This paper will consider the distinct differences between the dispute resolution process of adjudication under the New Zealand Act and new amendments to the UK Act and proposed Malaysian legislation as distinct from those in the Australian States and Singapore. The paper will also consider the advantages and disadvantages of provisions in the various Acts in a comparative analysis. The paper will update the trends of adjudication in New Zealand considering New Zealand case law and developments since the introduction of the Construction Contracts Act 2002.

In addition, the advantages and disadvantages of the various countries legislation dealing with payments in the construction industry and dispute resolution will be compared.

Finally, the future trends of adjudication will be discussed and practical advice will be provided for those involved in adjudication, either as adjudicator, expert or party.
INTRODUCTION

1.0 Overview

1.1 In 1996 the Housing Grants Construction and Regeneration Act in the UK was the first Act to introduce statutory adjudication to resolve disputes arising under construction contracts. Since then, the second generation Acts in the south pacific have spread with significant amendments to New South Wales with the Building Industry Security of Payments Act 1999 which also introduced statutory payment provisions and then with significant amendments to New Zealand with the Construction Contracts Act 2002.

1.2 We in New Zealand were fortunate that we were third, because that allowed the UK and NSW to have the pleasure of making all the mistakes that we could benefit from. Since then, payment and adjudication legislation in various forms has come into force in Victoria (‘Vic’), New York, Queensland (‘Qld’), Western Australia (‘WA’), Singapore (‘Sing’), Northern Territory (‘NT’), Tasmania (‘Tas’), Australian Capital Territory (‘ACT’), and South Australia (‘SA’). Malaysia is currently working on its payment and adjudication legislation and changes to the original UK legislation was enacted on.

1.3 The Acts that have been introduced to date generally fall into 2 categories:

1.3.1 In relation to payment provisions:

1.3.1.1 Those that do not interfere with the contractual right for payment, but provide statutory rights for payment in the absence of any contractual right. (UK/NZ/WA)

1.3.1.2 Those that introduce a statutory right for payment in tandem with the contractual right (NSW/Vict/Qld/Sing)

1.3.2 In relation to adjudication:

1.3.2.1 Those that provide for adjudication of payment & non-payment disputes (UK/NZ)

1.3.2.2 Those that provide for adjudication of payment-only disputes (NSW/Vict/Qld//WA/ Sing)
<table>
<thead>
<tr>
<th>No.</th>
<th>Country (State)</th>
<th>Principal Legislation title</th>
<th>Effective Date (in chronological order)</th>
<th>No. of adjudication ANA appl since enactment</th>
</tr>
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<tbody>
<tr>
<td>6</td>
<td>Queensland</td>
<td>Building and Construction Industry Payments Act 2004</td>
<td>1 July 2004 (certain administrative/miscellaneous provisions) &lt;br&gt;1 October 2004 (substantive provisions)</td>
<td>1317 (to 3/2008) &lt;br&gt;32 to 6/05, 289 to 3/06 &lt;br&gt;467 to 3/07, 529 to 3/08 (21 aver/mth)</td>
</tr>
<tr>
<td>7</td>
<td>Western Australia (“WA”)</td>
<td>Construction Contracts Act 2004</td>
<td>1 January 2005</td>
<td>29 (7/05 to 6/2006)</td>
</tr>
<tr>
<td>9</td>
<td>Northern Territory (“NT”)</td>
<td>Construction Contracts (Security of Payments) Act 2004 &lt;br&gt;Amended by the Community Justice Centre Act 2005 &lt;br&gt;Amended by the Justice Legislation Amendment Act 2006</td>
<td>1 July 2005 (except for s.66 remarks)</td>
<td>1 (to 2/2006)</td>
</tr>
<tr>
<td>11</td>
<td>Australian Capital Territory (“ACT”)</td>
<td>The Building and Construction Industry (Security of Payment) Act 2009</td>
<td>1 July 2010</td>
<td></td>
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<tr>
<td>12</td>
<td>South Australia (“SA”)</td>
<td>The Building and Construction Industry Security of Payment Act 2009</td>
<td>Yet to be announced by proclamation</td>
<td></td>
</tr>
</tbody>
</table>
Within the 2 broad categories of payment and adjudication legislation there are also further distinguishing features between the various models:

1.4.1 Those whose jurisdiction covers contracts that are written, oral, partly written and oral (NZ/NSW/Vic/Qld/WA) as opposed to written only contracts (UK/Sing).

1.4.2 Those in which disputes can be referred by either party to the contract (UK/NZ/WA) as opposed to only the claimant of the progress payment for construction work, supplied goods and services (NSW/Vict/Qld/Sing).

1.4.3 Those in which the adjudicator is selected by consent or failing consent, by an appointing body (UK/NZ/WA) as opposed to only an appointing body (NSW/Vict/Qld/Sing).

1.4.4 Those in which there are no set fees for adjudication with the market dictating the levels (UK/NZ/WA) as opposed to the appointing body setting the fees (NSW/Vict/Qld/Sing).

1.4.5 Those that permit concurrent adjudications by consent (UK/NZ/WA) as opposed to single adjudications (NSW/Vict/Qld/Sing).

1.4.6 Those in which the time period for the adjudication claim and adjudication response are set (NZ - 5 wd/5 wd extendable by consent or adjudicators ruling, NSW/Vict/Qld/Sing – 0wd/5wd, WA – 28wd/14wd) as opposed to no set time period for submission of adjudication claim and adjudication response other than within the adjudication period (UK).

1.4.7 Those in which the adjudication period is 20 working days, extendable by a further 10 working days and extendable indefinitely by consent (UK/NZ) as opposed to 10 working days extendable by consent (NSW/Vict/Qld/Sing) or 14 working days (WA).
1.5 To complicate matters further, the types of payment and adjudication legislation in Australia differs from state to state with the eastern seaboard states of Australia (NSW, Victoria, Queensland) following the NSW model of payment provisions and adjudication, while the more recent Western Australia and Northern Territory tending to follow many aspects of the NZ and originating UK Acts. A large division has developed between the opposing views of the Australian states over the progress payment process and it is unlikely there will be any support for a nationally consistent approach in the near future. To add to the differences, South Australia and Tasmania have indicated in June 2002 that that they have no intention of introducing any “security of payment” legislation.¹

1.6 Differences also appear to be developing also in Asia, where Singapore has tended to follow the NSW model of payment provisions and adjudication in its Act, while the current draft of the Malaysian Bill appears to be leaning towards many aspects of the NZ and originating UK Acts.

1.7 The perceived problems contained within both the UK and NSW Acts were the reason that New Zealand forged its own way with a new “Hybrid” Act based largely on the concepts in the UK Act rather than the pre-amended NSW Act, but including and building upon some of the payment provisions in the NSW Act.

2.0 Unique Characteristics of the New Zealand Act

2.1 The title of the NZ Act was chosen for simplicity to avoid the cumbersome description of the UK Act (which is now almost always referred to as the “Construction Act”) or the inaccuracies of title of the NSW Act in that the Act does not provide “security” of payments – it merely minimised the risk of non-payment.

2.2 Although a number of Acts in various jurisdictions have the same title, none of the Acts are identical and each contain provisions that addresses problems peculiar to each state or country. The Western Australian Act has the same title as that of NZ, but in almost every other respect the Acts are quite different. Similarly, the Singapore Act has the same title as the New South Wales Act, but again there are significant differences between the 2 Acts.

2.3 The NZ Act introduced many provisions that improved on the problem areas in both the UK and NSW Acts such as:

2.3.1 Providing the definition of a “working day” for statutory holidays (omitted in the UK Act);

2.3.2 Expressly providing that the Act covers written or oral contracts or partly written or partly oral.

2.3.3 Improving the wording for the requirement of a payment schedule above that of the NSW Act (the manner in which the Payer calculated the scheduled amount)

2.3.4 Improving the wording in relation to a mechanism to determine payment provisions (omitting the word “adequate” included in the UK Act)

2.3.5 Providing a specific period for provision of the adjudication claim and response outside the period for adjudication (omitted from the UK Act)

2.3.6 Providing for either party to a construction contract to refer a dispute to adjudication (omitted from the NSW Act)

2.3.7 Expressly preventing bespoke adjudication agreements (omitted from the UK Act).

2.3.8 Expressly preventing agreements made before the dispute arose over the choice of the adjudicator.

2.3.9 Simplifying the Nominating Body provisions in both the UK and NSW Acts.
2.3.10 Introducing a procedure for the adjudicators appointment that allows that adjudicator to obtain security for fees before confirming appointment.

2.3.11 Providing for experts advisors to the adjudicator (omitted from the NSW Act).

2.3.12 Providing express provisions for adjudicators powers in the absence of co-operation by any party to the adjudication.

2.3.13 Providing for consolidation of adjudication proceedings (omitted in the UK and NSW Acts).

2.3.14 Providing express provision for an adjudicator to correct errors of computation, clerical or typographical errors (omitted in the UK and NSW Acts).

2.3.15 Providing express provision for an adjudicator to determine costs and expenses (of the parties) and fees and expenses (of the adjudicator).

2.3.16 Providing express provision for default and enforcement procedures for the failure to provide a payment schedule, failure to pay the amount in a payment schedule or failure to pay an adjudicators determination (omitted in both the UK and NSW Acts).

2.3.17 Providing express procedures for withdrawal of claims (omitted from both the UK and NSW Acts).

2.3.18 Providing enforcement procedures for charges on land (not contained in UK or NSW Acts).

2.3.19 Providing clarification of the rules of document service.
2.4 There were also many provisions that were removed by the Parliamentary Select Committee despite recommendations for their inclusion in the Act such as:

2.4.1 Having the enforcement procedures of the Act applying equally to residential construction contracts as it did for commercial construction contracts (default provisions for payment, provisions for suspension of work under the Act, the approval of the issue of charging orders on the construction site and some enforcement procedures under the Act).

2.4.2 Including suppliers and consultants work as either “construction work” under the Act or “related good and services” under the Act.

2.4.3 Enforcement procedures in the case of non-payment determinations (on the basis that there was no case law from UK at that time that supported the enforcement of non-payment determinations).

3.0 New Zealand Hybrid Act followed the UK rather than NSW.

3.1 A number of considerations contributed to New Zealand opting to base its legislation on the UK Act than the NSW Act:

3.1.1 NSW payment-only disputes referred narrow issues to adjudication.

Adjudication of payment-only disputes under the NSW Act was regarded as addressing only narrow issues to adjudication and would prevent disputes regarding interpretation of contract, quality of work or extension of time being resolved before they became payment disputes. NZ favoured the UK position of all disputes being referable to adjudication.

3.1.2 Referral to adjudication only by the payee with no similar right to the payer.

The NSW Act limited the referral of a dispute to fast-track adjudication by only the payee and resulted in an imbalance in justice to the payer who was left with relatively slow procedures of litigation or arbitration to recovering contractual damages. The NSW Act was seen as manifestly pro-subcontractor legislation. NZ favoured the UK position that permitted reference to adjudication by either party to a construction contract.

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3 Both the UK and the NSW Acts include consultants work under coverage of the Acts.
3.1.3 **No adjudicators powers to extend adjudication period or appoint experts.**

The UK Act that provided an adjudicator with the power to extend the adjudication period by 10 working days without the parties consent and power to appoint expert advisors was seen as necessary in the case of larger dispute matters that was missing from the NSW Act. The extremely limited time period of adjudication under the NSW Act could not be extended other than by consent and appeared to cater for smaller payment-only disputes.

3.1.4 **Ten working day adjudication period.**

The 10 working day adjudication period in the NSW Act is arguably too short to deal with consolidation and non-payment issues, bearing in mind that by the time the adjudicator received the documents, there was very little time to ask for any further submissions or inspect the work. The UK provision of a 20 working day adjudication period was favoured with ability to extend by a further 10 working days with agreement or any further by agreement of the parties. The NZ adjudication period was greater than even the UK bearing in mind that the UK adjudication period of 28 calendar days (20 working days) included the period of time for the submission of the adjudication claim and response while the NZ Act provided for these outside the adjudication period.

The NZ concerns regarding insufficient time was borne out by the 2004 NSW Department of Commerce review of the NSW Act which found that in the 12 months after the 2002 Amendment Act was passed, over 80% of the amount claimed in the adjudication application was awarded to the claimant in determinations where the amount claimed was under $50,000\(^3\). For claims between $250,000 and $500,000 only some 60% of the amount claimed was awarded. This percentage diminished even further the more the amount claimed increased so that of claims over $750,000 only around 40% of the amount claimed was awarded in the adjudication determination. The NSW judiciary provided a court view that the NSW Act appeared to be less efficacious in dealing with larger claims, mainly because of the tight timeframe for adjudication.

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\(^3\) Ibid, figure 8 page 10
under the Act. The Court opined that with large claims being referred to adjudication in NSW under an extremely limited timeframe that this would inevitably result in some errors, and the likelihood for error would only increase with the size, complexity and sheer volume of paper involved in larger payment claims. The courts view also noted that larger payment claims were inevitably levelled against companies with the resources to dispute payment claims where an error was perceived.

3.1.5 Notification of suspension too short.

A 2 day period for notification of suspension of work in the NSW Act was seen as being too short to resolve some issues between the disputing parties and was inconsistent with most contracts in New Zealand that contained provisions for notification of suspension of work within 7 days while both the UK legislation (and subsequent Queensland legislation) contained provisions for suspension after 7 days notice. With such a short suspension notification period, the notice could be used vexatiously impacting on the whole project and placing all subcontractors and a head contractor at risk with late completion.

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5 Refer Master Builders Subcontract Agreement and Subcontract Conditions SC1 1991 clause 5 (f).
3.1.6 **Insufficient adjudication period for final accounts.**

Concerns were expressed that the 10 day NSW adjudication period would be insufficient for an adjudicator to properly to review and determine a large final account. With the NSW 1999 Act providing no ability to obtain expert assistance, concerns were raised that many of the larger final account dispute determinations could be compromised.

This issue has subsequently become greater with the trends to refer final account disputes to adjudication in all jurisdictions around the world, which will be discussed later in this paper.

3.1.7 **Timing for the payment schedule in relation to the claim size.**

The NSW Act allowed for payment claims of all sizes and required the payment to be made on the due date for payment agreed in the contract or by default 2 weeks after the payment claim was made. This requirement, combined with the 2002 revisions to the NSW Act\(^6\) which provided that the respondent could only lodge an adjudication response if it had provided a timely payment schedule made no distinction for claim size.

3.1.8 **Residential occupiers excluded in NSW & UK.**

A concern with the NSW legislation was that a main exclusion of the Act was for residential building work carried out for an owner who resided in or proposed to reside in the premises. The NSW Act would not apply between the builder and the owner, but would apply between the subcontractors and the builder. This would result in the subcontractors being provided protections under the NSW Act while working on a residential building project, while the builders were not.

While the consumer lobby in the UK prevented the UK Act from applying to an owner who resided in a residential house, the assessment in NZ was that the Act should apply to residential contracts because NZ did not have specific Acts that covered residential contracts as in the UK and NSW.

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\(^6\) in s14(4) or s.17(2)(b): s.20(2A)
3.1.9 **Nominating Authorities resulting in varying conditions and standards.**

In the UK and in NSW appropriate adjudicators were drawn from a pool of numerous Nominating Authorities. As a result there are various differing Adjudicator conditions that apply to various differing Nominating Authorities leading to different conditions and standards. For five years NZ had only a single nominating Authority (the Arbitrators’ and Mediators’ Institute of New Zealand Inc), but now 2 further Nominating Authorities have been approved.

3.1.10 **Payment into a Designated Trust Account could be defeated**

The anomaly of paying into a Designated Trust Account provided in the NSW Act (subsequently removed from the revised NSW Act) to defeat the prompt payment mechanism that the adjudication process was designed to achieve. This also permitted a receiver or liquidator of an insolvent respondent to claw back security if it fell into the category of preferential payments. The UK Act did not have this provision.

3.1.11 **Consolidation of similar disputes with a 10 day adjudication was not possible.**

Concerns that the 10 day NSW adjudication period for payment disputes in combination with pay-if-paid (‘PIP’), and pay-when-paid (‘PWP’) clauses being made legally ineffective, would not provide sufficient time for head contractors to adjudicate disputes with a principal in respect of the same matter referred to adjudication by a subcontractor against the head contractor. This would leave head contractors found liable in the subcontractors adjudication to fund payment of the dispute, whilst attempting to adjudicate the dispute with the principal. Consolidation of the 2 disputes would not be possible in 10 working days. Extension of the adjudication period to 20 workings would permit consolidation.

4.0 **NSW amends its Act.**

4.1 As a result of the deficiencies in the original NSW Act the NSW courts often gave the payer a second chance after adjudication to provide defences and cross-claims which
arguably should have been provided in the payment schedule or the adjudication. Many respondents were opting to pay security instead of the adjudicated amount to the claimants, which defeated the scheme of the Act. As a result, there were only 116 applications for adjudication (average 3/month) and of those only 65 adjudication determinations (average 2/month) were carried out in the first 3 years of the NSW Act.

4.2 The deficiencies of the original provisions in the NSW Act, combined with the respondent’s abuses and judicial interpretation of the early cases forced NSW to make major amendments to its Act. As a result the Building and Construction Industry Security of Payment Amendment Act 2002 No. 133 (the “revised NSW Act”) introduced significant changes to the original NSW Act, effective from 3 March 2003. Unfortunately, by the time the NSW legislation was revised, Victoria had only just enacted their copy of the old NSW Act with all its deficiencies, which then required Victoria to amend its deficient legislation in 2006. Northern Territory also revised its legislation.

4.3 The revised NSW Act introduced 52 changes to the original Act including the following:

4.3.1 Adjudication was only able to be carried out through one of the government authorised nominating authorities who were entitled to charge a fee for any service provided by the authority in connection with an adjudication application.

4.3.2 The respondent was only entitled to lodge an adjudication response if it had provided a timely payment schedule according to s.14(4) or s.17(2)(b): s.20(2A);

4.3.3 The respondent could not include in the adjudication response any reasons for withholding payment unless they were already included in the payment schedules.20(2B). Nevertheless, the respondent could commence separate proceedings and raise these other arguments in those proceedings;

4.3.4 The respondent could no longer bring cross-claims and raise any defence in relation to matters arising under the contract in proceedings to enforce the statutory debt (s.15(4)(b) and s.16(4)(b)) or proceedings to set aside the adjudication certificate filed as a judgment debt (s.25(4))

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7 In Baulderstone Hornibrook Pty Limited v HBO+DC Pty Limited [2001] NSWSC 821 the omission of the payment schedule should have resulted in the claim being paid in full but the court’s determination to hear the progress claim and the cross claim together delayed the enforcement considerably
8 Into “designated trust account” under s.4 of the original NSW Act
10 John Holland v Cardno [2004] NSWSC 258 held that the statutory scheme dictates that the adjudication response be relevantly tied to the payment schedule
11 cf. Brodyn v Dasein [2004] NSWSC 1230 allowed the main contractor to set-off despite the conflict between s.25(4)(a) and s.553C, Corporations Act, where the subcontractor went into administration, thus demonstrating that the protection of the revised NSW Act ceases when the claimant stops being a going concern.
4.3.5 Where a payment schedule had not been issued within time in response to a payment claim under s.14 and the claimant wished to adjudicate, it could not make an adjudication application before first notifying the respondent of its intention to apply for adjudication and giving the respondent a further 5 business days to provide a payment schedule: s.17(2);

4.3.6 If the adjudicated amount had not been paid in part or whole by the relevant date (s.23(1)), the claimant could request the authorised nominating authority to provide an adjudication certificate under s.24(1), which could then be filed as a judgment when accompanied by an affidavit (s.25(1)-(3)) without a requiring a statement of claim or a hearing. A notice to suspend construction works (or supply of related goods and services) could also be served (s.23(2));

4.3.7 If the respondent commenced proceedings to set aside the adjudication certificate, cross-claims, defences relating to the contract and challenges to the adjudicator’s determination would be denied (s.25(4)). The logic behind these changes was that any defences or cross-claims should have been set out in the payment schedule and argued in the adjudication.

4.3.8 Where additional enforcement measures were concerned, besides the pre-existing right to suspend works (and supply), the claimant was also entitled to interest on the unpaid portion of the progress payment and lien or charge over any unfixed plant or material (s.11(2)-(3)).

4.3.9 The 2002 revisions also amended Contractors Debts Act 1997 (“CDA”) to enable the subcontractor to apply for a debt certificate on the basis of the adjudication certificate, which assigns all or part of the principal’s debt to the contractor, to the subcontractor, who would then be paid directly by the principal (see CDA, s.3(3) and s.7(1A)).

In most cases disputing an adjudicated (or statutory) debt would not be possible at all. (In the case of Coordinated Construction Co v J M Hargreaves & Ors [2004] NSWSC 1206, the Court of Appeal made it clear that judicial intervention in form of judicial review (certiorari) was available both before and after an adjudication determination had been filed as a judgment under s.25. Therefore the “dire and irretrievable consequences” thought to attach to the filling of an adjudication certificate no longer applies. (refer Brodyn v Davenport (2004) 61 NSWLR 421) However, a few devices may still be available to delay payment or enforcement, including applications for stay of execution pending resolution of other debts or disputes not related to the contract or cross-claims against third parties, on the same or similar facts, which the convenience of the court demands must be determined with the adjudicated debt (Riddell (2003), ‘Building and Construction Industry Security of Payment Amendment Act – 2002: All Power to the Payment Schedule’, p.3, Seminar Paper presented in Sydney, March 2003, pp.1-6 [Online] <http://www.gadens.com.au/Documents/Security_of_Payment_Amendment_Act_ -187-1.pdf >). The Apellant would also be required to pay into court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings (s.25(4)(b)).

Note however that the lien or charge remedy in NSW Act ss.11(3) is subject to prior lien or charge as well as third party owners: ss.11(4)-(5).
5.0 Remaining anomalies in the NSW Act.

5.1 The revisions to the NSW Act led to privately owned ANA’s being established with the revised Act providing a captive adjudication market. Where previously, adjudications could be carried out with the consent of the contracting parties without ANA involvement, the new Act required the application be made through the ANA’s. Some private ANAs charge the adjudicator a service charge usually as a percentage of the adjudicator’s fees and this practice has been described as “secret commissions” that may lead to perceptions of ANA conflict of interest.

5.2 As a result of the revised NSW Act introducing adjudication certificates which could then be filed as a judgment, the revised Act circumvented the scrutiny of the Court on adjudicators determinations which had until then, had resulted in many adjudicators determinations being quashed on the grounds of denial of natural justice or jurisdictional error of law on the face of the record before they could be enforced\(^\text{14}\). Consequently, the numbers of adjudications increased markedly from 116 over the first 3 years of the Act to 593 in one year following the enactment of the revised Act\(^\text{15}\).

5.3 Although the NSW Department of Commerce regarded the increase in adjudication as a sign of “a willingness from industry to participate in a system that provides a quick and effective dispute resolution process such as adjudication\(^\text{16}\)”, it is arguable that these figures were simply as a result of channelling of all adjudications after the Acts revision through the ANA’s that had hitherto been undertaken by consent and the removal of the Courts review of the adjudicators determinations prior to the issuing of an adjudication certificate by the ANA.


\(^{15}\) Refer NSW Department of Commerce review report May 2004 into the Building and Construction Industry Security of Payment Act 1999, p.6 paragraph 4.1

\(^{16}\) Ibid, p.15
5.4 There are still many problems with the NSW Act despite all the amendments:

5.4.1 The confusion between the revised NSW Act’s payment regime and the contractual regime (‘duality’).

The revised NSW Act payment scheme operates on the basis of a dual system\(^\text{17}\). The statutory scheme provides for the service of the claim on “a person who under the...contract, is or may be liable to make payment” and the payment schedule whereas the contractual regime requires the delivery of a payment claim on the superintendent.\(^\text{18}\) or contract administrator\(^\text{19}\) and progress certificate.

Confusion between the two regimes will be inevitable. (This is the main reason why Western Australia subsequently decided to enact a completely different scheme.\(^\text{20}\))

It has been argued\(^\text{21}\) that the confusion over demarcation between the contractual regime and the statutory regime led to the principal’s downfall in *Leighton v Campbelltown*.\(^\text{22}\) It is apparent that as a result of the revisions in the NSW Act that a prudent contractor should therefore serve both a s.13(1) payment claim on the principal and a progress claim on superintendent.

The principal should then reply to the payment claim by serving a s.14 payment schedule while the superintendent should issue a progress certificate to the contractor under the contractual requirements.\(^\text{23}\) Even though the payment certificate issued pursuant to the Australian Standard General Conditions of Contract may have been accepted as payment schedule under the revised NSW Act,\(^\text{24}\) it is important that the payment schedule is served by the correct person.

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\(^{17}\) Referred to as the "dual railroad track system" whereby the statutory payment framework operates in tandem with the contractual machinery (Per Macready AJ in *Transgrid v Siemens Ltd. & Anor* [2004] NSWSC 87 at para.56)

\(^{18}\) AS 2124-1992, clause 42.1 (e.g. in *Beckhaus Civil Pty v Brewarrina Shire Council* [2002] NSWSC 960)

\(^{19}\) PC-1 1998, clause 12.6 (e.g. in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103)


\(^{22}\) *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103


\(^{24}\) E.g. in *Emergency Services Superannuation Board v Davenport* [2004] NSWSC 697 and *Water Construction v CPL (Surry Hills)* [2003] NSWSC 266
Furthermore, a progress certificate intended for a dual role (to serve as a payment schedule simultaneously) must fulfill both the contractual and statutory requirements in all respects.

5.4.2 The judiciary’s expansion of claimable items under the payment application.
Recent cases like Coordinated Construction Co. (“CCC”) v Hargreaves (2005) and CCC v Climatech (2005)\(^{25}\) have allowed payment applications to include delay damages despite the argument that these are not for construction work or related goods or services as mandated by s.13(2)(a). To overcome this problem it has been suggested that a dual process of adjudication be introduced, one to cover one procedure for adjudicating progress claims as distinct from another procedure for adjudicating claims for debt or damages (ex-contractual claims)\(^{26}\).

5.4.3 Claim ambush with the short timeframe for serving the payment schedule.
The revised NSW Act provides inadequate time for the respondent to respond to payment claims that may have been prepared over a long period of time covering complex issues.

5.4.4 Adjudication ambush with the short timeframe for serving the adjudication response.
The period for provision of an adjudication response\(^{27}\) is arguably too short to respond to an adjudication application is that have been prepared over a long period of time covering complex issues. There have been criticisms\(^{28}\) that the response time should be at least the equivalent of ten business days as provided for the claimant's adjudication application.

5.4.5 New claimant arguments in adjudication application.
The revised NSW Act did not restrict the claimants from including arguments in the adjudication application that were not provided in the payment claim, while the respondents are prevent from raising any new issues that were not included previously in the payment schedule;


\(^{26}\) “A proposal for a dual process of adjudication” by Philip Davenport 2007.

\(^{27}\) 5 business days after receiving a copy of the application, or 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later (s 20(1)(a) & (b))

\(^{28}\) NSW Department of Commerce report May 2004 p.19 supra.
5.4.6 **Interconnection between the adjudication provisions & payment schedule.**

The revised NSW Act’s payment schedule provisions and timeline are linked to the adjudication provisions.\(^9\) The timetable for adjudication application depends on whether a payment schedule has been served (s.17).\(^0\) If no payment schedule or payment is made and the claimant wishes to adjudicate, the respondent has 5 business days after the claimant's notice of intention to apply for adjudication,\(^1\) for a second opportunity payment schedule (s.17(2)(b)).\(^2\) Arguably the connection between the failure to serve the payment schedule and the respondent's entitlement to serve an adjudication response (s.20(2A)) seems unusually draconian and potentially unfair.

5.4.7 **Choice of adjudicator.**

Under the NSW Act the parties are unable to choose a particular adjudicator whose experience may be appropriate to the nature of the dispute, but are provided an adjudicator selected by the ANA. In NZ where the choice is provided to either agree selection of the adjudicator or nominating body by consent or, failing this, obtain selection through the ANA, in some cases 93% of selections of adjudicator are made by consent.\(^3\)

5.4.8 **Different levels of Adjudicator.**

Some ANA’s divide their adjudicators into different grades providing an inexperienced adjudicator with a smaller and simpler dispute. While this is may be commercially viable, the parties may wish to have an experienced adjudicator resolve their smaller dispute, but are prevented by the selection policies of the ANA.

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\(^9\) An adjudication application cannot be made unless the claimant has served a notice of its intention to apply for adjudication within 20 business days following the due date for payment and the respondent has been given an opportunity to serve a payment schedule within 5 days of the claimant’s notice (s.17(2)(a) and (b)) where he had previously failed to serve a payment schedule or pay the amount claimed in whole or part.

\(^0\) If a payment schedule has been served, the adjudication application must be made within 10 days after the claimant receives the payment schedule if the schedule amount is less than the claimed amount (s.17(3)(c)). If the respondent fails to pay the whole or any part of the scheduled amount, the adjudication application must be made within 20 business days after the due date for payment (s.17(3)(d)).

\(^1\) The claimant’s notice of the intention to apply for adjudication must be served within 20 business days following the due date for payment: s.17(2)(a).

\(^2\) Amflo Constructions Pty Limited v Anthony Jefferies [2003] NSWSC 856. (See, however, the court’s strict interpretation of the time period in which this “additional opportunity” payment schedule must be served: Taylor v Brick (2005)361

\(^3\) Refer to the selected sample under “Trends in adjudication”, supra.
5.4.9 Document delays.

The wording of the revised NSW Act did not prevent the ANA’s from becoming centrally involved in the administration of each adjudication and as a result, the collection and distribution of all documents relating to each of the adjudications were distributed by the ANA’s. As a consequence, some adjudicators have received their adjudication application and response documents 2 days before the required determination and there have been reports\(^{34}\) of a number of adjudications floundering, stalling, or being put under time pressure due to the mismanagement of documentation.

5.4.10 Clarity of wording required in the Act.

There have been some criticisms\(^{35}\) that the revised NSW Act should be written in plain English. Suggestions included that some definitions should be relocated under s4 of the Act. Examples being, “Reference Date”, “money owing”, “pay when paid” and “relevant date”. Other comments have suggested that the Act’s name should be shortened and changed to delete the word “security”.

Concern has been expressed with the definition of “Reference Date” (s8). One adjudicator wrote “in almost every adjudication application I have received there has been a problem with the reference date. Contracts are often unclear, silent or the parties and legal advisers do not understand the Act.” and “procedural error by early service of the payment claim, ie before the reference date, is almost universal in small matters.”\(^{36}\)

5.4.11 Claimable items under the Act.

There have been calls for an expansion of s9 and s10 of the Act to cover both the provisions of the contract relating to the amount of a progress payment and other amounts which should be paid for but which the contract clause has, intentionally or otherwise, excluded. Similarly, it has been suggested that the valuation provisions do not often apply to all of the work and that it should be clarified that disputed amounts, such as unapproved variations, should be claimable under the Act and allowed to be subject to adjudication.

There have also been calls for clarification of the form and content of the

\(^{34}\) Department of Commerce review report May 2004 on the Building and Construction Industry Security of Payment Act 1999 p.21
\(^{35}\) Ibid p. 20
\(^{36}\) Ibid.
Payment Claim under s13. It was suggested that although it has been held that a payment claim comprises the whole of the materials served by the claimant (including coversheets, annexure etc) the Act should be amended to expressly state this issue.

The form and content of the payment schedule under s14 has been questioned as being “ambiguous” and “lacking clarity”. It has been argued that the word “indicate” is too broad and leads to a paper dump as a “smoke screen” to frustrate the process. Suggestions have been made for improvement of the payment schedule under s14 by making the respondent provide a statement of reasons within the payment schedule why the respondent is withholding payment.

5.4.12 **Inflexibility of the adjudication procedure.**

Without the consent of both parties to the adjudication, there is no power for the adjudicator to extend the adjudication period due to illness, workload, claim or response ambush or the complexity of the submissions or to obtain assistance from experts. In many cases one or both of the parties have refused to allow for an extension and the adjudicator has had to complete the determination in ten business days. Arguably in some cases this has had a bearing on the quality of determinations.

6.0 **Singapore’s Act.**

Singapore’s Building and Construction Industry Security of Payment Act 2004 (“Singapore’s Act”) came into effect on 1 April 2005. It is closely modelled on the NSW Act with borrowed elements from the UK Act and NZ Act. However, Singapore’s Act has been modified to accommodate local conditions and concerns within the local industry\(^\text{37}\).
6.2 Singapore’s Act only applies to contracts “made in writing” or “treated” as such: s.4(1), s.4(3)-(4) (comparable to UK Act, s.107). The other exclusions are found in s.4(2). 38

6.3 The greatest difference between Singapore’s Act and all other Acts in relation to the payment provisions is Singapore’s separate approaches between “construction contracts” and the “supply contracts” as well as the different longstop periods for the service of documents and the due date in respect of each contract category under varying permutations of circumstances.

6.4 By prescribing maximum periods for serving the payment response and for payment, Singapore’s Act overcomes the abusive payment practice currently found in contracts with inordinately long certification and payment periods. Another innovation is its provision of a “dispute resolution period” before a claimant is entitled to apply for adjudication (s.12).

6.5 Singapore’s Act has no default provisions that apply when a construction contract or supply contract omits various payment provisions. The entitlement to progress payments is given by s.5 and the amount and valuation are provided in ss.6-7.

6.6 A payment claim may be served on one or more persons who may be liable to make the payment or such other person as specified or identified under the contract: s.10(1). The time for serving this may be specified by the contract (s.10(2)(a)) or by the last day of each month following the month in which the contract is made (Reg.5(1)).

6.7 The due date for payment is different for construction contracts and supply contracts (s.8). The statutory longstop period provided for each contract type is also dependent upon whether the due date has been contractually stipulated. In relation to construction contracts, this further depends on whether the claimant is a taxable person under the Goods and Services Tax Act. 494

6.8 For construction contracts, if the contract specifies the due date, the contractual due date would apply provided that it does not exceed 35 days after the claimant’s submission of his tax invoice (if the claimant is a taxable person) or,

38 The UK Act and the NSW Act also exclude residential property from the scope of their respective legislation (cf. NZ CCA).
in any other case, the date on which the payment response is to be provided under s.11(1): s.8(1). If the contract does not specify the due date, the progress payment will become due and payable after 14 days of the tax invoice (for a taxable claimant) or in any other case, the date on which the payment response is to be submitted.

6.9 For supply contracts, the contractual due date would be applicable subject to the 60-day maximum after the payment claim is served under s.10: s.8(3). If the due date is not contractually provided, it would be 30 days after the payment claim. Interest is payable on the unpaid amount of the due progress payment: s.8(5).

6.10 The response to a payment claim is called the payment response (cf. payment schedule in the NSW and CCA; and the s.111 and s.110(2) notices in the UK Act). It is only required in respect of construction contracts: s.11(1), Reg.5. With regards to supply contracts, the respondent is only required to respond by paying the claimed amount or “such part... as the respondent agrees to pay, by the due date”: s.11(2). A claimant under a supply contract therefore enjoys some procedural advantage.

6.11 The formal requirements of the payment response to construction contracts are provided in Singapore’s, s.11(3) and Reg.6(1). S.11(3) requires the payment response to:

(a) identify the payment claim to which it relates;

(b) state the payment response (if any);

(c) state (where the response amount is less than the claimed amount), the reason for the difference and the reason for any amount withheld; and

(d) be made in form and manner, and contain such other information or be accompanied by such other documents, as may be prescribed.

6.12 Reg.6(1) further prescribes that the payment response shall:

(a) be in writing;

(b) be addressed to the claimant;
(c) state “nil” where the respondent does not intend to pay any part of the claimed amount and the reasons therefore; and

(d) where the response amount is less than the claimed amount –

   (i) contain the amount the respondent proposes to pay for each item constituting the claimed amount, the reasons for the difference in any of the items and the calculations showing how the proposed amount is derived; and

   (ii) contain any amount withheld, the reason for withholding and the calculations showing how the withheld amount is derived.

6.13 The Singapore Act requirements for the payment response appear to be even more detailed than either the NSW or NZ Acts, in that every single item and every withheld amount needs to be quantified, reasoned and calculated if the respondent wishes to pay less than the claimed amount. Nevertheless, if Singapore follows the NSW approach in Multiplex v Luikens, the court may not demand an overly particularised payment response as long as it is “sufficient to appraise the parties of the real issues in the dispute”. Note however, that the NSW Act, s.14(3) uses the word “indicate” whereas the Singapore Act, s.11(3) uses the word “state” in respect of the reasons for withholding, the former which, according to Palmer J in Multiplex, “conveys some want of precision and particularity”.39

Consequently, the Singapore Act may require a higher degree of precision and particularity compared to the NSW Act although it would not approach the degree demanded of pleadings in litigation or arbitration.

6.14 It is vital that the payment response should contain all the reasons for withholding since Singapore’s, s.15(3) bars the respondent from including in the adjudication response and the adjudicator from considering, any reason for withholding any amount, including but not limited to cross-claim, counterclaim and set-off, unless it was included in the payment response.

6.15 Singapore’s Act therefore, retains the severity introduced in the NSW Act although the lack of an effective payment response does not jeopardise the respondent’s

39 Palmer J in Multiplex v Luiken [2003] NSWSC 1140, para.78 propounds that “Section 14(3) of the Act, in requiring a respondent to “indicate” its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word “indicate” rather than “state”, “specify” or “set out”, conveys an impression that some want of precision and particularity is permissible as long as the essence of “the reason” for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim...”
entitlement to serve an adjudication response. The timeline for the payment response is either contractually provided (subject to the 21-day statutory longstop)\(^{40}\) or if the contract is silent, within 7 days from the payment claim: s.11(1)(a)-(b).

6.16 Unlike the NSW Act where the due date and period for serving the payment schedule coincide, this is not the case under Singapore’s Act. Putting aside all the different permutations of the complex due date regime in s.8, the due date may be calculated as 35 days after the payment response is to be provided (if the contractual due date is later) or 14 days after the same (if no date is contractually provided): s.8(1)(b)(ii) and s.8(2)(b).

6.17 In certain circumstances, the payment response may take the form of a payment certificate, which issue date would be contractually provided. Under the Public Sector Standard Conditions of Contract (“PSSCOC”), (3rd and 4th editions) for instance, this is provided as 14 days from the receipt of the payment claim (which complies with the longstop period).\(^{41}\) The newly amended PSSCOC (4th edition) cl.32.2(2) also expressly provides that the payment certificate shall be deemed the payment response from the employer. However, where a payment response is provided by the employer within 14 days of the payment claim, it shall take precedence over the payment certificate issued by the superintending officer.

6.18 The position under the Singapore Institute of Architects (“SIA”) contract (6th edition) has previously been uncertain since the dates for issuing interim certificates makes no reference to the submission dates of the payment claims. Both the SIA (7th edition) and the PSSCOC (4th edition) contracts have now been amended to accommodate the Singapore Act payment claim and payment response provisions.

6.19 If a contract stipulates a 30-day response period, this non-compliant period would be substituted by the statutory 21-days maximum: s.11(1)(a). However, if no date is specified, the payment response would be required within 7 days of the claim: s.11(1)(b).

6.20 The time limit allowed where no relevant contractual term is available represents a considerable shortening of the period allowed contractually and is consistent with

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\(^{40}\) s.11(1)(a) provides that the maximum period which may be specified under the contract for the issue of the payment response is 21 days

\(^{41}\) See PSSCOC (4th ed.), cl.32.2(1). The PSSCOC (4th ed.) was amended in March 2005 to accommodate the Singapore Act.
Singapore Act general treatment to situations where the contract is silent on a particular matter.

6.21 The respondent named in a payment claim may furnish a payment response himself or cause a payment response to be provided (s.11(1)). Singapore’s Act thus overcomes the problem in NSW Act by statutorily allowing the owner/employer to instruct an architect or other professionals to respond to the payment claim (e.g. issue a payment certificate tendered as a payment response) if he does not provide the response himself.

6.22 The fact that the Singapore Act, s.10 allows the payment claim to be served on either “one or more other persons, who..., is or may be liable to make the payment”\(^{42}\) or such other person who is specified or identified by the contract for this purpose, \(^{43}\) therefore allows the payment claim to be served directly on the person who have been delegated the certification function under the contract e.g. the architect, quantity surveyor (or in a public sector contract, the superintending officer).\(^{44}\)

6.23 Unlike legislation elsewhere, Singapore’s Act, s.11(4) expressly allows variation of the payment response but it must be served within the period that the payment response should be provided under s.11(1) or within the dispute resolution period under s.12(4).

6.24 Reg.6(2) also provides that the payment response may varied only by a notice in writing which:

(a) is addressed to the claimant;

(b) identifies the payment response being varied and states if the variation would supersede or supplement the payment response;

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\(^{42}\) s.10(1)(a)  
\(^{43}\) s.10(1)(b)  
\(^{44}\) E.g. The architect, quantity surveyor (or in a public sector contract, the superintending officer)
(c) where the variation supersedes part of the payment response, identifies the part of the payment response that is superseded;

(d) conforms with Reg.6(1)(c) and (d) as appropriate

Payment Certificates Tendered as Payment Responses

6.25 Neither the Singapore Act nor the NSW Act specifically mentions the certification process but this does not prevent the parties from expressly agreeing that the payment response shall take the form of a payment certificate as long as it complies with the necessary s.11 requirements. However, the payment certificate’s status depends on the underlying contract.

6.26 Like the PSSCOC (3rd edition), the latest PSSCOC (4th edition.) allows the respondent-owner to assert its full position in resisting the payment claim since the superintending officer’s payment certificate expressly allows for “the deduction of any sums which have been or may become due and payable... under the Contract or otherwise”. However, under the previous edition of the SIA contract (6th edition), the architect’s certified amount cannot include any sum “deductible” for liquidated damages for delay or for direct payment to subcontractors, although if such deductions are made, the architect may record these in an interim certificate.

Therefore, the interim certificate cannot include the employer’s response to a contractor’s claim for loss and expense and hence does not represent the employer’s full position on the claim. Notwithstanding, the employer could elect to expressly extend the matters that the architect may certify, so that the interim certificate could cover all matters required of a Singapore Act payment response. Nevertheless, the SIA contract has also been amended to comply with the Singapore Act provisions on the payment claim and payment response.

45 See PSSCOC (4 ed., 2005), cl.32.2(1) and PSSCOC (3 ed., 2004), Clause 32.2(1). The term “any sums... under the contract or otherwise” is therefore wide enough to include cross-claims and set-offs in respect of defects, liquidated damages for delay and any other claim.
The Dispute Settlement Period

6.27 The Singapore Act concept of “dispute settlement period” is only relevant to construction contracts. Unlike NSW Act s.14(4), whereby the respondent is automatically liable for the whole claimed amount when the payment schedule is not served by the due date, under the Singapore Act, the respondent is instead allowed a second opportunity to review, the claim or reconsider its position during the 7-day “dispute settlement period” which runs from the date on which or the period in which the s.11 payment response is required: s.12(2), s.12(4)-(5).\(^{46}\)

6.28 During this period, the respondent could seek clarification and serve its payment response if it had initially failed to do so. The risk of a respondent overlooking the need to respond is thereby considerably reduced under Singapore’s Act. Singapore Act s.12 is thus rather similar to NSW Act s.17(2) in providing a second chance to serve the payment response although the purpose and the timing are different. S.12(4)(b) also uniquely allows the respondent to vary the payment response (if one had already been served) during the dispute settlement period.

6.29 The claimant’s entitlement to make adjudication applications where it fails to receive payment of the accepted response amount by the due date or it disputes a payment response or where the respondent fails to provide a timely payment response, thus only arises at the end of the dispute settlement period if the dispute is not settled or if the respondent has not provided the payment response by then: s.12(1)-(2), s.12(4).

However, under supply contracts, where the claimant-supplier fails to receive payment by the due date or where it disputes the response amount, it can apply for adjudication immediately and does not need to wait for the dispute settlement period.

\(^{46}\) s.12(2), (4) and (5)
Consequences for Non-Payment and the Failure to Serve a Valid Payment Response

6.30 The Singapore Act does not provide a wide range of remedies at this stage, compared to other legislation. The only remedies for non-payment for any part of the claim or response amount and the failure to serve an effective payment response are interest under s.8(5) and the right to apply for adjudication under s.12 (subject to the dispute settlement period for construction contracts).

6.31 All other Singapore Act remedies, including the right to direct payment from the principal (s.24), lien over goods supplied (s.25) and the right to suspend work or supply (s.26), only apply at a later stage, for non-payment of adjudicated amount.

The Link Between the Singapore Act Payment Schedule and Adjudication

6.32 In relation to construction contracts, the failure to provide a timely payment response entitles the claimant to make an adjudication application under s.13 by the expiry of the 7-day dispute settlement period if the dispute is still not settled or the respondent still has not served its “second chance” payment schedule by then: s.12(2)(b), s.12(4). 522 The adjudication application must be made within 7 days after the entitlement to make this first arises under s.12 but only after the claimant notifies the respondent in writing of its intention to apply for adjudication. There is hence a timeline link between the payment response and adjudication provisions (cf. UK Act s.108 allows reference to adjudication “at any time”).

6.33 This compares to the NSW Act timeline (NSW Act s.17(1)(b), s.17(2) and s.17(3)(e)) where the failure to provide a s.14 payment schedule entitles the claimant to serve a notice of the intention to refer to adjudication within 20 business days of the due date and to allow the respondent a second opportunity to serve a payment schedule within 5 business days of the receipt of the claimant’s notice. The application for adjudication can only be made after the end of the 5-day period.\(^\text{47}\)

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\(^{47}\) Different timelines for adjudication application apply in cases where the payment schedule has been served but the scheduled amount is less than the claimed amount (s.17(1)(a)(i) and s.17(3)(c)) and where the respondent has not paid the scheduled amount (s.17(1)(a)(ii) and s.17(3)(d)).
6.34 The failure to serve a payment response does not affect the respondent’s right to serve an adjudication response (cf. NSW Act s.20(2A)). However, s.15(3) prohibits the respondent from including in the adjudication response any withholding reason, “including but not limited to any cross-claim, counterclaim and set-off”, not already contained in the payment response. The adjudicator is likewise debarred from considering the same.

6.35 Although Singapore Act s.15(3) has the same effect as NSW Act s.20(2B), it clarifies the withholding reason further and contains the extra prohibition relating to the adjudicator. It does appear, taken as a whole, that the Singapore Act’s prohibitive provisions relating to the adjudication response are not as onerous as the NSW Act.

**Singapore Payment Response and the Payment Notices in the UK, NSW, WA and NZ.**

6.36 The Singapore Act payment response, like the rest of the Act, is chiefly modelled after the NSW Act with borrowed elements from other legislation despite its separate approaches between construction contracts and supply contracts.

6.37 The Singapore Act payment response only applies to construction contracts: s.11(1) (cf. NSW Act makes no distinction between construction contracts and supply contracts).

6.38 The requirements of the Singapore Act payment response, spread over both the Act and the Regulations (s.11(3) and Reg.6(1)), are the most extensive compared to all the payment notices in the earlier legislation. These requirements effectively make the Singapore Act payment response an extremely demanding version of a combined UK Act s.110(2)/s.111 notice which requires information concerning the amount proposed to be paid and the withheld amount in relation to each item claimed, the reasons and calculations thereof.

6.39 The requirements as to form in Reg.6(1)(b) are similarly found in the WA Act, Schedule 1, Div.5, cl.6(3)(a)-(b). The NZ Act s.21(2)(a) also contains the written requirement. The Singapore Act payment response, however, does not need to specify that it is made under the Singapore Act since there is no such corresponding requirement for the payment application (cf. NSW Act, NZ Act).
6.40 The Singapore Act’s clear position over a “nil” amount (Reg.6(1)(c)) is also an improvement over the NSW situation which has no such express provision. Nevertheless, if Singapore follows the NSW approach in *Multiplex v Luikens*, the payment response may not need to be overly particularised provided that it is sufficient to appraise the parties of the real issues in dispute. However, it must be borne in mind that *Luikens* dealt with the reasons for withholding whereas the brunt of the Singapore Act requirements involve the breakdown of the figures proposed to be paid or withheld in Reg.6(1)(d)(i)-(ii).

6.41 It remains to be seen how Singapore deals with the demanding Reg.6(1) requirements in practice. S.11(4) expressly provides for the variation of the Singapore Act payment response though it must be served within the period specified in s.11(1) or within the s.12(4) dispute resolution period.

6.42 The timetable for serving the Singapore Act payment response (s.11(1)) is slightly more complex than the earlier legislation although not as convoluted as the s.8 due date provisions. It depends on whether this date is contractually stipulated and if it falls within the statutory longstop of 21 days. If it is not contractually provided, the payment response must be served within 7 days after receipt of the payment claim.

6.43 Unlike the NSW Act, the timelines for the due date and for serving the Singapore Act payment schedule do not coincide and there is no express provision that the failure to provide a valid payment response results in the respondent becoming liable to pay the claimed amount on the due date.

6.44 Like the NZ Act, the Singapore Act payment response makes no distinction between abatement, set-off or cross-claims. It is important that a payment response which includes all possible withholding reasons is served because Singapore Act, s.15(3) prohibits the respondent from including in the adjudication response and the adjudicator from considering, any reason for withholding any amount unless it was included in the payment response. The first part of Singapore Act s.15(3) hence resembles NSW Act s.20(2B).

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49 Contrast NSW Act, s.11(1) and s.14(4) with Singapore Act, s.8(1)-(2) and s.11(1). s.15(3) has therefore the same effect as NSW Act s.20(2B). Respondents under supply contracts should therefore also provide any reasons for withholding on or before the relevant due date or be prevented from including these in the adjudication response: s.13(3)(b).
6.45 Nevertheless, the failure to serve an effective payment response does not disentitle the respondent from serving an adjudication response (cf. NSW Act s.20(2A). Therefore the penalty for failing to serve the payment response is not as severe as the NSW Act.

6.46 Unlike other legislation which provide a varying range of immediate remedies for non-payment and/or the failure to serve a payment notice, the Singapore Act only allows two remedies at this stage: interest (s.8(5)) and the right to adjudicate (s.12). The Singapore Act is the only legislation that does not allow for a notice of suspension to be served at this stage. Unlike the NSW Act or the NZ Act, there is no equivalent right for recovery of a statutory debt through the courts. However, before the claimant can adjudicate, the 7-day dispute settlement period must first take place during which the respondent may seek clarification of the payment claim and is given a second opportunity to serve a payment response (s.12(2), s.12(4) -(5)), followed by the claimant’s notice of adjudication (s.13(2)).

6.47 Although the NSW Act also provides a “second chance” payment schedule, the 5- day window of opportunity only begins after the notice of adjudication is served (NSW Act s.17(2)). Neither the NZ Act nor the UK Act provides for this additional opportunity for serving the relevant payment notice/schedule.

Problems with the Singapore Act

6.48 Although Singapore introduces a novel method of deriving different due dates for the separate contract categories with divergent combinations of circumstances, the different dates are convoluted and potentially confusing.

6.49 Unlike the NSW Act and the NZ Act, the Singapore Act has no express provision indicating that the respondent would become liable to pay the claimed amount on the due date in default of a payment response.

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6.50 There is a lack of remedies as a consequence of the payer failing to pay or serve a valid payment response leaving only a claim for interest and the right to apply for adjudication.

6.51 The requirements for the payment response are extremely demanding requiring information concerning the amount proposed to be paid and the withheld amount in relation to each item claimed, the reasons and calculations.

6.52 The exacting express requirements of the Singapore Act payment response may impose a tremendous administrative burden on the respondent (and/or its certifier) and can potentially produce more disputes as to compliance.

6.53 The comparatively few remedies for non-payment and the failure for serving the payment response compromise the strength of the claimant’s position in inducing a reluctant respondent to pay up, compared to other legislation.

6.54 With the relatively low number of adjudications reported in Singapore since the Acts introduction in April 2005\(^52\), there appears to be a hesitancy within Singapore’s construction industry to use the adjudication process and this may be in part due to the complexity of the provisions contained in the Act.

6.55 In summary, the Singapore Act payment response appears to have the most thorough requirements amongst its counterparts. Although its provisions provide more certainty, they also lack the simplicity of the NZ Act and may risk producing more disputes relating to compliance. Notwithstanding the seemingly excessive requirements, if Singapore follows NSW’s approach as to the level of particularisation needed, many of the fears about the administrative burden and the jeopardy of more disputes may be avoided.

\(^{52}\) Refer Table of enacted payment/adjudication legislation in this paper.
7.0 **The Malaysian Bill.**

7.1 The Malaysian Bill is yet to be introduced into parliament, however, if the proposals prepared for the draft Bill are implemented, it will be based largely on the NZ Act with a number on innovative amendments. Some of the amendments include:

7.1.1 introduction of a payment bond for any head work contract;

7.1.2 accreditation of adjudicators under an Adjudication Control Authority (“ACA”);

7.1.3 implementation of a preliminary meeting between the selected adjudicator and the dispute parties in order to provide an opportunity to resolve the dispute amicably prior to the adjudicator serving a notice of acceptance;

7.1.4 the inclusion in adjudication responses of cross claims provided that the cross claim was included in the preceding payment schedule;

7.1.5 adjudication claim/response/ adjudication periods of 7 days/ 7days/ 30 days;

7.1.6 provision for lodgement of all determination with the ACA and payment of the determined amount to the ACA pending review.

7.2 There is no doubt that Malaysia will benefit from the scrutiny applied to all the payment and adjudication legislation around the world and as a result, many of the problems encountered by previous legislation will be addressed.

8.0 **Revisions to the UK Act.**

8.1 Since March 2005 the UK Department of Trade and Industry has conducted a review into the original UK Act, which continued for some years, because there was no consensus within the construction industry and legal fraternity to make changes, despite many parties recognising that the original act had numerous deficiencies.
8.2 On 4 December 2008 proposed revisions to the 1998 UK Act were introduced into the UK Parliament in order to simplify complexities that were present in the original Act\(^{53}\). The original Act was called the Housing Grants Construction and Regeneration Act, while the new Act is called the “Local Democracy, Economic Development and Construction Act” (“LDEDC Act” loosely described as the Construction Contracts Act). The wording of the provisions in the Act making changes to the original Act have been criticised in the UK and described as being very complex\(^{54}\), convoluted and awkward\(^{55}\).

8.3 Although fourteen areas were identified for revision in the UK Act, (with nine of those already addressed by provisions in the NZ Act) the final revisions provide the following eight changes:

8.3.1 Providing the right to refer disputes to adjudication only if the contract provides for this in writing (s139 LDEDC Act);

8.3.2 Providing the adjudicator power to make corrections to clerical and typographical errors in his decision; (s140 LDEDC Act, NZ Act s47(3))

8.3.3 Providing that any agreement about how costs in an adjudication are to be allocated will be ineffective unless it is

8.3.3.1 made in writing, is contained in the construction contract and confers powers on the adjudicator to allocate his fees and expenses as between the parties or

8.3.3.2 made in writing after the notice of intention to refer the dispute to adjudication; (s141 LDEDC Act, NZ Act s56(3))

\(^{53}\) Part 8’s aims are 1. “to intervene where the legislation has shown to not have delivered its original objective”; and 2. to adopt “proportionate amendments to the existing framework” (from a paper titled “Impact Assessment of Part 2 of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (The Scheme) and the Scheme for Construction Contracts (Scotland)” published by the UK Department of Business Innovation and Skills dated 4 July 2008:

\(^{54}\) Professor Rudi Klein powerpoint presentation to the Society for Construction Law Oxford Region on 23 April 2009

\(^{55}\) None so aptly illustrated than s 143(3) of the Local Democracy, Economic Development and Construction Act which refers to s 110B(3) of the Housing Grants Construction and Regeneration Act which reads: “Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given
8.3.4 Defining what is not an “adequate mechanism” for determining what and when payments become due under a construction contract such as:

8.3.4.1 mechanisms that make the amount or date of the payment conditional upon performance of another contract, or

8.3.4.2 a third parties decision whether obligations have been performed in another contract, or

8.3.4.3 when a payment notice is given to a contractor.

(effectively “Pay-when certified clauses 142 LDED Act, “Conditional payment provisions ineffective” NZ Act s13)

8.3.5 Providing for “payment notices” detailing the sum considered to be payable and the basis on which the sum is calculated to be provided by either the payer, payee or specified person within 5 days after the payment due date and the reasons for set-off or abatement. (s143 LDED Act, “payment schedule” NZ Act s21)

8.3.6 Providing the right where a payer fails to provide a “payment notice” 5 days after the payment due date or at all, for the payee to serve a payment notice to the payer, thereby postponing the “final date for payment” of the sum in question by the same duration between the date the payment notice was due from the payer and the date the default payment notice was provided by the payee. (s143 LDED Act)

8.3.7 Confirming the obligation to pay the “notified sum” on or before the final date for payment, or paying less than the notified sum after providing a “counter-notice” under various circumstances and with the exception in the case where the payee becomes insolvent after the expiry of the period for giving a notice of intention to pay less than the sum. (s144 LDED Act)

8.3.8 Introducing a right to reimbursement for the costs of suspension and remobilisation under Section 112 of the Act. (s145 LDED Act, NZ Act s72);
9.0 **Trends in adjudication.**

9.1 Adjudication of disputes has now been in place in New Zealand for over 7 years since the enactment of the Construction Contracts Act 2002 on 1 April 2003 and through the Arbitrators and Mediators Institute of New Zealand (AMINZ) over 470 requests for adjudication and 422 nominations with adjudications have been carried out by 57 adjudicators on the panel list since the act’s introduction. There are now 2 other authorised nominating authorities.

9.2 Apart from selections of adjudicators being made by Arbitrators and Mediators Institute of New Zealand, the contracting parties themselves under the NZ Act can select an adjudicator by consent after a dispute has arisen and a much larger number of adjudications have been carried out under this manner than by selection of the ANA.

9.3 From a survey conducted last year with all the adjudicators on the AMINZ list there were a total of 595 nominations to adjudication as at August 2009. From comparison with AMINZ statistics, it appears that approximately 70% of all adjudications in NZ for the first 6 years were carried out through the Authorised Nominating Authority.

9.4 Permitting selection by the parties has the advantage of tailoring the size and complexity of the dispute with the experience and cost of the adjudicator, rather than being forced to accept the selection of a high court judge to determine a dispute over a kitchen sink.

9.5 There have been at least 110 cases brought before the NZ courts to June 2010 in relation to the Construction Contracts Act and Adjudicators determinations since 2003. Four adjudicators determinations have currently been quashed with one partially quashed, judgement of another two adjudicator’s determinations have been set-aside due to lack of proper appointment.

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56 The Arbitrators’ and Mediators’ Institute of NZ Inc. based on the date of selection
57 By Noushad Ali Naseem Ameer Ali (yet to be published)
Ten other applications for opposing entry of an adjudicators determination or judicial review of adjudicators determinations have been dismissed.

**Final Account disputes being referred to adjudication**

9.6 While adjudication was introduced to permit the resolution of dispute matters as the contracts proceeded, many of the disputes now being referred to adjudication are final account disputes spanning many months, if not years, and involving claims worth millions of dollars.

The trend for reference of final account disputes to adjudication in New Zealand has mirrored the experience in the UK, where frequently adjudicators are being asked to determine disputes worth many millions of pounds and as a consequence have required to extend adjudication periods beyond the 28 calendar day period (working days in NZ extendable by 10 working days without the parties agreement). Therefore, the need to have flexibility in the adjudication procedure, whilst still complying with the rules of natural justice is reasonably important.

The trends to refer final account disputes to adjudication will place increasing pressure of adjudicators especially in those in NSW, Victoria, Queensland and Singapore that have only 10 business days to provide determinations.

**Other trends**

9.7 Since the introduction of the New Zealand Act, there have been a variety of approaches taken by head contractors. The majority of contractors have accepted the requirement to provide payment schedules in response to payment claims and as a result, payment practices have improved and outstanding debt has reduced markedly. Other contractors have become more “innovative”. 
Pay-if-paid and pay-when-paid clauses that have been made legally unenforceable by the Act have given way to “pay-when-certified” and “condition-precedent clauses” which seek to defer payment until some action by a third party has been completed (such as the certification by an Employer before a head contractor pays a subcontractor) or by the contracting party (such as the provision of “full and adequate” supporting detail before the payment claim is valid on the basis that the payer determines what is “full” and “adequate”). The due date for the deferred payment is frequently never specified.

Case law is yet to be heard on whether PWC or condition precedent clauses contravene the requirement in the Act for parties to agree a due date for payment and in the absence of agreement that default provisions for payment 20 working days after the service of the payment claim would apply.

Recent NZ case law has confirmed that claims for loss of profits or general damages are not likely to be covered by the NZ Act because these types of claims do not arise “under” a construction contract, but arise out of or in connection with the contract.

Since the introduction of the NZ Act there have been a variety of approaches taken by adjudicators in New Zealand. Some adjudicators have adopted a rigid approach adhering to the provisions of the Act and rejecting any flexibility of the adjudication procedure. For example, where the Act is silent on issues (such as allowing a right of reply to an adjudication response) some adjudicators have allowed no right of reply. Other adjudicators will only undertake adjudications on a documents only basis.

I have introduced a number of procedures for adjudications in which I have been selected to act as adjudicator in order to assist the parties to resolve their dispute, some of which are listed below:

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61 It is, therefore, arguable that the PWC or condition precedent clause may not comply with s 14(d) of the CCA which requires the parties to agree a mechanism to determine the due date that the payments become due otherwise the default provisions for payment for a commercial construction contract under the act would apply requiring payment within 20 working days of the payment claim being served.

62 This issue was considered in the UK in the case of Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd (2002 18 Const LJ55 (Ct of Sess).

63 Jian Hua Property Ltd v Freemont Design and Construction Ltd (Ak HC 2005-404-5526, 16 February 2006)

64 The definition of “dispute” in the NZ Act s5 is “a dispute or difference that arise under a construction contract” and is similar to the wording in the UK Act s108(1).

65 Refer also to Bayley & Kennedy-Grant, Guide to the Construction Contracts Act, pgs 87 – 89.
9.10.1 Pre-adjudication conferences are conducted for no cost and provide the opportunity to explain the adjudication process and the time and cost implications of proceeding further. Approximately 30% of all the disputes referred to me for adjudication resolve as a result of the pre-adjudication conference (either separately or subsequently) with no adjudicators cost incurred by the parties.

9.10.2 Security for future fees and expenses are always required in order to keep the parties focused on the cost of the process in comparison with the amount in dispute. If the respondent does not pay their share, the claimant is given the opportunity to provide the full amount of security and claim the respondent share in the adjudication claim.

9.10.3 The service of the notice of acceptance is timed to coincidence with the start of the working week to allow parties the weekend to finish preparation of adjudications claims or responses.

9.10.4 The parties are always asked to confirm whether any other dispute matters between them need to be referred to a concurrent adjudication.

9.10.5 Conferences, site visits and cross examination of witnesses are considered if there is no valid reason to exclude these procedures.

10.0 **Concluding Comments**

10.1 If any legislation is to be lasting and effective, it must be balanced and provide protection for all parties in construction contracts, not just a selected few.

10.2 The introduction of the NZ Construction Contracts Act 2002 has had a marked effect on the attitudes within the NZ construction industry and payment practices have changed significantly. Economic and insolvency figures support the justification for the introduction of the NZ Act which is now recognised in the UK\(^{66}\) as one of the most balanced versions of the payment and adjudication legislation in the world.

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