

Claimant: MacSteel Pty Ltd ABN 55 056 359 445
Respondent: Evolve Property Group ABN 58 522 433 248

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:

Invoice 16240

1. The adjudicated amount of the adjudication application dated 5 December 2006 is **\$17,710.00** including GST.
2. The date on which the amount became payable is **7 November 2006**.
3. The applicable rate of interest payable on the adjudicated amount is **16.442%** simple interest.

Invoice 16316

1. The adjudicated amount of the adjudication application dated 5 December 2006 is **\$6,527.57** including GST.
2. The date on which the amount became payable is **27 November 2006**.
3. The applicable rate of interest payable on the adjudicated amount is **16.442%** simple interest.
4. The Claimant and Respondent pay the ANA’s fees of \$242 and the adjudicator’s fees in the proportion 25% by the Claimant and 75% by the Respondent

Invoice 16315

1. The adjudicated amount of the adjudication application dated 5 December 2006 is **\$7,475.55** including GST.
2. The date on which the amount became payable is **24 November 2006**.
3. The applicable rate of interest payable on the adjudicated amount is **16.442%** simple interest.

Invoice 16318

1. The adjudicated amount of the adjudication application dated 5 December 2006 is **\$9,769.68** including GST.
2. The date on which the amount became payable is **27 November 2006**.
3. The applicable rate of interest payable on the adjudicated amount is **16.442%** simple interest.
4. The Claimant and Respondent pay the ANA’s fees of \$242 and the adjudicator’s fees in the proportion 25% by the Claimant and 75% by the Respondent

Signed:

Date:.....

Chris Lenz Adjudicator

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Background

1. Sunshine Coast Roofing, ABN 55 056 359 445, entered into a period subcontract with ACW Investments trading as Evolve Property Group, ABN 58 522 433 248, in March 2006 (referred to in this adjudication as the “Respondent”) to measure, supply, deliver and install roofing (the “period subcontract”).
2. The period subcontract covered works yet to be agreed for a period of 12 months and provided that the Respondent issue a work order for each project during the term of the period contract.
3. On 26 July 2006, MacSteel Pty Ltd (referred to in this adjudication as the “Claimant”) provided the Respondent with Quote SAV23097 for roofing work at Lot 33 Sentosa Golf Estate, Peregrin Springs in the sum of \$20,692.05 (“Lot 33”).
4. On 14 September 2006, the Claimant provided the Respondent with Quote SAV23401 for roofing work at Lot 32 Sentosa Golf Estate, Peregrin Springs in the sum of \$17,855.17 (“Lot 32”).
5. On 18 September 2006, the Respondent in Order No. SGE-006563, addressed to Sunshine Coast Roofing, accepted the Claimant’s Quote SAV23401.
6. On 6 October 2006, the Claimant provided the Respondent with Quote SRD21990 for roofing work on Lot 14 Upper Hastings Street, Noosa Heads in the sum of \$28,614.42 (“Lot 14”).
7. On 5 July 2006 (sic), the Respondent in Order No. 006310, addressed to Sunshine Coast Roofing, accepted the Claimant’s Quote SRD21990.
8. On 24 October 2006, an invoice 16240 for \$17,710 with the Sunshine Coat Roofing logo next to the name of the Claimant, with the Claimant’s Account name and details (the “Claimant’s invoice details”) was addressed to the Respondent for work on Lot 14.
9. The Claimant claimed that it did not receive a payment schedule from the Respondent for invoice 16240.
10. A Notice of Termination was issued by the Respondent on 7 November 2006 on Sunshine Coast Roofing (Division of MacSteel P/L) for all works on the Sentosa Golf Estate at Peregrin Springs and 80 Upper Hastings Street, Noosa Heads (the “termination”).
11. Invoices with the Claimant’s invoice details were addressed to the Respondent for roofing works carried out at Lots 32 and 33, from which there were deductions for work not carried out by the Claimant, prior to the termination. The details were:
 - i. 10 November 2006 Invoice 16315 \$ 7,475.55
 - ii. 13 November 2006 Invoice 16316 \$ 6,572.57
 - iii. 13 November 2006 Invoice 16318 \$ 9,769.68

12. On 16 November 2006, the Claimant served a notice of intention to apply for adjudication for invoice 16240 on the Respondent and invited the Respondent to provide a payment schedule.
13. On 23 November 2006, the Respondent served 2 “Non Acceptance Claim Notices”. The first notice related to invoice 16316 and advised that the claim could not be accepted because the invoice would be resolved as part of a dispute resolution process.
14. The second notice dealt with invoices 16318 and 16315 respectively and advised that the claims would not be accepted because the credit provided for the lower roof, and apron in the case of Lot 33, was not sufficient to complete the works. The Respondent requested that the Claimant resubmit the invoices or provide a credit note to reflect the assessed value.
15. The Claimant made two written applications for adjudication on 6 December 2006 and the Respondent’s agent, Building & Construction Payment Solutions, provided an adjudication response on 14 December 2006 (the “response”).

Appointment of Adjudicator

16. The Claimant applied in writing to the Queensland Law Society (“QLS”) on 6 December 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.
17. I find the application was to QLS, as an authorised nominating authority (“ANA”), with registration number N1061878, thereby satisfying s21(3)(b) of the Act.
18. By letter dated 6 December 2006 QLS 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.
19. I accepted the nomination by facsimile dated 12 December 2006 sent to the Claimant and to the Respondent, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.

Material provided in the adjudication

20. I list the Claimant’s material and the Respondent’s material separately.

Claimant’s Material

This material comprised 2 separate applications both dated 5 December 2006, which QLS accepted as one adjudication application with number 39. For ease of reference, I have divided the Claimant’s material into Application 39A and 39B:

- (i) *Application 39A*
 - i. The Adjudication Application dated 5 December 2006 in support of two payment claims totalling \$24,282.57 (including GST);
 - ii. The Claimant’s submissions in support of the Adjudication Application (the “39A submissions”) (pages 1 & 2);
 - iii. Claimant’s letter to QMBA dated 29 November 2006 (the “QMBA letter”) (pages 2A & 2B);
 - iv. Letter to Claimant from Respondent dated 23 November 2006 not accepting tax invoice number 16316 dated 13 November 2006 (the “invoice 16316 response”) (page 3);

- v. Claimant's invoice 16316 dated 13 November 2006 for \$6,572.57 (page 4);
 - vi. Claimant's reminder notice to Respondent dated 29 November 2006 relating to overdue payment on Lot 14 Upper Hastings Street, Noosa Heads (page 5);
 - vii. Respondent's Notice of Termination to Claimant dated 7 November 2006 (page 6);
 - viii. Respondent's Without Prejudice letter to Claimant dated 6 November 2006 relating to dispute (the "without prejudice letter") (pages 7 & 8)
 - ix. Claimant's invoice 16240 dated 24 October 2006 for \$17,710.00 (page 9);
 - x. Claimant's Notice to Respondent dated 16 November 2006 requiring payment schedules for unpaid invoices, including invoice 16240 (page 10);
 - xi. Claimant's reminder notice to Respondent dated 8 November 2006 relating to overdue payment on Lot 14 Upper Hastings Street, Noosa Heads (page 11);
 - xii. Respondent's Purchase order dated 5 July 2006 accepting the Claimant's quote SRD21990 for metal roofing at 80 Upper Hastings Street for \$28,614.42 (the "6310 purchase order") (page 12);
 - xiii. Claimant's quote SRD21990 to Respondent dated 6 October 2006 for roofing to Lot 14 Upper Hastings Street, Noosa Heads for \$28,614.42 with Terms and Conditions (pages 13 to 18);
 - xiv. Claimant and Respondent's period subcontract concluded in March 2006 (pages 19 to 22).
- (ii) *Application 39B*
- i. The Adjudication Application dated 5 December 2006 in support of two payment claims totalling \$17,245.23 (including GST);
 - ii. The Claimant's submissions in support of the Adjudication Application (the "39B submissions") (page 1);
 - iii. Letter to Claimant from Respondent dated 23 November 2006 not accepting tax invoice numbers 16318 dated 13 November 2006 relating to Lot 32 and 16315 dated 10 November 2006 relating to Lot 33 (the "invoices 16315 and 16318 responses") (page 2);
 - iv. Claimant's invoice 16318 dated 13 November 2006 for Lot 32 Sentosa Golf Estate, Peregian Springs for \$9,769.68 (page 3);
 - v. Respondent's subcontract reconciliation of invoice 16318 advising that \$4,462.66 was owing on Lot 32 (page 4);
 - vi. Respondent's Notice of Termination to Claimant dated 7 November 2006 (page 5);
 - vii. Claimant's quote SAV23401 to Respondent dated 14 September 2006 for roofing to Lot 32 Sentosa Golf Estate, Peregian Springs for \$17,855.17 with Terms and Conditions (pages 6 to 10);
 - viii. Respondent's Purchase order dated 18 September 2006 accepting the Claimant's quote SAV23401 for metal roofing at Lot 32 Sentosa Golf Estate, Peregian Springs for \$17,855.17 (the "SGE-006563 purchase order") (page 11);
 - ix. Claimant's invoice 16315 dated 10 November 2006 for Lot 33 Sentosa Golf Estate, Peregian Springs \$7,475.55 (page 12);
 - x. Respondent's subcontract reconciliation of invoice 16315 advising that \$6,049.25 was owing on Lot 33 (page 13);
 - xi. Claimant's quote SAV23097 to Respondent dated 26 July 2006 for roofing to Lot 33 Sentosa Golf Estate, Peregian Springs for \$20,692.05 with Terms and Conditions (pages 14 to 19);
 - xii. Claimant and Respondent's period subcontract concluded in March 2006 (pages 20 to 23).

Respondent's Material

The Respondent's material consisted of the adjudication response of 4 pages (the "response") dated 14 December 2006 together with 10 pages of attachments in support of the response consisting of:

- (i) Respondent's Non Acceptance Claim Notice dated 23 November 2006 for invoice 16316 (Attachment 1);
- (ii) Quotation from Bruces Roof Plumbing dated 20 November 2006 for Lot 32 for roofing for \$13,392 (Attachment 2 page 1);
- (iii) Respondent's subcontract reconciliation of invoice 16318 advising that \$4,462.66 was owing on Lot 32 (Attachment 2 page 2);
- (iv) Quotation from Bruces Roof Plumbing dated 16 November 2006 for Lot 33 for roofing to lower roof for \$5,291 (Attachment 3 page 1);
- (v) Quotation from Bruces Roof Plumbing dated 16 November 2006 for Lot 33 for roofing to back lower roof for \$3,561 (Attachment 3 page 2);
- (vi) Tax invoice from Bruces Roof Plumbing dated 30 November 2006 for Lot 33 for \$8,852.00 (Attachment 3 page 3)
- (vii) Respondent's subcontract reconciliation of invoice 16315 advising that \$6,049.25 was owing on Lot 33 (Attachment 3 page 4);
- (viii) Respondent's subcontract reconciliation relating to Lot 14 Upper Hastings Street Noosa Heads advising that \$22,210.11 was owing on Lot 14 (Attachment 4 page 1);
- (ix) Lot 14 Upper Hastings Street Noosa Heads, Roofing Subcontractor Delay Summary identifying \$37,194 of lost workings and total cost incurred (Attachment 4 page 2);
- (x) Lot 14 Upper Hastings Street Noosa Heads, Preliminary Prolongation Costs of \$2,479.62 (Attachment 4 page 3);
- (xi) Copy of Fax transmission of Adjudication Response to Claimant.

Jurisdiction

21. 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.
22. I will also consider the Respondent's submissions in the response under this heading because it challenges my jurisdiction to make a decision in relation to the application. On page 2, the Respondent argues that, "*All of the four purported claims.....are unquestionably invalid under the Act*" and "*With respect the adjudicator has not jurisdiction to make a decision in relation to this adjudication application.*"
23. The Respondent asserts that the "*Claimant has not identified the Respondent correctly and as such is invalid. Just as serious is the entity of the Claimant. ACW Investments trading as Evolve Property Group has no contract or other arrangement with "Macsteel Pty Ltd". This point alone renders the Adjudication Application invalid under the Act.*"
24. There are other assertions in the submissions to which I will refer later, but it is important to systematically deal with jurisdictional issues, and until I am satisfied that the application falls within s3 of the Act, I have no jurisdiction to consider the

Respondent's submissions. However, it is sensible to deal with the identity of the contracting parties when I deal with the *construction contract* under the Act.

25. Turning firstly to schedule 2 of the Act. It 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.”

26. In applications 39A and 39B, the Claimant provided a copy of the period subcontract in each. The Respondent at page 1 of its response submissions stated ‘To save the adjudicator time the Respondent agrees that there was a ‘Period Subcontract’ between Sunshine Coast Roofing and ACW Investments trading as Evolve Property Group’.

27. I have reviewed the period subcontract between Sunshine Coast Roofing (“SCR”) and ACW Investments trading as Evolve Property Group. I find that the ABN of SCR is 55 056 359 445. Referring to the Claimant’s material regarding invoices 16240, 16315, 16316 & 16318, I find that this is the same ABN as identified under the Claimant’s invoice details relating to MacSteel Pty Ltd. However, the Respondent on page 2 of its submissions stated that SCR was not the applicant in the adjudication application. Furthermore, on page 3, the Respondent argued that the Claimant Macsteel was not the party to the agreed contract.

28. I caused a search of the Queensland Business Names Extract (the “extract”) for SCR and the ASIC register for MacSteel Pty Ltd because the identity of the Claimant and its association with this contract was of paramount importance in the Respondent’s submissions. These are public registers accessible to all. s24 of the *Business Names Act 1962* (Qld) provides:

*“(b) a copy of or extract from any document lodged with the registrar and certified by the registrar; or
(c) an extract from the register certified by the registrar; or
(d) a certificate issued under section 23(1)(b) or (c); or
(e) a combination of any of the above;
is, in any proceedings, admissible as prima facie evidence of the information contained in the document.”*

29. The extract for SCR provided that it had a BN2552310, with its address at Unit 1 Chaplin Place, 106 Sugar Road, Maroochydore, and the person carrying on business currently was MACSTEEL Pty Ltd with ACN 056 359 445. I find that this is consistent with the details provided by the Claimant in the invoices which purport to be payment claims. s176 of the Corporations Act states that unless there is evidence to the contrary, a register kept under this Chapter is proof of the matters shown in the register under this Chapter. The ASIC register provides Macsteel’s ABN to be 55 056 359 445.

30. The Respondent only asserted to the contrary and provided no evidentiary support for its contrary submissions. Accordingly, I am satisfied that the Claimant carries on business as SCR and is a party to the period subcontract because its ABN is correctly identified, and it carries on business as SCR. Accordingly, I reject the Respondent’s submissions on the incorrect identity of the Claimant and now consider the period subcontract in more detail.

31. The period subcontract provides that the Subcontractor agrees to perform and complete the Works in accordance with the conditions of the contract. Annexure A to the Period Subcontract with SCR refers to site measure, supply, delivery to site and installation of roofing. The period subcontract also refers to Works yet to be agreed and that a Work order signed by the Builder shall be issued from time to time during the period contract term and should be read in conjunction with it.
32. I find that the period subcontract was signed by the Claimant on 1 March 2006, as this is the date of the signature at the bottom, and was signed by the Respondent as Builder on 20 March 2006, which I find is the date of the period subcontract. I find that the period subcontract governs the parties' obligations during its validity period, and that from time to time, the parties will agree to carry out projects under the period subcontract.
33. I was not provided by either party with the General Conditions of Contract applicable to this period subcontract, which according to the words on the last page of the period subcontract, were printed on the back of the period subcontract. If the parties had considered them relevant to their dispute, they could have provided them, so I assume that they have no bearing on the dispute and I will consider the contract provided to me.
34. I am satisfied therefore that there was an *agreement or other arrangement* as provided by Schedule 2 of the Act, on 20 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*.
35. 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;...*
- (e) *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....*
- (iv) *the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site...”*
36. I am satisfied that installation of roofing falls within s10(1)(a), and that prefabrication of any special roofing falls within s10(e)(iv) of the Act
37. It is also necessary to refer to the related goods and services in relation to *construction work* because the Annexure “A” to the period subcontract referred to site measure, supply and delivery to site of roofing.
38. 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;”

39. I find that the measurement falls within the meaning of *services* s11(b)(i), supply of roofing within the meaning of *goods* under s11(1)(i) and delivery of roofing under the meaning of *services* s11(b)(i) of the Act.
40. 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*.
41. I have also referred to the Respondent’s Purchase order number 006310 which accepted the Claimant’s quote SRD21990, and find that this relates to roofing work on Lot 14 of 80 Upper Hastings Street, Noosa Heads. I find that this is a works order contemplated by the period subcontract, and relates to works in Noosa Heads which I find is in Queensland. Furthermore, I find the Respondent’s Purchase Order SGE-006563 accepted the Claimant’s quote SAV23401 and find this relates to roofing work at Lot 32 Sentosa Golf Estate Peregian Springs, which I find is in Queensland, and is a works order contemplated by the period subcontract.
42. I also find that the Claimant’s quote SAV23097 related to roofing work at Lot 33 Sentosa Golf Estate Peregian Springs, which I find is in Queensland. Although there is no works order provided by the Claimant to support this quote, the Respondent did not take issue that work was done on this Lot, as its Non Acceptance Claim Notice dated 23 November 2006 impliedly acknowledged that work had been done on this Lot, but took issue with the amount of credit being offered for work not done prior to termination. Accordingly, I am satisfied that this roofing work was done under the period subcontract, and was for works in Queensland
43. I find therefore that s3 of the Act has been satisfied for the reasons outlined above and because 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.
44. 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.
45. Before referring to the Scope of the Adjudication, I indicated that I would deal with some of the other “jurisdictional issues” raised by the Claimant in its submissions. I will start with page 1, where the Respondent indicated that I accepted the 2 applications and gave that number 39 by me for reference purposes, and that I intended to deal with 2 applications at the same time, which was of concern to the Respondent.
46. The QLS referred both applications to me and gave them the number 39, as this is an administrative numbering scheme used by it. I did not provide this number, as asserted by the Respondent. I note that both applications were identified by the QLS with Application number 39 and were received at 10.00am on 6 December 2006. I

therefore find against the Respondent's assertions on page 3 of the response that one of the adjudication applications was not date receipted. I have found nothing in the Act that prohibits an adjudicator from considering 2 applications at the same time, and the Respondent did not point to any authority prohibiting me from doing so.

47. Given that both applications (containing 2 invoices each) related to the same period subcontract between the same parties, I find that it was sensible for the QLS to refer both adjudications to one adjudicator. The Claimant by making simultaneous applications is at risk that the adjudicator may find against it on all payment claims, whereas, if it split up the claims, it may have reduced this risk. However, the Claimant chose to proceed in this manner, and I as I have already said, I find nothing to prevent me adjudicating what are essentially four payment claims, contained in two adjudication applications that have been rolled into one by the QLS.
48. The *construction contract* defined by the Act which I have found relates to all four invoices. If it had not related to all invoices, it would make the adjudication more complicated because one would be dealing with more than one construction contract, and the reasons would have to separate the contracts, but that is not the case I have found here.
49. The Respondent stated, on page 3 of its submissions:

“We have four tax invoices for three different projects, three different dates, all made out to the wrong entity. Two adjudication applications, one of which is not date receipted, both noting the Claimant as Macsteel Pty Ltd who is unquestionably not party to the agreed contract. Wrapped up into one notice of acceptance, which also notifies the Claimant incorrectly. Referring to application 39 none of which complies with Section 26(2)(b) or (c) or (d). Should the adjudicator continue with the adjudication process the Respondent queries the validity of the entire application itself as it is presented currently.”

50. I cannot understand the Respondent assertions that the notice of acceptance notifies the Claimant incorrectly, as the Claimant is Macsteel Pty Ltd, and it was so identified.
51. Furthermore, with respect I cannot understand the Respondent's submissions page 3 that the Claimant has identified the Respondent incorrectly, as the Respondent accepts that it was the party to the period subcontract. I reject this submission, as it is incorrect.
52. Having considered some of the submissions at this stage, I now consider it appropriate to deal further with these submissions under the “Scope of the adjudication”, as that is what the Respondent appears to be pointing is deficient by its reference to s26(2) of the Act.

Scope of the adjudication

53. s26(1) of the Act 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.

54. 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.”*
55. Part 4A of the *Queensland Building Services Authority Act 1991* (The “QBSA Act”) may apply to this adjudication to which I will return later and I did not conduct any inspection of the projects.
56. 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.
57. With respect to s26(2)(b) of the Act, I will be considering the provisions of the period subcontract as it related to the various projects identified by the various invoices.
58. In relation to s26(2)(c) and (d) of the Act, it will be necessary for me to consider each invoice separately together with its supporting submissions *to which the application relates*, and the payment schedule and supporting submissions *to which the application relates*, so as to ensure they are correctly considered in order that the parties are clear as to the reasoning behind the decision.
59. As stated previously, the Respondent provided no authority to support its assertions that I was unable to consider the application, and I do not find that I am prohibited by the Act in dealing with essentially four payment claims in the one adjudication. I acknowledge that it introduces complications in setting out the reasons, but I will be mindful of the requirements of s26(2) of the Act in carrying out my duties.
60. By dealing with each invoice separately, it will then be possible to isolate the important timing requirements under the Act, as well as the particular issues associated with each particular claim.

Requirements of an adjudication decision

61. 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)).*

62. I now check that each basic and essential requirement has been complied with, and at some stages, it will probably be necessary to consider each invoice and any response from the Respondent separately.

Detailed consideration of each Basic and Essential Requirement

The first basic and essential requirement – the construction contract

63. I have already found that there is a *construction contract* to which the Act applies, which gave me jurisdiction to proceed with the adjudication. This is the period subcontract which covers various projects during the term of the period contract. I have found that it related to roofing works at Lot 14 (Upper Hastings Street, Noosa Heads), Lots 32 and 33 (Sentosa Golf Estate).

64. I refer to Clause 31 of the Annexure A to the period subcontract, which requires the Claimant to quote each job individually upon the request of the Respondent. The Respondent did not take issue with the quotation documents provided by the Claimant in its application and I find that the Claimant issued quotes (including GST) with the following details during the period subcontract:

| <u>Date</u> | <u>Quote No.</u> | <u>Project</u> | <u>Amount</u> |
|-------------|------------------|----------------|---------------|
| 26/7/06 | SAV23097 | Lot 33 | \$20,692.05 |
| 14/9/06 | SAV23401 | Lot 32 | \$17,855.17 |
| 6/10/06 | SRD 21990 | Lot 14 | \$28,614.42 |

65. I refer to Clause 32 of the period subcontract, which provides that the Respondent will issue a separate work order for each project, which would be subject to the terms and conditions of the period subcontract. The Respondent did not deny that it issued the works orders identified in the Claimant’s application. I find that the following work orders were issued under the period subcontract:

| <u>Date</u> | <u>Order No.</u> | <u>Quote No.</u> | <u>Project</u> | <u>Amount</u> |
|-------------|------------------|------------------|----------------|---------------|
| 5/7/06 | 006310 | SRD21990 | Lot 14 | \$28,614.42 |
| 18/9/06 | SGE-006563 | SAV23401 | Lot 32 | \$17,855.17 |

66. I have also referred to the fact that the Respondent did not deny that the parties had agreed that the Claimant carry out work on Lot 33, and I have found that it had quoted to do so under SAV 23907 for \$20,692.05. Accordingly, I am satisfied that for each

project under the period subcontract there was an agreed cost identified by the 3 quotes listed above.

67. I find therefore, without controverting material from the Respondent that these quote amounts constituted the contract price for each project, including GST.
68. I am satisfied that the period contract is a *construction contract* between the Claimant and Respondent, to which the Act applies, and that it covers all three projects in the adjudication.
69. I have therefore established the *first basic and essential requirement*.

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

70. The *second basic and essential requirement* requires the service of the payment claim on the Respondent in accordance with s17 of the Act. S103(1) of the Act allows the contract to provide for the way of service, and after reviewing whether the period subcontract deals with service, it will be necessary to consider the service of each invoice separately,
71. I have already found that the General Terms and Conditions of the period subcontract have not been provided by either party to me. These terms may have provided for a means of service of documents. However, they are not in the material, and therefore I find that the period subcontract does not deal with service. s103(2) of the Act provides that s39 of the *Acts Interpretation Act 1954* (the “AIA”) regarding service is preserved. s39 of the AIA provides:

”(1) If an Act requires or permits a document to be served on a person, the document may be served—
 (a) on an individual...; or
 (b) on a body corporate—by leaving it at, or sending it by post, telex, facsimile or similar facility to, the head office, a registered office or a principal office of the body corporate.”

72. I refer to the details of the four invoices which form part of the adjudication material, which the Respondent listed on page 1 of its submissions, and I summarise their details as follows:

| <u>Date</u> | <u>Invoice No.</u> | <u>Project</u> | <u>Amount</u> |
|-------------|--------------------|----------------|--------------------|
| 24/10/06 | 16240 | Lot 14 | \$17,710 |
| 10/11/06 | 16315 | Lot 33 | \$ 7,475.55 |
| 13/11/06 | 16316 | Lot 14 | \$ 6,572.57 |
| 13/11/06 | 16318 | Lot 32 | <u>\$ 9,769.68</u> |
| | | TOTAL | \$41,527.80 |

73. In each case the invoices provided the Customer details as Evolve Property Group of PO Box 325 Peregian Beach Qld 4573 and I find as a matter of commonsense, without any controverting material from the Respondent that the invoices were posted to the Respondent on the invoice date. I am satisfied that Evolve Property Group is the trading name for ACW Investments Pty Ltd with ABN 58 522 433 248, which I find is a body corporate, thereby falling within s39(1)(b) of the AIA. I am satisfied that posting is in accordance with s39(1)(b) of the AIA, which in turn satisfies s103(2) of the Act regarding service.

74. I referred to the Postage Assessment Calculator on the Australia Post website www1.auspost.com.au/pac/aus_letter_select.asp to determine the time of delivery for postcode 4558 to 4573, the postcodes for the Claimant and Respondent respectively. The calculator provided a delivery time of the 2nd business day from posting, and I therefore find that the invoices would have been received by the Respondent on the 2nd business day after posting.
75. Accordingly I find that proper service of each invoice took place as required by s17 of the Act so that the *second basic and essential requirement* is satisfied.

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

76. I have already found the Claimant has validly made the application to the QLS which is an ANA. Accordingly, *the third basic and essential requirement* is satisfied.

The fourth basic and essential requirement – eligible adjudicator

77. *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.
78. I am not a party to the period subcontract 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.
79. Accordingly, *the fourth basic and essential requirement* has been satisfied.

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

80. *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 have decided to consider each invoice separately, so that my decision on page 1 relates to each invoice and separately provides for the amount of progress payment, due date for payment and the rate of interest payable, which is in accordance with this requirement.
81. 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.
82. Each invoice is in the same format, and it is useful to firstly satisfy myself, if it is possible, as to whether the invoices are *payment claims* under the Act. Thereafter, each invoice will be dealt with in turn, together with the associated payment schedule, if any. At the same time, I will deal with all other issues associated with each invoice, so as to determine the amount of progress payment, the due date for payment and the interest payable. This may mean that there is repetition in the decision, but it allows me to comply with s26(2) for each payment claim, as required by the Act.
88. 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.”

83. The invoice format provides for a description of work, which cross references a quotation number and a nett (sic) amount due. Furthermore, there is a job summary, which refers to the quoted price, progress claims to date inclusive of the invoice, and details of contract variations, history and comments. Finally each invoice bears the endorsement “This invoice is a claim for payment under the Building and Construction Industry Payment Act 2004”.
84. I am satisfied that the information provided in the invoice format complies with s17(2) and are *payment claims* under the Act. I find that the omission of the “s” from “Payments” has not misled the Respondent into not being aware that the invoices constituted a *payment claim*, as a payment claim is not invalid merely because it abbreviates the name of the Act: *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136.
85. I will nevertheless check that the details in each invoice are sufficient for them to be a *payment claim*, despite having found generally that the invoices’ format satisfies s17(2) of the Act.

Invoice 16240 dated 24 October 2006

86. This invoice refers to quotation number 21990, which I have already found relates to roofing work on Lot 14. It claims 61% of the total amount of \$26,378.06 (excluding GST) for this project. It correctly identifies the contract price for the project as \$26,013.11 (excluding GST), to which it added a variation amount of \$364.95 excluding GST. It claimed \$17,710.00 (including GST) for the work that it carried out, as 61% of the contract price, and identified that this related to the first stage on upper levels.
87. I am satisfied that it is a payment claim and was posted on 24 October 2006. Using my finding from the Australia Post website, I am satisfied that it was served on the Respondent 2 business days later, i.e. 26 October 2006.
88. The Claimant asserts that it did not receive a payment schedule from the Respondent and the Respondent does not deny this fact in the response submissions. I find from page 10 of the material in *Application 39A* that the Claimant served a notice of intention to proceed to adjudication under s21(2) of the Act dated 16 November 2006 on the Respondent. I am satisfied that the notice provided information inviting the Respondent to serve a payment schedule, and that the Respondent was made aware of the consequences of not serving a payment schedule.
89. I find that this notice would have been served on the Respondent on 20 November 2006, and that s21(2)(b) of the Act required a payment schedule from the Respondent within 5 business days after receiving the notice, which I calculate to be no later than 27 November 2006.

90. The Respondent in the response submissions on page 2 under the heading “Payment Schedules” makes reference to Attachment 1 which was a letter from the Respondent to the Claimant dated 23 November 2006, and the Respondent submitted that the parties had arranged discussions with the QMBA to resolve all outstanding issues.
91. I am unable to find that this letter constituted a payment schedule for invoice 16240. It specifically referred to Invoice 16316, and referred to a mediation/dispute resolution process underway, which ostensibly justified the Respondent to not accept the claim. s18(2) of the Act requires that a payment schedule:

- (a) must identify the payment claim to which it relates; and*
*(b) must state the amount of the payment, if any, that the respondent proposes to make (the **scheduled amount**).*

92. The letter refers does not refer to invoice 16240, the relevant payment claim, and does not identify a schedule amount. Therefore, I find that it is not a payment schedule for this payment claim, invoice no.16240.
93. s24(3) of the Act provides that the Respondent may give a response only if it has served a payment schedule on the Claimant within the time prescribed by s21(2)(b), and I have found that it did not do so. I am therefore constrained by s26(2) of the Act as to what material I may consider. In *The Minister for Commerce (formerly Public Works & Services) v. Contrax Plumbing (NSW) Pty. Ltd. & Ors.* (“Contrax”) [2005] NSWCA 142, 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).”

94. I may therefore consider material from the Respondent relating to s26(2)(a) and (b), which may does not relate to a payment schedule, but I would have to very careful in carrying out this process because the Claimant may be denied natural justice, and that I will not allow.

95. I am satisfied that the Claimant carried out work as reflected in invoice 16240, and that the amount of the progress claim was \$17,710.00. There was no challenge to this amount in a payment schedule. However, on page 2 of the response submissions, the Respondent said that,

“The Claimant has not provided one calculation, scope of deleted works, or evidence to justify the value of the works, or goods that were deleted from the projects just a magic figure out of the air. In comparison the Respondent has identified the costs of delay to complete. Evidence of payment to a third party and a statement of how he arrived at considering the amount fair and reasonable. It is our argument that the Claimant has not provided the adjudicator with any evidence to allow him to fulfil the requirement of s27(1)(b) and allow the unrealistic credits on invoice numbers 16315, 16316 & 16318.”

96. I am not prepared to consider this submission in relation to invoice 16240, as there was no payment schedule and the Respondent in its submissions makes reference to the other three invoices, but not this invoice, despite it having made reference to resolution of all outstanding issues.
97. Furthermore, on page 3 of the response, the Respondent argued that as regards Lot 14, there were delays caused by the Claimant resulting in costs to the Respondent caused by the Claimant’s delays, and in Attachment 4’s three pages it provided support for its set off claim. There is nothing in the material that allows for contractual set off, so I am unable to have regard to these submissions under the *Contrax* exception under dealing with provisions of the contract: s26(2)(b). I must exclude this material under s24(3) of the Act because it was not raised earlier, as there was no payment schedule.
98. I must, however, be satisfied that the Claimant has the right to the progress payment and I refer to s12 of the Act that 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.”

99. I will need to determine the reference date for this claim, so as to be satisfied that the Claimant was entitled to make the claim, and the Respondent had put reference dates in issue. *Reference date* is defined in Schedule 2 of the Act 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...”*
100. I will need to consider the terms of the period subcontract as regards due date for payment, which deals with the payment regime, so it is sensible to now consider these provisions, and then determine the *reference date*.
101. Accordingly, without controverting material, and having been satisfied that the Claimant carried out work on Lot 14, and subject to the payment claim having been made from a reference date, to which I will turn shortly, I am satisfied that the amount for invoice 16240 is \$17,710.00 (including GST).

102. In calculating the due date for payment as required by s15(1)(a) of the Act, I may have regard to the period subcontract, and I find on the last page of this document that the Claimant was required to invoice for work by specific dates. The terms were as follows:
- *“Invoice for work completed up to 15th of each month, to be submitted by the 12th day of the month*
 - *Invoice for work completed up to the 30th of each month, to be submitted by the 27th day of the month*
 - *Payment will be 16 days from the 15th and 31st day of each month”*
103. s15(1)(a) of the Act refers to s67U of the QBSA Act which deals with *construction management trade subcontracts*, which are defined in s67B of the QBSA Act as having (a) the contracting party for the building contract is a *principal*. A *principal* is defined in s67A as a person who is not a *building contractor*. I find that the Respondent is a *building contractor* because it describes itself as the builder in the period subcontract, in which it also identified a QBSA licence number of 1000659. Accordingly, I find that s67U of the QBSA Act does not apply to the period subcontract.
104. I refer to s67W of the QBSA Act which provides:
- A provision in a commercial building contract is void to the extent it provides for payment of a progress payment by a contracting party to a contracted party later than 15 business days after submission of a payment claim.”*
105. I carried out a few random calculations and find that the mechanism of payment claims provided in the period subcontract does not breach s67W of the QBSA Act. I must now turn to the meaning of the payment terms under the period subcontract.
106. There is a tension between the period subcontract terms and the payment terms provided in the invoice and the quote. The quote SRD21990 refers to payment is strictly nett (sic) 14 days, and I have found that the Respondent accepted this quote in works order 006310. Invoice 16240 refers to payment terms is strictly nett (sic) 14 days, which is consistent with the quote.
107. However, the works order states, *“Works shall include but not be limited to the above items in accordance with EPG specifications, contract and trading terms and conditions.”* I have no additional material about these trading terms and conditions, apart from the period subcontract, which provides in Clause 31 for the Claimant submitting quotes and in Clause 32 for the Respondent issuing works orders subject to the terms and conditions of the period subcontract. I am therefore satisfied that the works order accepted the quote, and did not constitute a counter offer.
108. It is necessary then to resolve the tension between the 14 days payment terms in the quote and invoice, and the 2 dates a month required by the period subcontract. In construing the meaning of contracts, there must be certainty of contractual obligations: Wilmot L, S Christensen and D Butler (2005), *Contract Law*, Oxford University Press, South Melbourne, 2nd Ed (“Wilmot et al”), par 4.4, page 86.

109. Wilmot et al referred to the case of *G Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251, 255 where Viscount Maugham held, “*In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty.*” Wilmot et al at par 4.3.1 on page 89 refer to individual terms that are struck down for want of uncertainty, rendering them void.
110. I am obliged to give the words their ordinary meaning, and looking at the payment terms in the period subcontract the ordinary meaning of the words are that the Claimant is required to claim on the 12th for work completed up to the 15th of each month, and similarly on the 27th for work completed up to the 30th of the month. It is to my mind not logical to put a claim in for work done up to a particular date, 3 days before some work is actually carried out. A Claimant would have to anticipate what work it was going to do by the 15th or 30th of each month and that is not the same as carrying the work. To my mind such a term is vague, ambiguous or uncertain and is void.
111. I accept that the schedule to the period subcontract provides that works orders shall be read in conjunction with the period contract. However, if the period subcontract clause is void, it is possible to rely on the works order, which accepted the quote, for payment terms. I find that the payment terms of 14 days from date of invoice quite clear and logical because the work has already been carried out for the invoice to be made. I have found that the works order 006310 accepted quote SRD21990, which contained the 14 day payment term, so I am satisfied, without controverting material from the Respondent to the contrary, that the parties agreed to this payment regime for this invoice, as it was to be read in conjunction with the period subcontract.
112. **I therefore find that the due date for payment for invoice 16240 is 14 days after 24 October 2006, which is 7 November 2006.**
113. I said earlier that after considering the contract, I would return to the question of the *reference date*. I have found that the payment regime in the period subcontract was void and that payment was 14 days from date of invoice. I have found that the parties agreed that payment was to be made on this basis, which was derived from the quote SRD21990. On page 5 of the quote I note that it specified,
- “Progress payments for the total value of the work completed and/or materials supplied at the end of each 14 day period will be claimed, and such progress payments are to be paid within 14 days of the date of the invoice.”*
114. I am therefore satisfied that that the period subcontract did provide for a reference date by reference to the works order 006310, which accepted the quote containing the progress payment terms. This means that the contract provides for a *reference date*, at the end of 14 day period of work being completed or material supplied. Accordingly, I am satisfied that there is a reference date that can be worked out under the contract.
115. Work on this invoice could not have commenced before 6 October 2006, as this was the date of the quote. The date of acceptance of the quote in the works order 006310 must be incorrect, as it was dated 5 July 1006, which predated the quote. However, on the works order is a handwritten note to proceed with site measure on 9 October 2006, and I am prepared to find that work commenced on this date. This means that an invoice could have been issued at the end of 14 day period. The invoice was dated 24 October 2006, so I find that this complied with the contractual provisions because it

was at the end of the 9 October to 23 October 2006 period. The reference date for this invoice was therefore 24 October 2006, and it is from this date that the Claimant made its progress claim.

116. I am therefore satisfied that the Claimant was entitled under s12 to make the progress claim, so that the proviso to my finding of the amount has been satisfied and I find that **the adjudicated amount for invoice 16240 is \$17,710.00 (including GST)**. I now need to deal with interest.
117. s15(2) of the Act deals with interest, at the greater of the rate under the Supreme Court Act 1995, or the rate specified under the contract, subject to s15(3) of the Act. The period subcontract refers in its schedule Clause 5 to *Interest on overdue progress payments shall be "AS PER CLAUSE % (note Condition 4e)*. There is no Clause 4(e) attached, so on the material before me I am unable to find that the period contract dealt with interest.
118. I must consider whether the period contract is a *building contract* to which s67P of the QBSA Act applies. This provision is in Part 4A of the QBSA Act which deals with building contracts other than *domestic building contracts*. A *domestic building contract* is defined in Schedule 2 of the QBSA Act as having the meaning in the *Domestic Building Contracts Act 2000*.
119. s7(2) of the *Domestic Building Contracts Act 2000* ("DBCA") provides that a *domestic building contract* does not include a contract between a *building contractor* and a *subcontractor*. Schedule 2 of the DBCA defines a *building contractor* as a person who carries out *domestic building work*. I need to consider whether the Respondent carried out *domestic building work*. *Domestic building work* is defined in s8 of the DBCA as *the erection or construction of a detached dwelling*. As a matter of commonsense I find that the dwelling on Lot 14, which is described as a duplex in the invoice 16240 and quote SRD21990, is a detached dwelling. This means that the Respondent is a *building contractor* under s7(2) of the DBCA.
120. I find that the definition of *subcontractor* under Schedule 2 of the DBCA as a person entering into a contract with a *building contractor* to carry out *domestic building work*. I have already found that the work was *domestic building work*, so the Claimant falls within the definition of *subcontractor* under the DBCA. Accordingly, it is a *subcontractor* within the meaning of s7(2) of the DBCA, which means that the period subcontract is not a *domestic building contract*, as this is specifically excluded from the definition under the DBCA. I am therefore required to consider the provisions of Part 4A of the QBSA Act.
121. s67P of the QBSA Act provides for interest of late progress payments in relation to a *building contract*. *Building contract* is defined in s67A of the QBS Act as a contract or other arrangement, other than a domestic building contract, for carrying out building work in Queensland. *Building work* is defined in Schedule 2 of the QBSA Act as *the erection or construction of a building*, and I find that the dwelling referred to a duplex for Lot 14 is a *building* as a matter of commonsense.
122. s67P(2) provides that interest at a *penalty rate* is payable for unpaid progress payments, and the penalty rate is defined in s67P(3) as 10% per year plus the annual rate of 90 day bank bills published by the Reserve Bank of Australia. I referred online to the Herald Sun's December 29, 2006 reference to the 90-day bank bill rate of 6.442

per cent from the Reserve Bank. **I therefore find interest at the penalty rate of 16.442% on the unpaid invoice number 16240.**

Invoice 16316 dated 13 November 2006

123. This invoice refers to quotation number 21990, which I have already found relates to roofing work on Lot 14. It claims 100% of the total amount of the contract price already found above to which it added a variation amount of \$364.95 excluding GST. It gave a credit of \$1325.00 for materials delivered to site on 8 November 2006 plus GST, as well as a credit of \$2978.00 plus GST for supply and installation of materials to complete the work.
124. These credits totalled \$4,303.00 plus GST, and this amount was deducted from the contract price of \$26,378.06 (excluding GST) (which included the variation) resulting in a final claim for \$22,075.06.
125. It was not clear from the invoice that it had already claimed \$16,100 (excluding GST) in invoice 16240, but the amount it claimed that it was due of \$5,975.06 (excluding GST) is the amount calculated when \$16,610 is deducted from \$22,075.06 (both excluding GST). Accordingly, I am satisfied that its calculations were correct.
126. I am satisfied that the invoice is a payment claim under the Act and was posted on 13 November 2006, which I find from the Australia Post website should have been received by the Respondent on 15 November 2006.
127. I need to have regard to any payment schedule that the Respondent may have served on the Respondent. I have already referred to the Non Acceptance Claim Notice ("NACN") dated 23 November 2006 from the Respondent to the Claimant, which specifically referred to invoice 16316, which identifies the progress claim to which it relates as required by s18(2)(a) of the Act. It was made within the 10 business days of having been served with the payment claim as required by s18(4) of the Act.
128. s18(2) of the Act requires that a payment schedule:
(a) *must identify the payment claim to which it relates; and*
(b) *must state the amount of the payment, if any, that the respondent proposes to make (the **scheduled amount**).*
129. Furthermore, s18(3) of the Act requires that in the event that the *scheduled amount* is less than the claimed amount, the Respondent is to explain the reasons for withholding payment.
130. The NACN makes no reference to the *scheduled amount*, as it states that the Respondent was unable to accept the claim. Accordingly, I am not satisfied that it is a valid payment schedule. Even if I am wrong in this conclusion and that it could be implicit in the refusal to accept the claim that the scheduled amount is nil, despite not having been stated as required by the Act; the reasons for non acceptance of the claim relate to a dispute resolution process. In these reasons there is no specific reference to why there is a withholding of payment, and the Act requires these reasons be stated. One may infer that as a matter of logic, that when mediation took place, that resolution of the payment claim may be achieved. However, that inference to my mind is not sufficient to satisfy the meaning of the provision requiring the Respondent to *state why the scheduled amount is less*.

131. In interpreting the meaning of the Act, one has regard to the ordinary meaning of the words, and the New Penguin English Dictionary definition of the word *state* in this context is:

*“1 to declare (something) formally
2 to present the facts (of a legal case) for consideration
3 to specify (something)”*

132. I am not satisfied that either the ***scheduled amount*** was stated, nor that the reasons for the ***scheduled amount*** being less than the claimed amount were stated. If one has regard to the dictionary definitions they connote a positive action of declaring, presenting or specifying. To my mind, leaving it to the Claimant to imply or infer ***scheduled amounts*** and reasons for them is not what the Act requires. I therefore do not consider the NACN as a payment schedule.

133. I again refer to s24(3) of the Act which provides that the Respondent may give a response only if it has served a payment schedule on the Claimant within the time prescribed by s18(4)(b), and I have found that the NACN was not a payment schedule. Again, I am therefore constrained by s26(2) of the Act as to what material I may consider. *Contrax* suggests that I can have regard to material under s26(2)(a) and (b) and the Respondent has put in submissions, and I will consider those under this invoice in the context of assisting with my functions under s26(2)(a) or (b).

134. On page 1 of the response submissions the Respondent stated that invoice 16316 should not be considered in the adjudication because the progress payment was not due for payment. This point was not taken in the NACN, but I am prepared to consider it under the *Contrax* exception, subject to any issues of natural justice that may arise, because it relates to the provisions of the Act [s26(2)(a)] and the period contract [s26(2)(b)].

89. The Respondent refers to s12 of the Act which 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** (emphasis by Respondent).”*

135. The Respondent argued that the period subcontract terms regarding progress payments applied, and the payment claim was not due and payable until 16 December 2006. I have already found that this term was void and that the payment regime was governed by payment being 14 days from the date of invoice, so I reject this submission of the Respondent that invoice 16316 cannot be considered in the adjudication.

136. I refer again to the Respondent’s submissions on page 2 which said:

“The Claimant has not provided one calculation, scope of deleted works, or evidence to justify the value of the works, or goods that were deleted from the projects just a magic figure out of the air. In comparison the Respondent has identified the costs of delay to complete. Evidence of payment to a third party and a statement of how he arrived at considering the amount fair and reasonable. It is our

argument that the Claimant has not provided the adjudicator with any evidence to allow him to fulfil the requirement of s27(1)(b) and allow the unrealistic credits on invoice numbers 16315, 16316 & 16318.”

137. I am unable to consider any of these submissions relating to invoice 16316 because they relate to my mind to the payment claim, which is to be considered under 26(2)(c) of the Act, and to a payment schedule under s26(2)(d), as reasons why I should not allow the payment claim.
138. To my mind it is not permissible to allow the Respondent to circumvent the requirements of the Act and compel me to now consider submissions of this nature, when they should have been provided in a payment schedule. Even if I am wrong in considering that no payment schedule has been provided, the reasons advanced in these submissions, are additional reasons than to the mediation reason in the NACN, and would be prohibited by s24(3) of the Act. Accordingly, I reject the submissions for this invoice.
139. On page 3 of the response submissions, I have already extracted above what the Respondent stated, but it is important to restate what it said, because they deal with the operation of the Act and the contract, as required by s26(2)(a) and (b) of the Act. The Respondent stated:
- “We have four tax invoices for three different projects, three different dates, all made out to the wrong entity. Two adjudication applications, one of which is not date receipted, both noting the Claimant as Macsteel Pty Ltd who is unquestionably not party to the agreed contract. Wrapped up into one notice of acceptance, which also notifies the Claimant incorrectly. Referring to application 39 none of which complies with Section 26(2)(b) or (c) or (d). Should the adjudicator continue with the adjudication process the Respondent queries the validity of the entire application itself as it is presented currently.”*
140. Furthermore the Respondent on page 3 of the submissions said:
- “The total of 4 payment claims not accurately reflecting the balance owed, and “involves at least 2 reference dates (another non compliance as required under the Act).”*
141. I have already found that adjudicating 4 tax invoices dealing with three different projects is not prohibited by the Act, particularly when the Respondent did not point to any authority preventing this adjudication from continuing. I have considered each invoice separately, and the fact that there are 3 projects, I have found that they all fall under the one *construction contract* as defined by the Act. s12 of the Act provides that the Claimant may claim for progress payments from each reference date, if it has undertaken to carry out construction work, or supply related goods and services under the contract.
142. I need to be satisfied that the progress claim was made from the *reference date* for this invoice. I have already found the mechanism for determining reference dates for Lot 14 in invoice 16240, as being after the end of a 14 day period in which work was carried out, or material supplied. This invoice date was 13 November 2006, and the earlier claim for Lot 14 in invoice 16240 was 24 October 2006. 14 days from 24 October 2006 is 7 November 2006, so I find that the next reference date for this project was 8 November 2006. The invoice was dated 13 November 2006, so I am satisfied

that it was from the reference date of 8 November 2006, and the Claimant had the right to make the payment claim.

143. This 8 November 2006 reference date is different from the 24 October 2006 reference date on Lot 14, so there is no contravention of s17(5) of the Act preventing more than one payment claim in relation to each reference date. There is nothing that the Respondent has pointed to that suggests that an adjudicator cannot deal with more than one payment claim with different reference dates, and I find that providing each invoice is considered separately, then s26(2) of the Act is complied with.
144. Although the Respondent has complained about the quantum derived by the Claimant in relation to Lot 14 in that there was insufficient credit allowed for the work that was not yet done prior to the termination, I am unable to have regard to those submissions for the reasons stated previously. I am satisfied that the Claimant has provided a calculation which has provided credit for work not carried out, and I have no other material on which to find other than the quantum of the claim is acceptable.
145. I am also unable to have regard to the Respondent's submissions regarding the set off for delay costs for the reasons provided under invoice 16240 above.
146. Accordingly, **I find that the adjudicated amount of the payment claim in invoice 16316 is \$6,527.57 (including GST).**
147. In relation to the due date for payment, I refer to my reasons in relation to invoice 16240, which provide that payment is 14 days from the date of invoice, and I find that this provision applies to this invoice. The invoice was dated 13 November 2006, **so I find that the due date for payment is 27 November 2006.**
148. **My reasons in relation to the interest payable for invoice 16240 dealing with Lot 14 also apply to this claim for Lot 14 and the interest rate is 16.442%**

Invoice 16315 dated 10 November 2006

149. This invoice refers to quotation number SAV23097, and referred to purchase order 006379 (which was not provided in the material), and I have already found that this invoice relates to roofing work on Lot 33. It claims 100% of the total amount of \$18,810.95 (excluding GST), the contract price for this project. It provided a credit for labour on the lower roofs of \$6,015 plus GST. The claim amount was \$7,475.55 including GST.
150. I am satisfied that it is a payment claim and was posted on 10 November 2006. Using my finding from the Australia Post website, I am satisfied that it was served on the Respondent 2 business days later, i.e. 14 November 2006.
151. On 23 November 2006, there was another Non Acceptance Claim Notice ("NACN 2") which dealt with this invoice and invoice 16318. As far as this invoice is concerned, the Respondent argued that it was unable to accept the claim, on the basis that the credit provided for the lower roofs and apron was not sufficient, and that the Claimant should resubmit the invoice. It was not clear to me from any of the submissions when and how the Subcontract Reconciliation document (page 13 of *Adjudication 39B*) came before the Claimant. However, the Claimant in its submissions made reference to the Respondent only being prepared to pay \$6,049.25, so I am prepared to find that the Subcontract Reconciliation document ("SRD") was attached to NACN 2, as the

Claimant had notice of an amount the Respondent was prepared to pay, and this was not on NACN2.

152. Accordingly, the Respondent identified invoice 16315 on NACN 2, and if read with the SRD indicated that the Respondent was prepared to pay \$6,049.25 (the *scheduled amount*), instead of \$7,475.55 in the payment claim. I am satisfied on balance that this complies with the provisions of s18(2), even though the express statement of what was owing was on the SRD only. The Respondent explained that the Claimant had not provided sufficient credit, but required the Claimant to resubmit the invoice or provide a credit note to the assessed value. Although this is by means clear cut, it is possible to glean that this satisfies s18(3) of the Act, and I find it was a valid payment schedule.
153. This means that I must have regard to the submissions in support of the payment schedule in the response: s26(2)(d). I have dealt with most of the Respondent's submissions already, and will confine this analysis to page 3 of the response submissions dealing specifically with Lot 33.
154. The Respondent identified that there was an amount of \$6,049.25 outstanding to the Claimant, after the works were completed by others, and attached Attachment 3 supporting its calculations. I have not been referred by the Respondent to any provision of the period subcontract that requires any amounts owing to the Claimant to await completion of the work by others. I cannot find any such provision, although the Respondent has the right under Clause 34 to appoint another roofing contractor at any time. I find therefore that the Respondent, who bears the onus of proving that it has the right to withhold payment until the work is completed by others, has not discharged this onus, and the amount is payable in the time frame contemplated by the contract.
155. Furthermore, I am not satisfied that the Claimant had been provided with the quotation from Bruces Roof Plumbing (Attachment 3 page 2) at the time of the payment schedule. This appears to be the case from the Claimant's submissions on page 1, and precludes me from having regard to the response attachments because the Claimant does not now have the opportunity to controvert the basis of the supporting evidence for the calculations.
156. I must therefore evaluate the amount based on the Claimant's assertions in the invoice, and the bare assertion in the payment schedule, which cannot be supported by the evidence now introduced in the response submissions. I am satisfied that the Claimant has discharged its evidentiary onus regarding the quantum of the claim as it provided the details and calculations on the invoice. The onus then shifts to the Respondent, and although there is cogent material supporting its calculations in the Attachment 3, I am of the opinion that I cannot have regard to the material for the reasons already outlined. Accordingly, the Claimant is found to have discharged its onus and the **adjudicated amount is found to be \$7,475.55, including GST.**
157. As regards the due date for payment, I have already found the period subcontract mechanism allows for payment 14 days from date of invoice. The quote underlying this invoice SAV23097, had the same provisions regarding progress payments as SRD 21990 to which I have made finding above, so the same mechanism applies. The invoice was dated 10 November 2006, so the amount **was due on 24 November 2006.**

158. I refer to my earlier reasons regarding the **rate of interest, which I find is 16.442%**, as this is the rate calculated for the period subcontract whatever project is carried out.

Invoice 16318 dated 13 November 2006

159. This invoice refers to quotation number 23401, and referred to works order SGE-006563, and I have already found that this invoice relates to roofing work on Lot 32. It claims 100% of the total amount of \$16,231.97 (excluding GST), the contract price for this project. It provided a credit for labour on the lower roofs of \$7,350.44 plus GST. The claim amount was \$9,769.68 including GST.
160. I am satisfied that it is a payment claim and was posted on 13 November 2006. Using my finding from the Australia Post website, I am satisfied that it was served on the Respondent 2 business days later, i.e. 15 November 2006.
161. I refer again to NACN 2 which dealt with this invoice. As far as this invoice is concerned the Respondent also argued that it was unable to accept the claim, on the basis that the credit provided for the lower roof was not sufficient, and that the Claimant should resubmit the invoice. I have already discussed the SCR for invoice 16315, and I am also prepared to find that the SCR for this invoice was provided to the Claimant with the NACN 2.
162. I have already found NACN 2 constitutes a valid payment schedule, and if read in conjunction with its SCR, then the Respondent indicated that it would pay \$4,462.66, and I consider this to be the *scheduled amount*, instead of \$9,769.68 in the payment claim.
163. However, for the reasons identified under the discussion of invoice 16315 above, I am not prepared to allow Attachment 2 of the response submissions to be considered because it appears from the Claimant's submissions that the quote was not provided in the payment schedule. On page 1 of its submissions the Claimant said, "*If EPG have received a quote of \$13,392.51 for lower roofs then that price is extremely inflated... and would be approximately 35% above average.*" In my view it is unsafe to allow the document into the material, as it goes beyond submissions but provides additional material supporting the submission which the Claimant would not have seen and is unable to counter.
164. Again, I am satisfied that the Claimant has discharged its evidentiary onus regarding the quantum of the claim, and that the Respondent is confined to its submissions only, which is insufficient to discharge its evidentiary onus. Accordingly **I find the adjudicated amount to be \$9,769.68, including GST.**
165. As to the due date for payment, I have already found the period subcontract provided a mechanism for payment to be made within 14 days of the date of invoice. The quote underlying this invoice was SAV23401 and had the same terms regarding progress payments as quote SRD21990, so I find the mechanism is the same as the earlier invoices. The invoice was dated 13 November 2006, **so the due date for payment is 27 November 2006.**
166. **For the reasons previously stated I find the interest is 16.442%.**

Remaining submissions of the Respondent

167. I have not yet dealt with the Respondent's assertions on page 4 of the response that provided:

“As a result of the many errors highlighted in not only the payment claims, but the adjudication applications, unsubstantiated credits claimed, the Respondent has not had the opportunity to

- i. *assess the amount of money claimed*
- ii. *determine what works they are claimed for*
- iii. *identify the legal status of the various entities in the documentation*

The Respondent is of the opinion that the adjudicator cannot accept these documents and entities as provided presently as a valid payment claim and in particular a valid adjudication application. Given that Macsteel Pty Ltd, the Claimant is not even mentioned in the contract, much less a signatory.

If the adjudicator does consider otherwise, then the Respondent requests:-

- iv. *The adjudication amount be \$Nil*
- v. *The Claimant pay 100% of the ANA and adjudication fees.”*

168. For the reasons already outlined in this adjudication, I have found that there are no errors highlighted in the payment claims. I am satisfied and found that the adjudication applications can be considered as one. I am satisfied with the credits claimed, and I do not accept that the Respondent has not had the opportunity to assess the amount of money claimed, as it has done so with three of the four payment claims.

169. I do not accept that the Respondent cannot determine the works that are claimed for, as it has challenged three of the four payment claims. I have found that the legal status of the Claimant and Respondent are as provided in the application, and from the material in the application, particularly each invoice, and the name of the person on the quotes that it accepted, that the Respondent ought to have known that it was dealing with Macsteel Pty Ltd. It would have not taken long for the Respondent to carry out the search of the public registers that I undertook because of the identity issue being raised by the Respondent. Accordingly, I reject the further submissions of the Respondent. I now turn to the question of fees.

Authorised Nominating Authority and Adjudicator's fees

90. 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 succeeded in the quantum of its four payment claims. I have found against the Respondent in its submissions, and found that I was unable to have regard to material it put in the submissions, and was not prepared to allow a set off, which was introduced into its submissions.

91. There are therefore sufficient reasons for me to depart from the status quo provided by ss34 and 35 of the Act. However, the Claimant chose to bundle up four payment claims into 2 separate applications, and although it was not to know that the ANA would send both applications to one adjudicator, this strategy of the Claimant did complicate the adjudication, as it required analysis and reasoning more complex than would otherwise have been necessary.

92. In exercising my discretion, I therefore find that the Claimant and Respondent share in the ANA's and my fees in the proportion 25% to the Claimant and 75% to the Respondent.

Chris Lenz
Adjudicator

2 January 2007