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Construction Alert

Privilege and the Adjudication Process

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The Victorian Supreme Court has held in its decision *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 477 handed down on 23 September 2011, that litigation privilege attaches to documents prepared for the purposes of the adjudication process under the *Building and Construction Industry Security of Payment Act 2002* (Vic).

Background

Hue Boutique Living Pty Ltd ('**Hue**') engaged Dura (Australia) Constructions Pty Ltd ('**Dura**') to build residential apartments on its land. Contractual disputes arose, which are set to be determined in a trial at a later date. The instant hearing was held to determine, *inter alia*, whether Dura was entitled to inspect the documents which it had subpoenaed and which were produced to the Court, comprising communications between Hue's project consultants and solicitors.

Section 119 of the *Evidence Act 2008* (Vic) ('**Evidence Act**') confers privilege on documents produced for the dominant purpose of providing professional legal services relating to an actual or contemplated Australian proceeding. The Evidence Act defines an 'Australian proceeding' as one taking place in an Australian court.

Decision

In determining whether the documents prepared for the purposes of adjudication under the Building and *Construction Industry Security of Payment Act 2002* (Vic) ('**SOPA**') attracted litigation privilege, His Honour Justice Macaulay emphasised the relationship between the parties at the time the documents the subject of claimed litigation privilege were generated, finding that the parties were 'engaged in clear conflict' on the basis of their litigious interaction and engagement of separate legal representation.

In further promotion of the distinct nature of the adjudication process under SOPA, Justice Macaulay highlighted that the legislation operates neither to affect parties' contractual rights, nor prejudice claims instigated in a court or tribunal.

His Honour applied the last of the three alternative definitions of 'Australian Court' in the Evidence Act to agree with Dura's submissions that adjudicators do not constitute an 'Australian Court' (and therefore do not preside over 'Australian proceedings') on the basis that they are 'not bound to apply the laws of evidence.'

Justice Macaulay went on, however, to adopt a wide interpretation of the words 'hear, receive and examine evidence' employed as the second alternative definition of 'Australian Court', and construe it such that adjudication did in fact fall within the ambit of the phrase.

His Honour stated: 'The adjudication occurs in a patently adversarial setting,' referring to the presentation of documentary evidence and written submissions in the adjudicative process, the result of which is a binding and legally enforceable decision (pending subsequent court orders). His Honour buttressed this reasoning with the importance of 'preserving confidentiality of communications' for the purposes of providing legal services to participants in adjudication, consistently with the Evidence Act's objectives of fairness.

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Conclusion

Adjudication under the Security of Payments legislation in Australian states necessarily imports the concept of adversarial processes, or at a minimum, the contemplation thereof. This decision is likely to be followed across Australian states which have enacted the uniform evidence acts, this legislation minimising the effect of jurisdictional variations in statutes' wording.

The decision will likely be persuasive in Australian States sourcing litigation privilege from the common law. In Queensland, for example, this privilege is both a common law right and a rule of evidence, the 'dominant purpose' threshold test for which mirrors that in other states' legislation.

Similarly to SOPA, section 5 of the *Building and Construction Industry Payments Act 2004* (Qld) outlines that the adjudication process resolves conflict on a basis separate and distinct from that prescribed in the contract. This, coupled with the formalities required in order to implement the adjudication process in Queensland, is consistent with the adversarial character of adjudication under SOPA to which Justice Macaulay alluded.

In New South Wales, the *Evidence Act 1995* (NSW) operates as part of the uniform evidence legislation. Section 3 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) states that the rights it statutorily confers do not derogate from those enforced contractually or otherwise. This, in conjunction with the formal adjudication process mandated by the legislation, indicate that the decision would be followed in New South Wales courts.

Given the parallels between Queensland, New South Wales and Victoria both with respect to the legal tests for litigation privilege and the legislative schemes within which the adjudication processes operate, this Victorian decision will likely be adopted in Queensland and New South Wales.

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