90396465 with documents supporting the breakdown and details of the amounts comprising the claimed amount;

- xvi. Appendix 14: Documents regarding emails reflecting agreement to pay for scaffolding from 3 September 2006 to 31 October 2006;
- xvii. Appendix 15: Document providing overdraft interest rate
- xviii. Appendix 16: Copy of delay damages calculations for 7 day EOT
- xix. Appendix 17: Claimant's letter to Respondent dated 15 May 2006

(ii) VOLUME 1 PAYMENT CLAIM

Payment claim

- Tab 1 Payment claim Summary
- Tab 2 Payment Certificate A
- Tab 3 Contract - AO503-CS-101
- Tab 4 AS4901-1998 General Conditions of Contract ("GCCC")
- Tab 5 Scope of Work
- Tab 6 Work Break Down Structure
- Tab 7 Final Extension of Time Submission dated 21 August 2006
- Tab 8 Civil Contractor – Transcote's Documentation

(iii) VOLUME 2 PAYMENT CLAIM

- i. Payment claim Part A
- ii. ROM Scope Deletion
- iii. LD Deduction
- iv. Backup Documentation

(iv) VOLUME 3 PAYMENT CLAIM

- i. Payment claim Part B
- ii. Backup Documentation

(v) VOLUME 4 PAYMENT CLAIM

- i. Payment claim Part C
- ii. Backup Documentation

(vi) VOLUME 5 PAYMENT CLAIM

- i. Payment claim Part D
- ii. Backup Documentation

(vii) VOLUME 6A PAYMENT CLAIM

- i. Timesheets from 12th June 2006 to 5th August 2006

(viii) VOLUME 6B PAYMENT CLAIM

- i. Timesheets from 12th March 2006 to 7th May 2006

(ix) VOLUME 6C PAYMENT CLAIM

- i. Timesheets from 8th May 2006 to 28 May 2006

(x) VOLUME 6D PAYMENT CLAIM

- i. Timesheets from 29th May 2006 to 11th June 2006

(xi) VOLUME 7 PAYMENT SCHEDULE

Respondent's Material

The Respondent's material consisted of the adjudication response in one lever arch folder comprising the **Response submissions** with 3 Annexures;

(a) **Annexure 1** comprising the payment schedule dated 27 October 2006, to which was attached 12 Annexures consisting of:

- Tab 1 Payment claim assessment
- Tab 2 Payment claim 1 dated 8 September 2006 (without annexures)
- Tab 3 Payment schedule dated 22 September 2006 (without annexures)
- Tab 4 Payment claim 2 dated 18 September 2006 (without annexures)
- Tab 5 Payment schedule with Annexure 1 (only) dated 2 October 2006
- Tab 6 Copy of contract between Claimant and Respondent
- Tab 7 Copy of Claimant's letter dated 22 March 2006 including Schedule of Rates
- Tab 8 Bundle of correspondence from Respondent to Claimant regarding lack of supervisors on site
- Tab 9 Copy of Payment Certificate dated 18 September 2006
- Tab 10 Copy of Subcontract Superintendent's direction regarding extension of time claim dated 21 August 2006
- Tab 11 Bundle of correspondence regarding practical completion
- Tab 12 Copy of payment schedule of Oak Creek Coal dated 20 October 2006

(b) **Annexure 2** Statutory Declaration of Darryl Vogel dated 16 November 2006

(c) **Annexure 3** Letter and Payment Certificate dated 25 August 2006

Jurisdiction

16. In order for me to have jurisdiction to adjudicate this dispute, s3 of the Act requires that:

- (1) the date of the *construction contract* (which can be written or oral, or partly written and partly oral) must be after 1 October 2004; and
- (2) that the *construction work* was carried out, or the related goods and services supplied for construction work, in Queensland.

17. Schedule 2 of the Act defines a *construction contract* as follows:

“‘construction contract’ means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”

18. In the application at paragraph 3.3 of the submissions the Claimant listed the contract documents it claimed formed part of the agreement between the Claimant and the Respondent. These documents were provided in Volume 1 of the payment claim at Tabs 3, 4 & 5. In the response submission 2.1 the Respondent agreed with the documents listed by the Claimant. In a dispute the parties are entitled to make agreement as to facts associated with their dispute. However, when it is a matter relating to the jurisdiction of an Adjudicator, it is incumbent upon the Adjudicator to make an objective finding as to whether there is a *construction contract* under s3 of the Act for an adjudication to proceed. In other words, the parties cannot agree that the Adjudicator has jurisdiction.

19. I have inspected the Formal Instrument of Agreement provided in Tab 3 of the payment claim and Tab 6 of the response, which both parties agreed formed part of the Contract. Both copies stated “This agreement is made on 20th day of December 2006”

(sic). I find that this date cannot be correct, because that is a date in the future. In addition neither party signed this document. The parties are in an adjudication and they cannot now cure the incorrect date, or the lack of execution of the agreement, even though they both agree that the Formal Instrument of Agreement and its attached documents comprise the contract.

20. I must therefore look elsewhere and objectively establish from the material when the parties may have first made an arrangement or agreement (their “dealings”) in relation to this project to ensure that it was after 1 October 2004 for the adjudication to proceed. I must also objectively establish their “dealings” constituted a *construction contract* under the Act. This cautious approach is necessary because Byrne J in *Pioneer Sugar Mills Pty Ltd v United Group Infrastructure* [2005] QSC 354 found that an original contract entered into between those parties governed their relationship, even though there were subsequent negotiations constituting a significant variation when considerably expanded the scope of the work that was to be performed. His Honour held that the variation was not a new agreement, and the agreement that was entered into prior to 1 October 2004 was the operative agreement, and this meant that the Act did not apply to the adjudication.
21. If jurisdiction is established, it will then be necessary to more fully consider the contents of and interpretation of the contract that the parties agree exists, but for now the inquiry is confined to establishing jurisdiction. As the point of departure, I refer to a letter from the Claimant to the Respondent dated 22 March 2006 at Tab 7 of the Adjudication Response. It was headed

*“Oak Creek CHPP Upgrade Project
Major Installation Works – A0503-CS-101
Contract Information – Request to Mobilise”*

in which the Claimant at its second paragraph said:

“We are mobilising in accordance with your requirements. Should we not be able to finalise a subcontract Transfield Services requires confirmation from Roberts and Schaefer that they will reimburse Transfield Services as follows...”

What follows was a listing of activities including project management, project equipment, mobilisation and demobilisation, consumables, labour and labour timesheets (the “activities”). Furthermore, attached to the letter was a Schedule of Rates for Variations for labour costs associated with the project.

22. I am satisfied from the material provided by both the Claimant and Respondent that the Claimant did mobilise and carry out the activities, from which I can draw the reasonable inference from the reference to “Request to mobilise” and the conduct of the parties that the Respondent had requested that the Claimant do so. I find that the date of this letter was 22 March 2006.
23. I am satisfied therefore that there was an *agreement or other arrangement* as provided by Schedule 2 of the Act, on or about 22 March 2006, in which the Claimant undertook to carry out work for or to supply related goods and services to the Respondent. This satisfies part of the definition of *construction contract*. However, it is necessary for me to determine whether the undertaking related to *construction work* or to supply related goods and services in relation to *construction work*.

24. Construction work is defined in s10 of the Act as:

“(1) **Construction work** means any of the following work –

- (a) *The construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;*
- (b) *The construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls,.....industrial plant and ...;*
- (c) *Any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including –*
 - (i) *site clearance....*
 - (iii) *the erection, maintenance or dismantling of scaffolding;..*

(3) **Despite subsections (1) and (2)** does not include any of the following work -

88. *The drilling for...;*

89. *The extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works for that purpose.*

25. I refer to the first page of the scope of works relating to the project found in Tab 6 of the adjudication response, which is identified by number AS0503-CS-101, and this is the same number for the project as that on the letter dated 22 March 2006. On page 5 of 51 of the Scope of Works under “Introduction” there is reference to the Oaky Creek Coal, Coal Preparation Plant with the works involving upgrading of the raw coal handling system, the fines circuit of the main plant and the fines circuit of the module 4 preparation plant.
26. I refer to the s10(1)(b) of the Act’s reference to *industrial plant*. The New Penguin English Dictionary (2000) meaning of industrial is, “*relating to, involved in, or derived from industry*”. The dictionary meaning of *industry* is, “*economic activity that is concerned with the manufacture of goods, the processing of raw materials*” (my underlining). I am satisfied that coal handling preparation plant involves the processing of raw materials. Therefore, I find that applying commonsense to the work identified in the letter and clarified in the Scope of Works introduction, that it falls within the definition of *construction work* under s10(1)(b) of the Act, as associated with *industrial plant*.
27. Although the work was carried out the Oakey Creek Coal mine, I find it was not excluded by s10(3) of the Act, because I find that the work was not involved in the extraction of minerals. Accordingly, I find that the *construction contract* was for the Claimant carrying out construction work on or about 22nd March 2006, which is after 1 October 2004.
28. It is also necessary to refer to the related goods and services in relation to *construction work* because the letter of 22 March 2006 referred to project management, project equipment, consumables and labour.
29. I now extract the relevant provision dealing with related goods and services.

11 Meaning of related goods and services

1. ***Related goods and services***, in relation to construction work, means any of the following—
 - (a) *goods of the following kind—*
 - i) *materials and components to form part of any building, structure or work arising from construction work;*
 - ii) *plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;*
 - (b) *services of the following kind—*
 - i) *the provision of labour to carry out construction work;*
 - ii) *architectural, design, surveying or quantity surveying services relating to construction work;*
 - iii) *building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;*
 - iv) *soil testing services relating to construction work;*
 - (c) *goods and services, in relation to construction work, of a kind prescribed under a regulation for this subsection.*
2. *In this Act, a reference to related goods and services includes a reference to related goods or services.”*

30. I find that the project management falls within the meaning of *services* s11(b)(iii), project equipment and consumables within the meaning of *goods* under s11(1)(ii) and labour under the meaning of *services* s11(b)(i) of the Act.
31. I therefore find that the contract date was after 1 October 2004, and it related to *construction work* and the supply of related goods and services for *construction work* in Tieri, which I find is in Queensland, thereby satisfying threshold jurisdiction issues numbers 1 & 2.
32. I find that none of the exceptions contained within s3(2) and s3(3) of the Act applies to disqualify the *construction work* from the application of the Act.
33. Consequently, I have jurisdiction to adjudicate this matter and now proceed to do so, being mindful of the constraints imposed by the Act in carrying out this function. I start by referring the parties to the scope of the adjudication.

Scope of the adjudication

34. Now that I have jurisdiction to proceed, the Act at s26(1) requires that I am to determine:
 - a. The amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the “**adjudicated amount**”); and
 - b. The **date** on which any such amount became or becomes payable; and
 - c. The **rate of interest** payable on any such amount.
35. s26(2) of the Act restricts the matters that I may consider in determining an adjudication application. s26(2) of the Act provides:

“In deciding an adjudication application, the adjudicator is to consider the following matters only (my emphasis added):

- (a) *the provisions of this Act, and to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*

- (b) *the provisions of the construction contract from which the application arose;*
- (c) *the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;*
- (d) *the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;*
- (e) *the results of any inspection carried out by the adjudicator of any matter to which the claim relates.”*

36. I did not conduct any inspection of the project.

37. s35(3) also gives me the discretion to determine the proportion of the contribution to be made by the Claimant and by the Respondent to the ANA’s fees and adjudicator’s fees and expenses. I will exercise that discretion after dealing with the substantive issues.

38. Although, s26(2) is restrictive in what an adjudicator may consider, it is useful at this point to refer to authority of *The Minister for Commerce (formerly Public Works & Services) v. Contrax Plumbing (NSW) Pty. Ltd. & Ors.* (“Contrax”) [2005] NSWCA 142, where Hodgson JA considered the restrictive scope in the NSW equivalent of s26(2) and said at paras 34 and 35 relating to s22(2) NSW:

“34 In my opinion, this suggested anomaly loses force when one considers the true effect of s.22(2). It is true that paragraph (d) of s.22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration under that paragraph, reasons included in the adjudication response that were not included in the payment schedule.

35 However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d).”

39. In line with this Court of Appeal authority of the Supreme Court in NSW, it may therefore be necessary to consider material relating to s26(2)(a) and (b), which may not relate to either the payment claim and payment schedule.

Requirements of an adjudication decision

40. The Court of Appeal in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another* [2004] NSWCA 394 (“Brodyn”) has provided a very useful guide for

adjudicators in relation to the requirements of an adjudication decision. At para 53 and following, Hodgson JA said with reference to the similar NSW legislation:

“[53] What then are the conditions laid down for the existence of an adjudicator’s determination? The basic and essential requirements appear to include the following:

- 1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).*
- 2. The service by the claimant on the respondent of a payment claim (s.13).*
- 3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).*
- 4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).*
- 5. The determination by the adjudicator of this application (ss.19(2) and 21(5), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).*

41. In order therefore to carry out an adjudication, it is prudent to check that each basic and essential requirement has been complied with.

Detailed consideration of each Basic and Essential Requirement

The first basic and essential requirement – the construction contract

42. I have already found that there is a *construction contract* to which the Act applies, which gave me jurisdiction to proceed with the adjudication. However, it is now necessary to consider the extent of the contract as it applies to the payment claim and the payment schedule, which is the subject of this dispute.
43. As mentioned previously the contract documents were listed from (e) through to (k) in paragraph 3.3 of the application. In submission 2.1 of the response, the Respondent agreed with those documents listed. Accordingly, I find that these documents constituted the contract, and although there is a dispute as to the precise terms and meaning of the contract, I am satisfied that it is a *construction contract* between the Claimant and Respondent, to which the Act applies.
44. I have therefore established the *first basic and essential requirement*.

The second basic and essential requirement – service of the payment claim

45. The *second basic and essential requirement* requires the service of the payment claim on the Respondent in accordance with s17 of the Act. I find that this contract provided a term relating to service of notices in Clause 7.
46. I find from the payment claim dated 13 October 2006 there is a notation “HAND DELIVERY” on the first page. I also refer to the payment schedule dated 27 October 2006 and note that the covering letter identified the payment claim of 13 October 2006 and at Tab 1 of the payment schedule there is reference to “date of service on Respondent: 13 October 2006”.

47. Accordingly, I am satisfied that on 13 October 2006 the payment claim was hand delivered to the Respondent. This satisfies the service of documents provision in Clause 7.2 (a) of the contract. s103(1) of the Act provides that service can be provided under the construction contract, so I find that service of notice has been in accordance with s103.1. Accordingly I find that proper service of the payment claim in accordance with s17 of the Act has been affected properly so that the *second basic and essential requirement* is satisfied.

The third basic and essential requirement – valid application to an ANA

48. I have already found the Claimant has validly made the application to an ANA; accordingly, *the third basic and essential requirement* is satisfied.

The fourth basic and essential requirement – eligible adjudicator

49. *The fourth basic and essential requirement* requires compliance with the Act regarding the reference to an eligible adjudicator: s21(6) of the Act. I have already found that I am an eligible adjudicator because I am registered, thereby satisfying s22(1) of the Act.
50. I am not a party to the contract and I have no conflict of interest, which satisfies s22(2) and s22(3) of the Act. I have been properly appointed under the Act as required by s23(2) of the Act.
51. Accordingly, *the fourth basic and essential requirement* has been satisfied.

The fifth basic and essential requirement – s26(1) requirements

52. *The fifth basic and essential requirement* is that the Adjudicator decide the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable in accordance with s26(1) of the Act. I refer to my decision on page 1 which is in accordance with this requirement.
53. The decision is in writing in accordance with s26(3)(a), and I have provided reasons in accordance with s26(3)(a) because the parties have not agreed to waive the requirement of reasons: s26(3)(b). The decision was made after consideration of the merits of the case, to which I now turn.
54. There are a number of significant issues in this adjudication which relate to the question whether there is any **liability** of the Respondent to pay the Claimant under the provisions of the Act. These issues must be considered first, because if there is no liability for payment established under the payment claim, in whole or in part, then there is no necessity to calculate the **quantum** of the payment claim.
55. As the point of departure for this analysis, it is useful to refer to the payment claim and payment schedule to summarise the parties' positions, so that the issues are crystallised. These issues are then amplified in summary in the parties' subsequent adjudication submissions.

Payment claim dated 13 October 2006

56. The payment claim comprised 6 volumes of material which are identified in the Claimant's material as Volumes 1 through to 6. Volume 6 comprises of 4 volumes A,

B, C and D relating to timesheets, providing the raw data for the various invoices associated with this payment claim.

57. The payment claim was divided into 4 sections as follows:

Payment claim Part A	\$2,910,251.45
Payment claim Part B	\$2,947,199.09
Payment claim Part C	\$165,455.87
Payment claim Part D	\$165,494.35

58. Payment Part A comprised a lump sum portion of \$204,388.83 referred to in Invoice 90375111; and schedule of rates works of \$2,705,862.62, which were provided in Invoices 90375812; 90375826 and 90375836.
59. In Part A the Claimant stated that the schedule of rates claimed were drawn from the submitted time sheets, subcontractor supplied services and materials. The Claimant asserted that Clause 37.7 of the Contract allowed the Claimant to claim, and that once the timesheets had been signed by the Subcontract Superintendent, there could be no dispute that the works had been performed. Furthermore, the Claimant asserted that the Subcontract Superintendent had assessed and certified the claimed value of works for the both the lump sum and the schedule of rates portion in the sum of \$2,910,251.45 in the Subcontract Superintendent's certificate dated 25 August 2006.
60. However, the Claimant asserted that in this certificate the Subcontract Superintendent had incorrectly deleted \$418,913 of ROM works. The Claimant asserted that this scope deletion had been verified by correspondence 1530-OC-076 dated 1 June 2006, but that the Claimant had made no claim for this deleted work and therefore no deduction was allowable.
61. In addition, the Claimant asserted that the deduction for liquidated damages of \$271,393.55 by the Subcontract Superintendent was incorrect because there was still an extension of time claim by the Claimant which had not been assessed by the Subcontract Superintendent.
62. In relation to Part B, the Claimant divided this part of the claim into 3 components:
- Schedule of rates works \$788,127.38 and a list of invoices
Additional works (variations) of \$853,531.08 and a series of invoices
Delay damages of \$1,305,540.63 pursuant to Clause 34.9 of the GCCC.
63. Again the Claimant asserted that the schedule of rates works and the additional works were drawn from the submitted timesheets, subcontractor supplied services and materials. The Claimant maintained its earlier assertion that the timesheets having been signed by the Subcontract Superintendent meant that that there was no dispute that the works had been performed, in accordance with the Clause 37.7 of the Contract.
64. In relation to the claim for delay damages, the Claimant asserted that Clause 34.9 of the Contract, to which I will refer later, provided the justification for delay damages.
65. The Claimant's delay damages claim was set out in Tab 7 of Volume 1 of the payment claim.
66. As to part C, the Claimant asserted that this comprised two components of work:

- Additional supervision \$102,705.61 with reference to Invoice 90392267;
- Materials supplied of \$62,750.26 with Invoice No's 903903928, 9032265, 90392266, 90390929 and 90390930;

67. As to Part D, the Claimant asserted that the works comprised the following:

- Schedule of rates works of \$17,498.06 with reference to Invoice 90396463; and
- Additional works (including variations) of \$147,966.29 a substantial part of which related to scaffolding hire with reference to Invoices 90396462, 90396464, 90396465 and 90396835.

68. The Claimant asserted that all the works associated with the payment claim were for the upgrade of the coal preparation plant and the adjacent satellite fourth module.

69. For present purposes it is now useful to consider the documents and assertions involved in the payment schedule so that it can become clearer where the dispute between the parties lie.

Payment schedule dated 27 October 2006

70. The payment schedule dated 27 October 2006 in response to the payment claim is contained within the Respondent's material in **Annexure 1**.
71. Tab 1 of this document deals with the payment claim submissions, and Tabs 2 through to 5, deal with earlier payment claims and payment schedules.
72. Tab 6 of the payment schedule contained a copy of the contract between the Claimant and the Respondent.
73. Tab 7 dealt with the copy of the Claimant's letter dated 22 March 2006 including the schedule of rates to which I have made reference earlier.
74. Tab 8 dealt with correspondence from the Respondent to the Claimant relating to the lack of supervision provided on site.
75. Tab 9 provided a copy of the Payment Certificate of the Subcontract Superintendent dated 18 September 2006 in which the Subcontract Superintendent certified that retention monies and monies due from the Claimant to the Respondent was \$10,000,86.14
76. Tab 10 dealt with the Subcontract Superintendent's direction regarding the extension of time dated 21 August 2006 (the "EOT") to which I will refer later.
77. Tab 11 deals with the correspondence associated with practical completion.
78. Tab 12 provides a copy of the Payment Schedule of the Principal, Oakey Creek Coal dated 20 October 2006.
79. In the payment schedule the Respondent denies that the Claimant has any entitlement to issue the payment claim because it related to the same reference dates as two previous payment claims served on the Respondent. In support of this assertion the

Respondent provided two earlier payment claims, already referred to as “Payment Claim 1 and Payment Claim 2” and the respective schedules in response thereto.

80. In addition, the Respondent says that it was unable to properly determine the Claimant’s entitlement under the payment claim, based on matters set out within the payment schedule. In a summary provided on page 3 of the payment schedule, the Respondent totalled the claimed amount of \$6,188,400.76 but then made two deductions as follows:

Coal stockpile handling	US \$705,602.35
Demurrage	US \$8,591,444.45

The total deductions claimed to be allowable was US \$9,297,046.80

81. In addition the Respondent claimed a 5% retention on the contract sum of \$5,427,871.00 of \$271,393.55.
82. In addition, liquidated damages of \$271,393.55 were also deducted.
83. This resulted in a calculation that the amount due to the Claimant was nil.
84. In the reasons to support the assertion that the scheduled amount was nil the Respondent divided its payment schedule into Parts 1 and 2. In Part 1 the Respondent referred to payment claims 1, 2 and 3 and essentially asserted that the reason why no monies were payable for payment claim number 3 was that it was a claim for payment for previous reference dates for which payment claims had already been provided.
85. In Part 2 of the payment schedule the Respondent provided a number of reasons as to why the payment schedule was nil. In reason 2 thereof the Respondent asserted that the progress claims had not been submitted in accordance with Item 31 of the Contract and failed to provide details of the value of the work performed under the Contract such that the Respondent was unable to determine how the invoices were referable to the scope of the works under the contract and how the invoices were referable to the contract sum.
86. In reason 3 the Respondent asserted that no amounts were owing to the Claimant because the Respondent was unable to determine the matters set out in paragraph 6.5 above. I find that this must be a typographical error and it should be referring to Item 2.5 above which were the assertions saying that the payment claim was not submitted in accordance with Item 31 of the Contract and failed to provide the details of the value of the work performed thereunder. However, the Respondent went further and divided up it’s responses in accordance with the payment claim Parts A, B, C, and D.
87. In reason number 4 the scope deletion of the ROM works which was identified in Part A of the payment claim the Respondent stated that the variations to the scope of work both positive and negative essentially cancelled one another out.
88. In reason 5 the Respondent asserted to it’s entitlement to deduct liquidated damages and provided an explanation as to why the amount of \$271,393.00 was deducted.
89. In reason 6 referring to delay damages the Respondent asserted that the only delay cost that the Claimant was entitled was a seven day extension of time, but that the

Respondent was entitled to set off any amount against that so that there was therefore was no monies payable.

90. Furthermore in relation to delay damages, the Respondent asserted that the extension of time claim on 21 August 2006 had not been submitted in accordance with the Contract in that it had failed to comply with Clause 34.3 of the GCCC.
91. Accordingly, the Respondent said that in accordance with Clause 34 of the Contract, the Subcontract Superintendent had issued its written direction, which was provided in Tab 10 of the payment schedule, providing an extension of time of 7 days only.
92. In reason 7 of the payment schedule, the Respondent referred to its entitlement to set off under the Contract.
93. In relation to this series of reasons, the Respondent referred to Clause 34.7A and submitted that it formed part of the Contract and allowed damages that had become due and payable by the Respondent to its Principal, Oakey Creek Coal Limited, to be set off against any monies owing to the Claimant under Clause 37.6 of the Contract.
94. In the reasons, (Tab 10), the Respondent provided the payment schedule of Oakey Creek Coal Limited dated 20 October 2006 in which the Respondent stated that Oakey Creek was entitled to set off the following amounts:

US \$10,739,305.57 for demurrage associated with the ships having to wait to load coal

US \$882,002.94 for costs associated with transporting coal from and back to the conveyor.

95. The Respondent stated that the date for practical completion under the main contract was 31 May 2006, however, due to the delays; practical completion was only achieved on 15 July 2006, which was 45 days late.
96. The Respondent stated that the Claimant was not the sole cause of the alleged liability to Oakey Creek for damages and then claimed that 36 days of the 45 days delay was due to the Claimant's delays. Accordingly, a calculation was performed in which only 36/45 of the demurrage and transporting coal costs were claimed as damages and identified that these sums were entitled to be offset against any amount due to the Respondent. This amount was certified by the Subcontract Superintendent in its certificate dated 18 September 2006 (attached in Tab 9 of the payment schedule).
97. I now identify and decide on each liability issue arising out of the payment claim and payment schedule, supported by the application and response respectively, before turning to quantum.

Liability issues

98. There are a significant number of important issues raised in this dispute, and the order with which they are discussed in this decision is based on convenience, and does not necessarily reflect the degree of importance of each issue.
99. I list the issues here for the convenience of the parties and then will discuss each in more detail thereafter:
 - i. Whether adjudicator can carry out the functions of the Subcontract Superintendent

- ii. No entitlement because payment claim relates to previous reference dates
- iii. Progress claims not submitted in accordance with contract
- iv. ROM works scope deletion
- v. Respondent's entitlement to liquidated damages
- vi. Claimant not entitled to delay damages
- vii. Claimant's extension of time claim and delay damages
- viii. Respondent's entitlement to set off under the contract
- ix. Cap on the Claimant's liability
- x. Due date for payment
- xi. Entitlement to interest

Whether adjudicator can carry out the functions of the Subcontract Superintendent

100. I am mindful that *Brodyn* precludes me making a decision on an issue that has been raised by neither party because this would be a breach of natural justice. At paragraph 56 of *Brodyn*, Hodgson JA referred to an adjudicator basing a decision on something that one had no right to take into account. However, it is my view that this issue governs my duties as an adjudicator to value the claim, such that it is necessary to determine the extent to which I can carry out the functions of the Subcontract Superintendent under the contract. Although neither party has made submissions on this point, I think it was implicit in the adjudication that both parties expect this function to be carried out by an adjudicator.
101. It is out of an abundance of caution that this issue is considered, and it is my view that I am not making a decision on a contentious issue between the parties, but rather an issue that is more akin to jurisdiction, that I have a right and indeed an obligation to consider.
102. Furthermore, in its submissions the Claimant expects valuation of delay damages, and the Respondent did not argue that I was unable to value delay damages, which is a function of the Subcontract Superintendent. Accordingly, I am prepared to consider this issue in light of current authority and principle in order to proceed with my duties under s26(2) of the Act. If I find that I could not carry out the functions of the Subcontract Superintendent under the contract, I would then ask for submissions, because that would appear to be at odds with what both parties impliedly expected and what the contract requires. I find that I can carry out these functions for the reasons given below.
103. It appears to be settled that an adjudicator is not bound to follow a certificate of a Superintendent: *Abacus Funds Management v Davenport* [2003] NSWSC 1027 ("*Abacus*"), McDougall J [38] – [39], which was affirmed in the New South Wales Court of Appeal by Hodgson J (albeit in obiter) in *Transgrid v Siemens Limited* (2004) 61 NSWLR 521, at para [35].
104. Although *Abacus* is authority that I am not bound by the Subcontract Superintendent's (the "Superintendent") certificate, I need to decide whether I may carry out the function of the Superintendent under the contract because the dispute involves issues of liquidated damages, extensions of time, delay damages and set offs under the contract. The Superintendent is the person nominated under the contract to make an assessment of these important issues. I therefore refer to the extract of McDougall J in *Abacus* where His Honour said:

“38 I do not think that the construction advocated by Abacus is required by the Act. It is correct to say that the amount of a progress payment is to be “the amount calculated in accordance with the terms of the contract” where the contract makes provision for that matter (s 9(a)). It is equally correct to say that construction work is to be valued “in accordance with the terms of the contract” where the contract makes provision for that matter (s 10(1)(a)). However, a reference to calculation or valuation “in accordance with the terms of the contract” is a reference to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who, under the contract, is to make that calculation or valuation. In the present case, it means that Mr. Davenport was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr. Davenport was bound by the architect’s earlier performance (or attempted or purported performance) of that task.

39 In the present case, what Mr. Davenport was required to do was to undertake for himself the task that the architect had purported to undertake. He was not required simply and only to apply his rubber stamp and initials to the results of the architect’s labours.”

105. My function, inter alia, is to determine the amount of the progress payment: s26(1)(a) of the Act. s13(a) of the Act, to which I will refer later, provides that this amount is calculated under the contract.
106. In my opinion, if Parliament has provided an adjudicator with the authority to determine an amount of a progress payment to be calculated under the contract, it would be implicit within such a power, that to the extent that it is necessary to calculate these amounts, the adjudicator needs to carry out the functions of a Superintendent, if they are required under the contract to make these decisions.
107. I find that as regards liquidated damages, Clause 34.7 of the Contract requires the Superintendent to certify as due and payable to the Respondent the liquidated damages that the Superintendent has assessed.
108. Furthermore, as regards extensions of time, I find that Clause 34.5 of the Contract provides that the Superintendent must give a written direction evidencing the extensions of time assessed by the Superintendent. In relation to this point I am not referring to the other requirements of the claim being submitted to the Superintendent which are provided under Clause 34.3 of the contract, but merely identifying the power that the Superintendent has to determine extensions of time, and Clause 34.9 then follows with a certification of damages by the Superintendent, if justified.
109. Accordingly, as a matter of practicality and logic, I find that in order to carry out the determination of the amount due under the progress payment, it is therefore implicit that I need to carry out the functions of the Superintendent at least to that extent. I have some comfort from paragraph 39 of Abacus in which his Honour McDougall J said *“In the present case, what Mr. Davenport was required to do was to undertake for himself the task that the architect had purported to undertake.”* It may be a slim line of authority, which the NSW Court of Appeal in *Transgrid* merely accepted in passing, but it supports the principle that I have had to derive. I am satisfied that without the power to step into the shoes of the Superintendent under the contract in

these circumstances would make it impossible for an adjudicator to determine the amount of progress payment under the contract.

110. I accept that it will be a difficult function to carry out the Superintendent's duties without having full knowledge of the circumstances surrounding parts of the claim and the contract, but Parliament has required that the adjudicator must carry out this function. Furthermore, s100 of the Act preserves the parties' rights under the contract, so that anything done by an adjudicator to carry out their powers under the Act, does not affect these rights. The Superintendent still has his powers under the contract.

No entitlement because payment claim relates to previous reference dates

111. I have carefully considered the contending arguments in this very important issue and summarised both parties' submissions in some detail, because this goes to the heart of the Claimant's entitlement. Before considering the various arguments, I must initially decide whether the Claimant has an entitlement to make a progress claim. I have already found that the Claimant undertook to carry out *construction work* for the Respondent under the Act. s12 of the Act gives rights to progress payments as follows:

"12 Rights to progress payments

From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."

112. Therefore the right to progress payments is governed by the *reference date* for the progress claim and I need to find the *reference date* for this payment claim. Schedule 2 of the Act defines *reference date* as:

"(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or..."

113. This is the point of departure for the contending arguments because the Respondent in the second paragraph of the payment schedule [and further discussed under Part 1 of the payment schedule (pages 4-6)] stated:

"R&SA deny that Transfield has any entitlement to issue the Payment Claim to the extent that it relates to the same reference dates as the previous payment claims served on R&SA."

114. The Respondent attached two of the Claimant's earlier progress claims called "Payment Claim 1" and Payment Claim 2", and its payment schedules to those 2 payment claims in Tabs 2-5 of this payment schedule which I must consider, and referred in paragraph 4.5 of its payment schedule submissions to s17(5) of the Act which states:

"(5) A Claimant can not serve more than one payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the Claimant from including in a payment claim an amount that has been the subject of a previous claim".

115. The Respondent asserted that Payment Claim 1 had a *reference date* of 28 August 2006, and Payment Claim 2 had a *reference date* before August 2006. In paragraph 4.4 of the payment schedule submissions, it referred to Item 31(a) of the contract, which qualified Clause 37.1 of the contract, and asserted that the applicable *reference date* was the “28th day of calendar month in which the works are completed”.
116. In paragraph 4.6 of the payment schedule submissions it alleged that the Claimant had reached practical completion on 13 July 2006, and had demobilised on 20 July 2006, and did the last work on 3 August 2006. The Respondent therefore argued in paragraph 4.9 of the payment schedule submissions that there were no further *reference dates* to which there was an entitlement to make a progress claim because no more work had been done since 3 August 2006.
117. In paragraph 3.2 of the payment schedule, the Respondent had made reference to “Payment Claim 3” which is the subject of this adjudication and asserted the following;
- i. Part A of the claim included amounts for ROM works (\$418,913) and liquidated damages (\$271,393, 55); both of which had already been claimed in “Payment Claim 1.”
 - ii. Part B claimed an amount of \$2,947,199.09 all of which had been claimed “Payment Claim 1.”
 - iii. Part C claimed an amount of \$165,455.78 had already been claimed in “Payment Claim 2”.
 - iv. Parts A to C were all the subject of previous payment schedules.
 - v. Part D’s claim of \$165,494.35 had not been claimed previously.
118. The crux of the Respondent’s argument was that work had finished on 3 August 2006. This meant that 28 August 2006 would be the last date for a *reference date* in accordance with Item 31(a) of the contract, which governed the Act’s Schedule 2 definition of *reference date*. It argued in paragraph 4.12 of the payment schedule submissions, that to the extent that Payment Claim 3 sought payment for work that was the subject of Payment Claims 1 and 2, it had no entitlement because that would breach s17(5) of the Act.
119. The Claimant in the application submissions dealt extensively with this issue in paragraph 10 (pages 10-12) and referred to the cases of *Brodyn; Falgat Constructions Pty Limited v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259 (“*Falgat*”); and *Rothnere Pty Limited v Quasar Constructions NSW Pty Limited & Ors* [2004] NSWSC 1151 (“*Rothnere*”) to support its case.
120. The Claimant in paragraph 10.1 of the application submissions stated that the Respondent’s approach was misconceived as a matter of fact and as a matter of the proper interpretation of the Act and the contract.
121. In paragraph 10.3, of the application submissions the Claimant argued that the inability to make a progress claim in a particular month, if no work had been done, was contrary to the proper interpretation of the contract and the Act. The Claimant stated that claims for payment under Clause 37.1 of the contract could be in respect of costs incurred, other than work done, in so far as they may include a claim for:
- (a) costs of suspension under Clause 33.4;
 - (b) a claim for delay damages under Clause 34.9;

(c) a claim for damages flowing from a suspension under Clause 39.9 of the Act.

122. In all three cases, the Claimant asserted that there was no requirement for work having been done.
123. Furthermore, the Claimant said the Respondent's interpretation of the contract was such that if works were suspended, then the Claimant would not be entitled to make a progress claim under Clause 37.1 to which it was entitled. The Claimant asserted that such a construction would be contrary to, or have the effect of excluding, modifying, restricting or otherwise changing the effect of s12 of the Act, and would therefore be void under s99 of the Act.
124. In addition, the Claimant asserted that s12 of the Act regarding the definition of "reference date" did not provide that the entitlement to a progress claim was dependent on the performance of work.
125. It added in paragraph 10.3(b) of the application submission that, even if the Respondent's interpretation of Item 31(a) was correct, the Claimant had continued to supply scaffolding after 3 August 2006 to 2 September 2006 in the payment claim, so that it was at least entitled to submit a claim from the 28 September 2006 reference date.
126. The Claimant argued that the Respondent in paragraph 4.9 of the payment schedule's submissions had conceded that a payment claim could include payment amounts that had been the subject of previous payment claim, so that it was entitled to make a payment claim from 28 September 2006, which was allowed by s17(6) of the Act in any event.
127. The Claimant cited Hodgson JA at paragraph 64 in *Brodyn* where His Honour said:

"64 In my opinion, as submitted by Mr. Fisher for Dasein, this view is supported by s.13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s.13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s.27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s.13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively."

128. Furthermore, the Claimant referred to Hodgson JA in paragraph 36 in *Falgat* where His Honour said:

"36 In my opinion the primary judge was in error in relation to s.13 of the Act. I adhere to the view I expressed in Brodyn Pty. Limited v. Davenport [2004] NSWCA 394, (2004) 61 NSWLR 421, at [62]-[66], to the effect that after cessation of work there continue to be reference dates in respect of which successive payment claims can be made, up to the twelve month limit under s.13(4)(b), and that s.13(6) permits successive payment claims to be for the same work. Mr. Rudge SC for Equity did not seek to submit to the contrary, and accepted that there was a reference date at about the end of November 2004 in respect of which a further payment claim, claiming the same amount, could have been served."

129. At paragraph 10.8 of the application submissions, the Claimant stated that it was not making more than 1 payment claim for each reference date, but successive claims for successive reference dates, and cited paragraph 5 in *Rothnere* for support, where McDougall J said:

“In the way that such things appear frequently to happen, progress claim 14 traversed much of the same ground and comprehended much of the same work as had been traversed and comprehended in progress claims 11 and 13. That is permitted: see s 13(6) of the Act. However, when that happens, s 22(4) of the Act is brought into play.”

130. In dealing extensively with the Claimant’s submissions, the Respondent, at paragraph 8 in the response reiterated its position in the payment schedule. In paragraph 8.7 of the response the Respondent referred to Clause 37.1 of the contract which provided that the Claimant is to include in any progress claim:

- (a) Details of the value of WUS done
- (b) Details of other moneys then due pursuant to the contract.

131. The Respondent stated in paragraph 8.8 of the response that Clause 34.9 of the contract, dealing with a claim for delay damages, had to be the subject of a claim pursuant to Clause 41.1 of the contract, and required certification of damages by the Subcontract Superintendent. It then outlined (in paragraphs 8.9 and 8.10) the wording of Clause 41.1 of the contract, and asserted that a claim for delay damages could not be the subject of a progress claim.

132. Furthermore, in paragraph 8.11 of the response, the Respondent asserted that Clause 39.9 provided a system of notification of breach by a Main Contractor, which if not remedied or capable of being remedied, allowed the Claimant to terminate the contract and a Subcontract Superintendent to certify any damages suffered as due and payable.

133. Accordingly, in paragraph 8.12 of the response, the Respondent asserted that a Claimant was not entitled to claim costs of suspension, delay damages or damages flowing from suspension in a progress claim, as these amounts are certified by the Superintendent following an entirely separate process to the making of the progress claim under the contract.

134. The Respondent then in paragraph 8.13 of the response clearly stated its position that the *reference date* arises only on the 28th day of the month in which works are completed and that where work has ceased, a further reference date can not arise under that contract.

135. The Respondent in paragraph 8.14 of the response stated that a progress claim is to include the value of WUS, as well as any moneys due, and that the contract specifically provided for separate methods of communication for claims for damages other than in a progress claim, such that if there were no money certified as “due” and no works had been completed, then there was no entitlement to make a progress claim.

136. The Respondent at paragraph 8.24 of the response submission took issue with the Claimant’s interpretation of *Brodyn* and quoted from paragraph 63 of Hodgson JA’s judgement that;

“However, section 9(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under section 8(2)(a) if the contract so provides but not otherwise;”

137. The Respondent therefore argued that the *reference date* could be limited by the contract and that Item 31(a) of the contract imposed a contractual limitation on reference dates.
138. It is useful to deal with these contenting assertions at this stage before moving onto the next point regarding the scaffolding hire, and it is necessary for me to interpret the Act and the contract to decide what is meant by “*reference dates*”, and make a decision as to the *reference date* for this payment claim.
139. In construing the meaning of the contract, if one includes the words of item 31(a) of Part A of the Annexure to the GCGC in the words of the first paragraph of Clause 37.1, the contract could be taken to read as follows;

“The subcontractor shall claim payment progressively on the 28th day of the calendar month in which works are completed.”

140. The critical question is whether this means that the Claimant is unable to make a progress claim on the 28th day of a month if no work is done. In other words, to paraphrase Hodgson JA in *Brodyn*, one needs to answer the question; “*Does the contract provide that reference dates cease on cessation of work?*”
141. If Item 31(a) did not have the words, “*in which works are completed,*” in my view I would be bound by *Brodyn* to allow successive payment claims even though no further work was done because the wording of the Act and the NSW Act are essentially similar. [For present purposes I am not considering the further submissions of the Claimant as regards the entitlements to claim for costs of suspension, delay damages and damages flowing from suspension, to which I will turn shortly.] In *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391 (“*Clarence*”), Mason P in discussing an issue surrounding the *due date for payment* said:

“49 The right to a progress payment cannot be bargained away entirely (see s34 which precludes contracting out). This appeal does not throw up any issue about the scope of s34.”

142. In considering this matter I found the case of *Isis Projects v Clarence Street* [2004] NSWSC 714 (“*Isis*”), a decision of McDougall J, which went on appeal as *Clarence*, where His Honour was considering the issues and said:

*“(3) Whether progress claim 12 or progress claim 13 was a claim for work that had been the subject of a previous progress claim and payment schedule in respect of which there had been no adjudication application or determination.
(4) If that question is answered “yes” as to either or both of the progress claims, is that a defence to ISIS’ claim?
(5) Whether progress claim 12 or progress claim 13 was a claim for work in respect of a reference date for which there had been a previous progress claim?
(6) If that question is answered “yes” for either or both of the progress claims, is that a defence to ISIS’ claim?”*

143. I have extracted His Honour's discussion of issues 3 to 6, although only issues 5 and 6 are directly on point. However, issues 3 and 4 explain His Honour's thinking and reasoning when he reached his decision on the *reference date* issues. His Honour held:

“Third issue: do progress claims 12 and 13 constitute claims for work the subject of previous payment schedules in respect of which no adjudication application has been lodged?”

48 I have great difficulty in understanding this issue. That difficulty has not been resolved by the submissions (written or oral) for Clarence Street.

49 The effect of s 13 (6) of the Act is that a payment claim may include an amount that has been the subject of a previous payment claim. Where the respondent to that previous payment claim had replied by way of payment schedule, and where the payment schedule had put in issue the particular amount that was later claimed again, it would be open to the respondent to repeat whatever it was that had been said on the prior occasion. There is nothing in the language of s 13(6) that restricts it to circumstances where the respondent to the previous payment claim has not replied by payment schedule. I cannot see why such a limitation should be read into the subsection.

50 Accordingly, even if this issue arises on the facts – and I am prepared to assume that it does, although I was not favoured with submissions showing that this is so – it does not raise a defence. Thus, even if the question raised by the third issue should be answered “yes”, the question raised by the fourth issue should be answered “no”.

Fifth issue: do progress claims 12 and 13 claim for work in respect of reference dates which there have been previous payment claims?

51 To the extent that this remained in issue – and, like the third, it was not expressly covered in written or oral submissions – the reasons that I have given for the third issue apply equally. Assuming for the moment that the issue arises in fact, it does not give rise to a defence.”

144. The Respondent argued in paragraph 8.29 of the response submissions that the Claimant could have applied for adjudication for Payment Claims 1 and 2, and chose not to do so, and in this payment claim it was in breach of s17(5) by claiming in relation to the same reference dates. McDougall J at paragraph 49 of *Isis* said that the Respondent could repeat what it said on a previous payment schedule, and at paragraph 51 did not seem to think that this was a defence to a progress claim. This is what the Respondent has done in this case by including two previous payment claims and its payment schedules in response.
145. There was no authority that I could find on the interpretation of s17(5) and 17(6) of the Act in Queensland, so I referred to *Isis* for assistance of the NSW equivalent. McDougall J, when dealing with the fifth issue appears to have no difficulty with the notion that a payment claim can traverse what has gone before in previous payment claims, and that is not surprising because s17(6) of the Act provides for this eventuality.

146. McDougall J also considered the operation of the NSW equivalent of s17(5) under the third triable issue as to whether progress claims 12 and 13 involved a contravention of the equivalent of s17(5) the Act, in which he said:

43 Reference was made in the evidence to variation 6407 to illustrate a point that this particular variation had been assessed at less than the amount claimed in an earlier progress certificate. The original amount was again claimed in progress claim number 12 but in progress claim number 13 the amount was corrected back to what had previously been allowed. It was suggested that this is an illustration of a new claim for work that had been rejected, not a claim for money outstanding in respect of old work. Reference was made to the approval by Heydon JA in Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd [2002] NSWCA 238 of the comments from IN Duncan Wallace (ed) Hudson's Building and Engineering Contracts (11th ed, 1995), para 8-105 in the following terms:

'... while payment by means of suitably calculated fixed instalments of the contract price due on completion of identified stages of the work offers valuable advantages to owners, particularly in encouraging expeditious progress, reducing administrative and professional valuation outlays, and avoiding "front-loading" pricing techniques by contractors, and while there is no reason why such a basis for interim payment should not be used equally in measured contracts as well as in the lump sum fixed price contracts with which it is usually associated, it remains the case that the great majority of English standard forms nevertheless use periodical valuation, usually monthly, of the work done to date as the basis for interim payment. For entirely valid practical reasons, these valuations usually represent successive retrospective valuations of the whole of the work done to date, and not of the work done in the preceding month, since many items, due to differenced (sic) in measurement or the subsequent discovery of defective work or the replacement of "materials on site" valuations with valuations of work done subsequent to their incorporation, may require revision in later certificates.'

44 Although there may be difficulties caused by claiming a sum for work again in a later claim it was easily enough identified and refused by the superintendent. It does not seem to me that the service of the second claim can be said to be the service of another claim in respect of the same reference date and thus in breach of subsection (5). The later claim obviously has a different reference date and subsection (6) is in terms quite general and allows matters to be included in a later claim without any limitation.

147. At first blush the case appears to be directly on point, because it is dealing with the prohibition of s17(5) of the Act. However, the Respondent argues that "Progress Claim 3" (the subject of this adjudication) has the same reference dates at Progress Claims 1 and 2. McDougall J said that, "*The later claim obviously has a different reference date*", so for this case to be authority on s17(5), I will need to determine the *reference date* for this payment claim.
148. For present purposes I am not considering the scaffolding claim, which is Part D of the payment claim, as there is dispute about its validity, and it will be dealt with later. I am focussing on Parts A to C of this payment claim, but of necessity will make reference to "Payment Claims 1 and 2" attached to the payment schedule because the Respondent has put them in issue. I was initially concerned about traversing these

earlier claims because they appeared to be outside the ambit of what an adjudicator is entitled to consider under s26(2), because I must focus on this payment claim to which the application relates: s26(2)(c). However, the earlier payment claims arise out of the construction contract and appear in the payment schedule, so I am prepared to find that s26(2)(b) and (d) of the Act allows me to consider these earlier payment claims. My earlier reference to *Contrax* contains authority to support this approach.

149. However, it did not appear to be sensible to consider these earlier payment claims in too much detail because the focus is on this payment claim and its reference date. I was content to initially only broadly consider what work each earlier payment claim was covering, because the Respondent in paragraph 3.2 of the payment schedule, to which I have already referred, stated that:

- i. Part A was already claimed in Payment Claim 1, and was responded to;
- ii. Part B was already claimed in Payment Claim 1, and was responded to;
- iii. Part C was already claimed in Payment Claim 2, and was responded to.

150. I find that Payment Claim 1 dated 8 September 2006 was for \$3,667,121.50 for work comprising:

i. Schedule of rates	\$817,743.24
ii. Additional works	\$853,531.08
iii. Other	
1. ROM	\$418,913.00
2. LD's	\$271,393.55
3. Delay damages	\$1,305,540.63

151. In comparing Payment Claim 1 to the payment claim, I find that the schedule of rates works covers the identical list of invoices, as that provided in Part B of the payment claim. However, Part B of the payment claim was for \$788,127.38, which is \$29,615.86 less than Payment Claim 1 for this item. Nevertheless, the description of the work carried out in both payment claims is identical, except that:

- i. the first dot point of description of Payment Claim 1 refers to invoice 90375812, which is the second dot point in Part B of this payment claim and the wording is quite different, although it refers to the same invoice number; and
- ii. the second dot point of Payment Claim 1 is identical to the first dot point in Part B of this payment claim.

152. It is not possible to delve further into the discrepancy between invoice number 90375812 in Payment Claim 1 and this payment claim, because no invoices were attached to Payment Claims 1 and 2 in the payment schedule.

153. Apart from this minor discrepancy and a difference of \$29,615.86, I am satisfied that Part B Schedule of rates of this payment claim is materially the same as Payment Claim 1's Schedule of rates, as it was covering the same work.

154. The "Additional works" in Payment Claim 1 of \$853,531.08 and that in Part B of this payment claim was for the identical amount and consisted of the same invoices claimed.

155. The ROM reference in Payment Claim 1 of \$418,913.00 and that in Part A of this payment claim was the identical amount.

156. The LD's reference in Payment Claim 1 of \$271,393.55 and that in Part A of this payment claim was the identical amount.
157. The delay damages reference in Payment Claim 1 of \$1,305,540.63 and that in Part B of this payment claim was the identical amount.
158. Parts A and B of this payment claim totalled an amount of \$5,857,450.54, whereas the total for Payment Claim 1 was \$3,667,121.50. The difference between these two claimed amounts is \$2,190,329.04, which is identical to the amount certified by the Superintendent on 25 August 2006.
159. Part A of the payment claim includes a lump sum portion of \$205,388.83, in accordance with invoice 90375111 which I find was not claimed in Payment Claim 1.
160. Part C of this payment claim, was \$165,455.87, which is the same amount as that claimed in Payment Claim 2, dated 18 September 2006, and consisted of the same invoices claimed.
161. Part D, which is the scaffolding claim is accepted by the Respondent as not forming part of either Payment Claims 1 or 2.
162. I revisit s12 of the Act which provides:

"12 Rights to progress payments

From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."

163. I refer to Pearce DC and RS Geddes (2006): *Statutory Interpretation in Australia*, LexisNexis Butterworths, Chatswood, 6th ed ("Pearce & Geddes"), and apply the literal approach of statutory interpretation, identified in paragraph 2.3 on page 25 to the meaning of s12 of the Act. This requires one to find what the language means in its ordinary natural sense, and on this basis, entitlement to a progress payment arises if the Claimant (in this case) has *undertaken to carry out construction work or supply related goods and services*. There is no requirement under s12 for work to be carried out for entitlement to be established according to my reading of the words and giving them their ordinary meaning.
164. If such an interpretation is ambiguous or inconsistent, I may have to have regard to the purposive approach to statutory interpretation: Pearce & Geddes paragraph 2.5, page 27. Is the literal interpretation of s12 of the Act ambiguous or inconsistent? It appears that s12, standing alone, allows anyone who has undertaken to carry out work or supply related goods and services to have an entitlement to claim from each reference date.
165. However, s12 does not stand alone. s13 of the Act provides the mechanism for deciding the amount of the progress claim as either (a) under the contract, or (b) calculated on the basis of the value of construction work carried out or undertaken to be carried out... under the contract. In the latter case, in my view, one then must have regard to s14 of the Act to carry out the valuation under the contract.

166. ss13 and 14 of the Act, both refer to “...*construction work carried out or undertaken to be carried out*...”. s12 does not include the additional wording, “*construction work carried out*” and the legislature must have had a reason for this wider wording. Applying the literal rule, s12 appears to provide a wider entitlement to progress payments than only if *construction work is carried out*. I do not think that such an interpretation is ambiguous or inconsistent, because the determination of the value of the progress payment is governed by the contract, if the contract provides such a mechanism: see ss13 and 14 of the Act. If the contract only allows progress payments for construction work carried out, then this would be dealt with in the valuation mechanism under ss13 and 14 of the Act
167. Moreover, I do not think that the contract can constrain the entitlement arising out of s12 of the Act, which is widely cast in the circumstance of *undertaking to carry out construction work*, rather than the narrower *construction work carried out* circumstance. To that extent, I disagree with the Respondent’s response submission in paragraph 8.25 that *reference dates can be limited by the contract* so as to limit a reference date from being activated if no work is done in that month. If such an interpretation was correct, then I agree with the Claimant that this would breach s99 of the Act which prohibits “...*excluding, modifying, restricting or otherwise changing the effect of*...” the operation of s12 of the Act.
168. Accordingly, Item 31(a) in Part A of the Annexure to the GCCC which provides the date for claiming progressively under the contract, as the *28th day of the calendar month in which work are completed*, can be interpreted to prevent it from breaching s99(2) of the Act, and still govern the parties’ commercial relationship. I return to the extract from Hudson’s Building and Engineering Contracts in paragraph 43 of *Isis* where the author said: “...*while payment by means of suitably calculated fixed instalments of the contract price due on completion of identified stages of the work offers valuable advantages to owners, particularly in encouraging expeditious progress, reducing administrative and professional valuation outlays, and avoiding “front-loading” pricing techniques by contractors*”. Having regard to the contract, I then construe Item 31(a) as governing progress claim dates for convenience in administration of the contract, so as to provide a regular date which closes off work that is to be claimed for the month.
169. I find support for this approach from the second paragraph of Clause 37.1 which provides that an early progress claim *shall be deemed to have been made on the date for making that claim*. This to my mind reinforces the notion that the “books close” on the 28th day of the month for work done in that month. The third paragraph of Clause 37.1 of the contract provides that the progress claim *shall include the value of WUS done and may include details of other moneys then due*. Whether the books close completely for work done in that month will be considered in more detail below.
170. In my opinion the Respondent has not properly clarified its paragraph 8.12 submissions regarding how the process dealing with costs of suspension, delay damages, or damages flowing from suspension constitutes an entirely separate process to the making of the progress claim under Clause 37.1. It appears to me, having regard to the provisions of the contract that claims under Clause 39.9 do not require recourse to Clause 41.1 of the contract, which deals with the notification of claims, because there is no reference to Clause 41.1.

171. How then can a Subcontractor get paid for damages for breach of contract? Clause 39.9 states that the Superintendent certifies these damages as due and payable, but in my view the logical mechanism is for the Subcontractor to detail these amounts in a progress claim as monies then due in accordance with Clause 37.1, and the Superintendent then assesses what is due and payable.
172. The Respondent did not deal with the costs of suspension submission relating to Clause 33.4 of the contract. This clause also does not require a claim to be made, so that Clause 41.1 of the Contract is not enlivened. How then does a Subcontractor get paid for the costs of suspension?
173. Clause 33.4 provides that in the event that there are any costs that are more or less than otherwise would have been incurred by the Subcontractor, these costs are assessed by the Superintendent and added or deducted from the Contract sum. However, there is no facilitation clause that specifically deals with how this actually takes place. I have already said that Clause 33.4 does not require the Subcontractor to make a claim, so it is necessary to look to the contract for guidance.
174. I find that the logical approach which on my view is contemplated by the contract; is that in the event there are more costs incurred under Clause 33.4, then the Subcontractor details the moneys then due under Clause 37.1 of the contract, so that the Superintendent can consider and provide certification of these monies, if they are so assessed.
175. Even if I am wrong in this approach to Clauses 33.4 and 39.9, and that they are both, together with Clause 34.9, subject to Clause 41.1 of the contract; this does not avoid the need for them to form part of a progress claim under Clause 37.1 if they have been assessed as due and payable by the Superintendent.
176. I do not see that the process of making a claim under Clause 41.1, providing of course it is a *prescribed notice* which has the meaning given to it under Clause 41.1; i.e. that it is a written notice of the general basis and quantum of the claim, is entirely separate from making a progress claim under the contract. Of course the Superintendent has a longer period (63 days) to consider the claim and provide a written decision, but if they do so, then ultimately any such amount has to enter the progress claim regime for actual payment to be effected. Therefore, apart from a timing issue, I do not see that the operation of Clause 41.1 is entirely separate from Clause 37.1.
177. In my mind in relation to this vitally important point, the question is whether *reference dates* are constrained to only being enlivened when construction work is carried out. The Claimant has pointed out 3 separate instances where other moneys due (not contingent upon work having been done), apart from those associated with *WUS*, may form part of a progress claim.
178. If no work is done, but other monies are due after being certified as due and payable, how can the *reference date* be calculated? Does one have to wait until further work is done? In that event, how does one catch up the inevitable housekeeping associated with construction contracts; e.g. claims where the Superintendent required further information before certification, invoices coming in after the 28th day of the month for work done in that month?

179. Referring back to McDougall J in *Isis* at paragraph 43 where His Honour referred to these sorts of issues with his reference to IN Duncan Wallace (ed) *Hudson's Building and Engineering Contracts (11th ed, 1995)*, where the learned author at para 8-105 in the said:

"... it remains the case that the great majority of English standard forms nevertheless use periodical valuation, usually monthly, of the work done to date as the basis for interim payment. For entirely valid practical reasons, these valuations usually represent successive retrospective valuations of the whole of the work done to date, and not of the work done in the preceding month, since many items, due to differenced (sic) in measurement or the subsequent discovery of defective work or the replacement of "materials on site" valuations with valuations of work done subsequent to their incorporation, may require revision in later certificates." (My underlining for emphasis)

180. In my view this proposition applies equally to Australian standard form contracts of which AS 4901 forms a part as they use periodical valuation of the work done to date, and Clause 37.1 refers to a progress claim including details of the value of WUS done and may include other monies then due. WUS is defined in Clause 1 of the contract as, *"means the work which the Subcontractor is or may be required to carry out and complete under the Subcontract..."*
181. Clause 37.1 talks about the value of WUS done; not the work that was carried out in the specific calendar month, even though the monthly claim regime in Item 31(a) specifies the 28th day of the month in which the works are completed. In my view the words *in which the works are completed* do not require works being completed in that calendar month for Clause 37.1 to be enlivened, because such an interpretation is inconsistent with the other provisions of the contract to which I have referred.
182. I find that the 28th day of the month has been agreed by the parties as the date for submission of progress claims, and that if work is completed in that month, then the books close on the 28th as a matter of convenience, but only as a matter of convenience. However, for the reasons previously stated I cannot accept that, if details for work done during that calendar month are not available by the 28th day of the month, then the Claimant is unable to claim for that work in the following month. To my mind that interpretation is inconsistent with other provisions of the contract.
183. I refer in particular to Clause 41.2 of the contract, to which I will refer in more detail later which provides:

"The failure of a party to comply with the provisions of subclause 41.1 or to communicate a claim in accordance with the relevant provision of the Subcontract (my emphasis) shall, inter alia, entitle the other party to damages for breach of the Subcontract but shall neither bar nor invalidate the claim."

184. If a party can fail to comply with a timing provision regarding the lodging of claims, including in my opinion the lodging of payment claims under Clause 37.1 (*in accordance with the relevant provision of the Subcontract*), without having the claim barred or invalidated, I cannot see how as a matter of commercial practicality that another provision of the contract can prevent that claim from being lodged at a later date, in a calendar month after the work has been done.

185. Naturally the other party may have a claim for damages, but the claim is still valid and may proceed. This to my mind means that the Respondent's interpretation of Item 31(a) is incorrect because it is inconsistent with other provisions of the contract, and therefore cannot govern the meaning of *reference date* suggested by the Respondent. The more logical interpretation is that the contract provides that the 28th day of the month is the reference date for progress claims, whether or not work is completed in that month and I am prepared to find this interpretation more plausible.
186. This point was fiercely contested by both parties as it goes to the heart of this adjudication, and having regard to all the submissions in relation to this important point, whether specifically referred to or not, I find that the *reference date* for this progress claim is 28th September 2006, because the 13th October 2006 is from that reference date, and this satisfies s12 of the Act.
187. This *reference date* is not the same as the *reference date* for Payment Claim 1 (28 August 2006) and Payment Claim 2 (prior to August 2006), so s17(5) of the Act is not contravened, and s17(6) permits the payment claim to include claims that were the subject of a previous claim.
188. Furthermore, I must deal with the scaffolding claim, which is the subject of Part D of the payment claim. The Respondent in paragraph 8.19 in the response submissions concedes that Part D has not been part of a previous payment claim. However, the Respondent in paragraph 8.19(a) through to (e) of the response submissions argues that the invoices 90396463, 90396462, 90396464, 90396465 and 90396835 to which Part D of the payment claim relates, although dated either 6 October or 12 October 2006, all involve work which was performed in previous reference dates.
189. Whilst it is not expressly stated in the Respondent's submissions, essentially its argument is that Part D cannot be claimed because previous payment claim have already been made for the reference dates associated with the scaffold hire. Taking this argument to its logical conclusion, it would mean that a Subcontractor could never make a progress claim, if it did not submit a progress claim in the month that the work was completed. I have already decided by reference to Clause 41.2 of the contract that such an interpretation is not correct, and that a claim can be made late, subject of course to a damages claim by the Respondent.
190. If I am incorrect in my interpretation regarding the *reference date* meaning, and the Respondent's interpretation is correct, then I find that this contractual mechanism in determining reference dates in accordance with Schedule 2, would breach s99 of the Act for the reasons stated previously, and in that event I find that Clause 37.1 as qualified by Item 31(a) in Part A of the Annexure to the GCCC is void. That would mean that the contract would not have "a date stated in it, nor could be worked out under it" to paraphrase the words of the Schedule 2 of the Act. In this event one refers to Schedule 2 (b) on the basis that the contract does not provide for the matter, and the *reference date* would then be the last day of each month.
191. However, I am satisfied of the correctness of my earlier analysis that does not require the rendering of Item 31(a) of the contract to be void, such that the *reference date* is the 28th day of the month whether or not work is carried out.

192. I now turn to the Respondent's objection in the payment schedule that the progress claims were not submitted in accordance with the contract.

Progress claims not submitted in accordance with contract

193. This is another vitally important issue that is in dispute between the parties and requires resolution before further work is done on quantum in the adjudication. It was necessary to consider the documents in some depth in order to establish what detail was contained in the payment claim, because the Respondent argued that there had been a failure to provide details of the value of work performed.
194. The Respondent in Part 2 of the payment schedule in paragraph 2, and in particular in paragraph 2.5 argued that:
- i. the invoices were not submitted in accordance with Item 31 of the contract. In particular it made reference to Item 31(a) which stated, "*28th day of the calendar month in which works are completed*"; and
 - ii. failed to provide details of the value of the work performed under the contract; in that it could not determine how the invoices were referable to the scope of works under the contract, or how the invoices were referable to the Contract Sum; such that;
 - iii. it could not determine when there was a due date for payment in relation to the works claimed in the payment claim.
195. Given that this is an adjudication under the Act, I am obliged to firstly consider the provisions of the legislation before delving into the merits of the Respondent's argument about the requirements for progress claims under the contract. I refer to s17(2) of the Act, which provides the statutory requirements for the payment claim:
- "A payment claim-*
- (a) must identify the construction work or related goods and services to which the progress claim relates; and*
 - (b) must state the amount of the progress payment that the claimant claims to be payable (the "**claimed amount**"); and*
 - (c) must state that it is made under this Act."*
196. As a matter of prudence, I first find that the first paragraph of the payment claim contains the endorsement that it was made under the Act, thereby satisfying s17(2)(c) of the Act.
197. The Respondent in paragraph 5.1(a) of its response, challenges the sufficiency of the information in the payment claim, which it says fell foul of s17(2)(a) of the Act. The Claimant, at paragraph 6.3 of its application submissions, asserted that the supporting documentation was sufficient, and that it set out the method of calculation of the amounts claimed. In addition, at paragraph 6.3(a) it said that it provided the relevant information in Appendices 8 to 13 (the "appendices") in the application. It did also assert in paragraph 6.3(b) that the appendices had been provided in the payment claim.
198. I must make a finding whether the documents contained in the appendices in the application had been provided in the payment claim. Although it is not entirely clear from the Respondent's submissions in paragraph 5.1(b) that it did not receive the appendices in the payment claim, it appears that it is impliedly making this assertion

when one looks at paragraph 5.1(c) of the submissions, by the Respondent challenging the rights of the Claimant to include additional information in the application.

199. I have compared the appendices to the documents in the payment claim, and find that they contain the same invoices. However, there are some different documents provided in the appendices, and I have tabulated these documents for ease of reference because I must make a finding in relation to them. A finding is necessary because the Respondent argues in paragraph 5.1(c) that the Claimant is not allowed to provide additional information in the application because it is unable to include reasons for withholding payment, apart from those provided in the payment schedule.

APPLICATION	Invoice #	Supporting docs	PAYMENT CLAIM	Supporting docs
Appendix 8	90384045	Reference doc	Vol 3	Reference doc
Appendix 9	90375857 & 90388840	1 page Reference doc for material only/site instructions/RFI's/tax invoices	Vol 3	13 pages Reference doc & List of rates only
Appendix 10	90384042	Short variation summary and Tax invoices	Vol 3	Short variation summary only
Appendix 11	90392266	Variation summary & RFI and General stores equipment and PPE cost ("GSEPPE")	Vol 4	Variation summary & tax invoices
Appendix 12	90390929	2 pages Reference doc/RFI/GSEPPE	Vol 4	2 pages Reference doc/RFI/GSEPPE & Tax invoices and supporting documents
Appendix 13	90396465	Scaffolding summary & Tax invoices	Vol 5	Scaffolding summary only

200. Before turning to findings on these documents, I need to refer to authority and principle in relation to the amount of information required for a payment claim.

201. I again refer to the case of *Isis*, where McDougall J was also considering the issue as to "do the progress claims identify the construction work to which they relate?" I refer to extracts of what His Honour said:

"36 In my judgment, the approach to be taken to this question is that described by Palmer J in Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140. His Honour dealt at paras [72] and following with the question of "what a payment schedule should show". In my respectful opinion, his Honour's observations are (as is in any event apparent from para [76]) applicable equally to payment claims. (my underlining) His Honour pointed out that, in considering whether a payment claim or a payment schedule contained sufficient detail, it was necessary to bear in mind that they were given and received by people experienced in the building industry and familiar with the particular contract, the history of construction work on the project and the broad issues underlying the dispute. He said:

“76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant’s payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.

37 In principle, I think, the requirement in s 13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:

(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;

(2) That reference is supplemented by a single line item description of the work;

(3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;

(4) There is a summary that pulls all the details together and states the amount claimed.

38 Where payment claims in that format have been used, apparently without objection, on 11 previous occasions, it is very difficult to understand how the use of the same format on the 12th and 13th occasions could be said not to comply with the requirements of s 13(2)(a). If payments claims in that format had sufficiently identified the construction work to which the progress payment claimed related on 11 previous occasions, I find it hard to understand how they would lose that character on the 12th and 13th occasion....

46... I think that the question is one to be resolved by the application of s 13(2)(a) in the context of the particular contractual provisions and particular facts of each case.”

202. Accordingly, paragraph 46 of *Isis* obliges me to refer to the particular contractual provisions and the facts in this adjudication. However, McDougall J’s list is very useful in comparing to the documents provided in this adjudication. This list is provided again for ease of reference:

(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;

(2) That reference is supplemented by a single line item description of the work;

(3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;

(4) *There is a summary that pulls all the details together and states the amount claimed.*

203. I apply this list to the payment claim, and in particular to the backup sheets described in paragraph 2 of Parts A, B, C & D of the payment claim, which the Claimant asserts that they support each invoice on pages 1 and 2 of each Part of the payment claim. These backup sheets are spreadsheets that provide information, which I have scanned from a typical spreadsheet and provided in the Appendix to this decision. The Claimant described the contents of the backup sheets on pages 1 and 2 of each Part of the payment claim, to which I will make further reference below.
204. In Tab 6 of the payment claim, the WBS element identified in the first column of these backup sheets was cross referenced with an abbreviation of work from the Scope of Works for the project. I have also scanned in a page of this cross referencing document to allow the parties to follow the reasoning in this decision, and it also appears in the Appendix below just before the backup sheet.
205. Having regard to the *Isis* list I find that the backup sheets, all of which were headed JR1530MP OAKY CREEK CPP UPGRADE, with a Reference to an invoice number, has the following information provided in columns from left to right:
- | | |
|----------------------------------|--------------------------|
| i. WBS element e.g. | TSMP1530.WS.PL.SP.PW |
| ii. Order e.g. | JR1530MP1376 |
| iii. Reference e.g. | 90375836 |
| iv. Short text | FCC Feed Pipework |
| v. BICl e.g. | DI |
| vi. Bill Class Description e.g. | Fitter |
| vii. BICd e.g. | BO |
| viii. Bill Code Description e.g. | Shift – double time |
| ix. Material e.g. | LABOURSUN |
| x. Description e.g. | 11.06.2006 Quetti Steven |
| xi. Labour hrs e.g. | 11 |
| xii. Labour (GST excl) e.g. | \$1,020.03 |
| xiii. Total (GST incl) e.g. | \$1,122.03 |
| xiv. Subtotal by WBS | |
206. The Respondent did not take issue with the information provided in these backup sheets. It merely argued in paragraph 2.5 of the payment schedule generally that the invoices failed to provide details of the value of the work performed under the contract, and in paragraph 3.1 of the payment schedule that it rejected that any amounts were owing to the Claimant, as it was unable to determine the matters set out in paragraph 6.5 (sic) above. I assumed that this was a typographical error and that the Respondent meant paragraph 2.5 above.
207. I cannot agree with the Respondent that the invoices failed to provide details of the value of work performed. Naturally, the invoices themselves do not provide these details, but the backup sheet contained in the supporting documentation for the invoice goes to the level of detail identified above. It is important to the parties to understand these reasons and this is an important issue, so some time needs to be spent in properly analysing these documents.
208. The backup sheets all refer to the Oaky Creek CPP Upgrade and I find, without anything in the payment schedule and the response submissions from the Respondent

to the contrary in relation to any aspect of the backup sheets, that these backup sheets apply to the project because the project is specified on each document. Furthermore, the backup sheet identifies an invoice number, both in the heading and in column iii, which is the reference number. The Claimant provided a key to explain the contents of the backup sheets on pages 1 and 2 of each Part of the payment claim to which I will now refer.

209. The WBS element was referred to on page 1 of every payment claim Part, which the Claimant said was:

“... an abbreviation used to identify the particular element of the scope of work to which each work task or material relates. The full description of each abbreviation appears in Volume 1 (Tab 6). Each full description correlates with a part of the Contract Scope of Work – see illustration below.”

210. The illustration provided the following assistance:

<i>“WBS element</i>	<i>TSMP1530-WS-PL-FS-ST</i>
<i>Scope reference</i>	<i>Main Plant Fine Coal Circuit Feed and Spirals, Structural and Plate work</i>
<i>Scope document</i>	<i>Section 3.2.1 pages 11-13”</i>

211. Two other examples were provided on the first and second page of each Part of the payment schedule, and it became clear from these three examples by applying reasonable objective powers of deduction, and after referring to Tab 6 in Volume 1 (the “scope of work key”), which provided a cross reference between the WBS element and the Scope of Work, that *TSMP1530-WS* meant “Scope of Work” under the project. Furthermore, if the WBS stated *TSMP1530-VR*, this meant variation, as there were a number of references to variations in the scope of work key. Accordingly, applying commonsense, I therefore find that these references refer to the scope of works of the project, or variations on the project and the Respondent did not take issue with this level of detail in the documents to persuade me otherwise.
212. Referring again to the backup sheet, the “*Short text*” in the backup sheet column iv amplifies the type of work being carried out in an abbreviated format. The next 4 columns v to viii deal with billing for the time of the person working. There is an abbreviation column, then a column providing text for that classification, as well as a code for how time is charged next to a column providing text for the time charging, i.e. whether they worked normal time, time and a half, or double time. Again, using commonsense I find that these were the meanings of these columns and provided the detail as so described, and again the Respondent did not take issue with this level of detail in the documents to persuade me otherwise.
213. Column ix is headed “*Material*”. I find, without anything from the Respondent to the contrary, after reviewing a number of the backup sheets that this column provides for a classification of what is being provided, e.g. External Labour, Labour, Subcontracting, LabourSat or LabourSun, TextSteel, which is an important record of the materials and labour supplied on the project.
214. Column x, refers to the date of work or material supplied and the name of the worker, and by my reference at random to time sheets for the dates nominated, and the name of the worker, I find this information to correlate with the time sheets, without anything from the Respondent to the contrary to persuade me otherwise. In referring to this

random check, I provide more detail under the quantum section of decision, as to the level of checking that took place. Suffice is it to say at this stage that a representative sample of 30 entries in the backup sheet for the large invoices were selected at random, and then satisfactorily cross referenced with the time sheets.

215. The time sheets also correlated with the “*Labour hrs*” in column xi, and I find that the backup sheets summarised the times worked for the various workers for particular dates. I also find that the information on the time sheets correctly cross referenced to column ii headed “Order”, which was a number that described an aspect of the scope of work on the time sheets. Again, after having reviewed backup sheets at random, together with the relevant time sheets, I am satisfied that the backup sheets captured the information provided in the time sheets for work and material supplied on the project, without anything from the Respondent to the contrary to persuade me otherwise.
216. In the column xi headed “*Labour hrs*”, the details also included whether the worker was working either as part of the scope of works, or as a variation to the works on the project.
217. Column xii provided a cost, excluding GST, and the Claimant pointed to the schedule of rates document in Tab 9 of Volume 1 to explain that the amounts in this column was derived using this document. In Tab 7 of the payment schedule, I note that the Respondent attached the same document, which provided the relevant rates for each class of worker under columns headed “normal time, time and a half, double time and worked public holiday”. Accordingly, I find that this document reflected the agreed schedule of rates for the workers on the project, and also find that was used to perform the calculation necessary to column xi to deduce the labour cost, because the Respondent does not controvert this item. Furthermore, as a matter of logic, and without anything from the Respondent to the contrary, column xiii is the total cost, including GST.
218. Having carried out an extensive investigation of these documents, using my findings about the meaning of each column, and without anything from the Respondent to the contrary, I find that the time sheets in Volumes 6A, 6B, 6C and 6D provided the raw data, which served as the input into the backup sheets. By random cross checking I was satisfied that the time sheets correlated with the backup sheets, and the Respondent did not take issue with these details.
219. I have not found that the quantum is established by this random check, and more investigation into each aspect of the claim is made under quantum below. However, I have established the level of detail provided in the claim as far as the backup sheets and the time sheets are concerned. If this level of detail is compared to McDougall J’s list in *Isis*:
 - i. *The payment claim gives an item reference* is satisfied in columns i, ii and iii of the backup sheet
 - ii. *That reference is supplemented by a single line item description of the work* is satisfied in column iv of the backup sheet.
220. The list also refers to two other important aspects which are not found in the backup sheets and time sheets. The payment claim before Tab 1 of Volume 1 provides a Payment Claim Summary, and the Respondent did not take issue with the detail

contained within the summary. I find that there are separate summaries in spreadsheet format for Parts A through to D of the payment claim. In these summaries are references to particular invoice numbers in rows under headings of Fixed Fee, Schedule of Rates and Variations. In the adjacent columns, I find headings, “Last Claim to Date, This Claim and a Claim to Date” in their own columns.

221. Without anything from the Respondent to the contrary, I am satisfied that these details satisfy the third item on the list, viz., *particulars are given of the amount previously completed and claimed and the amount now said to be complete.*
222. Furthermore, in the Payment Claim Summary, there is a document called “Summary Payment Certificate” which I find, without anything from the Respondent to the contrary that *there is a summary that pulls all the details together and states the amount claimed.*
223. In *Nepean Engineering Pty. Ltd. v. Total Process Services Pty. Ltd. (In Liquidation)* [2005] NSWCA 409 (*Nepean*), the Court of Appeal had to consider the amount of detail required, and confirmed that McDougall J’s approach in *Isis* was endorsed by the Court of Appeal in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391. Hodgson JA in *Nepean* at paragraph 25 referred to his own decision in *Climatech* and said:

“In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim; and in the case of “delay damages” of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates.”

224. In *Nepean*, Santow JA also provided guidance as to what level of detail was required to satisfy the NSW equivalent of s17(2)(a), and at paragraph 64 His Honour said:

“64 Here, Nepean has, clearly enough, information sufficient to understand the basis of the claim. As Mason P observed on appeal in Clarence Street Pty Ltd (supra):

“[36] According to the appellant, the focus of the inquiry should have been whether Progress Claim 12 and Progress Claim 13 provided sufficient detail of the work the subject of the claims to enable the appellant to make its own assessment of the amount payable and to prepare a payment schedule accordingly. Once again, this tends to state the problem in terms of circularity rather than offer a basis for arguing that the trial judge erred in construing and applying s13(2)(a). It also tends to elide the distinction between the informative and the persuasive roles of a payment claim. Section 13(2) prescribes matters that must be brought to the attention of the recipient, who then has the option of paying in full or submitting a payment schedule explaining why payment is withheld. It may be expected that a claimant will be considered to persuade the other party to accept the claim and pay promptly, but s13(2) makes no prescription in this regard.”

65 I understand Mason P to be rejecting that persuasive content is necessary “to enable the appellant to make its own assessment of the amount payable and to

prepare a payment schedule accordingly”. But he does not disavow the necessity for identification of construction work to which the progress claim relates at the minimum level where the respondent to the claim is able to understand the basis of the claim. But there is no legal necessity to include any material directed merely to persuading the respondent to accept the claim and pay promptly....

...68 So too “construction work”, defined in s5 of the Act, goes well beyond construction work as such. The definition, quoted below, identifies a series of categories of construction work used in a very broad sense. This strongly supports that identifying the construction work to which the progress claim relates requires no more in physical detail than identifying a particular category of construction work. There can be no necessity to identify for example the location on a particular pipe of a particular weld, as prerequisite for the payment claim to be valid in a case such as the present.”

225. The Respondent has argued throughout the payment schedule [paragraphs 2.5, and 3.1 of Part 2], and the response [paragraphs 5.1, 6.3, and 8.18] that the progress claims were not submitted in accordance with the contract, they were submitted on an irregular and piecemeal basis and failed to provide details of the work performed under the contract. These may be valid arguments under the contract to which I will have to turn later.
226. However, this submission does not fully take into account what the Courts have said regarding the requirements of a valid payment claim. Santow JA’s references in *Nepean* in paragraph 68 to the necessity to merely identify a category of construction work, and in paragraph 65 that there is no requirement to persuade the Respondent to pay and pay promptly, suggest that the Act does not require the level of particularity in the payment claim to the level that may be required under a progress payment under the contract.
227. Furthermore, I have found that the Superintendent had issued a certificate dated 25 August 2006 for \$2,190,329.04, and although I do not have the material before me on which this certificate was based, it is a matter of logical inference that the same sort of invoices, backup sheets and timesheets are likely to have formed the basis of that progress claim by the Claimant. It seems unusual that if the Respondent is correct in its submissions that the details are insufficient, a certificate would have issued. Referring back to *Isis* where McDougall J at paragraph 38 said:

“38 Where payment claims in that format have been used, apparently without objection, on 11 previous occasions, it is very difficult to understand how the use of the same format on the 12th and 13th occasions could be said not to comply with the requirements of s 13(2)(a). If payments claims in that format had sufficiently identified the construction work to which the progress payment claimed related on 11 previous occasions, I find it hard to understand how they would lose that character on the 12th and 13th occasion...”
228. Based on the above authorities and having regard to the findings of fact in this adjudication, I am satisfied that the Claimant has satisfied s17(2)(a) in sufficiently identifying the construction work or related goods and services to which the progress payment relates. Furthermore, the amount of the progress payment is identified, thereby satisfying progress payment s17(2)(b). Furthermore, the material provided in

the Appendices in the table to which I referred merely provided some additional supporting documents, and was not advancing a new claim. Accordingly, I am of the view that the Respondent had sufficient information on which to provide a payment schedule, and the few extra documents provided in the application are not material to this adjudication. The payment claim does not have to persuade: *Nepean* para 64.

229. In addition, the Respondent has complained about the piecemeal approach to the delivery of invoices. Whilst that makes the administration of a contract more difficult, it does not on the above authorities prevent the payment claim from being valid under the Act. I have already dealt with the 28th day of the month objection in the reference date argument above, and the due date for payment argument raised by the Respondent to my mind is not something that is too complex to prevent a payment claim from being responded to.
230. I am obliged to decide on the amount of the progress claim and it is useful to remind the parties of their obligations in a dispute. The Claimant bears the legal and evidentiary onus to prove its claim and the legal onus always remains with the Claimant. However, if the evidentiary onus is discharged in supporting the legal onus, then the evidentiary onus shifts to the Respondent if it is disputing some point.
231. The sheer volume of material in this adjudication and the breadth of issues have meant that I am unable to descend too far into the detail of any aspect of the payment claim in the 20 business days allowed. This means that although I am satisfied that the payment claim provides sufficient detail to satisfy s17(2) of the Act, this does not mean that there is sufficient clear information on which an independent adjudicator, who does not have intimate knowledge of the Superintendent, can safely decide in favour of the Claimant, who bears the legal onus of proof. I will deal with this aspect progressively under quantum below, being mindful at all times of where the onus lies.

ROM scope of works deletion

232. In the Payment Claim Part A on page 2 the Claimant asserted that the Superintendent had wrongfully deleted \$418,913.00 for ROM works. It said that the Respondent's instruction dated 30 May 2006 that all works listed in section 3.1, Raw Coal Handling (excluding electrical works and 150 ton crane supply) was deleted from the scope of works. The Claimant said that it had made no claims for any amount of this deleted work, and that given that it was a schedule of rates for this work there was no justification for deduction of work because none had been claimed for.
233. In paragraph 4 of the payment schedule, the Respondent stated at paragraph 4.1 that the Superintendent had not made a deduction for the ROM scope of works in its payment certificate issued on 18 September 2006, which was annexed to the payment schedule in Tab 9.
234. However, I find that in the earlier certificate dated 25 August 2006, this ROM amount had been deleted and it appears to me that the Respondent's statement that in the latest certificate dated 18 September 2006 no deduction was made, indicates that the Respondent concedes that there was an erroneous deduction in the earlier certificate. This means, and I so find that the deletion of the ROM works was incorrect and no such deduction was justified. I will not be using the certificate amount by the Superintendent in any event, so this is a moot point.

Respondent's entitlement to liquidated damages

235. Paragraph 5 of the payment schedule asserts liquidated damages (“LD’s”) of \$271,393.00 is payable because the Claimant was 36 days late in completing the contract. The LD’s were capped at this figure according to the Respondent by virtue of Item 27 of Part A of the Annexure to the GCCC.

236. I accept the Respondent’s reference to Clause 34.7 dealing with liquidated damages which states as follows:

“If WUS does not reach practical completion by the date for practical completion, the Subcontract Superintendent shall certify, as due and payable to the main contractor, liquidated damages in item 27(a) for every day after the date for practical completion to and including the earliest of the date of practical completion or termination of the subcontract or the main contractor taking WUS out of the hands of the subcontractor.

If an EOT is directed after the subcontractor has paid or the main contractor has settled for liquidated damages, the main contractor shall forthwith repay to the subcontractor such of those liquidated damages as represent the days the subject of the EOT.”

237. Both the Claimant on page 4 in Tab 7 of the payment claim, and Respondent in paragraph 5.4 of the payment schedule accept that the date for practical completion was 31 May 2006. It is also identified in Item 11 of Part A of the Annexure to the GCCC. Accordingly, I find that 31 May 2006 was the date for practical completion.

238. In addition, on page 4 in Tab 7 of the payment claim dealing with extension of time (“EOT”) of 43 days and delay damages of \$1,305,540.63, the Claimant stated that the actual practical completion date achieved was 13 July 2006 and this was accepted by the Respondent in its letter to the Claimant on 18th September 2006 in Tab 10 of the response. Accordingly, I am satisfied that the date of practical completion was 13 July 2006.

239. In response to the EOT claim for 43 days, the Superintendent in Tab 10 of the payment schedule did not provide any EOT. Previously on 2 August 2006, I find that the Superintendent had provided 7 days extension of time for a previous claim by the Claimant, which revised the practical completion date to 7 June 2006, and I find that this was the revised date before the EOT claim.

240. I am of the opinion that I am obliged to consider the EOT claim because it has a bearing under the contract to the amount of the progress claim. I will use the revised practical completion date of 7 June 2006 and then make further determinations, if any, from that date. This will be considered in the relevant issue below.

241. However, I am obliged to deal with the Claimant’s submissions in relation to LD’s. In paragraph 14.1 of the application, the Claimant asserted that no LD’s were payable because:

- i. the Superintendent had not assessed its EOT before certifying LD’s in the payment certificated dated 25 August 2006;

- ii. the Respondent was obliged under Clause 20 of the contract to ensure the Superintendent acted in good faith, and the Superintendent should not have deducted LD's when it had failed to assess an *EOT* claim;
- iii. in any event the Claimant was entitled as a matter of fact to an *EOT*.

242. The Respondent did not respond to these submissions in its response.

243. In dealing with the Claimant's submissions, I am of the view that it is not an adjudicator's function to make any findings in relation to the conduct of the Superintendent, because this conduct is unlikely to have any bearing on the amount of the progress claim. An adjudicator's jurisdiction is constrained by the Act, and therefore I make no finding in relations to submission points (i) and (ii) above because I am not empowered to do so, and it is not directly relevant to the amount of the progress claim.

244. I have found that I must consider submission (iii) in more detail, and make my own determination of any *EOT*. However, even if I find that the Claimant is entitled to an *EOT*; if that does not bring the date for practical completion to 13 July 2006, then the Respondent is entitled to LD's because Clause 34.7 of the contract specifically provides for this event.

245. The Claimant did not take issue with the interpretation of Clause 34.7 in the application and chose, instead to focus on the Superintendent's conduct, in denying any liability to pay LD's. Apart from the limit on LD's to 5% of the Contract Sum, which I find in Item 27(a) of Part A of the Annexure to the GCCC, in my view Clause 34.7 otherwise allows the Superintendent to certify LD's as due and payable to the Respondent, and I find accordingly.

Claimant not entitled to delay damages

246. In paragraph 6 of the payment schedule the Respondent asserted that the *EOT* claim had not been submitted in accordance with the contract in that it failed to comply with Clause 34.3 of the GCC, but did not elaborate on this deficiency any further. The Respondent also stated that the Superintendent had written a direction granting 7 days *EOT*.

247. Nevertheless, the Respondent asserted that there was no entitlement to claim delay damages for 7 days extension of time because the payment claim had the same reference date as the two earlier payment claims. In addition, the Respondent referred to paragraph 10 of the payment schedule, but there was no paragraph 10 to provide further explanation.

248. The Claimant in the application paragraph 15 referred to its rights to delay damages and extracted Clause 34.9 of the GCC which provided:

"For every day the subject of an EOT for a compensable cause and for which the Subcontractor gives the Subcontract Superintendent a claim for delay damages pursuant to sub Clause 41.1 damages certified by the Subcontract Superintendent under subclause 41.3 shall be due and payable."

249. The Claimant asserted that as a matter of fact it was entitled to its *EOT* and that delay damages were properly claimable under the contract based on the decision of the Court

of Appeal in New South Wales in *Coordinated Construction Co. Pty Limited v Climatech (Canberra) Pty Limited* [2005] NSWCA 229 ("*Climatech*").

250. The Claimant asserted that *Climatech* was authority that delay damages were not damages for breach of contract, but were additional amounts payable under the contract and therefore under the ambit of the Act. In addition, it was for the adjudicator to determine whether as a matter of fact amounts claimed as delay damages were properly payable. The Claimant referred to the decision of Hodgson JA from paragraphs 42 onwards. The Claimant asserted that Clause 34.9 of the contract was in virtually identical terms to the contract being considered in the *Climatech* case.
251. Accordingly the Claimant argued that it was entitled to make a claim for delay damages and that it was for the adjudicator to make an assessment of that entitlement.
252. In paragraph 15.8 of the adjudication submissions, the Claimant said that the Respondent in its paragraph 6.2 of the payment schedule advised that the *EOT* claim giving rise to delay damages had not been submitted in accordance with the contract because it had failed to comply with Clause 34.3 of the contract. The Claimant asserted that it was impossible now for the Respondent to provide any further particulars in relation to this statement and it was improper for the adjudicator to consider any unsubstantiated submissions that had been made.
253. Furthermore, the Claimant denied that its claim did not in any respect conform to the requirements of the contract. Furthermore, the Claimant submitted that as a matter of fact many materials which the Respondent was required by the subcontract to provide were not provided until after 7 June 2006, which was the revised date of practical completion, and that some of the materials were only provided as late as 27 June 2006. In this regard the Claimant referred to page 20 of its *EOT* claim.
254. Furthermore, in paragraph 15.11 of the application submissions the Claimant stated that in paragraph 6.4 of the payment schedule, the Respondent had conceded that the Claimant was entitled to delay costs for its 7 day extension of time, and that the Respondent did not in its payment schedule or in the response to the *EOT* claim dispute the amounts claimed by the Claimant as delay damages. Accordingly, the Claimant said that it was not possible now for the Respondent in its response to prohibit the inclusion of any reason not set out in the payment schedule in relation to the delay damages submissions.
255. I am satisfied that the Claimant is entitled to delay damages having construed the provisions of the contract, and because the Respondent has made that concession in paragraph 6.4 of the payment schedule that at least delay costs for a 7 day extension of time was allowable.
256. Whether or not there are any delay damages is dependent on the *EOT*, and this issue is discussed with the *EOT* analysis below.

Claimant's entitlement to an extension of time claim and delay damages

a. Late EOT claim

257. The Claimant's delay damages claim, which forms part of Part B of the payment claim amounts to \$1,305,540.63. I turn firstly to the payment schedule.

258. In paragraph 6.2 of part 2 of the payment schedule submissions, which dealt with the issue of delay damages, the Respondent by reference to Clause 34.3 of the contract said the *EOT* claim was not submitted in accordance with Clause 34.3 of the GCCC.
259. The Claimant in paragraph 15.8 of the application stated that the assertion in payment schedule paragraph 6.2 by the Respondent contained no particulars, rendering it impossible for the Claimant to respond to the allegation, and that it would be improper for me to consider that such an unsubstantiated allegation carried any weight.
260. Furthermore, the Claimant said that the Respondent could not elaborate on this allegation in the response, as it was prohibited from doing so under s24(4) of the Act.
261. What was foreshadowed by the Claimant in paragraph 15.8 of the application submissions appears, at first blush, to have taken place. The Respondent in paragraph 13.1 of the response stated that the *EOT* claim was not submitted in accordance with Clause 34.3 of the contract, in that:
- iv. it was not submitted within 21 days of when the Claimant should reasonably have become aware of that causation of the qualifying cause of delay occurring; and
 - v. it did not properly evidence the facts of causation and the delay to WUS (including extent).
262. I need to deal with the contending submission at this stage, as it has a significant bearing on the *EOT* and delay damages claim. s24(4) of the Act provides:
- “(4) The respondent can not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.”*
263. In *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors* [2004] (“*Cardno*”) NSWSC 258, Einstein J in dealing with the NSW equivalent of s24(4) at para 2 said:
- “In that adjudication a respondent is expressly prevented from including in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant (s20(2B) of the Act).*
- Given that prohibition an applicant could not, for reasons of procedural fairness or natural justice, raise for the first time in its adjudication application reasons which had not been included in the payment schedule, as a respondent would not have been able to deal with those reasons in its payment schedule and would thus be unable to respond to them in its adjudication response due to the prohibition in section 20 (2B) of the Act.”*
264. I need to decide on the material whether the Claimant is correct in asserting that the reasons given in paragraph 13.1 of the response had not been *included in the payment schedule served on the claimant*. The Claimant is correct that these reasons were not directly referred to in the payment schedule submissions in paragraph 6. However paragraph 6.3 of the payment schedule did refer to the Superintendent’s response to the *EOT* claim which was a letter dated 18 September 2006 (096/A0503CS101), and was included in Tab 10 of the payment schedule.

265. In the fourth paragraph on the unnumbered page 8 of the Superintendent's letter to the Claimant dated 18 September 2006, the Superintendent wrote:

"If Transfield were going to be delayed and was delayed it was incumbent on Transfield to give notice and make a claim for an extension of time within the time prescribed in the contract. Transfield have not met these requirements and its current submission does not in any way fulfil to any extent those obligations or requirements to make out an EOT claim."

266. I find that this letter was in the payment schedule, and by being referred to in paragraph 6.3 of the submissions, to my mind means that it was *"included in the payment schedule."* Accordingly, it should have come as no surprise to the Claimant that there was an issue raised about the timing of the *EOT* prior to lodging its application, and I find that this satisfies the provision regarding the necessity to provide reasons in the payment schedule. Accordingly, I do not agree with the Claimant on this point.

267. The more important issue in relation to the *EOT* is the Respondent's assertion that the Claimant has not made the submissions for the *EOT* within the 21 days required. To this extent it is necessary to canvass what the law states regarding claims for extensions of time and whether such provisions indicate a condition precedent, so that if the condition had not been satisfied, then no *EOT* is allowable. Neither party referred me to authority on this important point, but it is vital that I canvas authorities and principle on this issue because it has been raised by the Respondent in the payment schedule and in its response.

268. I refer to the case of *Opat Decorating Service (Aust) Pty Limited v Hansen Yuncken (SA) Pty Limited* Number SCGRG 93/595, a decision of the Full Court of the Supreme Court of South Australia. In this case, Bollen J at paragraph 22, indicated that the Court had been referred to several cases and that no case is decisive of the matter, nor could any case be decisive in that many principles were found in the cases.

269. In the end, His Honour said, it was the words used in the relevant clause or clauses of the subcontract which are decisive. In *Opat*, Bollen J referred to a number of High Court decisions, which are illustrative of time limitation clauses and their meanings. In paragraph 24 His Honour referred to the case *Port Jackson Stevedoring Proprietary Limited v Salmond and Spraggon (Aust) Pty Limited* (1977-78) 139 CLR 231 at 238 where His Honour The Chief Justice Barwick said:

"The decision in Suisse Atlantique...indicates, in my opinion, that whilst exemption clauses which, for present purposes, can be assumed to include a time limitation such as clause 17, should be construed strictly, they are of course enforceable according to their terms unless their application according to those terms should lead to an absurdity or defeat the main object of the contract or, some other reason, justifying the cutting down of their scope."

270. Bollen J then at paragraph 25 said there was nothing in the reasoning of the Judge below in *Opat* which lead to an absurdity or defeated the object of the subcontract nor was there any reason for the cutting down of the scope of the words which created the time limit. In the court below the learned judge had found that the written notice with the time limits prescribed in the *EOT* provision of the contract was a condition precedent to the granting of extension of time.

271. The Full Court upheld Mohr J's decision that the requirement for timing of submitting an *EOT* was a mandatory provision and that it was a condition precedent to the granting of *EOT*.
272. The time limitation clause provided in the contract under Clause 34.3 clearly states that an *EOT* must be made within 21 days. Wording of this clause is similar to clause 31(b) in the case of *Opat*, however, in that clause there was reference to the words that the claim for an *EOT* for completion of works had to be given to the contractor not later than (14) days after the cause of delay arose.
273. Furthermore, the notice had to be in writing for an extension of time for completion of the works together with a statement of the facts upon which the subcontractor bases his claim. In addition, there was a Clause 47 in *Opat* which the Full Court indicated was "a residual clause," which provided that the contractor should not be liable upon any claim by a subcontractor in respect of any matter arising out of the contract, unless the claim, together with full particulars thereof is lodged in writing with the contractor not later than 14 days after the date of occurrence of events or circumstances on which the claim is based.
274. Bollen J at paragraph 12 of *Opat* agreed that Clause 47 reminded the subcontractor of the requirements for timing. However, His Honour was focusing in on the words of Clause 31(b), as decisive of that particular case and it was a condition precedent to an *EOT*. It is useful to extract the precise words in the contract so that they can be properly considered in light of *Opat*.
275. Clause 34.3 of the contract in this payment claim provides as follows:

The subcontractor shall be entitled to such EOT for carrying out WUS (including reaching practical completion) as the Subcontract Superintendent assesses ('EOT') if:

- (a) The subcontractor is or will be delayed in reaching practical completion by a qualifying cause of delay; and*
- (b) The subcontractor gives the Subcontract Superintendent, within 21 days of when the subcontractor should reasonably have become aware of that causation occurring, a written claim for an EOT evidencing the facts of causation and of the delay to WUS (including extent).*

If further delay results from a qualifying cause of delay evidenced in a claim under paragraph (b) of the subclause, the subcontractor shall claim an EOT for such delay by promptly giving the Subcontract Superintendent a written claim evidencing the facts of that delay."

276. Clause 34.3 is perhaps not as directory as that in *Opat* where it was specifically specified that a claim had to be not later than 14 days. Nevertheless, it is my view that the clause standing alone is sufficiently directory to indicate that it is a condition precedent for the granting of an *EOT*. However, one cannot read any clause of the contract in isolation and Bollen J said one must consider the particular contract clauses and subclauses with which one is dealing.
277. I refer again to the provisions of Clause 41.2 of the contract which provides:

“The failure of a party to comply with the provisions of subclause 41.1 or to communicate a claim in accordance with the relevant provision of the subcontract shall, inter alia, entitle the other party to damages for breach of the subcontract but shall neither bar nor invalidate the claim.”

278. *Opat* is authority that I must look at the particular provisions of the subcontract, and to my mind Clause 41.2 again precludes the claim, in this case a claim for an *EOT*, from being barred or invalidated. Clause 41 deals with notification of claims, but it is not constrained by its positioning in the contract to prevent it from casting its net as widely as possible to pick up all clauses in the contract for which a claim needs to be lodged.

279. Clause 1 of the contract, which deals with interpretation and construction of the contract has a provision on page 10 of the interpretation section referring to the contract and provides:

“(c) Clause headings and subclause headings in the Subcontract Conditions shall not form part of these conditions and shall not be used in the interpretation of the subcontract;”

280. Therefore, Clause 41.2 to my mind casts the net widely enough to incorporate an *EOT* claim such that if the Claimant had not provided the *EOT* claim within time, the Respondent has a claim for damages, but the *EOT* claim itself was not barred. Accordingly, I am not prepared to accept the Respondent’s argument that the *EOT* claim was invalid.

281. Furthermore, even if I am wrong on this point, it is not possible for me from the material to find that the *EOT* claim was lodged late. The Respondent merely asserted this in the response submissions to which I have referred. In addition, the letter of the Superintendent dated 18 September 2006 (096/A0503CS101) also made this assertion, but the Respondent did not point or provide any indication of when the *EOT* claim should have been lodged. It did not point to any further details in that regard.

282. In the *EOT* claim in Tab 7 of the payment claim, the Claimant provides a number of references to the Respondent being progressively advised of delays. It is a matter of conjecture whether these constituted proper *EOT* claims as required by Clause 34.3, because I do not have material on which to base any decision as to their validity and timing. However, in the correspondence it appears as if the parties were dealing with *EOT* claims for a period of time because in the *EOT* claim, the Claimant in the covering letter dated 21 August 2006 referred to this being the final *EOT* submission. I conclude from this statement that there were previous *EOT* submissions.

283. Although the legal onus always remains with the Claimant, the Respondent positively asserted the *EOT* was late, which in my view shifts the onus to the Respondent to support its assertion. In my mind the Respondent has not discharged this onus in providing any cogent information for me to make a finding that the application for the *EOT* was late. Therefore, I am satisfied that the *EOT* claim may be considered by me, together with the consequential delay damages claim, and *Climatech* is authority that these are claims under the contract, rather than a claim for damages.

284. Under the previous heading I found that the Claimant would be entitled to delay damages in the event that there is a valid *EOT* to which they are entitled. So far, the Respondent has conceded that there is a 7 day delay damages cost for the 7 day

extension of time granted by the Superintendent, however, I will not value that component at this stage until I have decided how much more, if any, *EOT* is allowable.

b. How much EOT and delay damages are allowable?

285. I now deal with the very difficult question of how much *EOT*, if any, to which the Claimant is entitled based on its *EOT* and delay damages claim in Tab 7 of the payment claim. The Respondent in the payment schedule attached at Tab 10 the Superintendent's letter dated 18 September 2006 (096/A0503CS101) answered the *EOT* claim.

286. I could have discussed this matter under the quantum section below. However, there are a number of threshold liability issues that need resolution before quantum needs to be considered. It is probably sensible at this stage to deal head on with the assertion by the Respondent on page 6 of the unnumbered letter that the *EOT* claim was a global time claim, and on page 10 that it was a global claim.

287. Somewhat surprisingly, the Claimant in its submissions did not deal with the *EOT* claim any further, and did not deal with the Respondent's objections about the content of the *EOT* claim, and the assertion that it was a global claim. Nevertheless the Respondent has put global claims in issue, and I refer to the law in relation to them

288. Mr Justice Byrne of the Victorian Supreme Court wrote an article "*Total Costs and Global Claims*" in the *Building and Construction Law Journal* December 1995, 11th ed, p397-416, which is of assistance. He is the Judge that heard the important case of *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd and Another* (1996) 13 BCL 262 (*Kvaerner*) which dealt with global claims.

289. In the article the author referred to the definition of *global claim* provided in *IN Duncan Wallace (ed) Hudson's Building and Engineering Contracts (11th ed, 1995)* para 8-200 which states:

"...those where a global or composite sum, however, computed, is put forward as the measure of damage or of contractual compensation where there are two or more separate matters of claim or complaint, and where it is said to be impractical or impossible to provide a breakdown or sub-division of the sum claimed between these matters."

290. *Kvaerner* was a case dealing with the issue of global claims, but as is often the case with this topic, it was dealing with an application by *Kvaerner* to strike out John Holland's pleadings because, as stated on page 266 where Byrne J in summarising the defendant's argument, said that the pleadings did not:

"seek to establish a causal link between the breach and the damage alleged or even provide any basis for concluding that Holland should be relieved of that obligation; it passes to Kvaerner Brown all of Holland's costs of overrun with respect to this component, effectively shifting to the defendant the burden of proof with respect to Holland's loss and damage; it imposes on Kvaerner Brown as defendant the obligation to prepare for trial every aspect of the Project, an obligation which is unfair and unduly expensive; and it imposes on the tribunal of fact an impossible task of determining issues of relevance and an unreasonable burden of sifting through a mass of detail which is not related to defined issues."

291. At page 267, Byrne J said that the claim was a global claim:

“..that is, the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all the breaches alleged, or presumably as a result of such breaches alleged, or presumably as a result of all breaches as are ultimately proved. Such claim has been held to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant: London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32 BLR 51 at 102, per Vinelott J. See also Wharf Properties Ltd v Eric Cumine Associates (No 2) (1991) 52 BLR 1 at 20, per Lord Oliver.”

292. Adjudication is not a trial or arbitration, so the cases do not constrain my approach as an adjudicator, and it is not appropriate for me to refuse to consider a claim based on the fact that it is or may be a global claim. I am obliged to value the claim under the contract, and *Climatech* confirms that it is a claim under the contract, and not a damages claim.

293. It is this focus on the adjudicator’s obligation that allows me to refer back to Byrne J’s article, to the dilemma confronting an adjudicator in these cases, where on page 398 the author said:

“Further, the legitimacy of a global claim in a given case may arise in three quite different situations and different considerations may apply to each of them. First, where the contractor seeks from the architect or engineer administering the contract an entitlement to extra time or extra payment; second, where a claim is put before a court or an arbitrator and the claimant is required to present a properly formulated and particularised pleading; third, where a judgement or award is sought at trial for a global sum or time extensions or that award or judgment is subject to appellate review for error of law. I am not concerned with the first situation which will fall to be determined in accordance with the relevant provisions of the contract”

294. I have already discounted the second case referred to by Byrne J because adjudication is not a matter involving pleadings and their need for particulars. However, the difficulty is that an adjudicator is confronted with situation one and three referred to above. The deceptively obvious answer is that case one applies because I have already found that I must exercise the functions of the Superintendent, and therefore I simply value under the contract, which is my primary obligation under s26(2) of the Act. However, adjudication is an administrative process created by statute to which a whole raft of administrative law applies, and the number of cases in NSW attests to this fact. This means that the third case in Byrne J’s article also applies in that the administrative decision is subject to appellate review, and this makes the task more daunting because in carrying out their function, and adjudicator has to be ever mindful of a challenge in a Court to the decision that has to be made quickly.

295. Furthermore, in Queensland the *Judicial Review Act 1991* (“JRA”) applies to adjudicator’s decisions, where in s4 of the JRA a *decision to which this Act applies* means—

“(a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); or...”

296. In the case of the *State of Queensland v Epoca Constructions Pty Ltd & Anor* [2006] QSC 324, Phillipides J said:

“[24] The BCIPA does not expressly exclude review under the JRA. The BCIPA does not contain, in s 31(4) or any other provision, a privative clause excluding judicial review under the JRA. And in any event, the BCIPA is not included in Part 1 of Schedule 1 to the JRA as an enactment that precludes review. Nor is it included in Part 2 of that Schedule as an enactment to which the JRA does not apply.

[25] The consequence flowing from the regime provided in s 18 was in my view correctly identified by Dutney J in JJ McDonald & Sons Engineering v Gall, which concerned an application for judicial review of an adjudicator’s decision made under the BCIPA. His Honour, having concluded that an adjudicator’s decision was both a “decision” and “made under an enactment”, held it was subject to judicial review under the JRA.”

297. However daunting the task may be, it is my duty to value this delay damages claim. I am satisfied that it falls within the definition of a global claim, as identified above, and I find accordingly. Byrne J in *Kvaerner* on page 270 said:

“In my opinion, the Court should approach a total cost claim with a great deal of caution, even distrust. I would not, however elevate this suspicion to the level of concluding that such a claim should be treated as prima facie bad...Nevertheless the point of logical weakness inherent in such claims, the causal nexus between the wrongful acts or omissions of the defendant and the loss of the plaintiff, must be addressed.”

298. I find by applying common sense, that a Superintendent is far more across the issues than any adjudicator who has to value a claim of this magnitude and complexity within 20 business days. The Superintendent, complained about the *EOT* claim being a global claim on pages 6 and 10 of his letter referred to above. On page 8 the Superintendent had also complained that the claim had not been submitted within the time prescribed by the contract, but nevertheless he challenged the merits of the claim and criticised it in a number of instances to which I must have regard.

299. It is important for the parties to understand that my earlier reference to the party bearing the onus is particularly important in this contentious area. The Claimant is claiming \$1,305,540.63 for delay damages pursuant to Clause 34.9 of the contract as a global claim, and in order to succeed, firstly needs to demonstrate that it is entitled to the *EOT* and then to demonstrate how the delays translated into the damages asserted.

300. Byrne J said in his article on page 399 that:

“ As a matter of general principle, a tribunal is not relieved of the burden of estimating damages merely because the task is difficult...Global claims are brought after the loss has been incurred, often after the project is completed. Past loss, if any, suffered by a contractor which has, as a result of the proprietor’s breach, been required to perform a contract in circumstances which are more onerous, must be proved on the balance of probabilities.”

301. The task is difficult, but it is for the Claimant to make out its case on the balance of probabilities, and I start from the point that it has both the legal and evidentiary onus to discharge before I need to look at whether the Respondent has any evidentiary onus to discharge. I will look at the Superintendent’s complaints when reviewing the *EOT* claim, not to require the Respondent to discharge any onus, but as a test of the sufficiency of the Claimant’s claim.

302. Furthermore, it is not proper for an adjudicator to seek to assimilate information on behalf of either party to make out a case; it is for the parties to carry out that task for the adjudicator. I find that the application submissions on this aspect did not assist me, as the Claimant at paragraph 15.7 stated that there was no doubt it had the right to make the claim for delay damages, and it was for me to assess that entitlement. It is possible that it was mindful that it was unable to supplement its payment claim material on this point, but no assistance from these submissions was available. The Respondent did not advance much further in the response submissions beyond what was in the payment schedule, but it did reiterate in paragraph 13.1(b)(ii) that the EOT claim did not properly evidence the facts of causation and of the delay to WUS (including extent).
303. The *EOT* claim essentially states on page 3 that the date for practical completion of 31 May 2006 was not achieved because of the acts or omissions of the Respondent that affected the execution of the works undertaken by the Claimant that subsequently delayed and disrupted the works resulting in a time and cost impact to the project. The Claimant argued that the contract and project program provided certain prescribed dates by which the Respondent was to provide Approved for Construction (“AFC”) drawings and deliver materials or equipment. It asserted that these dates were not met, and despite promises during the contract regarding complete AFC drawings and provide materials and equipment by certain dates, these dates were not met, and this caused delays and disruption to the project resulting on prolongation of on-site activities and additional costs.
304. The *EOT* claim comprised 53 pages outlining the claim together with two pages of a delivery schedule, a one page RFI register and a 1 page Site instruction register, and a 43 page drawing register, which I counted to include 3,090 entries relating to drawings. I am satisfied that these documents provide cogent data of what they are intended to summarise, particularly since the Respondent did not take issue with their veracity. In order to get a feel for the claim, I referred to the entries in the documents to discern some numbers relative to key dates.
305. I find that the delivery schedule comprised 91 separate entries, 72 of which were dated on or before 30 May 2006, and 19 thereafter. I find the RFI register comprised 89 entries, 77 of which were on or before 31 May 2006 and 12 thereafter. I find the Site instruction register comprised 112 entries, 80 of which were on or before 31 May 2006 and 32 thereafter.
306. I find that by far the majority of the drawings referred to in the drawing register had been transmitted before 22 March 2006; the date which I have found is the date of the *construction contract* for the purposes of the adjudication. In fact I find 172 entries out of 3090 entries related to drawings transmitted after 22 March 2006.
307. This analysis of the data provided by the Claimant in support of its claim has given me a feel for the claim and I now summarise the *EOT* claim further.
308. The Claimant provided the legal basis of its claim as reimbursement of disruption costs associated with:
- i. Extensions of time
 - ii. Reimbursement of delay costs
 - iii. Reimbursement of disruption delay costs

- iv. The Respondent's failure to provide equipment and material
- v. The incompleteness, lack of accuracy and poor quality of AFC drawings
- vi. The Respondent from being estopped from denying it has an obligation to compensate for the Claimant's losses, expenses and damages.

309. At this point it is appropriate to decide whether the Claimant can advance all of these claims in the adjudication before descending further into the merits. I am satisfied that the extension of time in i above can be advanced under Clause 34.3 of the contract. Furthermore, reimbursement of delay costs under ii is allowable under Clause 34.9 of the contract.

310. I am not satisfied that disruption delay costs fall within Clause 34.9 of the contract, as delay damages only arise to my mind if the delay has been the subject of an *EOT*. I would characterise these as a claim for damages, which is not be considered in an adjudication. In any event, I note that the Claimant, although it refers to this claim on pages 50 and 51 has not quantified this aspect of the claim, so it will not be considered further.

311. The Respondent's failure to provide to provide equipment and materials and provide appropriate AFC drawings in iv and v above may be a *qualifying cause for delay* under the definition in Clause 1 if it is an *act, default, or omission of the Superintendent, the Respondent or its consultants*. Prima facie, these claims are allowable under Clause 34.3 of the contract.

312. In relation to its estoppel claim in vi above, I refer to the case of *Commonwealth v Verwayen* (1990) 170 CLR 394, which is authority for promissory estoppel. Based on this principle, the Claimant would need to establish that the Respondent is estopped from denying it has an obligation to compensate for the Claimant's losses, expenses and damages. It would need to establish that the Respondent made a representation which it intended that the Claimant was to rely upon, on which the Claimant did reasonably rely, and that as a consequence of relying on this representation, the Claimant has acted to its detriment and suffered loss. The *EOT* claim to my mind does not advance this estoppel case along those lines and the claim appears to focus on the contractual rights, so I will not consider the estoppel point in the *EOT* claim any further.

313. Returning to the detail of the *EOT* claim it identified in section 3 the Delay and Disruption events as follows:

- i. Supply of AFC drawings
- ii. Engineering clashes
- iii. Supply of materials and equipment
- iv. Supply of materials and equipment outside specification
- v. Site mobilisation
- vi. Management of delivery of material and equipment
- vii. Site instructions and variations
- viii. Subcontract Superintendent
- ix. Accommodation; and
- x. Productivity

314. As to supply of AFC drawings, the Claimant on page 8 referred to an increase of 349% on the number of drawings provided at tender stage, which had a significant

impact on preplanning and planning on the project. I do not have the benefit of the tender documents and the number of drawings provided at that stage, nor have I been provided with a construction programme, against which activities and their delays could be measured.

315. It is evident from the correspondence from both parties and the Superintendent that this project had significant problems. Although I make no finding on this point, the Superintendent's *EOT* response letter, on page 7 referred to negotiations between the parties continuing over many months from December 2005, and a letter of intent was issued on 24 January 2006, and the contract was agreed in final form in mid May 2006. This is only 2 weeks before the date for practical completion. I have found that the *construction* contract commenced on 22 March 2006.
316. Both parties have agreed which documents comprise the contract, although they disagree about the existence of certain terms within it, and the meaning to be ascribed to these clauses. I find that in the Special Conditions Clause 6 a provision dealing with *subcontractor reporting* in which the Claimant was required to report daily during shutdown and weekly during non-shut down periods. In the *EOT* claim there are references to daily site reports on page 10 in relation to the AFC drawings, suggesting that daily reports relating to drawings being preliminary only. Based on this slender material and without anything contrary from the Respondent, I find that there were drawing delivery problems.
317. However, I have found that 172 out of 3090 drawing transmittals took place after 22 March 2006 and it is necessary in assessing EOT's under Clause 34.4 of the contract that when both qualifying and non qualifying causes of delay overlap, the Superintendent has to make an assessment based on apportionments of the respective contributions to the delay. I have made no finding that there are non qualifying causes for delay, but refer to this Clause to illustrate that the Superintendent has to carry out an evaluation function, and to my mind in the case of a global claim, it is necessary
318. Whilst the Claimant may have been correct about the 349% increase of the number of drawings from tender stage, I cannot confirm from the material that this is the case, nor is it clear how that in reality affected the preplanning, because I have no material on which to measure the level of preplanning and actual construction planning that took place.
319. On page 14 of the *EOT* claim the Claimant refers to the AFC drawings effect and asserted:

"The increase of drawings by 349% after work commenced had a significant impact on pre planning of man power; equipment and other; and planning throughout the duration of the project. The failure in providing the information as required under the contract resulted in part to the number (110) of site instructions and or variations equating to approximately 21, 377 additional man hours which equates to 28% of the total direct man hours for the project, significantly impacted on the project program and the date for practical completion. In addition, the number (90) of RFI's raised with the 110 site instructions raised effected the duration of the works therefore extending the duration of project management, equipment and other."

320. On page 44 the Claimant stated that the effect of the AFC drawing delays resulted in a 73 day delay in the supply of information, which contributed on page 46 to the overall quantification of 169 days (less concurrence). This overall summary of delays on page 46 was:

<u>Event</u>	<u>Delay days</u>
AFC drawings	73
Supply equipment/Materials	106
Inclement weather	4
Scope 'growth'	23
Variations	<u>36</u>
Sub total	242
<i>Less concurrence</i>	<u>(73)</u>
TOTAL	169

321. The Claimant on page 46 then provided the "real" quantification which was divided into:

<u>Event</u>	<u>Delay days</u>
Inclement weather	4
Scope "growth"	23
Variations	<u>36</u>
Sub total	63
<i>Less mitigation</i>	<u>-20</u>
TOTAL	43

The Claimant added that the delays in AFC drawings and supply of equipment and materials is negated by the scope growth and variations incurred. This also takes into account the issue of concurrence. I find such an explanation confusing, and it is not clear to me what amount of EOT the Claimant has finally requested for the AFC drawings. After advancing its claim for delays associated with AFC delays, it then firstly seems to assert that this was a concurrent delay because it was also 73 days, and then was negated by scope growth and variations

322. In any event I am not satisfied that the lack of AFC drawings actually constituted a delay to the project because I have no objective means of measuring this delay in a particular sense, so for this delay it is not entitled to an *EOT*.
323. Turning the *Engineering Clashes* on page 16 the Claimant launched its claim under this head, but on page 46 made no claim for the effect of engineering clashes, so I disregard this aspect in assessing the *EOT* and find no *EOT* is applicable under this head.
324. I now turn to *Supply of Equipment and Materials* on pages 19 to page 25 and note that after calculating a delay of 106 days on page 44 and 45 for this cause, it also stated that this claim was also negated by the scope growth in the "real claim". I assume therefore that it has abandoned its claim for *Supply of Equipment and Materials* and I find that no *EOT* is applicable and do not consider this aspect any further in the *EOT*.
325. The Claimant had already listed the delay and disruption events to which I have already referred. However, in the real claim on page 46, *inclement weather, scope growth and variations* became essentially the claim, so I am content to not traverse the *EOT* in relation to the headings of *supply of equipment outside specification, site*

mobilisation, management of delivery of material and equipment, accommodation and productivity because they do not appear to fit into these three headings. I therefore find that there is no EOT applicable to any of these headings, and will focus on the *inclement weather, scope growth and variations* heads of claim.

326. I am assuming that they will be found under the original headings of *Site Instructions and Variations* and perhaps *Subcontract Superintendent* to which I now turn. I have referred to the *Subcontract Superintendent* heading and cannot find any nexus between the failures of the Superintendent to respond to requests and *scope growth* or *variations* which are the headings no being considered. I therefore attribute no EOT to the *Subcontract Superintendent* heading.
327. In relation to the *Site Instructions and Variations* heading, the Claimant argues that the failure in providing information resulted in 110 site instructions and or variations, which in turn resulted in an additional 21,377 additional man hours being needed for the project. This equated to 28% of the total direct man hours for the project. It did not advance a submission as to the number of day's delay it calculated under the *Site Instructions and Variations* heading. However, there was reference on page 45 to a calculation under *direct man hours*, and it referred in the fourth dot point to the same data.
328. Under this *Direct man hours* calculation there were the following assertions:
- i. Based on overall project duration 72% of the man hours expended is attributable to "scope works" and 28% to variations;
 - ii. Based on tender documentation the scope increase on the total project is 84% equating to 34,903 man hours or an equivalent 58 days extension to the project duration;
 - iii. Based on tender documentation for the original scope the direct man hours increased 33% equating to 13,525 man hours or an equivalent of 22.54 days extension to the project duration;
 - iv. Based on the site instructions and or variations the direct man hours attributable is 28% of the overall project direct man hours equating to 21,377 man hours or an equivalent of 35.63 days extension to the project duration.
329. I have a significant number of difficulties at this stage. The Claimant must provide evidence to support its claim, and I cannot see how it has attributed 72% of man hours being attributed to scope works and 28% to variations. It may be possible to deduce this from point iv above, where the Claimant says that 28% of the overall project is attributable to variations, but this is not clear from the calculation, and even if this assumption was correct there is no material to support, as a matter of fact that 21,377 man hours was attributable to variations.
330. I do not have the original man hours estimated, the tender documentation or the drawings and programs on which the contract was based. The paucity of supporting information and the resort by the Claimant to calculations and assumptions associated with the complex delays is unfortunately why global claims are viewed with suspicion, and however difficult it may be the Claimant bears the legal onus AND the evidentiary onus in support of its claim before the Respondent is called upon to provide anything. Furthermore, without this supporting material it is not possible to decide that any delays that may have occurred resulted in a delay in reaching practical completion.

331. It is not possible for an adjudicator in such circumstances to accept that this half page calculation, together with the other earlier assertions in the *EOT*, most of which were abandoned, and which do not really appear to connect with *direct man hours* somehow demonstrates the right to an *EOT* under Clause 34.3 of the contract. Furthermore, I have had to then assume that the 13,525 man hours (22.54 days) increase alleged in iii above is the “scope growth” of 23 days on page 46, without being specifically advised about that by the Claimant. The same applies to iv above with the variations *EOT* of 36 days claimed.
332. I have to agree with the Superintendent that there is insufficient causal link between the alleged breaches, a compensable delay and any consequences. This means in relation to scope growth and variations, it is not something that I am able to allow under the provisions of the contract based on the material provided, so no *EOT* is available for these headings.
333. This brings me to the claim for *inclement weather*, and this can be dealt with briefly by reference to the definition of *qualifying cause for delay* and Item 26 of Part A of the Annexure to the GCC, which makes no reference to inclement weather being a *qualifying cause for delay*. This means that no *EOT* of 4 days is available for inclement weather.
334. Accordingly, I am not satisfied that any aspect of the *EOT* is made out, which means that no delay damages associated with the *EOT* claim under Clause 34.9 is available to the Claimant.
335. However, I need to consider the 7 days *EOT* previously granted by the Superintendent, which I found extended the time to 7 June 2006. Having disallowed the Respondent to set off the damages claim, I am prepared to accept the Claimant’s calculation in Appendix 16 of the application regarding the 7 days *EOT*, because the Respondent did not take issue with this calculation or the basis of calculation and conceded in paragraph 13.1(d) of the response that delay damages were payable. This amount is \$203,435.41 and is carried to the quantum section of the decision.
336. However, in order to ensure that I do not forget this issue, I refer back to the *LD*’s and am satisfied that given there is no further *EOT* that I find that *LD*’s are payable by the Claimant to the Respondent because the date for practical completion was 13 July 2006, and the revised date of practical completion was 7 June 2006. I accept that this is a delay of 36 days, and I find that the *LD*’s per day from Item 27 of Part A of the Annexure to the GCCC was \$15,000 per day. This calculates to a figure of \$540,000 *LD*’s. However, the contract provides for a limit and both parties agree that the limit of *LD*’s is \$271,393.55 and I find accordingly and carry this amount to the quantum section.

Respondent’s entitlement to set off under the contract

337. Paragraph 7 of the payment schedule deals with the Respondent’s submissions in relation to this important point. Essentially, the Respondent states at paragraph 7.4 of the payment schedule that Clause 34.7A of the contract which provides:

“If the main contract works do not reach practical completion by their date for practical completion, for which the proximate cause is delay by the subcontractor in completing WUS, the subcontractor shall indemnify the main contractor against:

- (a) *liquidated damages under the main contract stated in item 27(b) certified by the superintendent; and*
- (b) *damages, other than liquidated damages, which have become due and payable by the main contractor to the Principal.*

If the subcontractor's delay is not the sole cause of the main contractor's liability for damages, the subcontractor shall indemnify the main contractor only in proportion to the subcontractor's delay, which shall be certified by the Subcontract Superintendent, as monies due to the main contractor by the subcontractors.

338. The Respondent attached in Tab 12 a payment schedule provided by Oakey Creek to the Respondent dated 20 October 2006. In this payment schedule the Principal, Oakey Creek, claimed it was entitled to settle the demurrage costs associated with ships having to wait in the sum of US\$10,739,305.57 together with US\$882,002.94 for costs associated with transporting coal from and back to the overland conveyor.
339. The Respondent claimed that the 45 days delay under the main contract was not all caused by the Claimant and that the proximate cause of the Claimant's delay was 36 days, for which it performed the calculation and identified the demurrage costs as US\$8,591,444.45 and US\$705,602.35 for transporting coal costs, which the Respondent stated it was entitled under Clause 37.6 of the contract to offset against any amount due to the Claimant.
340. The Respondent also provided a copy of the certificate dated 18 September 2006 which was certified by the Superintendent identifying that the Claimant was indebted to the Respondent to the sum of \$10,000,861.14 under Clause 34.7A of the contract and I have found that this Certificate was issued by the Superintendent.
341. In paragraph 16.3 of the application submissions the Claimant stated that Clause 34.7A does not form part of the contract between the parties thereby precluding any contractual entitlement of the Respondent to the \$10 million that the Superintendent had purported to certify. In support of this argument the Claimant referred to item 27(b) of Annexure part A of the GCCC which had been completed as '*not applicable*'. The Claimant argued that the completion of the document in this way was consistent with the preface to the form of contract which allowed 34.7A to be omitted from the general conditions. The preface provided:

*"Subclauses 8.6, 29.2 and 34.7A (prefixed by *) and item 27(b) (prefixed by *) are optional and may be omitted in the subcontract, where necessary, without making consequential amendments but such omission should be clearly shown on the face of the document by striking out these clauses or that item or indicating clearly in Clause 1 of annexure part B or elsewhere that they are not to apply...."*

342. The Claimant stated that the omission of Clause 34.7A was consistent with the correspondence that preceded the formation of the contract, where the Claimant made it clear and the Respondent accepted that "relevantly" the Claimant shall not have liability for delay greater than the amount of liquidated damages reflected in item 27(a) of the Annexure A to the GCCC.

343. The contending submissions of the Claimant and Respondent need be dealt with this stage. The Respondent has referred to the inclusion of Clause 34.7A in the contract, and it has provided support for that in reference to the documents, where there has been no striking out of that particular clause in any of the documents to which I have been referred.

344. I refer to the Formal Instrument of Agreement and on page 4 Clause 1.6 there is a heading “entire agreement” which provides:

“The contract constitutes the entire, final and concluded agreement between the main contractor and the subcontractor and all previous representations and correspondence, except to the extent expressly incorporated into and identified as forming part of the contract shall have no effect.”

345. Accordingly, even if I was entitled to overcome the issues associated with the *parole evidence rule* regarding written contracts, any reference by me to such earlier representations suggested by the Claimant which were not supported by any material would contravene Clause 1.6 of the Formal Instrument of Agreement. I also agree with the Respondent that the *not applicable* reference in Item 27(b) only refers to liquidated damages, as this is the ordinary meaning of that Item. Therefore, whether or not there were these representations to the contrary, to which I may not have regard, I am satisfied that Clause 34.7A does form part of the contract.

346. This means that the Respondent is entitled to an indemnity on these terms providing the rest of the conditions associated with the operation of this clause are met.

347. The Claimant puts in an alternative submission in paragraph 16.6 of the application where it says that the effective item 27(b) is to only omit any potential liability described in subparagraph (a) of Clause 34.7A. The Claimant asserted that the Superintendent was not authorised to certify the amount of approximately \$10million claimed by the Respondent. The reason why this proposition was put forward was that a certificate under Clause 37.2(b) of the contract may only contain the Superintendent’s assessment of retention monies and “*monies due*” from the subcontractor to the main contractor pursuant to the subcontract.

348. The Claimant in paragraph 16.8 of the application submissions stated that the amount of \$10 million claimed by the Respondent is not “*monies due*” in that it was merely an assertion of liability which at present was entirely contingent in character. The Claimant stated that any liability of the Claimant under Clause 34.7A was dependent on:

“(a) The main contractor then being liable to the Principal for damages (which damages have become due and payable), other than liquidated damages, as a result of delay in the completion of the main contract works;

(b) The proximate cause of that delay is delay by the subcontractor.”

349. At paragraph 16.9 of the application the Claimant stated that amounts which are only contingently due cannot be regarded as “*monies due*” and referred to the following cases:

Merritt Cairns Construction Pty Limited v Wulguru Heights Pty Limited [1995] 2 Qd R 521 (“Wulguru”)

Covecorp Constructions Pty Limited v Indigo Projects Pty Limited [2002] QSC 322 (“Covecorp”)

Rejan Constructions Pty Limited v Manningham Medical Centre Pty Limited [2002] BSC579 (“Rejan”)

350. At paragraph 16.10 of the application the Claimant stated that at the time of the purported certificate it had not been established that the Respondent was liable to the Principal for damages, other than liquidated damages which had become due and payable. Furthermore, the Claimant stated that it was apparent from the Respondent’s payment schedule delivered on 22 September 2006 at item 5 (xxx) annexure 1 that it did not accept that it was liable to the Principal in that it stated ‘*R & SA’s alleged liability for Oakey Creek damages*’ and the Claimant provided a copy of the schedule including those words in appendix 5 of the application.
351. The Claimant then went on to say in paragraph 16.10(c) that even if the Respondent was liable to the Principal under the head contract, that this did not translate to a liability for the Claimant because the Claimant had made claims for extensions of time of which:
- The cause of delay in completion is actions of the Respondent
 - There will be no relevant delay in completing the work the subject of the subcontract, the Claimant having completed the works before the date for practical completion, if properly extended.
352. Essentially the Claimant focussed on the fact that the assertion of liability associated with the damages claim of \$10 million was entirely contingent in character. MacPherson JA in the case of *Wulguru* on page 526 said that:
- “The expression ‘money due’ is not apt to describe a claim which, as regards liability, has not yet been determined, and, as regards quantum, has not yet been ascertained. The Principal’s claim for damages for delay is an assertion of a liability which at present is entirely contingent in character. ...*
- Until judgement is given in a money sum, or there is an agreement or an award of the amount being claimed as damages for delay, it cannot be said that the Principal is ‘entitled’ to deduct any money in respect of that claim. Both its title to the money and its right to deduct it remain in dispute.”*
353. In the case of *Wulguru*, it appears as if the Superintendent had not certified the amount of damages for delay that the Principal purported to deduct under Clause 42.10 of that contract. In this adjudication there is a difference from the facts in *Wulguru* in that the Superintendent on 18 September 2006 issued a certificate in which he said the Claimant was indebted to the Respondent for approximately \$10 million.
354. Clause 37.2 of the contract allows the Superintendent to issue effectively two certificates. The first certificate is a progress certificate evidencing the Superintendent’s opinion of the monies due from the Respondent to the Claimant pursuant to the progress claim, and also a certificate evidencing the Superintendent’s

assessment of retention monies and monies due from the Claimant to the Respondent pursuant to the subcontract.

355. I am satisfied therefore that the Superintendent is entitled to certify monies due from the Claimant to the Respondent and to this extent the facts are distinguished from the case of *Wulguru*. In *Wulguru* Davies JA at page 523 stated that:

“The argument that the amount claimed by the appellant is ‘money due’ from the Respondent pursuant to Clause 42.10, which it is ‘entitled’ to deduct under Clause 42.2(b), has the fatal defect that the amount claimed is no more than that. It does not even have the benefit of a prima facie independent ascertainment as does the amount specified in the Superintendent’s certificate.”

356. However, in considering the certificate dated 18 September 2006 provided by the Superintendent, and recognising that the Superintendent is entitled to issue under Clause 37.2(b) of the contract, it is necessary to determine whether there has been an independent ascertainment by the Superintendent of these monies that are allegedly due. This is where I have difficulty with that Certificate, because there is no mechanism for the Superintendent to make an assessment of those monies due under the subcontract.
357. In particular, Clause 34.7A(b) provides that the subcontractor shall indemnify the main contractor against damages, other than liquidated damages, which have become due and payable by the main contractor to the Principal. It is therefore essential for those monies to be due and payable under the main contract. Insofar as the Superintendent under this contract is concerned, if that money is due and payable under the main contract, then it is my view that the Superintendent could certify that amount due and payable under the main contract in his own certificate. But this does not mean that he is exercising an independent mind and determining how these monies are due, because that is the subject of the main contract and he has no powers to carry out that valuation function.
358. This means that it will be necessary for confirmation that the monies are due under the main contract for them to be justifiably certified by the Superintendent in this contract. This is where I encounter some considerable difficulty in this adjudication.
359. The Respondent in paragraph 14.8 of the response asserted that its liability to the Principal was not contingent upon any events and that it has been assessed as monies due by the Main Contract Superintendent and claimed by the Principal. I cannot find in any material a Certificate of the Main Contract Superintendent, on which the Superintendent in this contract could have relied in his certification. If the monies were due the Respondent could have produced the certificate, but even in that event, it may seek adjudication or litigation, now or in the future with the Principal over the damages claims, so it is my view that the liability is contingent.
360. Therefore, I cannot find that there are monies due under the main contract for damages. Accordingly, I find the 18th September 2006 certificate insofar as it purported to certify these damages under the Main Contract, had no basis for doing so.
361. Furthermore, I am constrained by section 26(2) of the Act to deal with this contract and reference to the Respondent’s liability to the Principal under the main contract outside the ambit of my jurisdiction. I concede that Clause 34.7A introduces the Main

Contract into this contract, so it is entirely isolated, but I must be careful how far I traverse into the Main Contract.

362. However, if I am wrong in my conclusion thus far that damages are not due and payable and I am obliged to look at this payment schedule of Oaky Creek, I accept that a payment schedule from Oaky Creek Coal dated 20 October 2006 was provided in the payment schedule. The extent to which I may have regard to such a document in the payment schedule is the subject of much deliberation and concern and I review this document in a bit more detail, being mindful of s26(2) of the Act.
363. The Respondent claimed just over \$4 million from Oaky Creek Coal in its payment claim, and Oaky Creek Coal advised that it proposed to pay \$Nil. In particular one reason why \$Nil was to be made payable was the allegation by Oaky Creek Coal that the Respondent had breached the agreement and was liable for losses associated with demurrage costs and for costs for transporting coal.
364. This is an assertion in a payment schedule and could be the subject of an adjudication and in my opinion does not constitute monies due and payable merely because it is in payment schedule to the Respondent under the head contract. There is no evidence of a certificate issued by the main contract superintendent indicating that such monies were due and payable in the payment schedule, which I have already stated.
365. Given there is no such certificate in evidence that the main contract superintendent had certified that any monies were due and payable, it is not for me to ascertain the terms of the main contract and decide if these monies were due and payable under the main contract. My functions, which I have found, include carrying out the functions of the Superintendent, do not extend to carrying out the functions of the Main Contract's Superintendent under the main contract. To do so would be to wander far outside what even the most elastic interpretation of the *Contrax* principles as to how far an adjudicator's jurisdiction extends.
366. Given that there is no such certificate provided from the main contract superintendent, I am not satisfied that the Superintendent in this adjudication had the right to issue a certificate dated 18 September 2006 indicating that the sum of monies associated with damages payable to the Principal Oaky Creek Coal were in fact monies that were due and payable. The certificate was not an exercise of an independent mind of the Superintendent and I am not prepared to accept that the monies claimed in the certificate were therefore monies due by the Claimant to the Respondent. My jurisdiction is limited to consideration of the provisions of this subcontract and unless there was satisfactory evidence on which the Superintendent of this subcontract relied to certify monies due and owing it is impossible for me to accept that those monies by way of damages were in fact due.
367. Accordingly, although I accept that Clause 47A is available to a Respondent in the contract, the situation has not arisen such that any monies arising out of damages payable to Oaky Creek Coal are currently due under the subcontract. Having regard to the case of *Rejan*, a decision of Byrne J in the Victoria Supreme Court, and in paragraph 24 His Honour said:

“As a matter of terminology, it is difficult to characterise as ‘monies due’ a sum which is asserted by a party in dispute to be owing by its adversary in a draft

interim claim without substantiation and without detail and, of course, without any determination by adjudication, arbitration or otherwise.”

368. I have already said the claim by Oakey Creek Coal in its payment schedule could be the subject of adjudication or litigation and cannot be considered monies due and payable at this time.

369. Accordingly, I am satisfied that the monies claimed by way of damages as a set-off are in fact not monies due and owing at this stage, so that the Respondent is not entitled to set-off in the circumstances.

Cap on Claimant's liability

370. Having found that the Respondent is unable to maintain its set off against the Claimant, and that the maximum LD's have been found against the Claimant, I see no need to canvass this issue any further because the cap, if any on the Claimant's liability is not required to be decided.

Due date for payment

371. The Claimant asserts various due dates for payment, viz.:

Alternative 1 (if 25 August 2006 Superintendent's certificate applies)

1 September 2006 for \$2,910,251.45, for the Superintendent's certificate;
10 November 2006 for the balance of the payment claim

Alternative 2 (if 18 September 2006 Superintendent's certificate applies)

25 September 2006 for \$2,910,251.45, for the Superintendent's certificate;
10 November 2006 for the balance of the payment claim

Alternative 3 (if certificates are found to be invalid)

1 September 2006 for \$2,910,251.45, for the Superintendent's certificate;
10 November 2006 for the balance of the payment claim

Alternative 4 if the contract makes no provision for due date for payment

27 October 2006

372. The Respondent said that in the alternative the due date for payment for any remaining invoices would be 10 November 2006.

373. I have not considered either of the Superintendent's certificates as providing the amount under the contract, so I do not consider that they govern the due date for payment.

374. I am satisfied that the *reference date* is the 28th day of the month, and s15(1)(a) provides the due date for payment if the contract provides about the matter. There is nothing to suggest that the provision is void under s16 of the Act or under ss67U or 67W of the *Queensland Building Services Authority Act 1991*. Clause 37.2 deals with payment, and I have not considered the Superintendent's certificate in dealing with the amount in the adjudication, I am satisfied that the 28 day period from submission of the payment claim, governs the due date for payment, which is 10 November 2006.

Entitlement to interest

375. s15(2)(a) applies because the rate of interest under the contract according to the Claimant, which was accepted by the Respondent in paragraph 7.3 of the response submission was governed by Clause 37.5 and Item 33. This provides reference to the Commonwealth Bank overdraft rate, and I am satisfied that that rate is 9.6% from the

Claimant's application submission 8.2. This is less than the Supreme Court rate of 10% prescribed under s48(1) of the *Supreme Court Act 1995* as regulated by Regulation 4 of the *Supreme Court Regulations*, so I find interest at 10% in accordance with s15(2)(a) of the Act.

376. I now turn to determine the quantum of the claim.

Quantum of the claim

377. There are 71 invoices relating to the cost of the work carried out on the project. These invoices have been derived from 4 lever arch folders of time sheets which the Claimant submits relate to the labour times of personnel on the project.
378. Adjudication essentially requires an objective determination of the amount of debt arising from work done under a construction contract, since s26(1)(a) requires a decision to be made on the amount of the progress payment.
379. The starting point for valuation is provided in s13 of the Act, which deals with the *amount of the progress payment* and in my view s13(a) applies for the *amount to be calculated under the contract*.
380. In deciding the amount of the progress payment, in a claim of over \$6 million, I could have checked all time sheets to ensure that they properly represented the work then invoiced under the contract. However, even though this is a large claim, in my view this level of scrutiny is not warranted because of the expense involved for the parties.
381. Accordingly, the approach taken with the valuation process was to review the payment claim and payment schedule to determine where there was common ground with invoice amounts. Where the parties disagreed about the value, then a deeper review took place of the amount claimed, with some reference to the time sheets where necessary. The depth of the review and extent of reference to time sheets was dependent on the amount of money at stake, and some verification of the data took place with the larger invoices to verify that the time sheets supported the backup sheets. A summary of each invoice, with its amount and what work it was related to was compiled to provide me with an overview of the respective aspects of the work, from which some invoices were selected for closer scrutiny. This summary is attached to the decision as Annexure A.
382. In considering the quantum of the claim, I have adopted the approach, as found elsewhere in the decision that the Claimant must prove its case, and it needs to discharge the legal onus and evidentiary onus in doing so. Under the liability section of the decision I have been satisfied that the Claimant is entitled to make a payment claim, and I found that the details provided in it were sufficient to allow the Respondent to provide a payment schedule.
383. In the payment schedule the Respondent firstly challenged the lack of details in the payment claim, but then descended into some detail in challenging the payment claim. The level of detail provided by the Respondent in the payment schedule, however, largely argued that rates provided in the invoices were too high, without challenging that the works was not done, or that a claim was not a proper variation. In response to the challenge regarding the rates, which must have happened prior to this adjudication, the Claimant had provided invoices reducing the extra amount associated with the incorrect rates, and the Respondent in most instances agreed with the deduction.

However, the Respondent generally was not prepared to commit to agreeing then with the reduced invoice amount, despite having no argument to suggest that the basis of the claim of the invoice was wrong. Furthermore, where the Respondent asserted positively that there were incorrect charges for crane drivers or that no supporting information was available to show items were claimable under the contract, it did not go further and provide further support for its allegations.

384. Apart from specific instances to which I will refer, I am satisfied that the invoices (with their supporting documents, including the backup sheets and the time sheets) clearly demonstrate that the Claimant carried out work under the contract, either under the lump sum component, under the scope of works or as a variation to the contract. Most of the time sheets to which I referred, were signed by someone whom the Claimant alleges was the Superintendent, or by inference, his representative. The Claimant on page 2 of the payment claim referred to Clause 37.7 of the contract, which provides:

“The subcontractor will present timesheets to the Subcontract Superintendent daily for acceptance. Upon acceptance of these timesheets this will be deemed acceptance of payment by the Main Contractor in accordance with the Schedule of Rates detailed in Schedule 2 of the Subcontract.”

385. The Claimant asserted that it had provided the timesheets to the Superintendent and these were signed, or to the limited extent they were not signed, there was no dispute that the work had been performed. The Respondent in its payment schedule did not argue this point. Accordingly, I am satisfied that the backup sheets drawn from the time sheets adequately demonstrated what work was being carried out, and that the scope of works key, the order and the short text, read together with the invoice discharged the evidentiary onus required of the Claimant. The timesheets in the vast majority of cases were signed.
386. In particular, where the Claimant was claiming variations there was sufficient detail in my view for the Respondent to challenge the basis of the variation claim by either arguing that it did not fall within Clause 36 of the contract found on pages 26-28 of Part B of the GCCC because the work was not ordered, or it was not in writing, or it was not extra work, or the work was defective. The Respondent did not make these assertions anywhere, nor did it provide any material to support its general assertions that the rates claimed were too high, after the invoices had been correctly discounted (on its own admission).
387. Furthermore, although I am responsible to value the claim, the Superintendent had provided a certificate on 25 August 2006 identifying a payment due to the Claimant of \$2,190,329.04, so the independent certifier had found justification for some payment. Accordingly, the approach I have taken in relation to valuation is to check the validity of some of the time sheet data supporting 2 large invoices each in Parts A and B of the payment claim by checking the statistically sufficient number of 30, to ensure that they support the backup sheets that provide the amount to the invoice.
388. This data verification yielded that the time sheets supported the claim. The time sheets hours were generally higher than the claimed amount of hours supporting the invoice, but this did not trouble me because what was of concern to me was to ensure that the invoice amounts did not exceed that provided in the time sheet. If the Claimant chose to claim less than what it may be entitled to, that is entirely a matter for the Claimant.

389. Furthermore, I am satisfied that generally the discount amounts then allowed the original invoice amount to proceed to collection, because the Respondent did not provide any evidence to support its claim that the amounts were too high.

390. In relation to the balance of the balance of the Lump sum claimed of \$204,388.83 I am not satisfied that the Respondent has discharged its onus to prove that the Claimant breached the contract by failing to provide the services invoiced, which in the next sentence of paragraph 3.2(i) then changed to *properly provided*. I accept that work increased, straining resources shown in Tab 8 of the response, but this does not equate to breach, since added scope requires supervision increases, which may be difficult to find. Accordingly this amount is extended in the spreadsheet that I have developed to capture the amounts that I find are payable. This spreadsheet is in the Annexures.

391. The issue regarding the scaffolding claim has been contentious. Statutory declarations on behalf of both parties dealt with scaffolding to which I must refer.

Claimant's material

- Mr Marcus Patten said that scaffolding was provided up to 3 October 2006, but the invoice provided was only up to 3 September 2006. He said that scaffolding from 3 September 2006 to 3 October was the subject of a separate invoice which was not part of the payment claim;
- Ms Nicole Cowley said that all amounts claimed in the invoices were in respect of the project, as did Mr Trevor Cohen.

Respondent's material

- Mr Vogel declared that claims for payment since 3 August 2006 was for scaffolding supplied to the project site, and that from 3 September 2006 all scaffolding hire has been paid in full, and that the Respondent was now arranging scaffolding itself.

392. I do not see any discrepancy insofar as the scaffolding up to 3 September 2006 is concerned, as this was the extent of the claim for this item in this payment claim. I am satisfied that the invoice for this scaffolding was only up to 3 September 2006, and Mr Vogel does not dispute this fact. I therefore allow the scaffolding claim in Part D of payment claim.

393. In this spreadsheet in Annexure B I have simply extended the invoice amounts across from the invoices to the Adjudicator's decision column because in my mind the Respondent has not discharged its onus regarding quantum. However, I have not allowed the delay damages claim claimed under the *EOT* of \$1,305,540.63. I did, however, allow for a claim of \$203,435.41 for the 7 day *EOT* granted by the Superintendent. Furthermore, I have deducted the *LD's* to which the Respondent is entitled as well.

The adjudicated amount

394. **The adjudicated amount is \$4,815,643.00**

Due date for payment

395. **I have already found that the due date for payment is 10 November 2006.**

Rate of interest

396. **I find the rate of interest is 10% simple interest payable on the adjudication amount.**

Authorised Nominating Authority and Adjudicator's fees

397. ss34 and 35 refer to equal contributions from both parties for both these fees unless I decide otherwise. I have found that the Claimant has substantially succeeded in the quantum of its claim. A significant component of the Respondent's defence was based on its argument in relation to set off. However, quite some time was of necessity devoted to the analysis of the EOT claim, which the Respondent said was not maintainable.

398. The parties have had a number of disputes in relation to this contract culminating in this adjudication, and although there is some merit in disturbing the status quo provided in ss34(3) and 35(3) that each party bear the ANA's fees of \$165 my fees equally, I am not inclined to do so, because the matter has been brought to a head, and both parties had parts of their case upheld in this adjudication.

399. Accordingly, I decide that both the ANA's fees and my fees should be shared equally.

Chris Lenz
Adjudicator

15 December 2006

ANNEXURES
ANNEXURE A SUMMARY OF INVOICES

PART A

Invoice No & amount	References
90375111 \$204,388.83	<ul style="list-style-type: none"> • Tax invoice (June 2006 - Lump Sum Billing) • Incl. descriptions showing which net amount due
90375826 \$533,959.10	<ul style="list-style-type: none"> • Tax invoice area 200 Module 4 (install. struct. & platework, install. pipework, civil works construction, install. electr.) • Backup sheets
90375836 \$1,996,703.43	Tax invoice area 300 Main Plant (install. pipework, install. mechanical, install. electrical, civil works construction, install. struct. & platework) Backup sheets
90375812 \$175,200.09	Tax invoice area 100 ROM (installation electrical) Backup sheets

PART B

90388453 \$14,089.45	<ul style="list-style-type: none"> • Tax invoice (applies to inv 90375812) (cable ladder installation) Backup sheets
90389450 \$462.76	Tax invoice (applies to inv 90375812) (cable ladder installation)
90375812 \$175,200.09	Tax invoice area 100 ROM (installation electrical)
90388458 \$40,991.51	Tax invoice (applies to inv 90375826) (cable terminations) Backup sheets
90375826 \$533,959.10	Tax invoice area 200 Module 4 (install. struct. & platework, install. pipework, civil works construction, install. electrical)
90388490 \$64,755.38	Tax invoice (applies to inv 90375836) (cable installations) Backup sheets
90375836 \$1,996,703.43	Tax invoice 90375836 area 300 Main Plant (installation pipework, installation mechanical, installation electrical, civil works construction, installation struct & platework)
90388454 \$ 5,605.58	Tax invoice (applies to inv 90379256) power cable removal and installation)
90379256 \$ 81,276.37	Tax invoice 90379256 (installation electrical) Backup sheets
90379257 \$1,112.76	Tax invoice area 200 Module 4 (installation electrical) Backup sheet

90388455 \$13,287.33	Tax invoice (applies to inv 90379258) (electrical equipment and instrument removal...)
90379258 \$224,834.17	Tax invoice area 300 Main Plant (installation struct. & platework, installation pipework, installation mechanical, installation electrical) Backup sheets
90380209 \$55,052.84	Tax invoice area 300 Main Plant (installation struct. & platework, civil works construction, installation electrical) Backup sheet
90380212 \$25,578.12	Tax invoice area 100 ROM (installation electrical) Backup sheets
90388440 \$1,239.52	Tax invoice (applies to inv 90382142) (3.4.2 (b) elect. equipment & instrument removal...)
90382142 \$14,129.73	Tax invoice 90382142 area 300 Main Plant (electrical and civil works construction) Backup sheet
90388450 \$34,927.07	Tax invoice (applies to inv 90382173) (cable terminations)
90382173 \$208,684.05	Tax invoice 90382173 area 100 ROM (installation – electrical) Backup sheets
90384043 \$90,394.05	Tax invoice area 300 Main Plant (install. struct. & platework, install. Pipework, install. electrical, civil works construction) Backup sheets
90384044 \$3,763.04	Tax invoice area 200 Module 4 (installation electrical) Backup sheets
90384045 \$12,567.31	Tax invoice area 100 ROM (installation electrical) Backup sheets
90385808 \$25,686.76	Tax invoice area 100 ROM (installation-electrical) Backup sheets
90385809 \$12,335.85	Tax invoice area 200 Module 4 (installation-electrical) Backup sheets
90385810 \$98,305.45	Tax invoice area 300 Main Plant (installation-electrical, installation-struct.& platework, installation-pipework) Backup sheets (many WBS elements regarding scaffolding)
90386632 \$59,972.70	Tax invoice area 200 Module 4 (civil works construction, installation-electrical) Backup sheets
90386635 \$27,687.57	Tax invoice area 100 ROM (installation-electrical) Backup sheets
90386637 \$22,105.21	Tax invoice area 300 Main Plant (civil works construction, installation-electrical) Backup sheets
90388461 \$6,755.07	Tax invoice (applies to inv 90375848) (general pre-works – Main Plant)
90375848 \$293,657.71	Tax invoice 90375848 VARIATIONS- General, Delays & Materials (miscellaneous, training, electrical, other) Backup sheets (90375848)
90388476	Tax invoice (applies to inv 90375849)

\$504.69 90375849 \$44,441.98	(remove of MCC3 radial stacker) Tax invoice 90375849 VARIATIONS- ROM (electrical and mechanical) Backup sheets
90388468 \$626.52 90375855 \$10,220.97	Tax invoice (applies to inv 90375855) (4AM <i>weigher addition to scope of work</i>) 90375855 VARIATIONS – Module 4 (electrical, steelwork, mechanical, pipework) Backup sheets
90388480 \$1,468.70 90375857 \$266,163.98	Tax invoice (applies to inv 90375857) (modify structural members to suit reje....) Backup sheet (90388480) 90375857 VARIATIONS Main Plant (mechanical, steelworks, pipework, electrical) Backup sheets (90375857) Schedule 2: <i>Schedule of rates for variations.</i> Labour
90388434 \$1,276.13 90379254 \$41,798.90	Tax invoice (applies to inv 90379254) Reagent dosing electrical system 90379254 VARIATIONS- Main Plant (steelwork, mechanical, pipework, electrical) Backup sheets
90388460 \$2,873.87 90379255 \$68,436.48	Tax invoice (applies to inv 90379255) (fly in fly out lost work DELAYS) 90379255 VARIATIONS – general, delays & materials (miscellaneous and other) Backup sheets
90380208 \$7,996.68	Tax invoice VARIATIONS ROM (mechanical) Backup sheets
90380210 \$11,770.28	Tax invoice area 200 Module 4 (civil works construction) One Backup sheets
90388418 \$577.78 90382141 \$6,355.58	Tax invoice (applies to inv 90382141) ROM electrical 5 90382141 VARIATIONS ROM (electrical) Backup sheets
90382143 \$1,443.77	Tax invoice VARIATIONS- Main Plant (pipework) Backup sheets
90388417 \$224.84 90382144 \$12,619.63	Tax invoice (applies to inv. 90382144) (officers and transport for R&S) 90382144 VARIATIONS – General, delay and materials (electrical , miscellaneous, training, other) Backup sheets
90382145 \$11,234.86	Tax invoice VARIATIONS Main Plant (Steelworks and pipework) Backup sheets
90382848 \$3,737.00	Tax invoice (R&S purchase of gear left behind as per..) Facsimile: subject: Transfield services equipment in use at Oak Creek (cost for mechanical items 3,737.00+GST)

90384042 \$2,283.73	Tax invoice VARIATIONS Main Plant (pipework) Backup sheets
90384046 \$42,110.59	Tax invoice VARIATIONS – General, delays & materials (installation electrical, miscellaneous, other) Backup sheets
90385807 \$6,183.4	Tax invoice VARIATIONS- ROM (miscellaneous- civil, electrical) Backup sheets
90385811 \$10,664.86	Tax invoice VARIATIONS- Main Plant (pipework, electrical) Backup sheets
90385812 \$14,003.93	Tax invoice VARIATIONS – General, delays & material (miscellaneous, electrical, other) Backup sheets
90386638 \$14,157.11	Tax invoice VARIATIONS- Main Plant (installation- electrical) Backup sheets
90386639 \$119.50	Tax invoice VARIATIONS- General, Delays & Materials (miscellaneous) Backup sheets
90386641 \$3,437.50	Tax invoice VARIATIONS ROM (other) Backup sheets

PART C

Invoice No. & amount	References
90390928 \$631.25	Tax invoice Main Plant Backup sheets Time sheets
90392267 \$102,705.61	Tax invoice (additional supervision claim) List of names who did supervision (probably. add ones?) + hours worked' Bill of hours worked (not very detailed), Vehicle hire cost per person and day, Accommodation costs, Total labour costs of 2 supervisors (I. Bailey + G. Lauder), Vehicle hire costs for Bailey+ Lauder (in May) 2 letters from Transfield to R&S re additional supervision
90392265 \$11,145.75	Tax invoice (Electrical Variations – Main Plant) Backup sheet
90392266 \$1,109.24	Invoice (Variations-General, delays & materials) Backup sheets CNW Pty Ltd invoices (\$79.20+ \$13,750.00 incl GST) PIRTEK invoice (\$199.32 incl GST)
90390929 \$45,806.48	<ul style="list-style-type: none"> • Tax invoice (Variations-general, delays & material) • Backup sheets • TRANSFIELD Request For Information dated 2June 06

	<ul style="list-style-type: none"> • TRANSFIELD letter to R&S (16Jan 06) • Invoices from MAC to TRANSF. (incorrect rates claimed) see copy • Many Invoices from HAGEMEYER • S.A & J.A. BEYER invoice (\$335,17 incl GST) • REB Engineering timesheet 30.06.06 • Other
90390930 \$4,057.54	<ul style="list-style-type: none"> • Tax invoice upgrade project (electrical and pipework) • Backup sheets • Night shift timesheets (25 & 26.05.06) • FLAT CHAT DELIVERIES tax invoice 1,112.93 incl GST • UNITED FASTENERS QLD Pty Ltd invoice 2,544.30 incl GST

PART D

Invoice No. & amount	References
90396462 \$113,425.77	<ul style="list-style-type: none"> • Tax invoice (scaffold hire) • Backup sheets without WBS elements • Invoice TRANSCOTE Pty Ltd \$158,925.75 inc GST (very detailed!! Informs about labour, equipment and materials ca. 10pages) • List (refers to invoice)
90396463 \$17,498.06	<ul style="list-style-type: none"> • Tax invoice area 100 ROM (installation electrical) • Backup sheets without WBS elements
90396464 \$19,049.73	<ul style="list-style-type: none"> • Tax invoice (Variations- general, delay& materials) • Backup sheets without WBS elements • CNW Pty Ltd invoice 13,750.00 incl GST
90396465 \$16,264.80	<ul style="list-style-type: none"> • Tax invoice area 300 Main Plant (installation pipework) • Backup sheets without WBS elements
90396835	MISSING!!!

APPENDICES SHOWING SCOPE OF WORK KEY AND BACKUP SHEET

VAR - MAIN PLANT - CW - CIVIL	TSMP1530.VR.PL.CW.CI
	TSMP1530.VR.PL.CW.CI.SC
MODULE 4 - FCCFS - STRUCT PLATEW	TSMP1530.WS.M4.FS.ST
MODULE 4 - FC - STRUCT PLATEWORK	TSMP1530.WS.M4.FL.ST
MODULE 4 - SPDC - STRUCT PLATEWOR	TSMP1530.WS.M4.SP.ST
MODULE 4 - DMCC - STRUCT PLATEWOR	TSMP1530.WS.M4.DM.ST
MODULE 4 - C4AM - STRUCT PLATEWOR	TSMP1530.WS.M4.C4.ST
MODULE 4 - C17M - STRUCT PLATEWOR	TSMP1530.WS.M4.C7.ST
MODULE 4 - MSM - STRUCT PLATEWORK	TSMP1530.WS.M4.MI.ST
MODULE 4 - CM4 - STRUCT PLATEWORK	TSMP1530.WS.M4.CO.ST
MODULE 4 - SRDC - STRUCT & PLATE	TSMP1530.WS.M4.SR.ST
MODULE 4 - CWC - STRUCT & PLATE W	TSMP1530.WS.M4.CW.ST
MODULE 4 - FCCFS - PIPEWORK	TSMP1530.WS.M4.FS.PW
MODULE 4 - FC - PIPEWORK	TSMP1530.WS.M4.FL.PW
MODULE 4 - SPDC - PIPEWORK	TSMP1530.WS.M4.SP.PW
MODULE 4 - DMCC - PIPEWORK	TSMP1530.WS.M4.DM.PW
MODULE 4 - C4AM - PIPEWORK	TSMP1530.WS.M4.C4.PW
MODULE 4 - C17M - PIPEWORK	TSMP1530.WS.M4.C7.PW
MODULE 4 - MSM - PIPEWORK	TSMP1530.WS.M4.MI.PW
MODULE 4 - CM4 - PIPEWORK	TSMP1530.WS.M4.CO.PW
MODULE 4 - SRDC - PIPEWORK	TSMP1530.WS.M4.SR.PW
MODULE 4 - CWC - PIPEWORK	TSMP1530.WS.M4.CW.PW
MODULE 4 - FCCFS - MECHANICAL	TSMP1530.WS.M4.FS.ME
MODULE 4 - FC - MECHANICAL	TSMP1530.WS.M4.FL.ME
MODULE 4 - SPDC - MECHANICAL	TSMP1530.WS.M4.SP.ME
MODULE 4 - DMCC - MECHANICAL	TSMP1530.WS.M4.DM.ME
MODULE 4 - C4AM - MECHANICAL	TSMP1530.WS.M4.C4.ME
MODULE 4 - C17M - MECHANICAL	TSMP1530.WS.M4.C7.ME
MODULE 4 - MSM - MECHANICAL	TSMP1530.WS.M4.MI.ME
MODULE 4 - CM4 - MECHANICAL	TSMP1530.WS.M4.CO.ME
MODULE 4 - SRDC - MECHANICAL	TSMP1530.WS.M4.SR.ME
MODULE 4 - CWC - MECHANICAL	TSMP1530.WS.M4.CW.ME
MODULE 4 - FCCFS - ELECTRICAL	TSMP1530.WS.M4.FS.EL
MODULE 4 - FC - ELECTRICAL	TSMP1530.WS.M4.FL.EL
MODULE 4 - SPDC - ELECTRICAL	TSMP1530.WS.M4.SP.EL
MODULE 4 - C4AM - ELECTRICAL	TSMP1530.WS.M4.C4.EL
MODULE 4 - C17M - ELECTRICAL	TSMP1530.WS.M4.C7.EL
MODULE 4 - CM4 - ELECTRICAL	TSMP1530.WS.M4.SR.EL
MODULE 4 - CWC - ELECTRICAL	TSMP1530.WS.M4.CW.EL
MODULE 4 - SUBST EXT - ELECTRICAL	TSMP1530.WS.M4.SU.EL
MODULE 4 - COM ITEMS - ELECTRICAL	TSMP1530.WS.M4.CR.EL
ELEC MOD 4 - COMMON ITEMS, TRUNK	TSMP1530.WS.M4.EL.CR
ELEC MOD 4 - FINE COAL CIRC FEED	TSMP1530.WS.M4.EL.FS
ELEC MOD 4 - FLOATATION CIRCUIT	TSMP1530.WS.M4.EL.FL
ELEC MOD 4 - SPIRAL PROD DEWATERI	TSMP1530.WS.M4.EL.SP
ELEC MOD 4 - SPIRAL REJECT DEWAT	TSMP1530.WS.M4.EL.SR
ELEC MOD 4 - CLARIFIED WATER CIRC	TSMP1530.WS.M4.EL.CW
ELEC MOD 4 - CONVEYOR 4AM	TSMP1530.WS.M4.EL.C4
ELEC MOD 4 - CONVEYOR 17M	TSMP1530.WS.M4.EL.C7
ELEC MOD 4 - SUBSTATION EXTENSION	TSMP1530.WS.M4.EL.SU
MODULE 4 - FCCFS - CIVIL	TSMP1530.WS.M4.FS.CI
MODULE 4 - FC - CIVIL	TSMP1530.WS.M4.FL.CI
MODULE 4 - SPDC - CIVIL	TSMP1530.WS.M4.SP.CI
MODULE 4 - DMCC - CIVIL	TSMP1530.WS.M4.DM.CI

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