



GREENWAY CHAMBERS

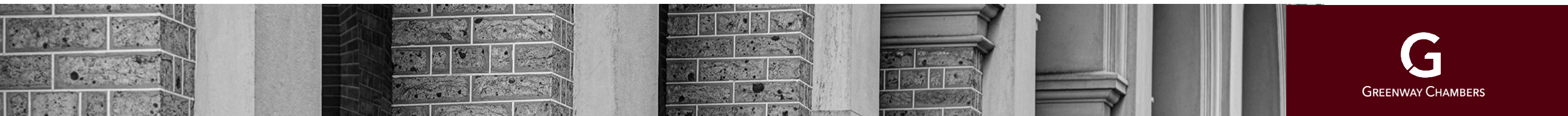
2023 – A year in review of construction law

Frank Hicks SC and Brienna Anderson

The Building Legislation Amendment Act 2023

Legislation effecting changes to various statutes

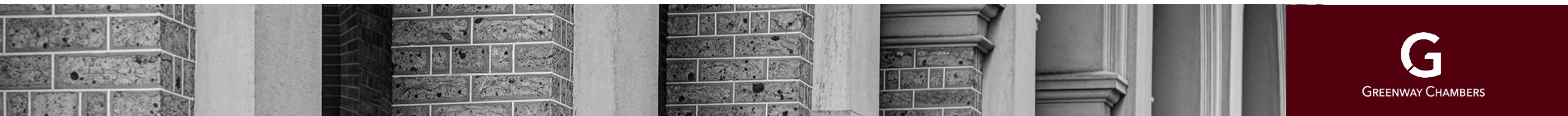
1. Passed on 21 November 2023 and assented on 11 December 2023.
2. Significant changes, among many:
3. Introduces Part 3B to the Home Building Act, which authorises the appointment of an inspector and empowers the Secretary to make rectification orders.
4. Authorises the Secretary to issue stop work orders to a developer (new s.129 of the Home Building Act).



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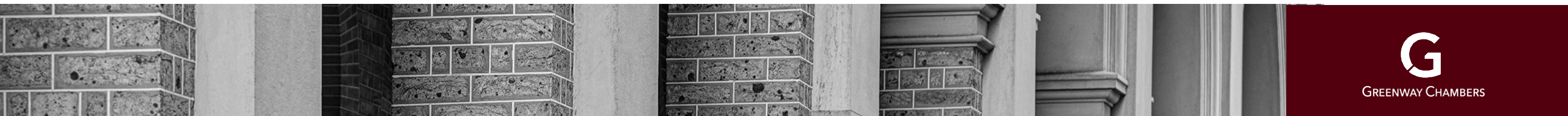
1. Introduces Part 2A to the Building Products (Safety) Act.
2. This provides for a statutory regime as to the “chain of responsibility” in respect of a building product.
3. A person may have multiple or concurrent duties in respect of a building product.
4. Stipulates the duties of a person in the chain of responsibility and the standards required for discharge of the duty (s.8D(1)).
5. Sets of the “risk management factors” which a person must take into account in the discharge of the duty (s.8D(2)).



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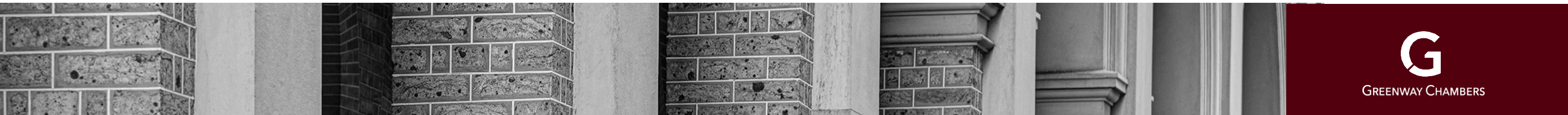
1. Duty to ensure conforming products (s.8E).
2. Duty to provide information (s.8F and s.8G).
3. Duty to notify the Secretary of non-compliance or safety risk (s.8H).
4. Duties in relation to a building product recall (s.8I).
5. Provisions for a voluntary recall.



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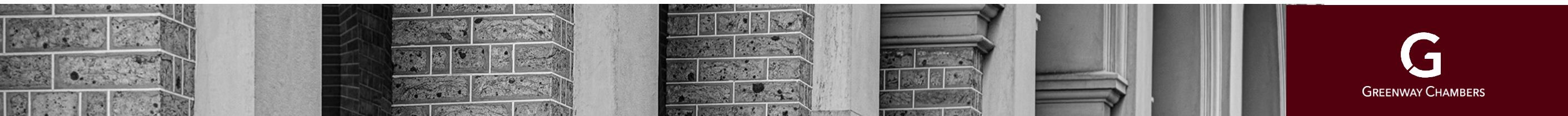
1. Part 3 – Building Product Safety Notices, which may be
 - a. a Building Product Warning (Div 2).
 - b. a Building Product Supply Ban (Div 3).
 - c. a Building Product Use Ban (Div 4).
 - d. a Building Product Recall (Div 5).
2. Where any Safety Notice is issued, the Secretary may require that persons in the chain of responsibility give specified information to other specified persons (Div 6).
3. The issue of a Safety Notice may give rise to a series of offences (Div 7).



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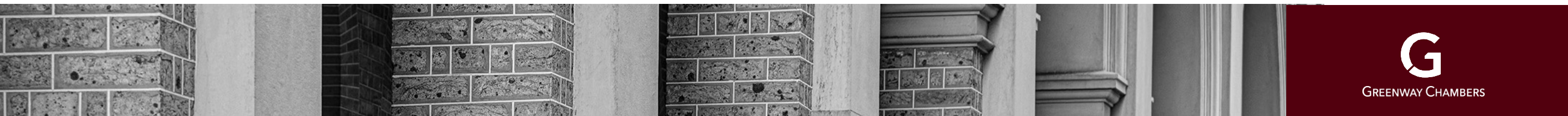
1. Codifies the power of the Secretary to obtain trading prohibitions where a person has, in trade or commerce, engaged in unlawful conduct, being a contravention of the Building Products (Safety) Act.
2. Show Cause Notice (s.41B).
3. Application by the Secretary to the NSW Supreme Court for a trading prohibition order (s.41C).
4. The order may be made where the Court is satisfied that the person is likely to engage again, or continue to engage in unlawful conduct (s.41C(3)).
5. The Court may also order compensation (s.41C(5)).



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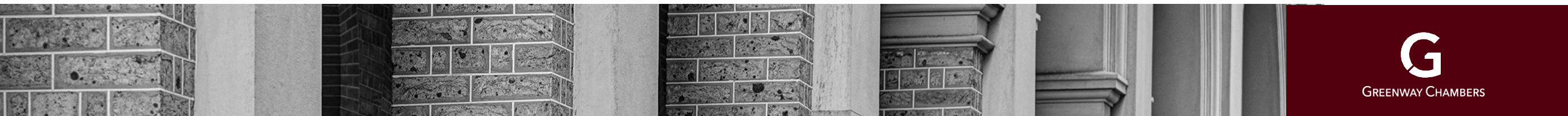
1. The heading of Part 7 is changed from “Investigative Powers” to “Powers”.
2. New s.42 as to purposes for which functions may be exercised.
3. Introduces Part 7, Div 2A, which empowers an authorised officer to give a Building Product Direction, which:
 - a. may be of wide scope (s.46B(2));
 - b. may be given orally or in writing (s.46B(3)), although must be confirmed in writing within 7 days if given orally and not complied with;
 - c. remains in force for 90 days, unless revoked earlier (s.46B(4)), and may be extended (s.46E).
4. Consequences of failing to comply (s.46D).



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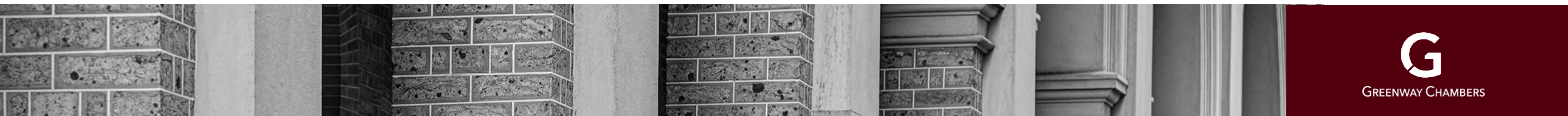
1. Introduces Part 7, Div 4, Subdivision 2, which sets out a regime for the seizure and forfeiture of a building product.
2. Seizure may occur where an authorised officer believes on reasonable grounds that:
 - a. a non-compliance risk exists in relation to the product;
 - b. a safety risk exists in relation to the intended use of the product;
 - c. seizure is necessary to determine whether a risk exists;
 - d. an offence under the Building Product (Safety) Act has been committed in relation to the product.
3. Provisions for orders and forfeiture.



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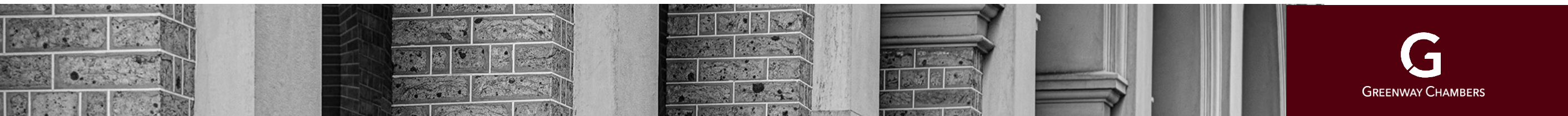
1. Other changes introduced by the Amendment Act.
2. Decennial insurance under the Strata Schemes Management Act and the Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020.
3. The Secretary is granted the power suspend the registration of a building certifier or a registered practitioner upon service of a Show Cause Notice under the Building and Development Certifiers Act or the Design and Building Practitioners Act.



Owners SP84674 v Pafburn Pty Ltd

The statutory duty of care and apportionable liability

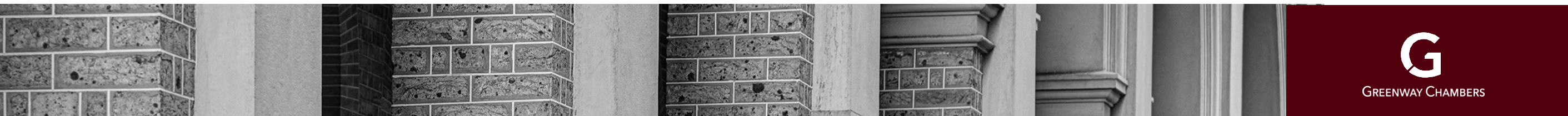
1. [2023] NSWCA 301
2. The duty of care in s.37 of the DBP Act is non-delegable by operation of s.39, this excludes, by necessary implication, the apportionment provisions of Part 4 of the *Civil Liability Act*.
3. A breach of the duty in s.37 of the DBP Act is actionable at the suit of the person who suffers loss as a consequence.
4. The duty of the builder cannot be delegated and s.5Q of the Civil Liability Act applies such that the builder is vicariously liable for the breaches of its contractors, trades, and suppliers.



A-Civil Aust Pty Ltd v Ceerose Pty Ltd

Security of Payment Act, insolvency, and production of documents

1. [2023] NSWCA 144
2. The risk of insolvency lies with the party who is to make payment under the Security of Payment Act.
3. The burden for a party seeking a stay of grounds of insolvency is heavy.
4. The party alleged to be insolvent bears no onus.
5. The party alleging insolvency is not entitled to use the compulsory processes of the Court to conduct wide-ranging enquiries into the solvency of the party against which a stay is sought.



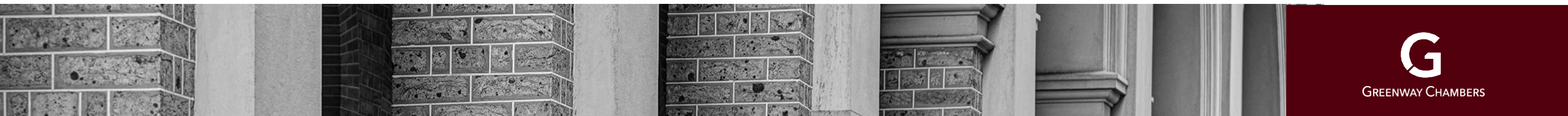
Ceeroose Pty Ltd v A-Civil Aust Pty Ltd

Security of Payment Act, jurisdictional error, severance under

§.32A

1. [2023] NSWCA 215.

2. The adjudicator's duty to consider.
3. The adjudicator is not obliged to investigate the "true merits" but to determine the issues joined by the claim and schedule. The respondent can only rely on grounds indicated in the payment schedule.
4. If no reason for resisting payment is stated, there is no jurisdictional error to award the payment claimed without further investigation as there is no relevant dispute for the adjudicator to consider.

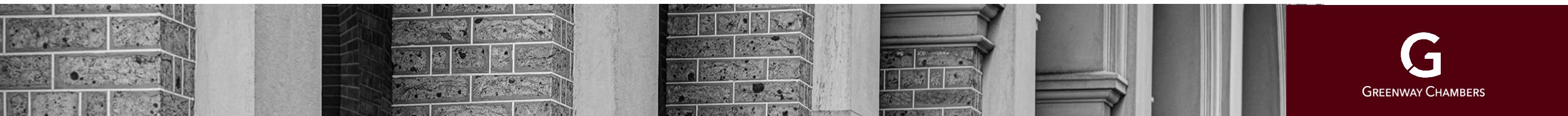


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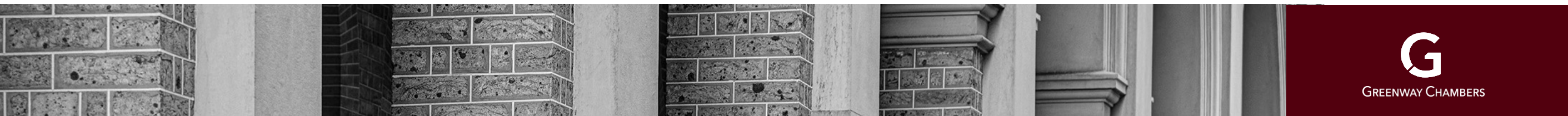
1. The Court, when exercising the power in s.32A(2), must identify which parts of an adjudicator's determination are to be confirmed and which parts are to be severed and set aside as affected by jurisdictional error.
2. The correct approach is to sever and set aside those parts of the adjudication concerning whatever component of payment was in dispute, and the adjudication should be confirmed insofar as it allowed amounts that the respondent agreed or did not dispute were payable.
3. The "decision" referred to be set aside or confirmed under s.32A is as to the amount of the progress payment, the due date and interest. The power does not concern the adjudicator's reasons.



Demex Pty Ltd v McNab Building Services

Security of Payment Act, jurisdictional error

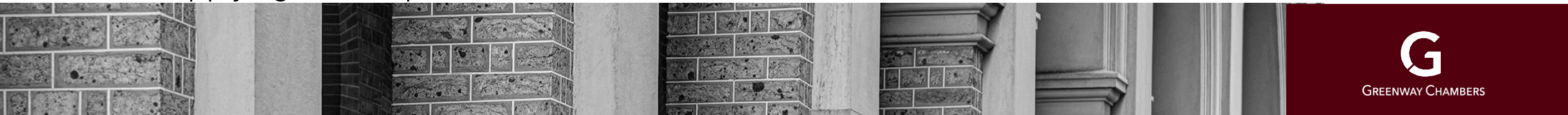
1. [2023] NSWCA 261.
2. Only if there has been a substantial denial of procedural fairness by an adjudicator will there be jurisdictional error.
3. This usually requires: (A) a significant departure from ordinary requirements of procedural fairness; and (B) that the departure has caused substantial practical injustice.
4. The respondent was sufficiently on notice of the matter of calculation of the claim to indicate it was disputed and to address it, but did not do so.
5. While the adjudicator reached a conclusion on grounds neither party advanced, as this was only “confirmatory” there was no substantial practical injustice.



Forte Sydney Development v Forte Sydney

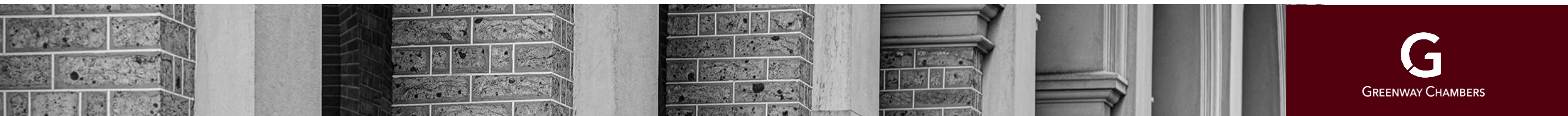
Security of Payment Act, injunction preventing adjudication

1. Full Federal Court Appeal - [2024] FCAFC.
2. Appeal from injunction granted preventing the Appellant submitting a payment claim to adjudication where it was dissatisfied with the adjudicator's determination as to entitlement.
3. Found no building contract or arrangement excluded by s.7(3).
4. Appellant not entitled to withdraw and resubmit payment claim if it considers an adjudication determination affected by jurisdictional error. This is a matter for the Court.
5. Further, the authorities establish that the Act was not intended to permit repetitious use of adjudication, applying *Dualcorp v Remo*.



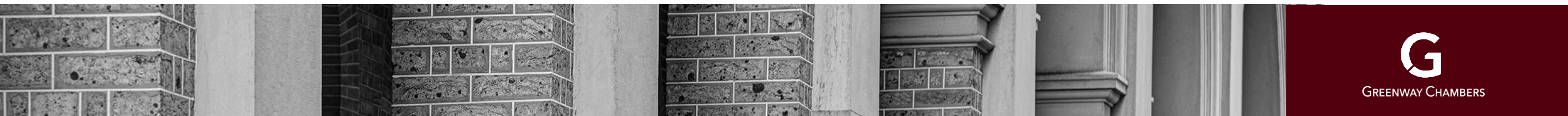
Cases

1. *Parkview Constructions Pty Ltd v The Owners - Strata Plan No 90018* [2023] NSWCA 66
2. *The Owners SP 92450 v JKN Para 1 Pty Limited* [2023] NSWCA 114



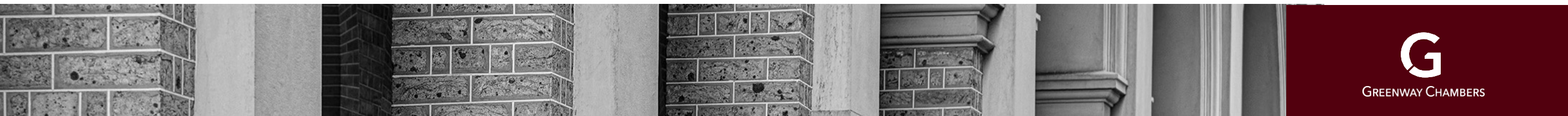
Parkview Constructions Pty Ltd v The Owners – Strata Plan No 90018 [2023] NSWCA 66

1. Ward P, Leeming JA, Simpson AJA
2. Primary Judge – Stevenson J
3. Involved an Owners Corporation amending their claim to include additional defects later in the proceedings
4. Discussion as to whether or not there was one cause of action, or multiple
5. Consideration of the *Onerati* principle



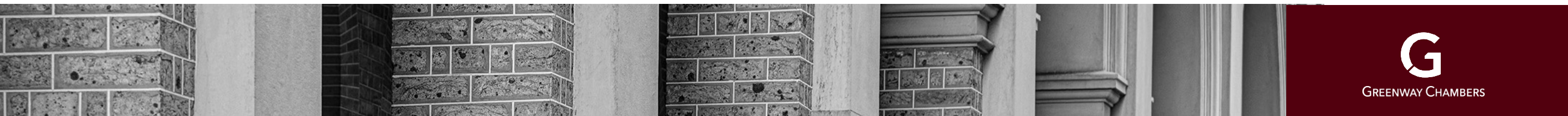
Parkview Constructions Pty Ltd v The Owners – Strata Plan No 90018 [2023] NSWCA 66

1. Held:
 - a. Claims are effectively for breach of contract
 - b. One single cause of action
 - c. Introducing additional defects does not give rise to a new cause of action because the cause of action is for breach of the same contract
2. Note: did not settle the issue in respect of the difference between major and minor defects
3. Why this case is important



Owners SP 92460 v JKN Para 1 Pty Limited [2023] NSWCA 114

1. Gleeson JA, White JA, Brereton JA
2. Primary Judge – Black J
3. Involved non-compliant cladding, the operation of the NCC/BCA and issues about the reasonable and necessary rectification
4. Discussion about the ways to comply with the NCC through either:
 - a. Deemed to satisfy;
 - b. Performance requirements; or
 - c. A combination of both



Building and Construction Update

Owners SP 92460 v JKN Para 1 Pty Limited [2023] NSWCA 114

1. Held:

- a. Building did not satisfy the performance requirements of the BCA because the cladding did not comply with DTS and there was no alternate solution prepared prior to the CC
- b. Burden of proof for establishing loss lies on the claimant
- c. The party in breach has an evidentiary onus of displacing the prima facie rule for assessing damages as the cost of reinstatement, by showing that reinstatement would be unreasonable
- d. Having established that the cladding was non-compliant, the OC was not required to prove that the respondents could not have complied with the BCA with respect to hypothetical alternative solutions

2. Why this case is important

