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EXAMINING THE APPROACHES TO DIMINISH JUDICIAL INTERVENTION IN STATUTORY ADJUDICATION IN AUSTRALIA

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ABSTRACT

In Australia, statutory construction adjudication is a fast payment dispute resolution process designed to keep the cash flowing down the hierarchical contractual chain in construction projects. Its rapid, highly regulatory and temporarily binding nature have led to it being often described as a ‘quick and dirty’ process that delivers ‘rough and ready’ justice. Adjudicators often have to grapple with complex legal issues related to jurisdictional facts and interpretation of contract provisions, though the majority of them are not legally trained. This has often led to a poor quality of adjudication outcome for large and complex payment claims which has, in turn, led to a mounting dissatisfaction due to the many judicial challenges to adjudicators’ determinations seen in recent years. The evolving tension between the object of the security of payment legislation and excessive involvement of the courts has often been the subject of comment by the judiciary. This paper aims to examine the legislative and judicial approaches to support the object of the security of payment legislation to ease cash flow. The paper adopts a desktop study approach whereby evidence is gathered from three primary sources – judicial decisions, academic publications and governmental reports. The paper concludes that there is a need to adopt other measures which can provide more convenient relief to aggrieved parties to an adjudication process, such that the adjudication process is kept away from the courts as far as is possible. Specifically, it is proposed that a well-designed expanded legislative review scheme of allegedly flawed adjudication, based on that provided in the Western Australian legislation, might stand as a promising remedy to eliminate the evolving tension.
INTRODUCTION

Statutory construction adjudication is a fast-track payment dispute resolution process designed to keep the cash flowing down the hierarchical contractual chain on construction projects. Its rapid, highly regulatory and temporarily binding nature have led to it being often described as a ‘quick and dirty’ process that delivers ‘rough and ready’ justice. In the context of disputed payment claims for relatively small amounts of money for construction work carried out, it may be argued that such a nature is both appropriate as well as justified in order to protect a vulnerable class of smaller businesses within the construction industry. However, the eventuating ‘one size fits all’ coverage of the adjudication scheme has, anecdotally, resulted in a mounting swell of complaints and dissatisfaction with adjudication outcome of large and/or more complex cases. Adjudicators of such cases often have to grapple with complex legal issues and large volumes of submissions from the parties within very limited timeframes (typically two weeks) with limited investigative powers. Such dissatisfaction is manifest in the large amount of judicial challenges to adjudicators’ determinations in recent years on grounds related to errors of law.

Since the enactment of legislation in Australia, a significant number of judicial review applications have been filed in the State Supreme Courts in relation to the security of payment legislation. According to the Society of Construction Law Australia (2014, p37), around 80% of adjudication determinations that were challenged in the courts in Victoria, Queensland and NSW were quashed in 2013. The report also identified the commons ground for quashing as breach of natural justice by the adjudicator; want of good faith by the adjudicator; want of jurisdiction of the adjudicator; actual or reasonable apprehension of bias by the adjudicator; and failure by the adjudicator to perform his or her essential role. This may justify the conducted investigations on the causes as well as the increased calls for reform to limit judicial review to reinstate the main intention of the legislation to provide quick and low cost relief to aggrieved parties.

Via a thorough desktop study approach whereby evidence is garnered from three primary sources – judicial decisions, academic publications and governmental reports – this paper aims to examine not only the diverse approaches in judicial review in dealing with determinations but also the main legislative approaches to ease the tension between the SOP object and court involvement.
BROAD APPROACH TO JURISDICTIONAL FACTS

The courts in the East Coast model jurisdictions have adopted a narrow approach when considering jurisdictional facts for the purpose of judicial review, which has led to the quashing of many determinations\(^1\). Accordingly, the Victorian Supreme Court has recognised that, “critically, an adjudicator is given no express power in s 23 of the Victorian Act, or anywhere else in the Act, to decide facts which may go to his or her jurisdiction”\(^2\). Notwithstanding this, however, the Victorian Supreme Court has also highlighted the drawbacks if a broad approach is not required by the legislation to be adopted by the courts when considering essential jurisdictional facts, other than those established in Brodyn, stating:

“[i]f the Act does make the jurisdiction of an adjudicator contingent upon the actual existence of a state of facts, as distinguished from the adjudicator’s determination that the facts do exist to confer jurisdiction, in my opinion the legislation would not work as it was intended to. Unnecessary challenges to the jurisdiction of an adjudicator appointed under the Act would expose the procedures to delay, cost and expense. The very purpose of the Act would be compromised”\(^3\).

His Honour went on to propose:

“For these reasons, in my opinion, in order to serve the purposes of the Act, the intention of the legislation is to confer upon an adjudicator the capacity to determine facts which go to his or her jurisdiction, subject to exceptions of the type to which I have referred. It follows that, in making those determinations, the Act confers on adjudicators jurisdiction to make an incorrect decision in relation to such jurisdictional facts which will not be overturned by certiorari”\(^4\).

In Western Australia, the Supreme Court has been consistent in adopting a broad approach when dealing with jurisdictional facts under section 31(2)(a), considering the adjudicator’s role to be analogous to an inferior court\(^5\). However, in the recent judgment of Laing O’Rourke Australia Construction Pty Ltd v Samsung C & T Corporation\(^6\), Mitchell J, expressed his reservations about the broad sense approach which an adjudicator is empowered to authoritatively to determine.

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\(^1\) See, eg, Sugar Australia Pty Ltd v Southern Ocean Pty Ltd [2013] VSC 535 at [66]; Chase Oyster Bar v Hamo Industries [2010] NSWCA 190.
\(^2\) See Sugar Australia Pty Ltd v Southern Ocean Pty Ltd [2013] VSC 535 at [107].
\(^3\) Grocon Constructors Pty Ltd v Planit Cocciardi Joint-Venture [2009] VSC 426 at [115].
\(^4\) Grocon Constructors Pty Ltd v Planit Cocciardi Joint-Venture [2009] VSC 426 at [116].
\(^5\) See, eg, Wqube Port of Dampier v Philip Loots of Kahlia Nominees Ltd [2014] WASC 331 at [78]; Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd [2012] WASC 304 at [83].
\(^6\) [2015] WASC 237.
The Society of Construction Law Australia (2014, p68) endorsed the broad sense approach and elaborated that:

*The legislation might explicitly provide that an adjudicator must proceed to determine an application for adjudication if the adjudicator is satisfied on reasonable grounds that the application was made within any relevant time limits, rather than providing that the adjudicator must proceed to determine an application for adjudication if the application was (in fact) made within time. Decisions of adjudicators under the former type of provision would still be subject to a level of judicial supervision but would limit the availability of judicial review and discourage applications for judicial review.*

Whilst such recommendation looks promising on its face, it is argued that unless adjudicators are well experienced and legally trained in identifying jurisdictional matters, the risk of judicial review against errant adjudicators will remain high.

**REMITTING JURISDICTIONALLY DEFECTIVE DETERMINATIONS**

Australian case law has been inconsistent regarding the remittal of invalid determinations to the adjudicator. The Australian Capital Territory legislation includes a unique section which gives the Supreme Court express authority to remit adjudication decisions referred to it to the original adjudicator or a new adjudicator appointed by the court, for reconsideration with its opinion on the question of law the subject matter of appeal. If an adjudication decision is remitted, the adjudicator must make the new adjudication decision within ten business days after the day the decision was remitted, or within a time period directed by the Supreme Court. The ACT Supreme court exercised its remittal authority for the first time in *Fulton Hogan Construction Pty Ltd v Brady Marine & Civil Pty Ltd*. In that case, Mossop AsJ found that the adjudicator made a manifest error of law which could substantially affect the legal rights of the parties and held:

"*In my view it is appropriate to remit the adjudication decision to the adjudicator who made the original decision. That is because there will be cost and time efficiencies in having the original decision-maker reconsider the claim. I do not accept that the fact that the adjudicator has been found to have made an error of law is a reason for remitting the decision to a different adjudicator.***"

In Victoria, despite the fact the Victorian Act is silent regarding remittal, the Victorian Supreme Court has nevertheless remitted several cases to

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7 Building and Construction Industry (Security of Payment) Act 2009 (ACT), s 43 6(b).
8 Building and Construction Industry (Security of Payment) Act 2009 (ACT), s 43 (7).
9 [2015] ACTSC 384 at [67] (Mossop AsJ).
the relevant Authorised Nominating Authorities for further remittal to the original adjudicator. In *Maxstra Constructions Pty Ltd v Joseph Gilbert*, Vickery J held that, where an order in the nature of *certiorari* is granted, the usual form of relief is to quash the decision (or part thereof) under review and remit it back to the tribunal for reconsideration according to law. In the recent case of *Plenty Road v Construction Engineering (Aust) (No 2)*, Vickery J examined whether the flawed determination should be remitted to the original adjudicator, or a different one, eventually deciding to remit the case to the original adjudicator to avoid delay in the process, since the original adjudicator was fully familiar with the case. Vickery J further asserted that "minimisation of delay in the decision-making process promotes a central aim of the Act".

In NSW, the Act is also silent as to whether the court has power to remit erroneous determinations. However, an order under section 69 of the Supreme Court Act 1970 (NSW) in the nature of *mandamus* could be made, so that the court may order an adjudicator to reconsider an application and make a determination according to law. This possibility was discussed, *obiter* by McDougall J in *Trysams Pty Limited v Club Constructions (NSW) Pty Ltd*. However, his Honour opined that "there may arise cases where it would be inappropriate to make such an order, and more appropriate to leave the dissatisfied claimant to its rights under s26(2)".

Eventually, the NSW Court of Appeal, in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*, resisted the possibility of remittal. In that case, Macfarlan JA, with whom Tobias AJA agreed, pointed out that, by the time the adjudicator decided the matter after remittal, circumstances might have changed significantly from the time when the adjudicator was considering his original determination (e.g., the payment schedule may be outdated, other defects may have come to light, and so on.). His Honour went on to say that the exemption of adjudicators’ decisions under the Act from the scope of judicial review is a further indication of a legislative desire that the Act’s mechanisms be quick, cheap and simple. Also, any remittal order would necessarily require the adjudicator to make a decision outside the time permitted by section 25(3), unless the parties agreed to an extension of time. Macfarlan JA further opined that:

"[i]f the legislature had adverted to the question of what should happen when a purported but void determination is issued pursuant to an adjudication application, it may have provided that that

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10 See *Maxstra Constructions Pty Ltd v Gilbert t/as AJ Gilbert Concrete* [2013] VSC 243; *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd (No 2)* [2010] VSC 255.
11 [2013] VSC 243 at [72].
12 [2013] VSC 243 at [72].
13 *Plenty Road v Construction Engineering (Aust) (No 2)* [2015] VSC 680 at [31].
14 [2008] NSWSC 399 at [80]-[89].
15 [2008] NSWSC 399 at [90].
16 *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399 at [100-103].
application should remain on foot but be remitted to the original adjudicator”17.

In Queensland, the Court of Appeal, in *Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd*18, followed a similar position to that of Macfarlan JA, in which Muir JA, with whom Gotterson JA and Morrison JA agreed, held that “the provision of such a remedy would be contrary to the quick, cheap and simple processes envisaged by the Act”. In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*19, Muir JA, with whom Holmes JA and Lyons J agreed, stated that no arguments were raised by the parties on whether remittal to the adjudicator was legally possible and concluded that remittal is doubted to be a desirable option for that case. Wallace (2013, p224) also argued that any legislative amendment providing the court with an express power to remit the matter to the adjudicator or another adjudicator is not a preferable outcome.

**SEVERANCE OF INFECTED PART OF DETERMINATION**

Sometimes, a part of the adjudication decision may be infected by a jurisdictional error, which would, generally speaking, invalidate the entire determination. This rule has been criticised as it “produced inconvenient consequences”20. However, in *Emergency Services Superannuation Board v Sundercombe*,21 McDougall J, in an attempt to give indirect effect to an invalid determination, required the respondent to pay the amount unaffected by the error as a condition to set aside the adjudicator's determination. In *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*22, the NSW Court of Appeal held that:

“Such an approach has much to recommend it, particularly, it might be added, if the claimant is otherwise unable to pursue its original payment claim to achieve a second adjudication. However, such conditional relief can itself only be valid if it is designed to achieve a legitimate purpose”.23

In Victoria, it was judicially decided that severance is technically possible as a common law doctrine which helps attain the object of the legislation in some cases24. Wallace (2013, p224) explained the logic of allowing severance from a commercial perspective as “the parties may have already expended significant costs on the adjudication and court processes. If the court is able to sever the affected part of the

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17*Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399 at [97].
18[2013] QCA 386 at [67].
19[2013] QCA 394 at [87].
20*Sunshine Coast Regional Council v Earthpro Pty Ltd* [2015] QSC 168 at [73] (Byrne SJA).
22NSWCA 399 at [52].
23*Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399 at [52].
24*Gantley Pty Ltd v Phenix International Group Pty Ltd* [2010] VSC 106 at [115-116]; *Maxstra Constructions Pty Ltd v Gilbert t/as AJ Gilbert Concrete* [2013] VSC 243 at [77].
adjudication decision then there will be significant cost advantages in doing so”. As a result, Queensland amended its Act in 2014, introducing, *inter alia*, a new section which provides that:

“If, in any proceedings before a court in relation to any matter arising from a construction contract, the court finds that only a part of an adjudicator’s decision under Part 3 is affected by jurisdictional error, the court may identify the part affected by the error and allow the part of the decision not affected by the error to remain binding on the parties to the proceeding”25.

In many other cases, the courts have emphasised that the legislation should be amended so as to permit so much of an adjudicator’s decision as is not affected by jurisdictional error to stand26. Having said that, introducing such a provision within legislation, without sufficient guidance on how a court is to allow part of an adjudication decision, could bring many other difficult questions and valid concerns regarding its practicality and application. For instance, Davenport (2015, p8) argued: “Is a breach of natural justice by an adjudicator a ‘jurisdictional error’ within the meaning of s 100(4)?” However, it has been applied without issue.27

**IMPROVING THE QUALITY OF ADJUDICATION OUTCOME**

In the wake of such inevitable drift in the legislative intent where more adjudication determinations concerning large claims have been challenged successfully in court, the Queensland legislation was substantially amended in December 201428. The amendments include, *inter alia*, allowing longer timeframes for adjudicators, as well as respondents, in complex cases and strict regulations to train and maintain competent adjudicators. To cope with the introduced changes, the legislation imposed mandatory transitional training upon all adjudicators, alongside the “legally oriented” mandatory training course29. That transitional training covers modules including the 2014 amendments, contract law, construction law, making and writing decisions, judicial ethics and natural justice, deciding jurisdiction, valuing work and legal principles. As such it was argued that with the longer timeframes, it becomes more difficult and costly for contractors to obtain progress payment. Appointing adjudicators where the government is party to adjudication, selection criteria of

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25 Building and Construction Industry Payments Act 2004 (Queensland), s 100(4).
26 See, eg, James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd [2011] QSC 345, [57]-[59]; Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd [2012] QSC 373, [61]-[62]; eg, BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (no 2) [2013] QSC 67 at [35]-[37]; Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 at [90-92] (Palmer J); Lanskey Constructions Pty Ltd v Noxequin Pty Ltd [2005] NSWSC 963 at [21-22].
27 See Sunshine Coast Regional Council v Earthpro Pty Ltd [2015] QSC 168, and previous excision prior to the BCIPA being amended is evidenced in Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea’s Concreting [2011] QSC 327.
29 See the Building and Construction Industry Payments Regulation 2004, schedule 1, part 2.
adjudicators, and imposing further training on adjudicators were also criticized for the Registrar’s lack of probity (Davenport, 2015).

Despite these amendments in Queensland, however, the latest monthly report by the Queensland Building and Construction Commission in December 2015 revealed that there have been seven judicial review court applications between December 2014 and November 2015, (comparing to 15 applications in the preceding year), in which the Queensland Supreme Court found that adjudicators committed jurisdictional errors in three cases. The continuation of erroneous determinations indicates that the quality assurance measures may not be sufficient. On the other hand, the number of judicial challenges may further emphasise that many desperate respondents may always seek to knock on the door of judicial review as a gaming tactic in an attempt to delay payment regardless of the quality of adjudication outcome. Having said this, it may be too early to have any certainty as to the effectiveness of the recent amendments to the Queensland legislation.

**INTERNAL REVIEW OF ADJUDICATOR’S ‘DECISION TO DISMISS’**

Under the Australian West Coast model, unlike all other jurisdictions, there is an express right of review by application in respect of an adjudicator’s decision to dismiss without a consideration of the merits of the application on certain grounds. These grounds include that the contract concerned is not a construction contract, the application has not been prepared and served in accordance with the requirements of the Act, and the adjudicator is satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason (See, eg, *Construction Contracts Act 2004* (WA Act), s 31(2)(a)).

This review is carried out by the State Administrative Tribunal (WASAT) in Western Australia (WA) and by the local court in the Northern Territory (NT). The WASAT has jurisdiction to review the adjudicator’s ‘decision to dismiss’ upon application by either party and the reviewed decision can be affirmed, varied, set aside, or sent back to the adjudicator for reconsideration, in accordance with any directions, or recommendations, which the WASAT considers appropriate. If the decision is reversed and remitted, the adjudicator is to make a determination within 14 days after the date upon which the decision was reversed, or any extension of that time consented to by the parties.

Judicially, it was decided that all grounds upon which a review is sought are jurisdictional facts. In *O’Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2011] WASCA 217 [16].

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30 *State Administrative Tribunal Act 2004* (WA), s 29 (3).
31 See *Construction Contracts Act 2004* (WA), section 46 (2).
32 See *Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd* [2011] WASCA 217 [16].
Beech J held that the WASAT also has jurisdiction to review the adjudicator’s ‘decision not to dismiss’. To reach this proposition, Beech J examined the object of the WA Act and found that the review by the WASAT of an adjudicator’s decision not to dismiss was ‘more expeditious’ and more consistent with the scheme of the WA Act than the ‘slower and more cumbersome prerogative relief’. That proposition was eventually overturned by the Court of Appeal in Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd, in which the Court held:

...insofar as the Tribunal would provide a quicker avenue for relief, a right of review to the Tribunal where an application is dismissed is conducive to the statutory purpose of ‘keeping the money flowing’. On the other hand, no evident statutory purpose is served by expediting a review of a ‘decision’ ‘not to dismiss’, with a view to rendering inapplicable the adjudication process facilitated by the Act.

A review by the WASAT involves a hearing de novo on the merits in which material which was not before the decision-maker may be considered. Apparently, there is an inconsistency between the WA Act and a hearing de novo. In Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture, strict limitations have been imposed upon allowing new submissions before the WASAT and it was held: ‘In my view, no new material should be permitted because, if the decision under review is reversed, and the matter referred back to the adjudicator, I consider that the adjudicator must remain bound to decide the matter on the material which was originally before the adjudicator...’

Interestingly, the WA Act, section 46(3) provides that, except as provided as grounds for the limited review, a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed. The WA Supreme Court interpreted this section in Red Ink Homes Pty Ltd v Court, stating that the provision only limits the appeal before the Tribunal, whilst judicial review will still be open for the aggrieved party. Furthermore, section 105 of the WASAT Act provides for an appeal to the Supreme Court from a decision of the WASAT, provided that the Court grants leave to appeal which is limited only on a question of law.

Since the commencement of the WA Act in 2005 until end of June 2015, the WASAT has reviewed 37 decisions of adjudicators dismissing applications without considering the merits. In 25 cases, the adjudicators’
decisions were upheld while, 12 cases (amounting to 37%) were set aside or remitted to the original adjudicator to revisit the original decision to dismiss. Notably, the review applications before the WASAT have been constantly increasing over the years. Table (1) below demonstrates an extract from the relevant annual reports on the operation of the review mechanism from 2008 until 2015.

Table 1 Operation of the review mechanism of adjudicators’ decisions to dismiss in WA

<table>
<thead>
<tr>
<th>Description</th>
<th>Annual review applications by the WASAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of lodged applications</td>
<td>105 172 197 178 208 175 235</td>
</tr>
<tr>
<td>No. of dismissed application by adjudicators for no jurisdiction.</td>
<td>25 57 57 40 74 47 52</td>
</tr>
<tr>
<td>No. of review applications by the WASAT</td>
<td>4 4 3 5 5 7 8</td>
</tr>
<tr>
<td>No. of remittal/set aside cases by the WASAT</td>
<td>0 0 0 2 1 3 2</td>
</tr>
</tbody>
</table>

CONCLUSIONS AND FURTHER RESEARCH

This paper has examined the main legislative and judicial approaches to diminish court involvement in the operation of the SOP legislation. The paper concludes that the examined approaches do not provide effective and practical measures, and there is a need to adopt other pragmatic measures that can provide a more convenient relief to either party aggrieved by the hasty adjudication process. This would help to confine adjudication process away from court and reinstate the object of the security of payment legislation to facilitate cash flow within the construction industry.

Moving forward, a well-designed expanded legislative review scheme of erroneous adjudication decisions on jurisdictional grounds might stand as a more convenient remedy. The lead Author is currently undertaking a further research as part of his PhD study upon the need, features and potential impact of such review mechanism throughout Australia.

REFERENCES


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40 Figures are extracted from the relevant annual reports on the WA Act as released by the Building Commissioner.