

# LegalUpdate

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## To what extent are Adjudication Determinations under the *Building and Construction Industry Security of Payments Act 1999* (NSW) subject to review by the Court?

Since our article in April 2010, there have been some further developments on the question of the ability of parties to seek the Supreme Court's assistance to set aside unfavourable determinations made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**the Act**').

Our suspicion that it would only be a matter of time before the decision in *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394 ('**Brodyn**') would be challenged has proved to be correct. In the case of *Chase Oyster Bar v Hamo Industries* [2010] NSWSC 332 ('**Chase**') the applicant sought to argue that *Brodyn* was incorrectly decided in light of the reasoning of the High Court in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 ('**Kirk**'). In *Chase*, Justice McDougall declined to deal with the argument but referred what he described as the "Kirk" point directly to the Court of Appeal for determination.

In the matter in which CBP is acting that was referred to in our previous article, we have applied to have the Court of Appeal hear the argument of our client at the same time as *Chase*.

We can also confirm that the State of New South Wales has intervened in *Chase* and notified its intention to intervene in our client's proceedings. The intervention of the State is reserved for matters of exceptional significance and highlights the importance of these issues to the broader construction and engineering industries.

Further, in our previous article we misstated part of what the High Court said in *Kirk*. In that case the High Court did not suggest that State Legislation which purports to take from a State Supreme Court power to grant relief for non-jurisdictional error, is beyond power. However, interesting arguments are now coming forward about how the Act may expressly or impliedly limit the power of the Supreme Court to review some errors in adjudications, in excess of what the law allows. If these arguments are upheld, the Act may be found by the court to be, at least in part, unconstitutional.

**Antony Riordan**  
**Partner**  
T: 02 8281 4614  
E: [apr@cbp.com.au](mailto:apr@cbp.com.au)

**Timothy Seton**  
**Senior Associate**  
T: 02 8281 4489  
E: [sct@cbp.com.au](mailto:sct@cbp.com.au)

T 61 2 8281 4555  
F 61 2 8281 4567  
E [law@cbp.com.au](mailto:law@cbp.com.au)  
I [www.cbp.com.au](http://www.cbp.com.au)

Level 42, 2 Park Street  
Sydney NSW 2000  
Australia

DX 280 Sydney  
Advoc Asia member

Colin Biggers  
& Paisley

LAWYERS