

**ENERGY AUSTRALIA v DOWNER CONSTRUCTION (AUSTRALIA) PTY LTD
[2005] NSWSC 1042**

Supreme Court of New South Wales – 14 October 2005

FACTS

Energy Australia, a statutory authority responsible for the supply of electricity, entered into a construction contract with Downer Construction (Australia) Pty Ltd (“Downer”) to construct a tunnel for electricity cables from a point in the south western part of the City of Sydney near Campbell Street to Surry Hills. Downer submitted a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”) in respect of certain latent conditions which it said could not reasonably have been anticipated and did not result from inclement weather. The latent conditions consisted of significant water ingress at certain chainages along the tunnel. Energy Australia submitted a Payment Schedule indicating that it did not accept Downer’s claim. Downer then submitted an Adjudication Application claiming latent conditions for water ingress at different chainages along the tunnel. The Adjudication was determined in favour of Downer in the sum of \$6,040,579.05.

Energy Australia sought an interlocutory injunction restraining Downer from enforcing the Adjudicator’s decision on the grounds that the Adjudication Application was not, in truth, an Adjudication Application at all, because the claim that Downer submitted for Adjudication was not Downer’s Payment Claim but a different claim, i.e. because of the different chainages. That is, the Adjudicator addressed a different question which amounted to a failure to deal with the real issue. Energy Australia also claimed that the lack of an opportunity to respond represented a substantial denial of natural justice.

ISSUE

Whether there was in reality any material divergence between Downer’s Payment Claim and the matter submitted for Adjudication.

FINDING

The Court found that there was a serious question to be tried as to the validity of the Adjudication Determination. The Court considered whether Energy Australia would suffer hardship and held that given the summary nature of the statutory scheme it was inappropriate to seek to temper with it in ways that the statute did not contemplate. Therefore, the Court dismissed Energy Australia’s application for an interlocutory injunction and the matter was transferred for further hearing.

QUOTE

Barrett J commented at paragraphs 34 and 35:

[34] I accept the plaintiff’s submissions... I am satisfied that the inter that the intervention of the varied descriptions of the affected parts of the tunnel has the capacity to justify a finding of non-correspondence indicative of a failure to follow and implement the statutory scheme so that the statutory conditions for the existence of a valid Adjudicator’s determination may be seen as not to exist.

[35] I doubt that the same holds good in relation to the suggestion that the adjudicator answered the wrong question, at least when that matter is viewed in its own right. That, if shown, would be an error of law which might not go to the satisfaction of the statutory conditions. However, as expressly recognised by Hodgson JA in *Brodyn*, the absence of opportunity for the plaintiff to put a case on the question eventually answered would potentially go to the matter of satisfaction of the statutory conditions and in that respect also there is, in my view, a serious question to be tried.

IMPACT

An Adjudication Determination may not be valid if the claims contained within the Payment Claim and Adjudication Application are of a different nature. Further, notwithstanding the issue as to validity of an Adjudication Determination, a Court may not interfere with the payment process under the Act.

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