

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

No. 05607 of 2013

MACKIE PTY LTD (ACN 097 603 846)

Plaintiff

v

NEIL COUNAHAN t/a NEIL COUNAHAN  
TRADING (ABN 19 375 306 158)

First Defendant

and

HARRY McIVER

Second Defendant

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JUDGE: VICKERY J  
WHERE HELD: MELBOURNE  
DATE OF HEARING: 6 NOVEMBER 2013  
DATE OF JUDGMENT: 13 DECEMBER 2013  
CASE MAY BE CITED AS: MACKIE PTY LTD v COUNAHAN and Anor  
MEDIUM NEUTRAL CITATION: [2013] VSC 694

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BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – What constitutes “valid payment claim” – What constitutes “final payment claim” – Whether payment claim identified the construction work to which each payment claim related under s 14(2)(c) of the Act – Requirement to identify work in final claim under s 14(2)(c) of the Act – Whether payment claim served within time under s 14(4) of the Act – Whether invalidity under s 14(8) of the Act by reason of more than one final payment claim made.

ADMINISTRATIVE LAW – Construction progress payment disputes – Statutory adjudication process – Whether adjudicator had jurisdiction to make determination – Validity of adjudication determination made in respect of final payment claim.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J A F Twigg	ICA Lawyers
For the First Defendant	Mr R Andrew	Moores Legal
For the Second Defendant	No appearance	

HIS HONOUR:

**Background**

1 This proceeding arises out of payment claims purportedly made under the *Building and Construction Industry Security of Payment Act 2002* (the “Act”).

2 A construction contract (the “Construction Contract”) was entered into between the Plaintiff, Mackie Pty Ltd (“Mackie”) and the First Defendant, Neil Counahan t/as Neil Counahan Trading (“Counahan”) on 31 October 2012 pursuant to which Mackie engaged Counahan to supply and construct office furniture to be installed at the University of Melbourne, Barry Road, Carlton, Victoria (the “Project”). The contract price for the work, including GST, was \$350,139.90.

*Progress of the Works*

3 Matters progressed broadly as follows:

4 On 5 November 2012 Counahan commenced works on the site. By approximately 15 December 2012, Levels 5 and 6 of the Project were completed by Counahan and were then occupied by the University. By approximately 1 February 2013 Levels 3 and 4 were completed by Counahan and subsequently occupied by the University from about mid March 2013. On 15 February 2013 "Practical Completion" for the Project was achieved.

5 However, on 21 February 2013, Mackie sent an email to Counahan notifying him that a number of minor defects in the work had been identified, which were required to be completed “ASAP”.

6 On 28 March 2013 Counahan had substantially completed its works on the Project, save for the provision of screens, which were completed on or about February 2013.

7 On 10 April 2013 Counahan replaced 6 overhead bookcases.

8 Commencing on 18 June 2013, a chain of emails between Counahan and Mackie extending to 27 June were sent regarding defects with the screens. On 23 July 2013,

Mackie emailed Counahan requesting advice as to when the screens would be installed, to which Counahan responded by advising that the screens would be installed on Thursday 25 July 2013. On 25 July 2013, the screens were installed by Counahan.

*The 26 July Payment Claim*

- 9 On 26 July 2013, Mackie received a payment claim from Counahan in which he claimed the "Balance of work completed" (the "26 July Payment Claim"). The balance due was claimed to be \$93,884.50, comprising the sum of \$85,349.55 plus GST of \$8,534.95.
- 10 The 26 July Payment Claim was enclosed with an email from Counahan to a Mr Gavan O'Connell of Mackie which stated: "Screens were completed yesterday. Final invoice is attached".
- 11 The 26 July Payment Claim was purported to have been made under the Act, in accordance with the requirements of s 14(2)(e) of the Act, being endorsed as such.
- 12 On 7 August 2013, Mackie emailed Counahan enclosing a defects schedule which had previously been issued by the Superintendent on 25 July 2013, notifying Counahan that the works were to be completed before the scheduled close out inspection date of 14 August 2013.
- 13 On 14 August 2013, Counahan received a payment schedule from Mackie in response to the 26 July 2013 payment claim (the "July Payment Schedule"). The July Payment Schedule was purported to be made under s 15 of the Act, being endorsed as such.
- 14 The July Payment Schedule did not allow \$78,340.70 but allowed the balance claimed of the total of \$93,884.50, which was \$15,543.80.

*The 25 August Payment Claim*

- 15 On 25 August 2013, Counahan served what purported to be a final Payment Claim (the "25 August Payment Claim"). The details of this claim are set out below.

- 16 On 11 September 2013, Mackie received a letter from Counahan, purporting to be given under s 18(2) of the Act notifying of Counahan's intention to apply for adjudication of the payment claim dated 25 August 2013. The letter said:

We refer to the above project.

On Monday 26 August 2013, we served on Mackie Pty Ltd a payment claim under the Act for work on the project. We have not received a payment schedule in response to our payment claim. We have not received payment for the whole or any amount as claimed.

We hereby notify Mackie Pty Ltd of our intention to apply for adjudication under the Act in respect of our payment claim of 26 August 2013.

This notice is given pursuant to section 18(2) of the Act. Pursuant to section 18(2)(b) of the Act, Mackie Pty Ltd has 2 business days to provide a payment schedule to us, after which time we may apply for adjudication.

- 17 On 12 September 2013, Mackie served a payment schedule in response to the 25 August 2013 payment claim. The scheduled amount allowed by Mackie for payment was \$16,290.95 excluding GST. The payment schedule was sent with a letter which said:

We are instructed as follows:

On 27 August 2013, Neil Counahan Trading served on Mackie a purported payment claim dated 25 August 2013 ("**the August Payment Claim**") under the *Building and Construction Industry Security of Payments Act 2002 (Vic)* ("**the Act**")

Mackie does not concede that the August Payment Claim is a valid payment claim for the purposes of the Act. In this regard, we note that you previously served a purported payment claim on Mackie constituted by a document entitled "Tax Invoice" numbered 6458 dated 26 July 2013 ("**the July Payment Claim**"). The August Payment Claim seemingly relates to the same subject matter as the July Payment Claim.

However, we are instructed that you have agreed to meet representatives of Mackie early next with a view to discussing and attempting to resolve the matter. We are instructed that you have informed a Mackie representative that you will refrain from bringing any application for adjudication under the Act until this meeting is held (and presuming that a resolution is not achieved).

Notwithstanding the above, given that the August Payment Claim is expressed to be a payment claim under the Act, Mackie is required to comply with the time periods and obligations under the Act. Accordingly, we enclose herewith, by way of service, Mackie's Payment Schedule 5. Service of this Payment Schedule is not to be construed as a concession to the validity of the August Payment Claim.



We otherwise reserve all of Mackie's rights and look forward to the learning of the outcome of the forthcoming meeting.

*Adjudication of the 25 August Payment Claim*

18 On 19 September 2013, Mackie received the adjudication application from Counahan in respect of the 25 August Payment Claim. On 26 September 2013, Mackie received notice that Mr Harry McIver, the Second Defendant, had been appointed as the Adjudicator. On 26 September 2013 Mackie lodged and served on Counahan's lawyers its Adjudication Response. On 1 October 2013, Mackie received an email from Counahan's lawyers, Moores Legal, enclosing a letter, a submission and a further affidavit of Counahan. On 4 October 2013, Mackie provided a submission under s 22(5) of the Act.

19 On 7 October 2013, the Adjudication Determination was provided by the Adjudicator. The Adjudicator determined that of the amount of \$93,257.95 claimed pursuant to the 25 August Payment Claim, the sum of \$92,410.95 including GST was payable by Mackie to Counahan. The due date for payment was determined to be 9 September 2013.

20 There being no payment forthcoming pursuant to the Adjudicator's Determination, on 21 October 2013 an Adjudication Certificate was provided. On 24 October 2013 Counahan's lawyers, Moores Legal, applied to County Court of Victoria for judgment pursuant to s 28R of the Act.

*Procedural History*

21 On 28 October, Mackie applied to the Supreme Court for an order to set aside or quash the Adjudicator's determination of 7 October on the basis that: the Adjudicator had no jurisdiction to make the determination pursuant to the 25 August Payment Claim; the Adjudication Determination was infected by error of law; and further that the Adjudicator had failed to comply with the procedural requirements of the Act.<sup>1</sup>

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<sup>1</sup> Originating Motion in S CI 2013 05607 filed 28 October 2013.

22 On 1 November 2013, Counahan filed a summons in the Supreme Court seeking judgment against Mackie for the amount of \$93,884.50 pursuant to s 12(2) of the Act. This was done in a second and separate proceeding.<sup>2</sup> This claim was suspended by consent orders made 31 October 2013, which restrained Counahan from pursuing judgment for payment or otherwise relying upon the Adjudication Determination until its validity is resolved in these proceedings.

23 In these reasons, as they deal with the proceedings initiated by Mackie which challenge the validity of the Adjudication Determination, Mackie will be referred to as the Plaintiff, and Counahan as the First Defendant. Counahan also advanced submissions that the 26 July Payment Claim was validly served.

### **The Submissions of the Plaintiff**

24 The Plaintiff in the current claim, Mackie, submitted that the Adjudicator had no jurisdiction to make the determination dated 7 October 2013, founded on three grounds, as follows:

#### *Ground of Review 1 - Section 14(2)(c)*

25 The payment claims dated 26 July 2013 and 25 August 2013 did not comply with s 14(2)(c) of the Act, as they did not identify the construction work to which each payment claim related.

26 Section 14(2) of the Act provides in relation to a payment claim made under the Act:

- (2) A payment claim—
  - (a) must be in the relevant prescribed form (if any); and
  - (b) must contain the prescribed information (if any); and
  - (c) must identify the construction work or related goods and services to which the progress payment relates; and
  - (d) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*); and
  - (e) must state that it is made under this Act.

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<sup>2</sup> Proceeding number SCI 2013 05712.

*Ground of Review 2 – Section 14(4)*

- 27 Mackie submitted that the 25 August Payment Claim, upon which the adjudication application was founded, was served more than 3 months after the reference date to which the payment claim related, in contravention of s 14(4) of the Act.

*Ground of Review 3 - Section 14(8)*

- 28 The payment claim dated 25 August 2013, upon which the adjudication application was made, was the second payment claim, in respect of the reference date to which the payment claim related, contrary to s 14(8) of the Act.
- 29 Section 14(8) together with its related s 14(9) provide:
- (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
  - (9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

**The Submissions of the Defendant**

- 30 The Defendant, Counahan opposed the application by the Plaintiff, Mackie, for judicial review of the adjudication determination.
- 31 In the alternative, it submitted that if the Court rules that the payment claim made on 25 August 2013 is invalid for being a second payment claim, then the payment claim served on 26 July 2013 is claimed to be a valid payment claim and Counahan is entitled to payment for that claim.

*Ground of Review 1 - Section 14(2)(c)*

- 32 It was submitted on behalf of Counahan that in *Seabay Properties v Galvin*<sup>3</sup> the Court held that the purposes of the requirement to identify the construction work the subject of the claim is to:
- (a) enable a respondent to a payment claim to consider and respond to it;
  - (b) to define any issues in dispute between the parties.

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<sup>3</sup> *Seabay Properties v Galvin* [2011] VSC 183.

33 However, in the present case, the 25 August Payment Claim was said to be a “final claim”.

34 It was submitted that the document on its face made it clear that the construction work to which the claim related was for “all works”. A reasonable builder, with knowledge of the project, it was put, would have no difficulty understanding what work was being claimed, ie “all of the work was being claimed”.

35 Counahan pointed out that Mackie had previously issued a payment schedule to a similar claim, indicating that it was able to respond to the payment claim, and a further Mackie had provided a payment schedule to the 25 August Payment Claim.

36 For these reasons, it was submitted that this ground should be dismissed.

*Ground of Review 2 – Section 14(4)*

37 In response to Mackie’s submission that the 25 August Payment Claim was made outside of the 3 month period after the reference date to which the payment claim related, provided for under s 14(4) of the Act, Counahan pointed to and relied upon the following matters:

- (a) work was done up to March 2013;
- (b) Mackie requested further work in June 2013;
- (c) Counahan completed the additional work on 25 July 2013;
- (d) the relevant reference date was 26 July 2013.

38 On these facts, on the basis that the 25 August Payment Claim was a final payment claim, Counahan sought to rely upon s 14(5)(b) of the Act in combination with s 9(2)(d)(iii).

39 For these reasons, it was submitted that this ground too should fail, because the 25 August payment Claim, as a final payment claim, was served within 3 months of the relevant reference date, being 26 July 2013.



*Ground of Review 3 - Section 14(8)*

40 It was submitted on behalf of Counahan that if the first payment claim (the 26 July Payment Claim, issued on 26 July 2013) is not valid, then the payment claim of 25 August 2013 is not a second payment claim.

41 It was further submitted that if the 25 August Payment Claim is a second payment claim, Counahan in any event was entitled to serve a further payment claim because the 25 August Payment Claim was a “final claim” pursuant to s 14(7) of the Act.

42 Further, it was put that in the event the Court ruled against Counahan on the above issue, then Counahan is entitled to payment founded on the 26 July Payment Claim, to which no payment schedule was served within 10 business days, pursuant to s 16(2)(a)(i) of the Act.

*Service of the 26 July 2013 Payment Claim by Email*

43 In the light of a challenge by Mackie as to service of the 26 July Payment Claim, Counahan also advanced submissions that it was validly served.

**Ground of Review 1 - Section 14(2)(c)***Legal Analysis – Identification of Construction Work etc.*

44 The Act places the claimant of a payment claim in a privileged position in the sense that it confers rights that go beyond the claimant’s contractual rights.<sup>4</sup> The Act provides a procedure for recovering progress payments. Commencing with s 9(1), an entitlement to a progress payment under the Act is created. Section 14 then provides for the mechanism by which a payment claim may be validly made under the Act.

45 In *Protectavale Pty Ltd v K2K Pty Ltd*.<sup>5</sup> Finkelstein J considered the application of the Act’s predecessor provision, s 14(3)(a),<sup>6</sup> which was materially in the same terms as s 14(2)(c) of the present Act, requiring as it did that “a payment claim – must identify the construction work or related goods and services to which the progress payment

<sup>4</sup> See *Hickory Developments Pty Ltd v Schiavello* [2009] VSC 156 [163], and *Gantley Pty Ltd v Phoenix International Group Pty Ltd* (2010) VSC 106 [30].

<sup>5</sup> *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, [10]-[15] (“*Protectavale*”).

<sup>6</sup> Section 14 was amended to its present form by s 16 of the *Building and Construction Industry Security of Payment (Amendment) Act* 2006, No. 42/2006 and applies to contracts made on or after 30 March 2007.

relates". His Honour made a number of observations as to the requirements of s 14 of the Act.<sup>7</sup>

46 Drawing upon *Protectavale* and subsequent case-law, the requirements of s 14(2) of the Act as to the making of a statutory payment claim may be summarised as follows:

(a) The payment claim is the pivotal document in the procedure established under the Act for recovering progress payments and the other payments contemplated by the Act, being a 'final, single or one-off payment'.<sup>8</sup> It provides a basis for the respondent to the payment claim to reply to the payment claim by providing a payment schedule to the claimant: via s 15; and, if the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim, the claimant may initiate the adjudication process provided under the Act: Division 2 of the Act.<sup>9</sup>

(b) Because at this time no form has been prescribed under s 14(2)(a) and no information has been prescribed under s 14(2)(b), ss 14(2)(c)-(e) prescribe only three formal requirements for a valid payment claim made under the Act. A payment claim –

- (c) must identify the construction work or related goods and services to which the progress payment relates; and
- (d) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*); and
- (e) must state that it is made under the Act.

(c) The operative requirements of s 14(2) are expressed in mandatory terms. Indeed, the requirements of ss 14(2)(c)-(e) comprise some of the basic and essential requirements of the Act. A payment claim will be invalid if it fails to comply with these requirements.<sup>10</sup>

<sup>7</sup> *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, [10]-[15].

<sup>8</sup> See for example: ss 14(4)(5)(6) & (7) of the Act.

<sup>9</sup> *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 [39].

<sup>10</sup> *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 10, [45].

This is not an unreasonable burden for an applicant who is seeking to obtain the benefits of the statute in aid of payment of contractual entitlements.

(d) The test to be applied as to whether the operative requirements of s 14(2) have been satisfied is an objective one, in the sense that it must be clear from the contents of the document that it contains the required information, when those contents are properly considered in their context (namely a context in which payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment).<sup>11</sup>

(e) The approach to considering compliance with s 14(2) should not be unduly technical or critical and the requirements should be applied in a commonsense practical manner.<sup>12</sup> It is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively, that is from the perspective of a reasonable party who is in the position of then recipient. In evaluating the sufficiency of the information provided in the payment claim, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.<sup>13</sup>

(f) Nevertheless, reasonable specificity in the payment claim is required for two principal purposes:

- (i) to enable a respondent to a payment claim to consider and respond to it, either by accepting the claim in full or in part, or rejecting the claim totally; and
- (ii) to define the issues in dispute between the parties which the adjudicator is to resolve, and to assist an adjudicator, if appointed, to determine the adjudication application.<sup>14</sup>

<sup>11</sup> *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, [10] and the cases cited therein.

<sup>12</sup> *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, [11] and the cases cited therein.

<sup>13</sup> *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 [51].

<sup>14</sup> *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor* [2009] VSC 156, [56]; *Gantley Pty Ltd v*

A payment claim must be sufficiently detailed to fulfill these basic functions.<sup>15</sup>

#### *26 July Payment Claim*

- 47 The 26 July Payment Claim, to my mind, fails to identify the construction work undertaken for which payment is claimed under the Act, either adequately or at all. At no point is there any statement purporting to identify the work carried out since the making of the last payment claim (if any).
- 48 This payment claim, although it contains the necessary statutory endorsement required by s 14(2)(e) that it is made under the Act, merely states as to the description of the work: "Balance of work completed", for which the sum of \$85,349.55 together with GST is claimed, amounting to \$93,884.50 in total.
- 49 This is not expressed to be a final payment claim containing all the necessary adjustments to arrive at a final accounting for the project, a concept which is dealt with in some detail below. It is merely a claim for work which is undefined in all material respects. Even if it could be construed to be a final payment claim, it fails to provide any adequate information as to how the claim was calculated or arrived at.
- 50 It does not fall within the concept of a "final payment claim" for the following additional reason. As noted above, on 7 August 2013 Mackie emailed Counahan enclosing a defects schedule which had previously been issued by the Superintendent on 25 July 2013, notifying Counahan that the works were to be completed before the scheduled close out inspection date of 14 August 2013. It was clear that the works had not been completed by the date when the 26 July Payment Claim was made.
- 51 When the 26 July Payment Claim is considered objectively, as it must be,<sup>16</sup> I am satisfied that it is not a payment claim which is capable of putting the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule.

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*Phoenix International Group Pty Ltd* [2010] VSC 106 [41].

<sup>15</sup> *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 [12] and the cases cited therein.

<sup>16</sup> "The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information": *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 [82].



52 It is accepted that on 14 August 2013, Counahan received the July Payment Schedule from Mackie in response to the 26 July Payment Claim. The July Payment Schedule was purported to be made under s 15 of the Act, being endorsed as such. However, even this schedule noted "Balance of works no description given". Nevertheless, the fact that a payment schedule was provided by Mackie is not sufficient to cure the deficiency in the description of the works which is fatally absent in the 26 July Payment Claim.

53 Accordingly, by reason of this failure, the 26 July Payment Claim does not comply with the mandatory requirement of s 14(2)(c) of the Act, and is not a valid payment claim for the purposes of the Act.

#### *25 August Payment Claim*

54 Under "Claim Details", the 25 August Payment Claim set out the following:

##### **Claim Details**

Contract: For the supply and place of furniture, both loose and workstation, at the Melbourne University ICT Refurbishment Project #C1114 (Levels 3,4,5 and 6) (Trade: Furniture Supply, Ref No. S5308) pursuant to contract formed on or about 30 October 2012.

The Claim: The works are complete. This claim is for all works, being the contract sum less payments and credits to date, calculated as follows:

<b><u>Contract works - Percentage Breakdown</u></b>			
	<b>Contract Value</b>	<b>% Complete</b>	<b>Value of works completed</b>
Level 1	\$ 86,575.00	100%	\$ 86,575.00
Level 2	\$ 42,030.00	100%	\$ 42,030.00
Level 3	\$ 97,165.00	100%	\$ 97,165.00
Level 4	\$ 92,539.00	100%	\$ 92,539.00
<b>Subtotal:</b>	<b>\$ 318,309.00</b>	<b>100%</b>	<b>\$ 318,309.00</b>
<b>plus GST:</b>			<b>\$ 31,830.90</b>
<b>Total contract works complete</b>			<b>\$ 350,139.90</b>

<b><u>Payments</u></b>	
<b>Date / description</b>	<b>Amount</b>
8.11.12	\$ 55,000.00
7.12.12	\$ 70,738.00
Paid direct to supplier	\$ 72,190.55
22.03.13	\$ 58,953.40
<b>Total payments / credits</b>	<b>\$256,881.95</b>

<b>Claimed amount</b>	
	<b>Amount (inc GST)</b>
Contract Sum	\$ 350,139.90
less paid / credited to date:	\$ 256,881.95
Amount of claim:	\$ 93,257.95

The total amount claimed in this payment claim is \$93,257.95 (inc GST).

This is a payment claim under the Building and Construction Industry Security of Payment Act (Vic) 2002.

<b>Subtotal</b>	\$84,779.95
<b>GST</b>	\$ 8,478.00
<b>Total Claimed</b>	<b>\$93,257.95</b>

What is a "Final Payment Claim"?

- 55 The 25 August Payment Claim needs to be considered in its relevant context. A key element of that context lies in whether or not the claim may be considered a "final payment claim" for the purposes of the Act. As noted in *Protectavale*, payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract at hand, the history of the project and any issues which may have arisen between the parties over the course of the project regarding payment. Those matters are all part of the context.<sup>17</sup>
- 56 Section 4 of the Act relevantly defines "payment claim" as meaning a claim as referred to in s 14.<sup>18</sup> This definition confines the formal meaning of this term to that used in Part 3, being that section of the Act which governs the procedure for recovery of progress payments. This is to be distinguished from other claims for payment of invoices and the like which may be made under the provisions of the relevant construction contract.
- 57 The operation of s 14 of the Act in respect of payment claims is in addition to, and subject to the terms of, the relevant construction contract to which the claim relates.<sup>19</sup>

<sup>17</sup> *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 [76].

<sup>18</sup> Section 4 of the Act: **payment claim** means a claim referred to in section 14.

<sup>19</sup> Section 3(4) of the Act provides that "[i]t is intended that this Act does not limit - (a) any other entitlement that a claimant may have under a construction contract; or (b) any other remedy that a claimant may have for recovering that entitlement".

- 58 In the present case the terms of the Supply Agreement and the Tender Breakdown Form, which comprise the Construction Contract between the parties, do not shed light on the precise meaning to be attributed to a “final claim”.
- 59 Prior to 30 March 2007 in its pre-amended form,<sup>20</sup> the Act only conferred an entitlement to recover for a progress payment.<sup>21</sup> Section 4 defined “progress payment” to mean “a payment to which a person is entitled under section 9”. Section 9 created the right to progress payments at particular points in time but did not provide a definition of the expression.<sup>22</sup>
- 60 Following the amendments brought about by the *Building and Construction Industry Security of Payment (Amendment) Act 2006*, No. 42/2006, which applies to contracts made on or after 30 March 2007, including the Construction Contract in the present case, the definition of “progress payment” in s 4 of the amended Act was extended to include a “final payment”, a “single or one-off payment” and a “milestone payment”.
- 61 A “progress payment” is now defined in s 4 of the current Act by reference to a number of criteria, including a “final payment”: progress payment means a payment to which a person is entitled under s 9, and includes (without affecting that entitlement) –
- (a) the final payment for –
    - (i) construction work carried out under a construction contract; or
    - (ii) related goods and services supplied under the contract; or
  - (b) a single or one-off payment for –
    - (i) construction work carried out under a construction contract; or
    - (ii) related goods and services supplied under the contract; or
  - (c) a payment that is based on an event or date (known in the building and construction industry as a “milestone payment”)

<sup>20</sup> See the *Building and Construction Industry Security of Payment Act 2002* as it was prior to 30 March 2007 as Act No. 15/2002.

<sup>21</sup> *Jemzone Pty Ltd v Tryton Pty Ltd* (2002) 42 ACSR 49; *De Martin & Gasparini Pty Ltd v Energy Australia* (2002) 55 NSWLR 590-591.

<sup>22</sup> See *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, [16].

62 Section 14(5) of the Act now provides a regime for the service of payment claims in the following terms:

- (5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within —
  - (a) the period determined by or in accordance with the terms of the construction contract; or
  - (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

[Underlined for emphasis]

63 Sub-sections 14(6) and (7) of the Act provide:

- (6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.
- (7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if-
  - (a) a claim for the payment of that amount has been made in respect of that payment under the contract; and
  - (b) that amount was not paid by the due date under the contract for the payment to which the claim relates.

64 However, the terminology of “final payment” as it is employed in s 4, and “final ... payment” as used in s 14, is not defined in the Act. The meaning of the phrase “final payment” must be divined by reference to ordinary language as commonly used in the building and construction industry and in general usage.

65 The final payment in the course of a construction contract serves a particular purpose in the legal relationship between the parties. A “final payment”, as that phrase is used in construction contracts and in ordinary language, is generally the last payment from the owner to the contractor of the entire unpaid balance of the contract sum as adjusted by any adjustments made, and if necessary approved, under the relevant construction contract. Generally, a claim for such payment may be properly made when everything required of the contractor under a construction contract has been fulfilled and he is discharged from all contractual obligations. In the usual case a final



payment claim is properly made when the works have achieved the stage of “Practical Completion”, that is when the works are handed over to the principal and are reasonably fit for the use for which they were designed.

66 This construction accords with the observations of Finkelstein J in *Protectavale*, where his Honour contrasted claims for “progress payments” with “final payment claims” in the following passage:<sup>23</sup>

Progress payments are effectively payments by instalments or periodic payments made over the life of the contract for construction work already completed. A final payment claim may be defined as a "final balancing of account between the contracting parties" (*Jemzone Pty Ltd v Tryton Pty Ltd* (2002) 42 ACSR 49 at 49) or "simply the last of the payment claims" (*Southern Region Pty Ltd v State of Victoria (No 3)* [2001] VSC 436 [32]). In substance it is a claim for a payment which, when made, will discharge the principal from further obligations to pay money under the construction contract.

67 Sweet and Schneier, in their construction law text *Legal Aspects of Architecture, Engineering and the Construction Process*<sup>24</sup> write to similar effect. They observe that ideally, final payment would signal the amicable end of the relationship between the owner and contractor (or, similarly, contractor and sub-contractor).<sup>25</sup> A final payment may also signal completion, a final accounting between the parties of costs or claimed amounts and importantly, can provide a marker for a release from future claims in relation to that work.

68 In situations where the end of the relationship is not necessarily characterised by Sweet and Schneier’s amicable ideal, the final payment must also serve as a signpost demarcating the scope of the dispute over the claimed amounts and the catalyst triggering recourse to arbitration in respect of them.

69 Thus, a final payment claim must be identifiable as the delineation between ongoing obligations and the termination of obligations, *in toto*, in respect of the claimed work. Such a final claim may take account of unpaid claims in respect of previous work as

<sup>23</sup> *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 [17].

<sup>24</sup> Sweet, Justin and Schneier, Mark, *Legal Aspects of Architecture, Engineering and the Construction Process* 9<sup>th</sup> ed, (Cengage Learning 2013).

<sup>25</sup> Sweet, Justin and Schneier, Mark, *Legal Aspects of Architecture, Engineering and the Construction Process* 9<sup>th</sup> ed, (Cengage Learning 2013) 541.

permitted by s 14(9),<sup>26</sup> by virtue of its being a claim which will have the effect of acquitting all previously outstanding obligations once it is paid.

*Statutory Requirements for a "Final Payment Claim"*

70 The objective requirements for formal validity of a "final payment claim" are shared with the requirements relevant to progress payment claims. These are both qualitative and procedural in nature.

71 Clearly, the threshold requirements in ss 14(2)(d)-(e) must be met. A valid "final payment claim" must contain these basic formal identifiers.

72 Pursuant to s 14(2)(d), a final payment claim must state the exact amount claimed, in sufficient detail to allow the other party to produce a payment schedule in respect of it. That is to say, it "must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule".<sup>27</sup>

73 Pursuant to s 14(2)(e), a final payment claim must also purport to be a claim made under the Act in order to have the character of a valid statutory claim which engages for the claimant the additional rights granted under the Act. A communication which may make a claim for final payment, but does not purport to be made under the Act, is not a valid final payment claim under the Act.

74 As far as the qualitative considerations embodied in s 14(2)(c), it is sufficient if the construction work (or related goods and services) to which a final payment claim relates is defined at least in the following manner:

- A statement (express or implied) that the claim is a final payment claim;
- A statement (express or implied) that the works under the construction contract are complete; and

<sup>26</sup> Which permits the inclusion in a payment claim of an amount that has been the subject of a previous claim, if the amount has not been paid.

<sup>27</sup> *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462, 477; *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, [18]-[21].

- A statement of account which sets out with sufficient clarity precisely what is claimed, and how the claim has been calculated or arrived at.

75 This may be contrasted with a payment claim made in respect of a progress payment, where it will be necessary to identify the construction work (or related goods and services) to which the progress claim relates, defined at least by reference to the item or items of work or categories of work done, and quantifying sufficiently the amount of work done for which payment is claimed, so as to differentiate the work claimed for from previous progress claims made (and from further progress claims to be made in the future) and enable valuation of the work to be undertaken by the respondent for the purposes of preparing a payment schedule pursuant to s 15 and by an adjudicator (if appointed) in undertaking a determination pursuant to s 23(1) of the Act.

*Whether the 25 August Payment Claim a "Final Payment Claim"*

76 Consideration of the context is relevant in identifying and determining whether a claim is a "final claim". This may be done by examining a given series of claims or chain of invoices which refer to moneys owing in respect of work done. Of particular relevance in the present case is the history of the project and the issues which arose between the parties regarding payment.

77 In response to the claim which was issued by Counahan dated 26 July 2013, Mackie issued a payment schedule under s 15 of the Act, which noted some defects, disputes some of the amounts claimed, adjusts the balance owing and also purports to describe the payment claim issued by Counahan as "balance for works, no description given".

78 This exchange demonstrates a number of contextual indicators of "non-finality" at that stage evidenced by a number of items of remaining work to be completed. This lends support to the 26 July Payment Claim not being a final payment claim. The context also leads to the conclusion that the 25 August Claim is in fact a final payment claim which was issued in respect of the totality of the work, once the rectification of defects and other outstanding matters had been addressed.

79 The text of the 25 August Payment Claim lends further support to it being a final payment claim. The invoice claims that the “works are complete” and that this claim is for “all works, being the contract sum less payments and credits to date”, calculated in accordance with the sums set out in the table which followed, and which was reproduced above.<sup>28</sup>

80 The contract works are broken down into the 4 levels of the building where the goods were supplied and installed. It is claimed that the work done on each level has been completed to 100%. A “contract sum” is provided in respect of each level which totals \$318,309.00. GST is added to this figure, resulting in the total contract sum of \$350,139.90.

81 For these reasons, I find that the 25 August Payment Claim was a final payment claim.

*Does the 25 August Payment Claim Satisfy s 14?*

82 The question then arises as to whether the description of the works contained in the 25 August Payment Claim satisfies the requirements of s 14(2)(c) of the Act.

83 The invoice comprising the 25 August Payment Claim calculates the amount claimed to be due by taking the contract sum and making a number of adjustments.

84 Four payments have been identified and specified resulting in total payments claimed to be made of \$256,881.95. When this figure is deducted from the total contract sum, the balance claimed to be due under the 25 August Payment Claim is \$93,257.95, which includes GST. All this is made plain in the payment claim.

85 The 25 August Payment Claim also includes a short description of the done under the construction contract, being: “For the supply and place of furniture, both loose and workstation, at the Melbourne University ICT Refurbishment Project #C1114 (Levels 3,4,5 and 6) (Trade: Furniture Supply, Ref No. S5308) pursuant to contract formed on or about 30 October 2012”.

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<sup>28</sup> See the table reproduced at [54], above.



86 To my mind, the 25 August Payment Claim, being a final payment claim, does contain sufficient detail for the purposes of a final payment claim to satisfy the requirement of s 14(2)(c) of the Act.

87 The work to which this invoice relates is the balance of the work done to complete the project. The work earlier completed is identified in a general way by reference to the sums already paid which, by clear inference, are referable to work already done. Although the payment claim does not specifically describe by item or category the work done for which payment is claimed, in my opinion, in contrast to the usual type of payment claim which is made during the progress of the works, this level of specificity is not required in a claim for "final payment".

88 In this case it is clearly possible to determine the basis of the claim for \$93,257.95 which comprises the 25 August Payment Claim, sufficient for the recipient to prepare a payment schedule, and sufficient for any appointed adjudicator to identify the outstanding issues and make the necessary determination of the sum due in the light of the material provided in the course of any adjudication.

89 For these reasons, there has been no failure to comply with s 14 of the Act in respect of the 25 August Payment Claim, and it remains a valid statutory claim in the nature of a final payment claim.

90 Accordingly, Ground 1 of Review must fail.

**Ground of Review 2 – Section 14(4)**

91 An issue arises under Ground 2 of review as to whether the 25 August Payment Claim was made outside of the 3 month period after the reference date to which the payment claim related provided for under s 14(4) of the Act.

92 Section 14(4) provides:

- (4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within –

- (a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or
- (b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment –

whichever is the later.

93 However, s 14(4) does not apply to a payment claim in respect of a progress payment that is a final payment.

94 Section 14(5) provides the relevant period of time limitation. This sub-section provides:

- (5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within –
  - (a) the period determined by or in accordance with the terms of the construction contract; or
  - (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

95 The reference date referred to in s 14(5) is specified under s 9(2) in the following terms:

- (2) In this section, "reference date", in relation to a construction contract, means –
  - (a) a date determined by or in accordance with the terms of the contract as –
    - (i) a date on which a claim for a progress payment may be made; or
    - (ii) a date by reference to which the amount of a progress payment is to be calculated –

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

- (b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after –

- (i) construction work was first carried out under the contract; or
- (ii) related goods and services were first supplied under the contract; or
- (c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that –
  - (i) construction work was last carried out under the contract; or
  - (ii) related goods and services were last supplied under the contract; or
- (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following –
  - (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
  - (ii) the issue under the contract of a certificate specifying the final amount payable under the contract *a final certificate* ; or
  - (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that –
    - (A) construction work was last carried out under the contract; or
    - (B) related goods and services were last supplied under the contract.

96 I find the following facts of relevance to Ground 2:

- (a) work was done on the Project up to March 2013;
- (b) Mackie requested further work in June 2013;
- (c) Counahan completed the additional work on 25 July 2013 when on that day the screens were installed by Counahan, which was the day that construction work was last carried out under the Construction Contract.

(d) being a final payment claim the relevant reference date for the final payment claim was therefore the date immediately following 25 July 2013, that is 26 July 2013.

97 On these facts, Counahan is able to rely upon s 14(5)(b) of the Act in combination with s 9(2)(d)(iii).

98 For these reasons, this ground of review too must fail, because the 25 August Payment Claim, a final payment claim, was served within 3 months of the relevant reference date, being 26 July 2013.

**Ground of Review 3 - Section 14(8)**

99 Mackie submitted that the Adjudicator had no jurisdiction to make the relevant determination dated 7 October 2013 because,<sup>29</sup> among other grounds, the 25 August Payment Claim, upon which the adjudication application was made, was the second payment claim in respect of the reference date to which the payment claim related (26 July 2013), contrary to s 14(8) of the Act.

100 Section 14(8) and its related s 14(9) provide:

- (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
- (9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

101 The short answer to this ground of review is that the 26 July Payment Claim, as has earlier been found, is not a valid payment claim made under the Act. Accordingly, s 14(8) has no application to the 25 August Payment Claim, which has been found to have been validly made. In short, the 25 August Payment Claim is not a second payment claim in respect of the same reference date as the 26 July Payment Claim.

102 This ground of review also fails

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<sup>29</sup> Plaintiff's 3<sup>rd</sup> ground of review.



**Service of the 26 July 2013 Payment Claim by Email**

103 On the question of service of the 26 July Payment Claim by email, it is unnecessary to consider this matter in the light of my finding that, in any event, the 26 July Payment Claim was invalid in that it failed to comply with s 14(2)(c) of the Act.

104 This finding renders any further finding as to whether it was validly served in compliance with the Act irrelevant.

**Orders**

105 I will make the following orders:

1. The proceeding be dismissed.

106 I will hear the parties on costs and on any further orders which should be made in the second proceeding.<sup>30</sup>

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<sup>30</sup> Proceeding number SCI 2013 05712.