Introducing Review Mechanisms into Statutory Construction Adjudication

by

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Submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy

Deakin University

February 2017
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DEDICATION

I dedicate this thesis to *Allah* Almighty my creator, my strong pillar, my source of inspiration, wisdom, knowledge and understanding. *Allah* has always been the source of my strength and determination throughout this study and with his blessings only I have soared. I then dedicate this work to my mother and father whose continual blessings and prayers have accompanied me since I started my career not only this study. Finally, I dedicate this work to my beloved wife *Sarah* who has encouraged me all the way; and to my four children: *Feras, Hisham, Yara* and *Lareen* who have been affected in every way possible by this quest. You all sacrificed a lot in order for me to have this thesis completed in 2.5 years only. My love for you all can never be quantified. May Allah bless you all!
PUBLICATIONS DURING CANDIDATURE

(* denotes included in this thesis)
(Note: Click on the title of publication to access the source)

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Conference proceedings (Peer reviewed)


Government Reports/Submissions


Awards/Achievements during candidature

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Faculty Higher Degree by Research Publication Incentive Award: Issued by Faculty of Science, (awarded three times in 2016), Engineering and Built Environment, Deakin University, 2016.

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ABSTRACT

Statutory adjudication was introduced into the security of payment legislation as a fast-track payment dispute resolution process aiming to facilitate cash flow within the construction contractual chain. However, in recent years, courts have been more willing to intervene in the adjudication process due to poor quality of adjudication outcome, particularly in relation to large and/or complex payment claims. This situation has encouraged aggrieved parties to challenge adjudication determinations by way of judicial review resulting in numerous judicial review applications, particularly in Australia. This has eroded the original object of the security of payment legislation. The mission has been compromised particularly in ensuring that contractors are paid quickly for the work they do on an interim basis. With that, some jurisdictions allow for an express limited right of aggrieved parties to apply for review against erroneous determinations as a way to remedy injustice caused by the speedy adjudication process. The aim of this thesis is to examine whether the Australian statutory adjudication would benefit from introducing a review mechanism, and if so, what would be the guidelines for devising an effective review mechanism. The study adopts a combination of doctrinal legal research and socio-legal research (empirical research) involving 23 interviews with industry experts. The research starts by extensively analysing the effectiveness of the operation of the security of payment laws in Australia. Then, it thoroughly examines the factors affecting the quality of adjudicating complex cases. The study reveals that the lack of full review mechanisms within the security of payment legislation is one of the identified factors leading to poor adjudication outcome and/or excessive judicial intervention. The study draws upon this analysis and evaluates the operation of review mechanisms in various jurisdictions to examine whether or not a legislative review mechanism, should be an essential characteristic of any effective statutory adjudication scheme. The study concludes that an appropriately designed full review mechanism is a pragmatic and effective measure to improve certainty, reinstate disputants’ confidence and diminish judicial intervention. The study identifies some barriers resulting from introducing review mechanisms, namely, additional time and cost, and persistent availability of judicial review. Thus, a set of detailed guidelines for devising an appropriate review mechanism is proposed to counter those barriers and avoid any abuse of process. With regard to time, the guidelines make it
incumbent on respondents to release the undisputed portion of the adjudicated amount to claimants. Also, respondents will be required to pay the disputed portion to claimants against a bank guarantee. If claimants cannot provide a bank guarantee, respondents must pay the disputed portion into a trust account. This requirement will not only improve the flow of cash in a timely manner but also deter respondents from benefiting from the additional time in the adjudication process. also, the review mechanism is devised as a swift process where the total review duration may take 20 to 25 business days in normal cases and 25 to 30 business days in complex cases. Arguably, this is a little price to pay to obtain a reliable and more certain adjudication outcome away from curial proceedings. With regard to cost, the guidelines provide that the review can only be accessed if the adjudicated amount in dispute is $100,000 or more. This monetary threshold will ensure there is sufficient substance in economic terms to make the review process economical and convenient to both parties. Also, review adjudicators should take into account the conduct of the parties (acting unreasonably) in the apportionment of fees and award of legal costs. In addition, review adjudicators can reduce fees of errant original adjudicators. With regard to judicial review, the guidelines make it clear that a party to an adjudication determination may not bring judicial proceedings to set aside an adjudicator’s determination without having first obtained a review determination with respect to the adjudicator’s determination. This requirement is consistent with the observations of the WA Supreme Court in Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd [2011] WASC 172 at [64] (referring to various authorities including the High Court's decision in The Queen v Cook; Ex parte Twigg [1980] HCA 36) that the “availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review.”

The findings of this study, whilst they are very relevant to Australia, can be applied with minor alterations to suit other jurisdictions operating equivalent security of payment legislation. It is hoped that the recommendations of this study will be considered by concerned policy makers and governmental agencies seeking to apply best practices to improve security of payment laws.
DECLARATION FOR AUTHOR CONTRIBUTIONS

Declaration by candidate

Paper number: 1


In the case of paper 1, the nature and extent of my contribution to the work was the following:

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<tr>
<td>Wrote the original draft of the manuscript, and took the lead for all subsequent drafts.</td>
<td>80%</td>
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The following co-authors contributed to the work and the nature and extent of their contribution to the paper, book chapter or book are as follows:

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(1) the above declaration correctly reflects the nature and extent of the candidate’s contribution to this work, and the nature of the contribution of each of the co-authors.
(2) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;

(3) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;

(4) there are no other authors of the publication according to these criteria;

(5) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit.
Declaration by candidate

Paper number: 2


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LIST OF ABBREVIATIONS

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<th>Abbreviation/Term</th>
<th>Definition for this thesis</th>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>ANA</td>
<td>Authorised Nominating Authority</td>
</tr>
<tr>
<td>ACT</td>
<td>Australian Capital Territory</td>
</tr>
<tr>
<td>ACT Act</td>
<td>Building and Construction Industry Security of Payment Act 2009 (ACT)</td>
</tr>
<tr>
<td>ANB</td>
<td>Authorised Nominating Body</td>
</tr>
<tr>
<td>AUS</td>
<td>Australia/Australian</td>
</tr>
<tr>
<td>BCIPA</td>
<td>Building and Construction Industry Payments Act 2004 (Qld)</td>
</tr>
<tr>
<td>ECM</td>
<td>East Coast model which refers to Security of payment legislation in NSW, Victoria, Queensland, ACT, SA and Tasmania</td>
</tr>
<tr>
<td>IAMA</td>
<td>Institute of Arbitrators and Mediators Australia</td>
</tr>
<tr>
<td>NCAT</td>
<td>NSW Civil &amp; Administrative Tribunal</td>
</tr>
<tr>
<td>NSW</td>
<td>New South Wales</td>
</tr>
<tr>
<td>NSW Act</td>
<td>Building and Construction Industry Security of Payment Act 1999 (NSW)</td>
</tr>
<tr>
<td>NT</td>
<td>Northern Territory</td>
</tr>
<tr>
<td>NT Act</td>
<td>Construction Contracts (Security of Payment) Act 2004 (NT)</td>
</tr>
<tr>
<td>QBCC</td>
<td>Queensland Building and Construction Commission</td>
</tr>
<tr>
<td>QCAT</td>
<td>Queensland Civil &amp; Administrative Tribunal</td>
</tr>
<tr>
<td>Qld Act</td>
<td>Building and Construction Industry Payments Act 2004 (Qld)</td>
</tr>
<tr>
<td>SA Act</td>
<td>Building and Construction Industry Security of Payment Act 2009 (SA)</td>
</tr>
<tr>
<td>SAT</td>
<td>State Administrative Tribunal</td>
</tr>
<tr>
<td>SG</td>
<td>Singapore / Singaporean</td>
</tr>
<tr>
<td>SG Act</td>
<td>Building and Construction Industry Security of Payment Act 2004 (Singapore)</td>
</tr>
<tr>
<td>SoCLA</td>
<td>Society of Construction Law Australia</td>
</tr>
<tr>
<td>SOP</td>
<td>Security of Payment</td>
</tr>
<tr>
<td>Tasmanian Act</td>
<td>Building and Construction Industry Security of Payment Act 2009 (Tas)</td>
</tr>
<tr>
<td>UK legislation</td>
<td>Part II of The Housing Grants, Construction and Regeneration Act 1996</td>
</tr>
<tr>
<td>VCAT</td>
<td>Victorian Civil &amp; Administrative Tribunal</td>
</tr>
<tr>
<td>Victorian Act</td>
<td>Building and Construction Industry Security of Payment Act 2002 (Vic)</td>
</tr>
<tr>
<td>WA</td>
<td>Western Australia</td>
</tr>
<tr>
<td>WA Act</td>
<td>Construction Contracts Act 2004 (WA)</td>
</tr>
<tr>
<td>WASAT</td>
<td>State Administrative Tribunal of Western Australia</td>
</tr>
<tr>
<td>---------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>WCM</td>
<td>West Coast model which refers to Security of Payment legislation in Western Australia and Northern Territory</td>
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1. CHAPTER 1: INTRODUCTION

1.1 Introduction and background

In Australia, all six State and two Territory legislatures have enacted Security of Payment (SOP) legislation to address the problem of inadequate measures to ensure that contractors are paid in a timely manner for the work performed in the building and construction industry. In the explanatory statement of the relevant Australian Capital Territory Bill, the reasons behind enacting this regime were well explained:

“Security of payment has been an issue in the building and construction industry over many decades. Several taskforces and the 2003 Cole Royal Commission into the Building and Construction Industry flagged security of payment as a significant industry matter and cited strong anecdotal evidence across all jurisdictions to support the notion that security of payment problems are widespread within the industry. The building and construction industry is particularly vulnerable to security of payment issues because it typically operates under a hierarchical chain of contracts with inherent imbalances in bargaining power. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow, and in some cases, insolvency.”

The Building and Construction Industry Security of Payment Act 1999 (NSW) was assented on 5 October 1999 and commenced on 26 March 2000 following a number of reviews of payment practices in the construction industry. The NSW Act was the first of its kind in Australia. It was a continuation of the State’s attempts to protect small and vulnerable class of contractors after the enactment of the Contractors Debts Act 1997. In the second reading of the relevant Bill, the Minister for Public Works and Services advocated the need of enacting such novel SOP legislation and stated:

“I remind the House that on 15 February the Premier announced the Government’s intention to stamp out the un-Australian practice of not paying contractors for work they undertake on construction. It is all too frequently the

\[\text{Explanatory Statement, Building and Construction Industry (Security of Payment) Bill 2009, The Legislative Assembly for The Australian Capital Territory, Presented by Mr John Hargraves MLA, Minister for Industrial Relations.}\]

case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families. The Government is determined to rid the construction industry of such totally unacceptable practices."

The Minister went on to state:

“The main thrust of this bill is to reform payment behaviour in the construction industry. The bill creates fair and balanced payment standards for construction contracts. The standards include use of progress payments, quick adjudication of disputes over progress payment amounts and provision of security for disputed payments while a dispute is being resolved. The bill will speed up payments by removing incentives to delay.”

Basically, there are two distinct Australian models of SOP legislation. Those models have been classified as East Coast and West Coast models.³ The East Coast model Acts include New South Wales, Queensland, Victoria, South Australia, Tasmania and Australian Capital Territory⁴ and the West Coast model Acts include Northern Territory and Western Australia.⁵ Both models are based on the similar legislation in the United Kingdom (the Housing Grants, Construction and Regeneration Act 1996) that applies in England, Wales and Scotland. Whilst both models aim to provide a speedy dispute resolution mechanism for payment disputes through adjudication, there are key differences between them. The East Coast model Acts provide, in addition to an adjudication scheme, for a highly regulatory statutory payment scheme which runs alongside the contractual payment scheme. The West Coast model Acts are more akin to the UK Act, affording primacy to the contractual payment scheme. The common object of legislation in all States is to facilitate timely payment between contracting

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⁵ The relevant legislation are: Construction Contracts (Security of Payments) Act 2004 (NT) and Construction Contracts Act 2004 (WA).
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parties within the construction and building industry by improving the cash flow down the contractual hierarchy.

Understanding of the object of the SOP legislation helps justify the “pay now, argue later”\(^6\) inherent in the adjudication process. The SOP object is to facilitate cash flow within the contractual chain of construction projects through a rapid adjudication scheme which contrasts with the traditional lengthy, expensive but more comprehensive avenues of litigation and arbitration\(^7\). As such, any delay in enforcing the due payment following an adjudication decision by further litigation hinders the legislative object.

Judicially,\(^8\) it was noted that the intention of the SOP legislation is to resolve payment disputes with minimum of delay as well as minimum of opportunity for court involvement. Also, it was observed that the SOP legislation emphasises speed and informality.\(^9\) Vickery J mentioned the deficiency of the NSW legislation in achieving its object due to the vast amount of judicial review in a very short period of time, and stated: “If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.”\(^10\) In another judgment, the same judge stated: “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.”\(^11\)

There is no doubt that the adjudication process was intended to be a simple and handy vehicle to vulnerable subcontractors and suppliers to quickly and inexpensively recover due payments on an interim basis and avoid the financial burden of engaging experts and lawyers. The Victorian Building Authority emphasised on that intent of the SOP legislation and stated that “it is designed to provide a fast and inexpensive process to recover payments due under a construction contract, without the need for lawyers to become involved.”\(^12\) This would justify the very tight adjudication

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\(^6\) A description originating in the UK but adopted by the courts of Australia, for example John Holland Pty Ltd v Roads and Traffic Authority of New South Wales [2007] NSWCA 140.
\(^7\) See Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [2009] VSC 426 at [33].
\(^8\) Brodyn Pty. Ltd. t/as Time Cost and Quality v Davenport [2004] NSWCA 394 at [51].
\(^9\) Minimax Fire Fighting Systems Pty Ltd v. Bremore Engineering (WA Pty Ltd) [2007] QSC 333 at [20].
\(^10\) Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd [2009] VSC 156 at [46]-[47].
\(^11\) Grocon Constructors Pty Ltd v Planit Cocciai Joint Venture [2009] VSC 426 at [115].
timeframes as well as the relaxed regulation and eligibility criteria of adjudicators set out by the legislatures to serve that purpose.

Under the West Coast model, the SOP legislation has an additional express object of determining the dispute fairly and as rapidly, informally and inexpensively as possible. The design and purpose of the rapid adjudication process was well explained as:

“a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.”

There is a general consensus that the “broad brush” approach of the legislation makes it very much suitable for dealing with simple and small claims disputes. However, in recent years, an increasing number of larger and/or more complex claims has been considered by adjudicators. This was one of the main reasons that led to a major drift in the application of the SOP legislation. This was not the intention of the NSW Act upon which all the subsequent East Coast model legislation were based.

The parties to large payment disputes in adjudication typically invest a lot of resources in the adjudication process, including the engagement of lawyers and technical experts to reinforce their positions. This has the tendency to force the adjudication process to drift away from the intended simple process towards a more complex process that is more akin to curial proceedings involving substantial amounts of legal and technical submissions before adjudicators. Such arrangement provides a major challenge to adjudicators being to reach sound determinations within strict time limit imposed by the legislation which is typically 10 business days. Accordingly, McDougall J noted that: “[the NSW Act] provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving

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14 See the Minister's Second Reading Speech (WA Hansard, 3 March 2004, 275).
very substantial volumes of documents.”\footnote{Chase Oyster Bar v Hamo Industries [2010] NSWCA 190 at [207]-[209].} According to the Society of Construction Law Australia, the courts have lost confidence in the adjudication process after seeing “more and more cases where the quality of the adjudication decision making process has been so poor that the courts have been increasingly willing to intervene.”\footnote{The SOCLA Report, above fn 16, p 38.}

Under the East Coast model, as at the end of 2013 there had been a total of 197 cases challenging the adjudicators’ determinations in the NSW, Queensland and Victorian courts, 48% of which were successful.\footnote{The SOCLA Report, above fn 16, p 37.} In 2013 alone, there had been 22 appeals before courts, 77% of which have been successful and adjudication determinations were set aside. In 2014, the courts in the East Coast model jurisdictions dealt with around 50 applications in relation to adjudication decisions (20 in NSW, 19 in Queensland and three in Victoria, four in Australian Capital Territory, three in South Australia and one in Tasmania).\footnote{The figures are deemed approximate, although being extracted with care from searching in reliable databases, namely, Australasian Legal Information Institute (Austlii) and Judgments and Decisions Enhanced (Jade). Deliberate key words were used such as “name of the legislation” and “adjudication determination/decision.”} This, it is contended, is representative of the evolving dissatisfaction of the parties with the adjudication process.

Under the West Coast model, to the end of June 2015, there had been 47 matters referred to Court, 18 of which (amounting to 38%) have been successful and the adjudicators’ determinations were quashed.\footnote{See Building Commissioner, Annual report (2014-2015), Construction Contracts Act 2004 (WA), page 10; Department of the Attorney-General and Justice, Annual report (2014-2015), Construction Contracts (Security of Payments Act) 2004 (NT).} It is worth mentioning that the lower percentage in WA and NT compared to other Australian States, as addressed above, may be influenced by the existence of the unique review mechanism within the West Coast model legislation that allows an aggrieved adjudication party to apply for a review of an adjudicator’s “decision to dismiss” an adjudication application without making a determination on the merits on the basis of certain grounds\footnote{The WA Act requires an appointed adjudicator to first consider an application against qualifying criteria in the Act that defines a valid claim (s.3) and a payment dispute (s.6). The application must be dismissed if it also fails on any one of further hurdles in s.31(2)(a)(i to iv). The adjudicator is required to consider whether the payment claim comes from a valid construction contract, is served in time and in a prescribed manner and is not too complex to decide within set time limits.} and, therefore, acts as a filtering system to keep many challenges away from the Supreme Court.
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Notwithstanding the provisional “pay now, argue later”24 nature of statutory adjudication, the interim enforcement of adjudication determinations that are perceived as lacking in the quality has many negative ramifications not least of which is a proliferation of judicial challenges to adjudication decisions which results in not only late or non-payment for the claimants but also extra costs to both disputing parties, and a general undermining of faith which the construction industry has in the adjudication process.

The ultimate yardstick by which adjudication quality can be measured is to be found in the legal accuracy – both in terms of procedural and substantive fairness – of adjudication decisions whether such decisions involve a determination on the merits or dismissal for want of jurisdiction. However, recognising that there is a trade-off between fairness and efficiency in dispute resolution,25 this criterion needs to be calibrated in light of the legislative object, being to provide a rapid and interim adjudication process. Thus, it would clearly be absurd to hold adjudication decisions up to as higher level of scrutiny as in arbitration or litigation. However, there surely must be a “quality floor” below which the quality of adjudication decisions must not fall otherwise the overemphasis on efficiency in lieu of fairness would result in a process that the parties would perceive as unfair with the consequence that they are more likely to seek to undermine it.26

Accordingly, the Queensland Act has been significantly amended in 2014. The amended Act established many new features and changes, which have no equivalent elsewhere in Australia, in response to concerns raised by industry stakeholders relating to the unintended consequences which undermined industry confidence in the Act27. The reform is said to be aimed to “reduce regulatory burden and costs associated with adjudication and provide a fairer and more transparent process for the appointment of adjudicators”28 but there is no evidence that this has been achieved. As amended,

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24 In the Australian Judiciary system, this term appeared first in Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 at [96] (Palmer J). Since then, it has repetitively appeared in various court cases related to the security of payment legislation across Australia.
the Act provided a unique dual mechanism retaining the proceedings of the standard payment claims as stated in the original Act with some differences, and introducing a separate mechanism for complex claims.

The amendment classifies all payment claims greater than AUS$750,000 as complex payment claims even when the amount in issue is less than AUS$750,000. The timeframes have been extended for complex claims to 15 business days for both delivery of payment schedule and adjudication response. The timeframe for serving a payment schedule is further extended to 30 business days if the claim is submitted more than 90 days after the relevant reference date.29 The adjudicator can have up to 20 business days to make the “adjudicator’s decision” in respect of a complex payment claim, instead of ten business days in respect of a standard payment claim.30 In addition, the appointment process has been regulated abolishing the role of authorised nominating authorities, replacing that with appointment by a single government registry within the Queensland Building and Construction Commission. Also, the regulation ensures that only senior adjudicators are appointed to deal with complex disputed matters regardless of the value of the payment claim.31

In October 2015, the Tasmanian Government introduced the Building and Construction Industry Security of Payment Amendment Bill 2015 (the Bill) which is yet to be assented. The Bill mainly established a review mechanism for erroneous adjudication determinations at no cost to either party. If the Bill is assented to and becomes an Act, Tasmania will be the only Australian jurisdiction to have a review mechanism on the merits of erroneous determinations. The review mechanism states that an adjudication decision may be referred to the review panel if the decision is “inappropriate or unfair”.32 The Treasurer and Minister for Planning and Local Government, explained the purpose of the review mechanism by saying:33

“Where a decision is prima facie out of step with the intent of the legislation then this expert panel review will provide an alternative which does not involve

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29 Queensland Act, s 18A.
30 See Queensland Act, s 25A (4) & (6).
31 See Adjudicator Grading and Referral Policy 2015, Queensland Building and Construction Commission, p 8
33 Ibid.
costly litigation. This new review will not be commonly used, but will be available for those rare occasions where something goes wrong.”

It is submitted that, despite looking, on its face, a promising step towards improving the finality of adjudication outcome away from courts, the Tasmanian prospective review mechanism lacks clarity and transparency in various aspects. For instance, the Bill does not provide a mechanism for initiating the review process and whether it is activated by the own initiative of the SOP Official or by a formal complaint from either party. The Bill does not address the criteria to be followed by the SOP Official to identify what would be an “inappropriate or unfair” decision as a basis for review and whether the scope of review will cover any determination regardless of the size or nature of the payment dispute. The Bill does not define the referral period within which a referral by the SOP Official can be made, which will add an unnecessary layer of uncertainty to the parties. The Bill also does not include any details relating to the selection criteria and powers of the review panel and whether the panel will be paid from the public fund or engaged on a voluntary basis.

1.2 Justification and significance of the research

The “one size fits all” adjudication scheme has resulted in a mounting swell of complaints and dissatisfaction with the adjudication outcome of larger and/or more complex cases, particularly in Australia.34 Adjudicators of such cases often have to grapple with complex legal arguments and large volumes of submissions within very limited timeframes. Such dissatisfaction is manifest in the large number of judicial challenges to adjudicators’ determinations in recent years (see table 7, Chapter 5) which has frustrated the object of the SOP legislation and deterred many construction firms from using the adjudication scheme to resolve their payment disputes.35 In particular, paying parties aggrieved by adjudication determinations usually strive to challenge the determination in order to delay paying, or avoid payment of the adjudicated amount. Thus, they seek the available remedy of judicial review and engage lawyers to identify any flaws, or loopholes, to frustrate the adjudication process. Challenges are typically related to lack of adjudicator’s jurisdiction to hear

35 The SOCLA Report, above fn 16, p 37.
the matter and/or adjudicators exceeding their jurisdiction during the adjudication decision-making process.

Notwithstanding the fact that legislatures had attempted to insert privative clauses to exclude adjudication determinations from judicial review, in order that the object of the legislation could be attained, those clauses became redundant following the authority of the High Court in *Kirk v Industrial Relations Commission of New South Wales*, which held at paragraph [100] that: “Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.”

As a consequence, the mission of the legislation has drifted away from its original intent. Aggrieved respondents are left with no constraints (save for the high legal cost and the potential cost of interest accumulating upon the adjudicator’s determination, if subsequently upheld by judicial review) of seeking judicial review in order to frustrate the adjudication process. Arguably, these cost factors are often ignored by respondents, when balanced against the benefits of retaining the large amounts in dispute as long as possible and use these in the business, by seeking judicial review as a delaying tactic. In practice, some aggrieved paying parties seek judicial review by exhausting all appeal measures to the very end, with the hope, the claimant may become insolvent by the time the case is eventually decided, so that the paying party may not be obliged to pay. There have also been a small number of claiming parties seeking review, principally to prevent the loss of future claims by the statute binding subsequent adjudications.

Furthermore, parties to any payment dispute seek to have that dispute resolved in a quick, inexpensive and informal manner. Not only does a contractor seek to recover disputed progress payments from its employer but that contractor also has a keen interest in having all its payment disputes resolved with finality to ensure certainty in

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36 See, eg, *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 [58], [66], [68]; sections 90 and 91 of the *Justice and Other Legislation Amendment Act 2007* which amended Schedule 1, part 2 of the *Judicial Review Act* to exclude the operation of that Act to decisions made under part 3, division 2 of the *Building and Construction Industry Payments Act 2004*.


38 To this end, several applications have been made to the High Court for review of the appellate courts findings in SOP actions. Until the date of writing, the High Court has only accepted one application for special leave in this area and released its decision. See *Southern Han Breakfast Point Pty Limited v Lewence Construction Pty Limited* [2016] HCA 52.

business. It is advantageous for both parties to have a trustworthy opinion (albeit one that is made on an interim basis) upon the merits of the payment dispute, which would stand as a reliable indicator of the likely final outcome should the parties initiate further legal proceedings on the same dispute. Accordingly, both parties will be in a better position to deal with similar future disputes and plan their financial resources to mitigate the effect of the dispute resolution outcome.

As such, it is submitted that there is no valid reason to restrict the operation of the statutory adjudication scheme in a way that keeps it too far from operating as an effective alternative dispute resolution (ADR) for most of the payment disputes cases. This could be achieved by optimising the adjudication scheme to increase the confidence of disputants in the adjudication outcome. To optimise adjudication as an effective binding dispute resolution, there are three key essential requirements: procedural fairness, accessibility and finality. To attain some (if not all) of those essential requirements, and 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 2014. 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 course.

Despite these amendments in Queensland, there have been seven judicial review court applications between December 2014 and November 2015 (compared to 15 applications in the preceding year), in which the Queensland Supreme Court found that adjudicators committed jurisdictional errors in three cases. Furthermore, the amendments where much criticised by the industry because they have made adjudication of complex claims too long and expensive and comparable to litigation.

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41 See Building and Construction Industry Payments Amendment Act (2014), Act No. 50 of 2014 (Qld).
42 See the Building and Construction Industry Payments Regulation 2004, schedule 1, part 2.
As such, there is a need to examine other pragmatic and more viable alternatives to improve the outcome of adjudication and reinstate the industry confidence. One of those alternatives is the introduction of an appropriate legislative review mechanism for erroneous determinations in the SOP legislation. A range of different legislative review mechanisms have been introduced in some jurisdictions operating the SOP legislation around the world. The main purpose of having such review mechanisms is to provide aggrieved parties with a convenient remedy to appeal the decision of errant adjudicators in certain situations. Among those, the Singaporean and the prospective Tasmanian review mechanisms are the only schemes that generally allow for a full legislative review of the merits of erroneous adjudication determinations. Other jurisdictions, including New Zealand, Malaysia, Ireland, the Australian Capital Territory, Western Australia, Northern Territory and Victoria expressly grant aggrieved parties the right to challenge adjudication decisions. Such right is typically limited, albeit to varying degrees.

Surprisingly, there is a very limited research conducted with regard to the need or efficiency of review mechanisms in statutory adjudication. Michael Christie, a well experienced Senior Council in NSW, noted that the Singaporean review mechanism is worth serious consideration by Australian legislatures envisaging reform of their existing schemes. Masters Builders Australia suggested that the review mechanism arrangement implemented in Western Australia may be suitable for implementation in South Australia.

In his final report on improving the SOP legislation in Queensland, Andrew Wallace noted receiving a suggestion to limit the number of applications to the court by providing a mechanism for the review of an adjudication decision by another adjudicator, in a way that is similar to the mechanism established under the Victorian Act. He objected to this concept of adjudication review on the grounds that it is neither consistent with the object of the Queensland SOP legislation, nor supports its interim and rapid nature. Regarding the popularity of the Victorian review scheme,

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47 Wallace Report, above fn 15, p 225.
Wallace said: “during my discussions with the responsible officer in charge of administering the Amended Victorian Act, I was advised that the review adjudication process had only been used on one occasion since the amendments commenced in 2006.”

An empirical PhD study completed in 2012 examined the operational problems and missed opportunities in statutory adjudication in most of jurisdictions operating the regime. The notion of review mechanisms was examined among numerous other features of statutory adjudication. The study found that although there are some apparent benefits from review mechanisms, the mechanism is not widely used in Singapore, and therefore it was not recommended. The study excluded the scope of examining the reasons behind its limited use by respondents from the study. Interestingly, only Singaporean experts participating in that study were in favour of the review mechanism compared to other experts in NSW and UK jurisdictions that have no review mechanisms.

Without a review mechanism in place, an aggrieved party in adjudication has no option but to initiate lengthy and expensive proceedings such as arbitration or litigation but the inherent cost of such proceedings may prevent the party from seeking justice. The remedy by way of judicial review is available in very limited situations where an adjudicator committed a jurisdictional error. Consequently, many erroneous adjudication determinations have become final and binding decisions. For instance, in the *Uniting Church in Australia Property Trust (Old) v Davenport*, the adjudicator, after releasing his original decision and upon a request from the claimant, conceded that he had misinterpreted the claimant’s submissions and made a miscalculation, so he attempted to correct it. The respondent sought court order to restrain the adjudicator from correcting the released decision. Daubney J held that the adjudicator committed a jurisdictional error as this type of error is not a “Slip Error” that can be corrected within the jurisdiction of the adjudicator. As a result of the first flawed decision being upheld by the court, the claimant was underpaid by AUS$148,226 and left without any effective remedy to obtain a revised and correct decision. In such cases, the

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49 *Uniting Church in Australia Property Trust (Qld) v Davenport* [2009] QSC 134 (Daubney J).

50 See *Building and Construction Industry Payments Act 2004 (Qld)*, s28
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The significance of a legislative review mechanism on the merits is manifest as a fair and convenient alternative remedy, compared to expensive and lengthy curial proceedings.

Nevertheless, it is a frequent problem that a claimant, which obtains a favourable adjudicator’s determination, is disadvantaged from the effect and certainty of that determination if the respondent opts to challenge the determination by invoking lengthy judicial review proceedings. The uncertainty issue was judicially explained by Basten JA who noted that:

“between the date of a purported determination and an order of the court setting it aside, no-one could be sure whether the adjudicator had failed to validly determine the application and it was only the order of the court which would resolve that question.”

Furthermore, Macfarlan JA has observed that: “A long period of time might elapse between a purported determination and a court declaring it void. In the present case that period was seven months, but in others the period might be much longer.”

As a result, the claimant will be at considerable risk of not only becoming insolvent, but also confidently exercising its statutory right to suspend work in case of non-payment. The consequences of any work suspension may be devastating if the adjudication determination is eventually quashed by way of judicial review. Vickery J observed this dilemma in Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and noted:

“A contractor would be seriously inhibited in the exercise of its statutory right to suspend works if it suspected that its payment claim and the adjudicator’s determination made upon it could be vulnerable to attack on technical legal grounds. If the contractor made the wrong call, the consequences of suspending work could be prohibitive.”

In addition, the claimant will be more hesitant and reluctant to apply for further adjudications on other payment claims until certainty materialises upon the outcome of the judicial review. The claimant may also compromise its right and be compelled

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51 [2011] NSWCA 399 at [50] (Basten JA).
52 [2011] NSWCA 399 at [99] (Macfarlan JA).
53 The risk of such suspension was well noted in Brodyn v Davenport [2005] NSWCA 394 at [51] (Hodgson JA).
54 [2009] VSC 156; 26 VR 112 [47].
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to settle the issue with the respondent so as to avoid the huge expense and delay in going to court to defend the validity of the determination.

The availability of an internal review mechanism is likely to diminish judicial challenges as the courts are likely to be more reluctant to exercise their discretionary powers to set aside adjudication decisions.\textsuperscript{55} In Singapore, Prakash J held in \textit{SEF Construction Pte Ltd v Skoy Connected Pte Ltd}\textsuperscript{56} that the availability of the legislative review mechanism, with other factors, impliedly restricted judicial review in the High Court. In \textit{Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd},\textsuperscript{57} the WA Supreme Court noted that:

\begin{quote}
“As to discretion, the availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review. Circumstances where parties have been granted and hold alternative review options bear upon the availability of prerogative relief as a matter of discretion.”
\end{quote}

In summary, introducing an appropriate review mechanism may offer a pragmatic and practical solution that acknowledges the existing variety of adjudicators’ qualities and competencies and the difficulty of attaining quality adjudication outcome due to the hasty adjudication process. The review mechanism may act as an effective safety net to capture erroneous determinations away from curial proceedings to help control the overall cost and improve the finality and informality of statutory adjudication.

Furthermore, in 2016, the Senate Economics References Committee released its report "\textit{I just want to be paid}: Insolvency in the Australian Construction Industry."\textsuperscript{58} The report recommended that the Commonwealth enact uniform national SOP legislation, albeit with a target of around 2018 for implementation. Accordingly, the Minster of Employment appointed Mr John Murray to review all SOP laws in consultation with business, governments, and other relevant interested parties and submit his report by

\textsuperscript{55} As to the use of the discretion to deny certiorari where there lies another review option, see for instance, the High Court's decision in \textit{The Queen v Cook; Ex parte Twigg} [1980] HCA 36 [29], [30] and [34]; \textit{Re Baker; Martin CJ in Re Carey; Ex parte Exclude Holdings Pty Ltd} [2006] WASCA 219 [128] - [140].

\textsuperscript{56} [2009] SGHC 257.

\textsuperscript{57} [2011] WASC 172; 42 WAR 35 [64]. (Kenneth Martin J).

the end of 2017. The Senate’s report was published simultaneously with the release of discussion papers in NSW, Queensland and South Australia which reflects the strong appetite to improve the SOP laws across Australia.

These moves towards necessary law reforms in the SOP legislation together with the Tasmanian Building and Construction Industry Security of Payment Amendment Bill 2015 regarding the introduction of review mechanism make it very evident that conducting a research in this area is not only worthwhile but also very timely and relevant.

1.3 Research questions

1. To what extent do the available adjudication review mechanisms help attain the object of the SOP legislation and increase the industry confidence and satisfaction with the adjudication outcome?

2. If a review mechanism is found to be beneficial, what are the key features of a review mechanism that help achieve the object of the SOP legislation?

1.4 Research aim and objectives

The aim of this thesis is to examine whether the Australian statutory adjudication scheme would benefit from the introduction of adjudication review, and if so, what would be the guidelines for devising an effective review scheme. In order to achieve this, the following objectives were addressed:

1. To identify and investigate the causes of compromised quality of adjudication outcome.

2. To examine and appraise the features and effectiveness of available review mechanisms.

3. To assess the need to propose a new scheme of adjudication review.

4. To develop guidelines for devising an appropriate adjudication review scheme.

5. To examine solutions to counter the barriers of introducing a legislative review mechanism.

1.5 Research methodology

There are two main strategies or approaches to conduct research, namely, quantitative and qualitative approaches. Deciding on which approach of research to follow, depends on the purpose of the study and the nature and availability of the information.\textsuperscript{60} This study primarily followed a qualitative approach since the study aims to obtain rich information through assessing a wide range of attitudes, perceptions and behaviours relevant to the topic under investigation.\textsuperscript{61} The quantitative approach, being rigid, was not considered, as it does not provide enough flexibility to investigate underlying issues to obtain rich and deep data.\textsuperscript{62}

Since the nature of the study is legal, the applicable legal research methods were considered. In journal papers adopting doctrinal legal research method, it is very rare to have a section on research methods as the process is one of analysis rather than data collection.\textsuperscript{63} However, for the purpose of this thesis, a brief section is included because a combination of legal and scientific methods was used.

The study adopted a combination of doctrinal legal research (research in law) and interdisciplinary research (research about law).\textsuperscript{64} The doctrinal legal research asks what the law is regarding a particular issue by analysing legal sources while the interdisciplinary research (non-doctrinal legal research) is about law and it usually engages empirical data. The combination of the two legal research methods is adopted to benefit from the strength and advantages of each method. The benefits help the researcher explore the development of the SOP laws over years and analyse the underlying theories from different aspects.


\textsuperscript{62} Naoum, above fn 60, p 39.


1.5.1 The doctrinal legal research

The doctrinal legal research is concerned with the analysis of the legal doctrine and how it has been developed and applied. In this method, the analysis is interpretive and qualitative in nature. The doctrinal method is characterised by the study of legal texts, therefore, it is informally described as “black-letter law”. The analysed legal sources include the relevant statutes, case law, parliamentary debates, discussion reports, governmental reports, doctoral theses, legal journals and commentaries.

Legal researchers acknowledge the importance of doctrinal legal analysis within their interdisciplinary research. The experience of adopting the doctrinal legal method made the researcher better informed and more knowledgeable in the topic under investigation. It also made him well prepared for adopting the subsequent research method where empirical data was engaged by interviewing experts. This result reconciles well with the requirements that the interviewer should become a “quasi expert” to successfully carry out an expert interview, as a central constitutive element of such interviews. Starting with doctrinal research, as the first stage of the study, helped the researcher prepare well for the second empirical stage and effectively interact with the experts by raising critical follow-up questions or controversial matters to help achieve the overall aim of the study.

1.5.2 The interdisciplinary research (non-doctrinal)

The interdisciplinary research (non-doctrinal research) is concerned with facilitating a future change, either in the law itself, or in the manner of its administration, therefore it is often described as a “law reform research”. In the UK, the terms “law in context” or “socio-legal research” are often used. The “law in context” means how the law works in the real world. This method helps the researcher take other matters into account in order to interpret ambiguous legal rules by viewing them in their proper

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66 Chynoweth, above fn 63, pp.28-38.
67 Chynoweth, above fn 63, pp.28-38.
71 Chynoweth, above fn 63, pp.28-38.
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historical or social context, when, for example, evaluating the effectiveness of existing review mechanism in achieving the object of the legislation or examining its need or impact on the construction industry. For the purpose of this study, the interdisciplinary research method was very essential to explain, predict or even understand the stakeholders’ behaviours in dealing with SOP laws and regulations in which doctrinal legal research falls short.72

The interdisciplinary research uses empirical data; therefore, it provides vital insights into the law in context. Empirical legal research is valuable in revealing and explaining the practices and procedures of legal, regulatory and dispute resolution systems and the impact of legal phenomena on a range of social institutions, business and citizens.73 This study selected “expert interviews”74 as a method of collecting the empirical data as detailed in the next section.

1.5.2.1 Expert Interviews

In social research, the use of “expert interviews” as a method of qualitative empirical research has long been popular as it offers an effective means of quickly obtaining good results.75 Conducting expert interviews can serve to shorten time-consuming data gathering processes, where experts can provide practical insider knowledge and avoid the necessity to interview a wider circle of players.76 “As a method, the expert interview appears to be “quick, easy, and safe” in its application, and it promises to be of good practical value.”77 This method helped explore various opinions and perceptions regarding the inherent problems in the SOP laws and the effectiveness of the taken measures as demonstrated in the legal research. Specifically, the method helped in 1) validating the findings of the doctrinal legal research conducted in the first stage, 2) shaping the guidelines needed to devise review mechanism and 3) examining other solutions to counter the barriers of introducing a legislative review scheme.

72 Chynoweth, above fn 63, pp.28-38.
74 See Appendix (A), Experts Credentials which provide profiles of the experts who participated in the research.
The interview stage commenced after the Deakin University ethics approval was obtained in accordance with the university requirement (See appendix 1). The interviews were conducted whilst the doctrinal legal research was in its final stages. A purposive sampling method was adopted to identify the potential experts who are experts in the field in most of the Australian jurisdictions including Victoria, New South Wales, Queensland and Western Australia. Many of those experts are also active in other smaller jurisdictions including South Australia, the Australian Capital Territory and Tasmania. In addition, a small sample of Singaporean experts was identified since Singapore is the only jurisdiction that implements a full review mechanism within its SOP legislation. The experts were selected based on their specific experiences relevant to the research area under investigation. Sometimes, during the interview, the experts indicated or proposed additional potential experts to participate in the research. The experts belong to different groups including adjudicators, construction lawyers, academic scholars, appointing authorities and government officials as explained in the next session.

All potential experts were sent a formal invitation by email to participate in the research. Experts were encouraged to participate in the research by mentioning in the invitation letters that a lottery would be organised to select winners of eight prizes to attend international construction law conferences in addition to the benefit that all experts would be updated with the research findings.

52 invitations were sent out. 28 responses confirming the “consent to participate” were received whilst six potential experts replied with “regret letters”. Eventually, only 23 out of the 28 experts have participated in the research. That was a satisfactory sample size in accordance with the well-established guidance that the minimum number of interviews needs to be between twenty and thirty for an interview-based qualitative study to be published.78

Upon receiving the “consent to participate” in the research, a set of interview questions79 was sent to experts in advance to familiarise themselves with the scope of the interview and be better prepared. All experts were given the same set of questions

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79 See Appendix (B), Interview questions.
and the interviews followed the form of semi-structured interviews with a mix of open and close ended questions (see appendix 2). The questions were designed to probe the individual’s viewpoint regarding the subject matter; and that the structure of the questions allowed reciprocal two-way communication, thereby giving room for exploratory and clarification purposes.\textsuperscript{80} In some cases, the questions were not asked in order depending on the flow of thoughts and the experience of the expert in certain areas which he or she was more interested to talk about. The main objective for the interviewer was to discover as much as possible about the specific issues under investigation such as the need of legislative review mechanisms, the features and barriers. On many occasions, some follow up questions were raised referring to the situations analysed during the doctrinal legal research,\textsuperscript{81} to clarify some doubts, better understand the practical aspects of the phenomena under investigation or to touch base upon a key issue raised by a previous expert in order to form a robust understanding. Follow-up questions are usually recommended to “evoke accounts of concrete events or generate narrations.”\textsuperscript{82}

The 23 interviews were conducted over a period of five months between 28 October 2015 and 23 March 2016. Most of the interviews were conducted by phone being the most convenient way in terms of time and cost. Only four interviews (out of 23) were conducted “face to face”, three in the experts’ offices and one at Deakin University’s CBD campus. The interview durations varied between 30 minutes to two hours but the majority were completed in one hour. All interviews were recorded with the permission of experts. See appendix 3 to review the biographies of interviewed experts.

Most of the interviews were transcribed by professional service providers and the rest were transcribed by the researcher. The biographies of experts were analysed quantitatively to help evaluate the reliability and relevance of the collected data\textsuperscript{83} (See appendix 4). The analysis started with skimming all transcripts and coding them using the qualitative research analysis software (nVivo 11). The main themes generated from


the doctrinal legal research were used as a basis of coding the transcripts. The coding used the theme descriptions as keywords for categorising the data under headings and sub-headings. The process of generating headings and subheadings of the categories was progressively elaborated during the analysis. The process also identified some additional themes that were not picked up during the doctrinal legal research. Afterwards, each transcript was thoroughly examined and manually coded under its relevant heading. A chronological order was followed in examining the transcripts starting with the older interviews moving to the most recent ones. Interestingly, the data collected from the first eight interviews were significant and sufficient to be compared with doctrinal legal research and draw final discussion. A substantial portion of the data collected from subsequent interviews were largely repetitive, although some new and important issues relevant to the study were raised by the experts and explored further. That is normal in qualitative studies adopting “grounded theory methodology” which requires that all of the properties and the dimensions are saturated where saturation may indicate when it would be wise to stop conducting further interviews.84

The process of analysing the interview qualitative data has helped identify similarities and differences between experts regarding important issues relevant to the study. The results were then discussed in the context of the findings of the doctrinal legal research.

1.6 Scope of the research

Whilst the research mainly aimed to examine the notion of review mechanisms in Australia, it was a quite important to consider other jurisdictions (e.g. Singapore), especially where review mechanisms have been implemented. As such, the emerging findings of this study are applicable to the eight Australian jurisdictions considering the fact that in reaching the findings, a consideration was given to the social, culture, political and legal dimensions that are unique to Australia. Having said that, the findings may worth serious considerations in all other jurisdictions operating the SOP legislation since they broadly share a similar object of the SOP legislation as well as suffer from the excessive judicial intervention in statutory adjudication.

84 Mason, M., (2010), August. Sample size and saturation in PhD studies using qualitative interviews. Forum qualitative Sozialforschung/Forum: qualitative social research (Vol. 11, No. 3).
1.7 Thesis structure

This thesis takes the form of ‘thesis by publication’. Each publication is inserted as a chapter on its own and the next section demonstrates how the publications are logically linked. One book chapter and seven journal papers, all of which were peer reviewed, form the core chapters of this thesis. Chapters 2 was published in the form of a book chapter, whilst chapters 3, 4, 5 and 6 were published in the form of journal articles, all of which have emerged from the doctrinal legal research. Chapters 7, 8 and 9 were published in the form of journal articles demonstrate the results emerging from the empirical research together with the analysis and discussion. Many other publications emerging from this study were not included due to space limits including book chapters, conference proceedings and governmental reports, however, a hyperlink has been provided under the subheading “Publications during candidature”. Table 1 below demonstrates the structure of the thesis.

Table 1: Thesis by publication structure

<table>
<thead>
<tr>
<th>Chapter no.</th>
<th>Published as</th>
<th>Chapter Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Thesis Chapter</td>
<td>Introduction</td>
</tr>
<tr>
<td>2</td>
<td>Book Chapter</td>
<td>Australia: The East Coast Model with New South Wales as the Principal Legislation.</td>
</tr>
<tr>
<td>3</td>
<td>Journal Article</td>
<td>The Big Picture: Causes of Compromised Outcome of Statutory Construction Adjudications in Australia.</td>
</tr>
<tr>
<td>6</td>
<td>Journal Article</td>
<td>The Tip of the Iceberg: Jurisdiction of Statutory Adjudicators.</td>
</tr>
<tr>
<td>7</td>
<td>Journal Article</td>
<td>Operational problems and solutions of statutory Complex adjudication: stakeholders’ perspectives.</td>
</tr>
<tr>
<td>8</td>
<td>Journal Article</td>
<td>Effectiveness of existing adjudication review mechanisms: Views of industry experts</td>
</tr>
</tbody>
</table>
1.8 Linkage of publications

In order to identify problems and/or potential gaps of knowledge in the area of statutory construction adjudication in Australia, it was essential to conduct an extensive doctrinal legal research. The author undertook a thorough and comprehensive analysis of the Australian SOP legislation in each jurisdiction. The analysis was peer reviewed by Philip Davenport and Edited by Andrew Burr which was eventually published in the form of four chapters within “International Contractual and Statutory Adjudication” book by Routledge. The book chapters are as follows:

1. Australia: The East Coast Model with New South Wales as the Principal Legislation
2. Australia: The East Coast Model: Victoria, Tasmania, The Australian Capital Territory and South Australia
3. Australia: The East Coast Model: Queensland
4. Australia: The West Coast model: Western Australia and Northern Territory

The second thesis chapter is an exact copy of the first book chapter (Australia: The East Coast Model with New South Wales as the Principal Legislation) as appeared in the above list. Other book chapters are not included in this thesis due to space limits. The chapter critically analyses the features of East and West Cost models then extensively examines the NSW legislation as the first SOP legislation, which heavily influenced all other Australian SOP legislation. Therefore, the rest of the chapter extensively demonstrates the key aspects of the NSW legislation in some depth to stand as a reference point when covering the other SOP legislation. The chapter demonstrates many problems in the operation of the SOP legislation. Mainly, it explains how the legislative object of the SOP legislation has been compromised when dealing with large and/or complex payment claims. This is due to poor adjudication quality and the excessive judicial intervention, which effectively hinders the smooth flow of cash.
The main focus of the third thesis chapter in the form of a journal paper (*The big picture: Causes of compromised outcome of statutory construction adjudications in Australia*) identifies and examines the factors influencing the quality of complex adjudications which also sets out the criteria parameters of quality and complexity in statutory adjudications. The paper discusses the lack of legislative review mechanisms as one of the influential factors and provides a brief justification. The chapter concludes with advocating the need of further research about the introduction of review mechanisms as an effective measure to address quality concerns and excessive juridical intervention.

The fourth thesis chapter in a form of a journal paper (*Taking statutory adjudication to the next level: a proposal for review mechanisms of erroneous determinations*) provides extensive analysis of the available review mechanisms around the world and critically examines their features and effectiveness. The chapter justifies the need of a review mechanism on the merits of adjudication determinations. This basically helps improve finality and confidence in statutory adjudication as an effective alternative dispute resolution (ADR) platform that may help reduce further curial proceedings to finally decide the dispute on the merits. The chapter concludes with proposing a detailed framework of review systems including their features, benefits and barriers of the proposed legislative review mechanism. The proposal represents something of a “blunt instrument” whereas further consultation with the industry’s stakeholders will be required. The chapter also excludes jurisdictional objections as a basis for review from the ambit of the proposed review mechanism because of the different purpose that review mechanism for jurisdictional challenges serves in the sense that it merely assists in diminishing judicial intervention rather than finally resolving the underlying dispute.

The fifth thesis chapter in the form of a journal paper (*Towards diminishing judicial intervention in statutory adjudication: A pragmatic proposal*) looks into the excessive judicial intervention in statutory adjudication and the need to address emerging problems. Also, it identifies and analyses the main available measures to diminish judicial intervention such as remittal of erroneous determinations to the adjudicator and severance of infected parts of adjudication determinations. Thereafter, the chapter proposes that jurisdictional challenges be separated from the merits of the dispute, so

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85 An edited version of this paper received ‘High Commendation’ in 2016 Australian Brooking Prize in Construction Law, issued by the Society of Construction Law Australia (the SoCLA) and published in the SoCLA’s website.
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Adjudicators can only deal with the real dispute as many adjudicators lack the legal training and knowledge to adequately deal with complex jurisdictional matters. As such, any jurisdictional challenges should be dealt with in parallel by establishing a legislative review mechanism via a quick, informal and cost effective process by competent tribunal who has the jurisdiction to consider questions of law. The chapter also demonstrates the key features of the proposed review mechanism subject to a further empirical research.

The sixth thesis chapter in the form of a journal paper (The tip of the iceberg: jurisdiction of statutory adjudicators) provides a focused research into the problem of allowing jurisdictional issues to be raised in adjudication which can possibly turn every payment claim into a complex payment claim that would need a legally trained adjudicator to deal with the raised jurisdictional arguments. As such, the chapter proposes another alternative to the review mechanisms proposed in chapter 5 to deal with this evolving problem and satisfy the stakeholders who do not advocate the notion of review mechanisms. The chapter proposes a roadmap of six hold points that mainly call for better drafting and optimizing of the SOP legislation and it contends that the proposal is a blunt instrument where further research will be needed which is outside the scope of this study.

The seventh thesis chapter in the form of a journal paper (Operational problems and solutions of statutory Complex adjudication: Stakeholders’ perspectives) is the first chapter demonstrating findings from the second stage of empirical research. The chapter draws upon some findings of the first stage (i.e. the doctrinal legal research) which were discussed in chapter 3 and uncovers many inherent operational problems in statutory adjudication and opportunities for law reform. The chapter also provides some practical measures as suggested by the industry practitioners for each identified problem which may stand as a reliable reference for potential reform in the SOP laws.

The eights thesis chapter in the form of a journal paper (Effectiveness of existing adjudication review mechanisms: Views of industry experts) draws upon the earlier doctrinal research findings discussed in chapter 4 and analyses the views of experts regarding the operation of review mechanisms in their jurisdictions and investigates the factors influencing their effectiveness.
The ninth thesis chapter in the form of a journal paper (An empirical study: How to introduce effective review mechanisms into statutory adjudication?) draws upon the findings of chapters 4 and 5 and reviews experts’ views about the need of introducing review mechanism, essential features and potential barriers. The chapter concludes with a set of proposed guidelines for introducing effective review mechanisms into statutory adjudication. The guidelines are devised to counter potential barriers addressed in the empirical study and they can be adopted in any jurisdiction operating the SOP legislation.
2. CHAPTER 2: AUSTRALIA: THE EAST COAST MODEL WITH NEW SOUTH WALES AS THE PRINCIPAL LEGISLATION

Book Chapter, Peer reviewed.


This thesis chapter is an exact copy of the book chapter in its final accepted form. (except for formatting, numbering and referencing that were varied to reconcile with the format of the thesis).
2.1. An overview of statutory adjudication in Australia:

2.1. In Australia, all six State and two Territory legislatures have enacted Security of Payment (SOP) legislation to address the problem of inadequate SOP for subcontractors in the building and construction industry. The SOP legislation is a term used to describe the Acts listed in paragraph 2.2. In the explanatory statement of the relevant Australian Capital Territory Bill, the reasons behind enacting this regime were well explained:

*SOP has been an issue in the building and construction industry over many decades. Several taskforces and the 2003 Cole Royal Commission into the Building and Construction Industry flagged SOP as a significant industry matter and cited strong anecdotal evidence across all jurisdictions to support the notion that SOP problems are widespread within the industry. The building and construction industry is particularly vulnerable to SOP issues because it typically operates under a hierarchical chain of contracts with inherent imbalances in bargaining power. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow, and in some cases, insolvency.*

2.2. The SOP legislation sought to modify payment behaviour in the construction industry to limit the continuous fight of subcontractors for their due payments and shift the risk of insolvency to the parties up the contractual chain. The legislation aimed to provide a statutory right to ensure SOP in the building and construction industry. As such, the legislation introduced a rapid statutory adjudication process to resolve payments disputes. Basically, there are two distinct Australian models of the SOP legislation. Those models have been classified as East Coast and West Coast models.

1) **East Coast model**: applies in NSW, Queensland, Victoria, South Australia, the Australian Capital Territory, Tasmania and South Australia as follows:

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86 Explanatory Statement, Building and Construction Industry (Security of Payment) Bill 2009, The Legislative Assembly for The Australian Capital Territory, Presented by Mr John Hargraves MLA, Minister for Industrial Relations.

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- **New South Wales (NSW)**
  
  *Building and Construction Industry Security of Payment Act 1999 (NSW).*
  
  
  Amended by *Building and Construction Industry Security of Payment Amendment Act 2010.*
  

- **Victoria (Vic)**
  
  *Building and Construction Industry Security of Payment Act 2002 (Vic).*
  

- **Queensland**
  
  *Building and Construction Industry Payment Act 2004 (Qld).*
  
  Amended by *Building and Construction Industry Payment Amendment Act 2014.*

- **Australian Capital Territory (ACT)**
  
  *Building and Construction Industry (Security of Payment) Act 2009 (ACT).*

- **Tasmania (Tas)**
  
  *Building and Construction Industry Security of Payment Act 2009 (Tas).*
  

- **South Australia (SA)**
  
  *Building and Construction Industry Security of Payment Act 2009 (SA).*
2) **West Coast model:** applies in Western Australia and Northern Territory as follows:

- **Western Australia (WA)**

  *Construction Contracts Act 2004 (WA).*

  Amended by *Construction Contracts Amendment Act 2016.*

- **Northern Territory (NT)**

  *Construction Contracts (Security of Payments) Act 2004 (NT).*

2.3. Both models are based on the similar legislation in the United Kingdom (*the Housing Grants, Construction and Regeneration Act 1996*) (UK Act) that applies in England, Wales and Scotland. Whilst both models aim to provide a speedy dispute resolution mechanism for payment disputes through adjudication, there are key differences between them. The common object of the legislation in all States and Territories is to facilitate timely payment between contracting parties within the construction and building industry by improving the flow of cash within the contractual hierarchy.

2.2. **Features of the East Coast model**

2.4. The East Coast model creates a "dual payment system" which creates a statutory payment system alongside any contractual payment regime. Thus, the model renders void any clause in building and construction contracts that aims to frustrate the operation of the regime such as the “paid when paid” clause. Under this model, an entity (whether person or firm) carrying out construction work (the claimant) is entitled to progress payments by serving a progress payment claim on the paying party (the respondent), who must then serve what is so called a “payment schedule”. The payment schedule must state how much, if anything, the respondent will pay the claimant and the respondent’s grounds for withholding payment of any of the claimed amount. If the respondent fails to serve a payment schedule on the claimant within a prescribed time the respondent must pay the claimant the whole of the claimed amount by the due date for payment. If the respondent fails to do so, the claimant is entitled to suspend work
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and recover the whole of the claimed amount as a debt. Alternatively, the claimant can seek adjudication of the payment claim. If the respondent has provided a payment schedule that includes reasons for withholding payment of the claimed amount or any part of the claimed amount, the claimant may seek adjudication of the payment claim.

2.5. Perhaps, the most important feature of the East Coast model is that it provides a tool to help ensure the cash-flow down the contractual hierarchy of the contracting parties and it does not affect the rights of the parties regarding the final contract sum. Rather, it simply provides an interim mechanism for the recovery of progress payments on account during the course of a contract.88 The Acts imposing this model exclude construction contracts related to the drilling or extraction of oil and natural gas or the extraction of minerals, and do not apply to residential contracts except in Tasmania.

2.6. Except in Queensland, this model provides for authorised nominating authorities (ANAs) appointment by the government which train and nominate adjudicators. The adjudication process must be completed within a prescribed time. Sometimes this is ten business days after the adjudicator is appointed. An adjudication decision is binding and final on an interim basis pending any final curial proceedings. The role of the adjudicator under this model is largely that of a “statutory certifier” who essentially determines the amount of the progress payment due but does not decide any claims for debt or damages.89 The progress payment to which a claimant is entitled is an amount calculated under the construction contract or, if the contract does not provide for the calculation, an amount calculated in accordance with the act. Some construction contracts provide that in calculating the amount of a progress payment, account must be taken of claims for damages by the claimant or claims by the respondent of set off for debt or damages. When the construction contract so provides, the adjudicator will have to decide the amount of the progress payment taking into account such claims or set offs. Adjudication decisions under this model are not

89 K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd [2011] NTCA 1 per Southwood J at [2].
subject to judicial review except upon limited grounds related to jurisdictional errors and/or denial by the adjudicator of natural justice.

2.7. The East Coast model has been the subject of a lot of criticism over the recent years. First, it is said that it encourages a “rubber stamp” approach, whereby the overwhelming majority of claims are waved through, without any substantive determination of the merits, leading to the aggrieved party taking an intransigent attitude in subsequent litigation, exacerbating disputation and encouraging costly litigation. Secondly, the lack of freedom to agree an adjudicator has led to a parasitic industry of adjudicators with a monopoly. Thirdly, restricted hearings necessitate further litigation and poor decision-making. Fourthly, completion of the process within ten business days is too short as a time schedule for all but the simplest of cases. Fifthly, the use of “ambush claims” leads to further litigation. Sixthly, the “one way street” of the model, whereby a claim for damages can be used as a defence but not by way of attack, distorts the adjudication process and, again, encourages subsequent litigation. Finally, it is said that the exclusion of financial institutions and residential contracts from the ambit of the legislation in question is unjustified.

2.8. A particular feature of the East Coast model which has attracted criticism is what has been described as a “procedural trap” which prevents a fair hearing and requires the respondent to divert significant resources to the massive task of preparing appropriate payment schedules. It is also said that respondents’ ignorance of the legislation often prevents them from submitting payment schedules. The appointment of adjudicators by (ANAs) has also been criticised for its leading to perceptions that profit-driven ANAs are biased towards claimants, and allegations of “adjudicator shopping” whereby a claimant or its representative may demand that an ANA should either appoint or not appoint

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certain adjudicators, otherwise the claimant would refer its adjudication application to another ANA.

2.9. Under the East Coast model, the role of adjudicators is more analogous to an administrative tribunal for which the ambit of jurisdictional error is broader.\textsuperscript{94} Having said that, the courts in NSW and Queensland are currently upholding adjudication decisions on a “pay now, argue later” basis,\textsuperscript{95} and, as in the United Kingdom jurisdictions, an adjudication decision is not required to be reasonable nor correct in order to be enforceable, provided that it otherwise complies with the basic and essential requirements.\textsuperscript{96} The situation is no different in South Australia and Tasmania that have a quite similar legislation while the Australian Capital Territory is an anomaly having an express legislative arrangement of appeal. In Victoria, it remains the position that relief in the nature of certiorari, on all of the grounds available under that writ, including error on the face of the record, is not excluded.\textsuperscript{97} The East Coast courts maintain the view that the SOP legislation only offers interim remedy, so if a claimant is insolvent, the courts will be reluctant to allow enforcement of its right under this legislation.\textsuperscript{98}

2.10. There has been considerable court involvement in adjudication in the Eastern States. It is reported that there has been 197 cases challenging the adjudicator’s determinations in NSW, Queensland and Victorian courts until the end of 2013,\textsuperscript{99} 80% of which have been successful.\textsuperscript{100} Apparently, the courts have been gradually losing confidence in the quality of adjudication outcome after seeing “more and more cases where the quality of the adjudication decision making

\textsuperscript{94} In Craig v South Australia [1995] HCA 58, the court held at [14]: An administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

\textsuperscript{95} In the Australian Judiciary system, this term appeared first in Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 at [96] (Palmer J).


\textsuperscript{97} Hickorey Developments Pty Ltd v Schivello (Vic) Pty Ltd [2009] VSC 156, [86] and [87] (Vickery J); Grocon Constructors v Planit Cocciardi Joint Venture [No 2] [2009] VSC 426, [102] (Vickery J).

\textsuperscript{98} As an example, in Prime City Investments Pty Limited v Paul Jones & Associates Pty Limited [2013] NSWSC 2, the court refused to allow a debt certificate to found a winding up order where the respondent had a set off claim.


\textsuperscript{100} The SOCLA Report, above fn 98, at 37.
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process has been so poor that the courts have been increasingly willing to intervene.”101 In 2014, the East Coast Courts dealt with at least 50 applications in relation to adjudication decisions (20 in NSW, 19 in Queensland, three in Victoria, four in the Australian Capital Territory, three in South Australia and one in Tasmania).102 This somehow reflects the ongoing dissatisfaction by respondents with the adjudication appointment process and/or adjudication outcome. Since under the East Coast model an adjudication decision can only be for payment of a progress payment, it is invariably the person liable to make the progress payment (the respondent), who challenges the validity of the adjudication decision.

2.3 Features of the West Coast model

2.11. The West Coast model is adopted by WA and NT, with some differences between the two jurisdictions. The model is much more akin to that of the UK model. Similar to the East Coast model, the West Coast model provides for an interim payment regime, leading to a rapid adjudication process. Some significant differences from the East Coast model include that the claim can be done both up and down the contractual chain. Certain provisions are prohibited such as “pay when paid” and payment due dates of greater than 50 days after the claim is made. Also, the payment claim is not limited to one specific type of money claim under a construction contract; and any party to a construction contract may refer a disputed payment claim to an adjudicator for determination. Thus, principals are not barred from raising claims for payment on account for liquidated damages or disruption costs or for the costs of remedial works.

2.12. Unlike the East Coast Model, the notion of “payment schedule” is not applicable as a precondition to entitle a respondent to make submissions and to be heard in any subsequent adjudication, and there is no limitation on what might be included in the adjudication response. All adjudicators must be registered in order to adjudicate and parties are allowed to select their adjudicator or the appointing body. The adjudicator adopts an evaluative approach as he or she is not bound by documents and submissions of the parties. The adjudicator also enjoys wider

101 The SOCLA Report, above fn 98, at 38.
102 The figures are approximate, although being extracted with care from searching in Austlii and Jade databases using the key words of the “name of the legislation” and “adjudication determination/decision.”
powers including allowing legal representation in conferences, engaging experts and arranging of testing of certain works.

2.13. Under this model, the adjudicator makes an assessment on the balance of probabilities about what has already occurred under the construction contract with respect to a payment claim.\textsuperscript{103} The process under this model somewhat mirrors a court process and the adjudicator’s role is analogous to an inferior court, rather than an administrative tribunal.\textsuperscript{104} Accordingly, the test and ambit of jurisdictional error is very narrow, as inferior courts would commit a jurisdictional error when purporting to act wholly, or partly, outside their jurisdiction, or whilst acting within their jurisdiction, but doing something for which they lack authority.\textsuperscript{105} The adjudicator has an authority to decide questions of law authoritatively and wrongly as long as the error is not jurisdictional.\textsuperscript{106} The model also provides for the right of either party to seek limited review of an adjudicator’s decision to dismiss an application upon grounds related to validity of payment claim, existence of construction contract and complexity of the payment dispute. The review is conducted whether by the state administrative tribunal as the case in WA or a local court as the case in NT.

2.14. As such, and unlike the situation in the East Coast model, there has been comparatively very few judicial review applications to challenge adjudication decision in the Western States and a very few of which has been successful. As reported, from the commencement of the WA Act to the end of June 2014, 23 cases have been referred to the WA Supreme Court amounting to less than 2% of all adjudications. 7 out of the 23 cases have been referred to court in 2013-2014 reporting year in relation to adjudicator’s determination.\textsuperscript{107}

### 2.4 Harmonisation/national legislation

2.15. The current level of inconsistency across States and Territories has been identified as a matter which ought to be addressed on an urgent basis and it is not

\textsuperscript{103} K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd [2011] NTCA 1 per Southwood J at [5].
\textsuperscript{104} See Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd 2011 WASCA 217 at [118].
\textsuperscript{105} See Craig v South Australia [1995] HCA 58 at [12].
\textsuperscript{106} See, eg, O’Donnell Griffin Pty Ltd v John Holland Pty Ltd [2009] WASC 19 at [102]; Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd [2014] NTSC 20 at [31].
obvious why sub-contractors in one State, or Territory have better prospects of receiving payment for their work than sub-contractors working in any other State, or Territory.\textsuperscript{108} It has also been suggested that it is now time to capture the best from all jurisdictions and consolidate them all into a coherent national framework.\textsuperscript{109} In August 2001, the Federal Royal Commissioner conducted the first national overview of the conduct and practices of the Australian building and construction industry. In February 2003, the Federal Royal Commission released the final report (the Cole Report)\textsuperscript{110} which addressed, inter alia, the need to harmonise SOP legislation across Australia. The Cole Report included a Draft Bill of the likely national legislation which was more or less akin to the West Coast model. The call for a national scheme came into picture to mainly ease the business of construction firms operating in several states and to combine the strength of all Acts. Many other calls for harmonisation have followed since then\textsuperscript{111}, however, neither the Cole Report nor subsequent calls have been considered by legislatures until the time of writing.

2.5 The approach of writing the book chapters

2.16. The \textit{Building and Construction Industry Security of Payment Act 1999} (NSW) was the first SOP legislation enacted in Australia, and is the basis for all other East Coast SOP legislation that has been progressively passed since then.\textsuperscript{112} South Australia was the last jurisdiction to commence operation of its \textit{Building and Construction Industry Security of Payment Act 2009} (SA) on 10 December 2011. NSW and Queensland are currently the two most active jurisdictions using the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{112} For helpful clear summary of the legislation, see \textit{Trysams Pty Ltd v Club Construction (NSW) Pty Ltd} [2007] NSWSC 941, at [17] – [29] (Hammerschlag J).
\end{itemize}
\end{footnotesize}
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legislation in Australia as indicated from the annual adjudication applications lodged in both States in the last three years.\textsuperscript{113}

2.17. For the purpose of this book, this chapter will continue to cover the NSW legislation as the first SOP legislation which heavily influenced all other Australian SOP legislation. Therefore, the rest of this chapter will comprehensively demonstrate the key aspects of the NSW legislation in some depth to stand as a reference point when covering other jurisdictions. Thus, the discussion in other East Coast chapters will merely focus on the deviations and differences from the NSW model. In other words, reading through the NSW section first is quite essential for those interested to have sufficient information about any of the East Coast legislation.

2.18. On that basis, the smaller Eastern jurisdictions, namely Victoria, Australian Capital Territory, South Australia and Tasmania will be covered in chapter 3 with much focus on the Victorian Act due to its massive differences and the comparatively excessive case law. The Queensland legislation will be covered separately in full details in chapter 4 to adequately address its substantial differences and far reaching new features as amended in 2014. The two legislation under the West Coast model are covered independently under chapter 5.

2.6 New South Wales (the leading legislation)

2.6.1 Introduction

2.19. The \textit{Building and Construction Industry Security of Payment Act 1999} (NSW) (The NSW Act) was assented on 5 October 1999 and commenced on 26 March 2000 following a number of reviews of payment practices in the construction industry. It was a continuation of the State’s attempts to protect small and vulnerable subcontractors after the enactment of the \textit{Contractors Debts Act 1997}. The NSW Act was the first of its kind in Australia.

2.20. In the second reading of the relevant Bill, the Minister for Public Works and Services advocated the need of enacting such novel SOP legislation and stated:

\textsuperscript{113} The number of lodged adjudication applications was (779, 1009, 817 in NSW) - (731, 721, 670 in Qld) – in 2012, 2013 and 2014 financial years as extracted from the relevant annual reports.
“I remind the House that on 15 February the Premier announced the Government’s intention to stamp out the un-Australian practice of not paying contractors for work they undertake on construction. It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families. The Government is determined to rid the construction industry of such totally unacceptable practices.”

The Minister went on to state:

“The main thrust of this bill is to reform payment behaviour in the construction industry. The bill creates fair and balanced payment standards for construction contracts. The standards include use of progress payments, quick adjudication of disputes over progress payment amounts and provision of security for disputed payments while a dispute is being resolved. The bill will speed up payments by removing incentives to delay.”

2.6.2 Legislation overhaul over years

2.21. After three years of the operation of the NSW Act, it was further amended through the Building and Construction Industry Security of Payment Amendment Act 2002 (NSW) No 133, to improve the original Act which was loosely modelled on the UK Act. The 2002 Amendments provide more clarity about statutory time frames, their application and the consequences of not complying. Notably, the reform repealed the provision in the original Act that was allowing respondents to place the determined amount in security or trust until the dispute was finally heard. Also, the definition of progress payment was amended to include final payment to overcome the negative effect of a previous court decision excluding final payments from the scope of the NSW Act. Since then, the NSW legislation has been prone to various governmental reviews aiming to improve its operation against the set objectives.

2.22. In 2004, the NSW Department of Commerce released a review report on the 2002 Amendments and concluded that the amendments remain valid and the terms of the NSW Act remain appropriate, so the NSW Act should continue to operate. The review report also suggested further improvement in the NSW Act including but not limited to have minimum qualifications for adjudicators and allow longer duration for adjudication determination.\textsuperscript{116} The report identified genuine industry’s concerns about the lack of a documented mechanism to bring complaints about adjudicators and lack of transparency in the authorisation and operation of nominating authorities.

2.23. In 2010, the Department of Services Technology and Administration released a discussion paper drawing upon the 2004 report. The discussion paper proposed significant improvement to the NSW Act aiming to increase confidence in the regime and adding certainty to the outcome of adjudicator’s determination.\textsuperscript{117} The paper introduced administrative improvements to adjudication as well as legislative proposals. The paper also addressed serious concerns regarding, inter alia, the need for better regulation of adjudicators and the ANAs and the capacity for the NSW Act to deal with complex claims, especially in high value contracts, in which the risk and impact of incorrect adjudication is severe. Accordingly, some of the recommendations have been adopted in the \textit{Building and construction Industry Security of Payment Amendment Act} (2010) no 103.

2.24. The 2010 amendments (now sections 26A to 26F of the NSW Act) allow a claimant who had made an adjudication application for a progress payment allegedly owed by a contractor to require a principal contractor, who in turn owes money to the contractor for work carried out or materials supplied by the contractor to the principal contractor as part of or incidental to the work or materials that the contractor engaged the claimant to carry out or supply, to withhold payment of that money. It also provides that if the principal contractor does not withhold that money, the principal contractor shall be liable, along with the contractor, for the amount owed to the claimant. It empowers an adjudicator, at the request of the claimant, to direct the respondent to provide information to


the claimant as to the identity and contact details of any person who is a principal contractor in relation to the claim. The respondent can be subject to a fine for failing to comply. 118

2.25. In 2012, Bruce Collin QC was commissioned by the NSW Government to conduct an independent inquiry on construction industry insolvency following the shocking report of 1,113 insolvencies in the NSW building and construction industry in 2011-2012 financial year. The inquiry sought to assess the cause and extent of insolvency in the industry and recommend measures to better protect subcontractors from the effects of insolvency. The inquiry’s final report (the Collin’s report) addressed various recommendations to improve the NSW Act to give better protection to subcontractors.119 The most important recommendation was for legislation for a construction trust similar to that in many Canadian Provinces and States in the United States. In addition, the report endorsed collective submissions from the industry proposing to allow a sliding scale of timeframes based on the size of adjudicated claim, so the larger the claim, the more duration is given to respondents and adjudicators. The report also recommended a specific training system for adjudicators and proposed core topics to be covered in the training course.

2.26. The Building and Construction Industry Security of Payment Amendment Act 2013 (NSW) No. 93 adopted selected recommendations from the Collin’s Report but not the most important recommendation, namely, the construction trust. For construction contracts entered after the commencement of the amending Act, except if the construction contract is connected with an exempt residential construction contract, the claimant is no longer required to include in a payment claim a statement that it is a payment claim made pursuant to the NSW Act. This means that any invoice or claim for payment that complies with section 13(1) of the NSW Act is a payment claim within the meaning of the NSW Act even though the claimant may not intend it to be a payment claim under the NSW Act. This has led to some unintended consequences. Section 13(5) of the NSW Act provides that a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract. Sometimes a claimant finds that

118 For more details, see NSW Act, s (26A)-(26F).
recourse to adjudication is barred because the claimant failed to make an adjudication application within the prescribed time after serving an invoice that the claimant appreciates it was a payment claim under the Act. The Amendment also established mandatory deadlines for paying progress payments. Unless the contract provides for earlier payment, progress payments must be paid no later than 15 business days after a payment claim is submitted by a head contractor to a principal; and no later than 30 business days after a payment claim is submitted by a subcontractor to a head contractor.\(^{120}\)

2.27. The Amendment also provides that a head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that includes a declaration to the effect that all subcontractors, if any, have been paid all undisputed amounts that have become due and payable in relation to the construction work concerned.\(^{121}\) This requirement (that is an offense if not complied with) may have a significant impact on the cash flow of head contractors who, in the past, used to rely on collecting payment from their principals in order to pay their subcontractors. A payment claim issued without a supporting statement could not be relied on to enforce rights under the NSW Act.\(^{122}\) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading. The penalties for not complying with this requirement is significant (e.g. a maximum penalty of either AUSS22,000 or 3 months imprisonment).

2.28. To ensure compliance with these requirements, the Amendment established a specific scheme. The Director-General of the Department of Finance and Services may appoint an "authorised officer" (for the purpose of investigating compliance) who may require a head contractor to provide the officer with information or documents relating to the payment of subcontractors by or on behalf of the head contractor in respect of specified construction work.\(^{123}\) The Amendment also provided for the making of regulations which will require head contractors to create a trust account to hold retention money for subcontractors.

\(^{120}\) NSW Act, s 11 (1A), (1B).
\(^{121}\) NSW Act, s 13 (7), (9).
\(^{122}\) Kitchen Xchange v Formacon Building Services [2014] NSWSC 1602.
\(^{123}\) NSW Act, s 36.
2.29. In 2014, the NSW Government amended the Building and Construction Industry Security of Payment Regulation 2008 which came into effect in 1st May 2015. The amended regulation (which were in line with the recommendations of the Collins’ report) requires head contractors holding retention money of subcontractors under a construction contract with a project value of not less than AUSS20 million to hold the money in a trust account established with an authorised deposit-taking institution. The regulations were made to put an end to the traditional practice where the retention money payable to subcontractors is withheld by head contractors who may become insolvent putting such subcontractors under major risk of not being able to recover their retention amounts. The usefulness and effectiveness of the retention money trust has been criticised.\textsuperscript{124}

2.30. The term of ‘the NSW Act’ referred to in the following parts of this chapter is the NSW Act in its amended form at that particular time as applicable.

\textbf{2.6.3 The object of SOP Act}

2.31. As in the case of other Australian legislation, the NSW Act identifies its object, being that to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.\textsuperscript{125} This means that a person is entitled to receive a progress payment by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.\textsuperscript{126} Judicially, it was held that:

\textit{“The NSW Act seeks to ensure, among other things, that those who perform construction work pursuant to construction contracts have enforceable rights to progress payments. The statutory mechanisms for achieving that aim include a number of elements. There is a statutory right to progress payments despite any contractual provision to the contrary. In the event of disagreement, there

\textsuperscript{125} NSW Act, s 3(1).
\textsuperscript{126} NSW Act, s 3(2).}
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is a statutory mechanism, called adjudication, for the interim determination of entitlements to progress payments."127

2.32. To achieve its express object, the NSW Act established a procedure that involves:128

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the progress payment so determined.

2.33. It was argued that such procedures provided for in the NSW Act indicate some relaxations with regard to the compliance with natural justice requirements. Hence, it was judicially decided that "an adjudicator under the Act is obliged to afford the parties to the adjudication natural justice, there being no indication of any legislative intention to exclude that fundamental right."129

2.6.4 The Ambit of the legislation

2.34. The NSW Act applies to “construction contracts” which may be written or oral or partly written and partly oral.130 “Construction work” is broadly defined and exclusions are essentially limited to mining operations. Basically, the NSW Act provides that construction work includes construction, alteration, repair, maintenance and demolition of most structures that can be fixed to land. This means the NSW Act will apply to most typical construction contracts and related consultancy agreements. However, the NSW Act does not apply to a construction contract:131

a. that forms part of a loan agreement, a contract of guarantee or a contract of indemnity;

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128 NSW Act, s 3(3).
129 Musico v Davenport [2003] NSWSC 977 at {44}–{45} per (McDougall J).
130 NSW Act, s 7(1).
131 NSW Act, s 7(2), (3).
b. for residential building work if the owner lives or intends to live in the building;

c. where it is agreed that the consideration payable is not calculated by referring to the value of the work carried out or the goods and services supplied;

d. under which a party undertakes to carry out construction work, or supply related goods and services, as an employee; and

e. to the extent the construction work or related services are carried out outside NSW.

2.35. The “construction contract” is defined in the NSW Act as “a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.” The word “arrangement” denotes some engagement, or state of affairs, or agreement (whether legally enforceable or not) under which, perhaps among other things, one party undertakes to perform construction work for another.132 Judicially, it was held that an “arrangement” between the proprietor and the builder in a conversation can be an engagement, or agreement (not legally enforceable as a contract), under which the proprietor assured the builder that he had sufficient personal resources to pay it if the proprietor did not; that he would do so; and that the builder accepted and acted on this assurance by executing the building contract and the bonus deed.133

2.6.5 Statutory mechanism for payment claims

2.36. The NSW Act provides for a statutory right to progress payment alongside the existing contractual right through a strict and quick statutory procedure. A person who has undertaken to carry out construction work under the contract, or who has undertaken to supply related goods and services under the contract, is entitled to a progress payment on and from each ‘reference date’ under a construction contract.134 The ‘reference date’ means a date determined in accordance with the

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134 NSW Act, s 8(1).
terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out. This indicates that the parties are not prohibited by the NSW Act from limiting the occurrence of reference dates in their construction contract. However, if the contract is silent about the ‘reference date’; it is the last day of the named month in which the construction work was first carried out under the contract and the last day of each subsequent named month. The claimant can only make one claim for each reference date. However, if money has not been paid for a previous claim, it can be included in the next claim. Where reference dates are provided in a construction contract, and the contract does not provide that the reference dates will survive termination of the contract, then termination of the contract may extinguish all future reference dates.

2.37. The statutory adjudication mechanism starts when a person who claims to be entitled to a progress payment (the claimant) serves a valid payment claim on the person who, under the construction contract concerned, is or may be liable to make that payment in accordance with the legislative guidelines (the respondent). The claim must be served within the period determined by the terms of the construction contract or the period of 12 months after the construction work to which the claim relates was last carried out, whichever is the latter. A payment claim under the NSW Act can be made at the same time as a progress payment claim under the contract. The respondent can reply to the claim by providing a payment schedule to the claimant which must identify the payment claim to which it relates and indicate the amount of the payment (if any) that the respondent proposes to make. If the scheduled amount is less than the claimed amount, the payment schedule must indicate why the scheduled amount is less and the respondent's reasons for withholding payment. As a
good practice, the reasons should include any jurisdictional objections concerning the validity of the payment claim or the existence of a construction contract. The payment schedule may be served by the respondent or his/her agent (i.e., the superintendent) provided that a proper delegation is made by the respondent to the agent with a clear statement that this is a respondent’s payment schedule not merely a superintendent’s certificate. The respondent must issue a payment schedule within 10 business days or as specified in the contract whichever time expires earlier.

2.38. The NSW Act also provides for consequences of not paying the claimant where there is no payment schedule. So, if the respondent becomes liable to pay the claimed amount to the claimant as a consequence of having failed to provide a payment schedule, and fails to pay the whole or any part of the claimed amount by the due date, the claimant may: 1) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or 2) make an adjudication application in relation to the payment claim, and 3) may serve notice on the respondent of the claimant’s intention to suspend carrying out the work. The reason why a claimant may choose the option of adjudication rather than suing on the statutory debt is to avoid the requirement to issue a summons for the statutory debt.

2.39. Subsequently, if the claimant commences proceedings to recover the unpaid portion of the claimed amount from the respondent as a debt, judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the relevant circumstances. Also, the respondent has very limited grounds to contest liability in those proceedings. The respondent is not entitled to bring any cross-claim against the claimant or to raise any defence in relation to matters arising under the construction contract. However, the respondent may challenge the claimant’s application in these proceedings on grounds related to jurisdiction.
the validity of the payment claim. For instance, the respondent may use “misleading and deceptive conduct” of the claimant as a possible defence to the consequences of failing to provide a payment schedule within the relevant timeframe, notwithstanding the fact that the NSW Act does not require the payment claim to be served in a good faith nor having a genuine belief in the claimant’s entitlement to do so.

2.6.6 Statutory adjudication process

2.40. If there is a payment schedule and the claimant is unhappy with it; or if the respondent did not pay the amount stated in the payment schedule, the claimant may serve an adjudication application to an ANA to nominate an adjudicator. The application must be accompanied by an application fee as may be determined by the ANA. Currently, there are eight ANAs practicing in NSW. The adjudication application must be in writing and made to an ANA chosen by the claimant. Judicially, it was held that the adjudication application must not provide arguments altering the position in the payment claim or introducing new issues. The fact that the claimant has the discretion to choose its favourite ANA raised significant concerns within the industry about the apprehended bias claiming that the appointment process is a claimant friendly, thus flawed.

2.41. The adjudication application must be made within 10 business days after the claimant receives the payment schedule or within 20 business days after the due date for payment where any part of the scheduled amount has not been paid by the due date. If there is no payment schedule and the claimant elects to go to adjudication, the claimant must serve a notice on the respondent of the claimant’s intention to commence adjudication and give the respondent a second chance to issue the payment schedule within 5 business days. In this case, the

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150 See Brookhollow Pty Ltd v R&R Consultants Pty Ltd [2006] NSWSC 1 at [34]-[41] (Palmer J)
151 Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2006] NSWCA 238.
152 NSW Act, s 17(3)(g).
154 NSW Act, s 17 (3) (a)-(b).
157 NSW Act, s 17 (3) (c)-(d).
158 NSW Act, s 17 (2) (b).
adjudication application must be served within 10 business days after the expiry of the five business days.\(^\text{159}\)

2.42. The respondent has the right to serve an ‘adjudication response’ within five business days after receiving the adjudication application or two business days after the adjudicator is appointed whichever time expires later\(^\text{160}\) provided that the respondent had served a payment schedule.\(^\text{161}\) The response must be in writing, identify the adjudication application to which it relates, and contain such submissions relevant to the response as the respondent wishes to include.\(^\text{162}\) However, the respondent is not entitled to raise new reasons other than those mentioned in the payment schedule.\(^\text{163}\) As such, the NSW Act somewhat facilitates the game of “ambush claims” where the claimant may spend several months, assisted by lawyers and experts preparing a comprehensive and lengthy payment claim for a substantial monetary amount, leaving the unsuspecting respondent with a few days only to respond in its payment schedule and adjudication response.

2.43. If the chosen ANA\(^\text{164}\) refers an adjudication application to an adjudicator, the adjudicator may accept the application by serving a notice of the acceptance onto the parties.\(^\text{165}\) Some ANAs will only refer an adjudication application to an adjudicator who has contracted to pay the ANA a proportion up to one third of the adjudicator’s fees.\(^\text{166}\) The adjudicator’s notice should be served within four business days after the application is made, otherwise, the claimant may opt to withdraw its application.\(^\text{167}\) Having said that, the NSW Act has no express time limit for issue of an adjudicator’s acceptance to the parties. Such gap was criticised as it unnecessarily leads to a prolonged period of determination.\(^\text{168}\)

2.44. By his or her acceptance, the adjudicator is taken to have been appointed to determine the adjudication application and is obliged to determine it as

\(^{159}\) NSW Act, s 17 (3) (e).
\(^{160}\) NSW Act, s 21 (1).
\(^{161}\) NSW Act, s 22 (2A).
\(^{162}\) NSW Act, s 20(1), (2).
\(^{163}\) NSW Act, s 22 (2B).
\(^{164}\) For more details on how the nominating authorities are authorised by the government, refer to NSW Act, s 28.
\(^{165}\) NSW Act, section 19 (1).
\(^{167}\) NSW Act, section 26 (1).
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expeditiously as possible and in any case within 10 business days after the adjudicator notified the parties as to his or her acceptance of the application or within such further time as both parties may agree.\footnote{NSW Act, section 21 (3).} Since the respondent can submit the adjudication response within two business days after the adjudicator’s acceptance, it is very likely for an adjudicator to issue his or her acceptance without having any clue how the adjudication response would look like. This, of course, will limit the adjudicator’s ability to assess his or her capability of reviewing extremely complex cases. The “one size fits all” approach inherent in the statutory mechanism (dealing with all types and sizes of claims) has been much criticised for its inability to produce quality determinations for larger and more complex payment claims.\footnote{See, eg, the SOCLA Report, above fn 98; Wallace, A. (2013) Discussion Paper – Payment dispute resolution in the Queensland building and construction industry-Final Report.}

2.45. The respondent must pay the adjudicated amount within five business days.\footnote{NSW Act, section 23.} Failure to do so will allow the claimant to request an adjudication certificate from the ANA and serve notice onto the respondent of the claimant’s intention to suspend carrying out construction work.\footnote{NSW Act, section 24.} The adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.\footnote{NSW Act, section 25 (1).} Section 7(1A) of the Contractors Debts Act 1997 provides that: “If an Adjudication Certificate...has been filed as a judgment for a debt in accordance with section 25 of the NSW Act, the court may...issue a Debt Certificate in respect of the debt due under this section.” However, the certificate cannot be filed unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.\footnote{NSW Act, section 25 (2).}

2.6.7 ANAs’ code of conduct

2.46. In order for an adjudicator to be eligible to practice, he or she must be natural persons and have such qualifications, expertise and experience as may be prescribed by regulations made under the NSW Act.\footnote{NSW Act, section 18(1).} However, no regulations...
have been made to date to prescribe such qualifications or experience. Rather, the NSW Fair Trading released what is so called "Authorised Nominating Authority Code of Practice"176 (The Code). The Code established certain requirements that regulate the ANAs’ functions under the NSW Act. For example, an ANA must notify the Minister’s representative of any complaint or allegation made against an adjudicator or the ANA, including court actions or adjudications submitted for judicial review, within seven days of becoming aware of the complaint or allegation, whether by formal or informal means. An ANA will manage the processes of selection, training and monitoring of adjudicators as outlined in a referred Schedule within the Code. That Schedule provides that an ANA must:

a. Determine the necessary core competencies of adjudicators required to undertake the adjudication process under the NSW Act;

b. Select, train and monitor adjudicator performance and compliance with the NSW Act on a continuous basis;

c. Monitor and report any instance of non-compliance and unsatisfactory adjudicator performance including details on remediation actions to ensure such issues do not arise again;

d. Establish and maintain a training, accreditation and pre-qualification scheme where necessary;

e. Establish and maintain effective ANA services including but not limited to the numbers and type of adjudicators necessary to cater for all such adjudication;

f. Maintain a suitable quality system that supports consistent and reliable adjudicator selection, training and monitoring;

g. Ensure when nominating an adjudicator that:

1. the adjudicator has the core competencies to carry out each specific adjudication determination noting that all adjudications are unique and may require varying degrees of competencies;

2. the adjudicator has been adequately trained and retrained in the adjudication process relating to the NSW Act;

3. any perception of conflict of interest has been addressed prior to nomination.

2.47. It is submitted that the Code provides a free hand to the ANAs to decide upon the required training, qualifications and competencies of adjudicators. It also provides no deterrent against adjudicators accepting adjudication appointments while they lack the necessary competencies to properly deal with the disputed matters. The lack of quality control over adjudicators in NSW attracts some criticism driven by the risk of injustice in rapid adjudication which requires a high standard of adjudicator’s expertise.\footnote{Zhang, T. (2009). Why national legislation is required for the effective operation of the security of payment scheme. Building and Construction Law Journal, 25, 376.} It was argued that the ANAs in NSW do not have similar quality control over adjudicators and their training courses significantly vary where some ANAs provide training for months whilst others provide training for a few days only.\footnote{Munaaim, M. E. (2012). Developing a framework for the effective operation of a security of payment regime in common law jurisdictions. Doctor of Philosophy, King's College London.} It is likely that one of the reasons for the recent high rate of adjudication determinations that have been quashed by the NSW courts is linked to shortcomings in the way adjudicators are regulated.

2.6.8 Adjudicator’s powers and functions

2.48. The NSW Act provides for limited powers to adjudicators. The adjudicator may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, may set deadlines for further submission and comments by the parties, call a conference of the parties, and carry out an inspection of any matter to which the claim relates.\footnote{NSW Act, s 21(4).} If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.\footnote{NSW Act, s 21(4A).} In practice, site inspections or conferences
are rarely conducted due to the tight timeframes available for an adjudicator to release the determination. In *Downer Construction (Australia) Pty Ltd v Energy Australia*, Giles JA provided some insights on the circumstances where further submissions may be sought:

“there may not be any submissions in support of the payment claim. The adjudicator must still make the determination, perhaps invoking the powers under s 21(4). If the submissions in whole or part address a progress payment in relation to construction work (or related goods and services) other than that identified in the payment claim, the adjudicator can invoke those powers in order to clarify matters; but even if the adjudicator does not do so, the adjudicator must make the determination addressing the work identified in the payment claim.”

2.49. The adjudicator’s function is confined to determining the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount), the date upon which any such amount became or becomes payable, the rate of interest on the adjudicated amount and the apportionment of adjudication fees. In doing so, the adjudicator is strictly limited to considering the provisions of the NSW Act as well as the construction contract, the payment claim and the payment schedule together with all supporting submissions, and the results of any inspection. As such, the adjudicator is not allowed to use his or her own knowledge or rely on arguments that have not been advanced by either party to reach his or her determination without giving both parties the opportunity to put submissions on that basis to afford them natural justice.

2.50. The adjudicator has no power to correct the adjudication amount where it is shown to have been produced by error of law, whether or not jurisdictional. However, the adjudicator can, on his or her own initiative or on the application of either party, correct the determination, in the event of a clerical mistake, an

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181 *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWCA 49 at [64] (Giles JA).
182 NSW Act, s 22(1).
183 NSW Act, s 22 (2).
184 See, eg, *Musico v Davenport* [2003] NSWSC 977, *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 491; *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 657; *Parkview Constructions v Sydney Civil Excavations* [2009] NSWSC 61 at [38]
185 *Multiplex Constructions Pty Ltd v Laikens* [2003] NSWSC 1140 at [91] (Palmer J).
error arising from an accidental slip or omission, a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or a defect of form. This is what might loosely be called the “Slip Rule”. Judicially, it was held that the whole determinations should not be invalidated where an adjudicator makes an error that could have been corrected by this rule. The adjudicator will enjoy the power to correct his or her determination under this rule even after the commencement of court proceeding to challenge the determination.

2.6.9 Adjudicator’s determination

2.51. The determination must be in writing and include reasons unless both parties have requested otherwise. The NSW Act does not state any requirement regarding the length, detail, or elaboration of the reasons. However, in Clyde Bergemann v Varley Power, McDougall J held that:

“The reasons should show that the adjudicator has turned his or her mind to the dispute entrusted to his or her determination, and has addressed the issues raised by the parties in support of or opposition to the payment claim. There is no requirement that they be lengthy, elaborate or detailed. On the contrary, it may be thought, the scheme of the Act tells strongly against any such requirement and the obvious statutory intent that valid payment claims should be paid as quickly as possible.”

McDougall J went on to say that "the reasons should be sufficient to show that the adjudicator has engaged actively with the dispute tendered for his or her decision, and dealt with it in a way that is reasoned, and not perverse, arbitrary or capricious.”

2.52. In Shell Refining (Australia) Pty Ltd v A J Mayr Engineering Pty Ltd, the adjudicator stated in the first page of his determination that he had considered all

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186 NSW Act, s 22(5).
190 NSW Act, s 22(3).
193 [2006] NSWSC 94.
the submissions and accompanying documents submitted by the parties and the fact that he had not specifically referred to any submission or document in the determination, should not be taken as any indication that he had not considered it. The adjudicator said that the reason that he had not referred to any submission or document was that he had not considered it of sufficient relevance to warrant specific comment. Bergin J was critical in considering such approach and held that:

"It is perhaps understandable that some adjudicators whose determinations have been the subject of administrative law challenge may regard it as appropriate to utilise a catch-all statement, similar to the one used in the Determination, to fend off an allegation that they have failed to consider a relevant matter. Notwithstanding the somewhat ‘pressure cooker’ environment in which adjudicators provide their determinations, it seems to me that it would be unhelpful for adjudicators to develop such a practice. It is assumed that adjudicators will comply with their statutory duties under s 22(2) of the Act, which sets out the matters to which they are to give consideration. A consideration of whether they have so complied is made from the content of their determinations rather than from a statement or claim by the adjudicator in the determination that he/she has so complied."  

### 2.6.10 Issue estoppel/abuse of process

2.53. If an adjudicator has determined the value of works, the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work, to give the work the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work has changed since the previous determination. This provision had much debate before the NSW courts whether it is a replacement or an exception to the ‘issue estoppel’ doctrine which prevents new adjudication of the same claim which has already been decided in a previous adjudication. In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*, Macfarlan JA disagreed with McDougall J in his interpretation of this provision in *John Goss*
Projects v Leighton Contractors\textsuperscript{197} and held that “the view that the claimant once disappointed by an adjudicator can seek a different determination from another, or indeed from a succession of others, until a favourable decision is reached would in my view conflict with the policy of the NSW Act to render adjudicators’ determinations final on issues which they resolved, subject only to provisions of the NSW Act conferring limited rights of correction of determinations.”\textsuperscript{198}

2.54. In Ku-Ring-Gai Council v Ichor Constructions Pty Ltd,\textsuperscript{199} the claimant made a first adjudication application in relation to a payment claim for delay damages. In support of its delay damages claim, the claimant submitted an expert report on the delays. Whilst the adjudicator, found that the claimant had been delayed by the respondent and was entitled to delay damages, he identified a number of shortcomings with the way in which the expert report had calculated the length of compensable delay. The adjudicator concluded he is unable to replicate the assessment process followed in the expert report being computer driven in order to assess the true extent of the claimant entitlement, so he was unable to assess it and the resulting quantum of the delay costs claims.\textsuperscript{200} Subsequently, the claimant made a further payment claim which included the delay costs that the first adjudicator had been unable to assess and served a second adjudication application that included a supplementary expert report which had been prepared to address the shortcomings identified by the first adjudicator. The respondent sought a declaration that the second adjudication application was an abuse of process and void. The court held that, whilst the circumstances did not give rise to ‘issue estoppel’ (as the first adjudicator had not made a determination with respect to the delay damages claim), there had been an abuse of process in that the claimant had used the first adjudicator’s observations as an advice on evidence and was making a second attempt to prove the same case thus requiring the respondent, for the second time, to meet it.

2.55. Interestingly, in Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd,\textsuperscript{201} the adjudicator was requested to decide whether he has jurisdiction before accepting

\textsuperscript{197} [2006] NSWSC 798 (McDougall J).
\textsuperscript{198} Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69 at [70], (Macfarlan JA).
\textsuperscript{199} [2014] NSWSC 1534.
\textsuperscript{200} [2014] NSWSC 1534 at [24].
\textsuperscript{201} [2011] NSWSC 165.
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The adjudicator did not wait for the adjudication response and accepted that he does not have jurisdiction on the basis that the construction work was done outside NSW. The claimant argued that it is entitled to put a new adjudication application. Accordingly, Ball J held that the principles of ‘issue estoppel’ and ‘abuse of process’ prohibit a claimant from making a new adjudication application under section 17 in circumstances where an adjudicator correctly holds that he or she does not have jurisdiction to adjudicate the referred matter.

2.6.11 Adjudicator’s fees and immunity

2.56. The adjudicator is entitled to be paid fees and expenses as may be agreed with the parties to the adjudication, or as reasonable having regard to the work done and expenses incurred by the adjudicator.202 The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.203 The adjudicator must provide reasons for apportionment if any. However, the Act does not provide guidelines upon the criteria of such apportionment. The adjudicator is not entitled for such fees if he or she fails to make a decision on the application (except where the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21 (3).204 This would indicate the implied intention of the NSW Act to promote expeditious procedures. Notably, it was judicially decided that the adjudicator’s determination made outside the statutory time limits will remain valid, because the statutory remedy of not paying the adjudicator’s fees was a sufficient remedy for the breach.205

2.57. Neither the adjudicator nor the ANA is liable for anything done or omitted to be done in good faith in performing their functions under the NSW Act.206 The question is whether an adjudicator’s who has acted in good faith and delivered the determination within the 10-day period limits, is still entitled for his or her fees even though the adjudicator’s determination is set aside. Until the time of

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202 NSW Act, s 29(1).
203 NSW Act, s 29(2),(3).
204 NSW Act, s 29(4).
206 NSW Act, s 30.
writing, there is no authority in NSW to suggest so. The contrary was held in the UK in the case of *PC Harrington Contractors v Systech International*. In that case, the court held there was nothing in the contract or in the governing legislation to provide that the parties are obliged to pay for an unenforceable decision or for the preliminary functions of the adjudicator. Hence, the unenforceable decision was of "no value to the parties".

### 2.6.12 Contracting out of the NSW Act

2.58. The NSW Act prohibits the contracting parties from attempting to contract out of the provisions of the NSW Act and provides that the provisions have effect despite any provision to the contrary in any contract. Therefore, a provision of any agreement that has the effect of excluding, modifying or restricting the operation of the NSW Act, or that may reasonably be construed as an attempt to deter a person from taking action under the NSW Act is void. This provision was prone to heavy debates in courts which might reflect the difficulty facing adjudicators as well as judges in applying this provision in practice. McDougall J discussed this provision in detail and concluded that:

> “Regardless of the Act’s apparent attempts to preserve contractual freedoms, I suggest that s 34 is a bulwark against provisions attempting to eradicate or limit the rights established by the Act. The section, as amended, may be seen to have transformed the Act from a legislative scheme providing default mechanisms to one which establishes a strong entitlement to a prompt, interim progress payment. It may be that s 34 will also have an impact on rights outside the Act, in that its avoiding effect may be permanent, and for all purposes.”

### 2.6.13 Effect on civil proceedings

2.59. The NSW Act acknowledges the essentially provisional nature of the adjudication process affirming that it has no effect on the rights under the

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207 [2012] EWCA Civ 1371.
208 NSW Act, s 34.
contract, or on any civil proceedings arising under the contract.\textsuperscript{211} The proceedings may commence before, during or after the start of adjudication process. In \textit{John Holland Pty Ltd v Roads and Traffic Authority of New South Wales},\textsuperscript{212} McDougall J described the role of the relevant section as follows:

\begin{quote}
"I do not think that it is correct to speak of s 32 as creating a restitutionary right. Its place in the scheme of the Act is to reinforce the interim nature of adjudication determinations, and to provide that parties' legal rights (as decided by a court or tribunal) are given full effect notwithstanding what may have been determined by an adjudicator and what may have been done in pursuance of, or obedience to, that determination."
\end{quote}

2.60. In addition, the NSW Act provides that the court or tribunal in any proceedings relating to any matter arising under the construction contract must allow for any amount paid to a party to the contract under the NSW Act.\textsuperscript{213} The court or tribunal may make such orders for the restitution of any amount so paid so any mistake by the adjudicator can be eventually corrected in such proceedings.\textsuperscript{214} The cause of action that a respondent has to recoup an adjudicated amount (that the respondent has paid the claimant pursuant to SOP Act and similar acts in other jurisdictions) includes damages for breach of the construction contract, and the respondent does not have a cause of action in restitution based upon unjust enrichment.\textsuperscript{215}

2.61. In \textit{Ceerose Pty Ltd v Building Products Australia Pty Ltd},\textsuperscript{216} the court clarified the purpose of section 32 within the NSW Act and held that:

\begin{quote}
"S 32(3)(b) does not confer or grant jurisdiction on a court to hear a claim that it is otherwise not empowered to. However, the provision confirms that, a court having determined such a claim, then the existence of either an adjudication certificate or a judgment based on such a certificate does not represent an impediment to that court granting relief that reflects the final rights of the parties that it has determined. This can be of particular
\end{quote}

\textsuperscript{211} See NSW Act, s 32 (1),(2); \textit{Chase Oyster Bar v Hamo Industries} [2010] NSWCA 190 at [198].
\textsuperscript{212} [2006] NSWSC 874 at [33].
\textsuperscript{213} NSW Act, s 32 (3)(a).
\textsuperscript{214} NSW Act, s 32 (3)(b).
\textsuperscript{216} [2015] NSWSC 1886 at [14] (Beech-Jones J).
importance in the case of inferior courts. Thus, for example, in hearing a proceeding that involves or constitutes a matter “arising under a construction contract”, s 32(3)(b) confirms that the Local Court is not impeded from ordering the repayment of funds previously paid under, say, a judgment of the District Court obtained as a consequence of the registration of an adjudication certificate as a judgment debt under s 25 of the Security of Payment Act.”

2.62. It is submitted that section 32 somewhat acts as a safety net for any of the contracting parties aggrieved by a determination which has an interim nature. In practice, where a claimant does not commence proceedings to recover an amount additional to the adjudicated amount and the respondent does not commence proceedings to recover an amount from the claimant, adjudication finally resolves payment disputes. The time, cost and effort inherent in any litigation or arbitration proceedings deters parties from commencing further proceedings. As such, most of the aggrieved parties (whether claimants or respondents) cannot afford commencing such proceedings unless the dispute involves large amounts for which any unfavourable adjudication determination may put their financial standing at a major risk. This may also justify the excessive applications by aggrieved respondents to have the adjudication determinations reviewed in court as they will be under risk of being unable to recover the payment later should they finally succeeded in the relevant dispute because of the insolvency of claimants by the time the final proceedings are complete.

2.6.14 Judicial intervention

2.63. The adjudication procedures stipulated in the NSW Act contemplate a minimum of opportunity for court involvement.217 Whilst the NSW Act is silent on whether judicial review of adjudication determinations is permitted, it does not shut the door for such remedy. The NSW Act provides that the amount determined by an adjudicator’s determination can be registered as a judgment. If the respondent commences proceedings to have the judgment set aside, the respondent is not, in those proceedings, entitled to bring any cross-claim against the claimant, or to raise any defence in relation to matters arising under the construction contract, or

217 Brodyn Pty Ltd t/a Time Cost and Quality v Davenport [2004] NSWCA 394 at [51]-[55].
to challenge the adjudicator’s determination.\textsuperscript{218} However, this does not prevent a respondent from raising an argument that there never was an adjudication determination.\textsuperscript{219} The respondent is also required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.\textsuperscript{220}

2.64. There have been a series of cases before the NSW courts dealing with the possibility of having the adjudicator’s determination judicially reviewed in light of the legislative scheme. The matter was first considered in \textit{Abacus Funds Management v Davenport}\textsuperscript{221} in which Gzell J confirmed that an order in the nature of certiorari is available against adjudication determinations. A few days later, this issue was discussed in more detail in \textit{Musico v Davenport}\textsuperscript{222} (\textit{Musico}). In that case, McDougall J held that an adjudicator’s determination is susceptible to judicial review under section 69 of the \textit{Supreme Court Act} 1970 (NSW) and can be quashed if the adjudicator committed a jurisdictional error.\textsuperscript{223}

\textbf{2.6.15 The role/position of adjudicators}

2.65. Examining the role of the adjudicator was an essential step in the reasoning process by courts when considering challenges to the validity of adjudicators’ determinations. The NSW courts have adopted different approaches about the role of the adjudicator within the meaning of the NSW Act over years. In \textit{Musico},\textsuperscript{224} McDougall J held that:

\begin{quote}
“The position of an adjudicator under the NSW Act is not completely analogous to that of an administrative tribunal... Nor, of course, is it closely analogous to that of an inferior court...The position is, in my view, closely analogous to that of an expert by whose determination the parties have agreed to be bound.”
\end{quote}

\begin{itemize}
\item[\textsuperscript{218}] NSW Act, s 25(4)(a).
\item[\textsuperscript{219}] \textit{Brodyn Pty Ltd t/a Time Cost and Quality v Davenport} [2004] NSWCA 394 at [42].
\item[\textsuperscript{220}] NSW Act, s 25(4)(b).
\item[\textsuperscript{221}] [2003] NSWSC 935.
\item[\textsuperscript{222}] [2003] NSWSC 977.
\item[\textsuperscript{223}] Section 69(3) of the Supreme Court Act states that relief in the nature of certiorari may lie to quash a determination made on the basis of an error of law that appears on the face of the record of the proceedings.
\item[\textsuperscript{224}] \textit{Musico v Davenport} [2003] NSWSC 977 at [51.]
\end{itemize}
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In *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*²²⁵ (*Brodyn*), Hodgson JA held that “it is by no means clear that an adjudicator is a tribunal exercising governmental powers, to which the remedy in the nature of certiorari lies.”²²⁶ In *Chase Oyster Bar v Hamo Industries*²²⁷ (*Chase*), it was held that adjudication “is a public, relevantly a statutory, dispute resolution process, and as a consequence is subject to the supervisory jurisdiction.”²²⁸

2.6.16 Adjudicating complex payment disputes

2.66. Adjudication, with its abbreviated timeframes, has always been acknowledged as a somewhat ‘rough and ready’ dispute resolution process. As such, Australian courts (as well as their English counterparts) have generally been happy to uphold adjudicator’s decisions containing non-jurisdictional errors of law, only quashing those where adjudicators have strayed outside the boundaries of their jurisdiction.

2.67. Despite the success of the NSW Act in dealing with smaller payment claims, there have been many judicial review applications by aggrieved respondents challenging adjudicators’ determinations on large payment claims by raising complex questions of law related to jurisdictional issues or interpretation of the contract to frustrate the adjudication process or to have adjudication determinations set aside. This has eventually resulted in inevitable formalisation of adjudication process, drifting away from the simple process envisaged by Parliament. The Victorian Supreme Court mentioned the deficiency of the NSW legislation in achieving its object due to the vast amount of judicial review in a very short period of time and stated: “If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.”²²⁹

2.68. McDougall J stated in *Chase* that the NSW Act “provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents.”²³⁰ It was also held that adjudicators are often required to make their determinations in

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²²⁶ *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* [2004] NSWCA 394 at [58].
²²⁸ *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 at [5].
²²⁹ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [46]-[47].
²³⁰ [2010] NSWCA 190 at [207]-[209].
a pressure cooker environment because of the strict timeframes and the complexity of the cases, and accordingly, considerable latitude should be afforded to an adjudicator as to the manner and form of the determination.  

2.69. In *Laing O'Rourke Australia Construction v H&M Engineering & Construction*, the plaintiff contended that the adjudicator did not consider its submissions in support of its payment schedule. McDougall J found that notwithstanding the fact that the adjudicator was required to assimilate a huge mass of material and to deal with it in order to reach a reasoned conclusion in a very short time and the adjudicator did consider the submissions of the plaintiff (respondent), the adjudicator failed to carry out an active process of intellectual engagement. For that reason, he set aside the adjudication determination void. There is a limit to how much material a single adjudicator can intellectually engage with in just 10 business days, so the fact that an adjudicator is usually overwhelmed by sheer volume of paperwork in complex cases may, be likely to leave the door always ajar for a potential judicial challenge on the grounds of breach of natural justice and/or want of good faith. Such volume of paperwork may include, among other things complex legal submissions and technical expert reports upon which the adjudicator is obliged to reasonably consider.

2.6.17 The ambit of judicial review

The position before 2010:

2.70. The ambit of judicial review with regard to adjudication determinations was substantially influenced by certain landmark cases, with the NSW Supreme Court trying to interpret its supervisory role in light of the legislative intent. In *Musico*, it was held that relief to quash adjudication determination in nature of certiorari is available where the adjudicator acted beyond his or her jurisdiction or breached the principles of nature justice. However, it was also held that the legislative scheme of the NSW Act was inconsistent with the availability of review for non-

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232 [2010] NSWSC 818. This case was followed in *QCLNG Pipeline v McConnell Dowell Constructors* [2011] QSC 292. Both cases are the subject of criticism in *Moving the goal posts*, a supplement to *Adjudication in the Building Industry*, 3rd edn 2010, Davenport, P. Federation press, Sydney.

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jurisdictional error of law. These propositions were followed in many subsequent judgements.

2.71. In *Brodyn, the NSW Court of Appeal* held that *Musico* and the cases that followed it were incorrectly decided. The court decided that the legislature did not intend that exact compliance with all the more detailed requirements of the NSW Act was essential to the existence of a determination. The established propositions from the reasoning of *Brodyn* were precisely summarised as follows:

a. *Certiorari* is not available for non-jurisdictional error of law on the face of the record;

b. For the existence of a valid adjudicator’s determination, the following must be satisfied:

c. The five basic and essential requirements:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (sections 7 and 8);
2. The service by the claimant on the respondent of a payment claim (section 13);
3. The making of and adjudication application by the claimant to an authorised nominating authority (section 17);
4. The reference of the application to and eligible adjudicator, who accepts the application (sections 18 and 19);
5. The determination by the adjudicator of this application (sections 19(2) and 21(5), be determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (section 22(1)) and the issue of determination in writing (section 22(3)(a));

d. Good faith in the *Hickman* sense;

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234 *Musico v Davenport* [2003] NSWSC 977 at [54].
236 *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* [2004] NSWCA 394 at [59] (Hodgson JA).
237 *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* [2004] NSWCA 394 at [55] (Hodgson JA).
238 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 at [146].
239 See *Hickman v R* [1945] HCA 53; (1945) 70 CLR 398
e. No “substantial denial” of the measure of natural justice that the Act affords;

f. Other basic essential requirements may be discovered;

g. The consequence of absence of a basic and essential requirement is that the determination is void;

h. Leaving to one side fraud in which the adjudicator is complicit, a determination will only be void if a basic and essential requirement for validity is lacking;

i. If a determination is void, through absence of a basic essential requirements for validity, relief may be granted by way of declaration and injunction;

j. It is inconsistent with the legislative intention demonstrated by the Act that relief in the nature of certiorari should be available where there is some element of invalidity falling short of absence of a basic and essential requirement.

2.72. In *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd*, Hammerschlag J referred to the “extensive judicial consideration” of the NSW Act provisions post *Brodyn* and usefully identified the following relevant principles from a review of the authorities:

a. The NSW Act seeks to facilitate speedy resolution of claims to progress payments without exclusive formality or intervention by the court and the scope for invalidity of adjudicator’s determination for non-jurisdictional error is limited.

b. An adjudicator’s determination is reviewable for jurisdictional error where the determination is not a determination within the meaning of the Act because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination.

c. Whether a failure by an adjudicator to meet a requirement imposed by the Act makes the determination void depends upon whether that requirement was

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242 *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWCA 49 at [81] (Giles JA).
243 *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 at 441 (Hodgson JA);
intended by the legislature to be an essential precondition for the existence of an adjudicator’s determination.\textsuperscript{244}

d. The existence, or otherwise, of essential pre-conditions to a valid claim, as well as determination of the parameters of the payment claim, are matters for the adjudicator and are not for objective determination by a court.\textsuperscript{245}

e. An erroneous decision by an adjudicator that an essential pre-condition has been satisfied, when in truth it has not, can be jurisdictional error making the determination reviewable. When there is present such jurisdictional error, the determination is void and relief by way of declaration and injunction is available.\textsuperscript{246}

f. Sections 13, 17, 18, 19, 21 and 22 of the NSW Act contain certain basic requirements, as well as more detailed requirements. The legislature did not intend precise compliance with all of the more detailed requirements to be essential to the existence of a determination. What was intended to be essential was compliance with the basic requirements, a \textit{bona fide} attempt by the adjudicator to exercise the relevant power relating to the subject / matter of the legislation and reasonably capable to reference to that power and no substantial denial of the measure of natural justice that the NSW Act requires to be given.\textsuperscript{247}

g. If the basic requirements of the Act are not complied with, or if a purported determination lacks a \textit{bona fide} attempt by the adjudicator to exercise the relevant power, or if there is a substantial denial of the measure of natural justice, a purported determination will be void, because then there will not be satisfaction of a requirement that the legislature has indicated to be essential to the existence of determination.\textsuperscript{248}

\textsuperscript{244} Transgrid v Siemens Ltd (2004) 61 NSWLR 521 at [539] – [540] (Hodgson JA); Brodyn Pty Ltd \textit{t/a Time Cost and Quality} v Davenport (2004) 61 NSWLR 421 at 441 (Hodgson JA);

\textsuperscript{245} Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2006] NSWCA 238 at [71]; Downer Construction (Australia) Pty Ltd v Energy Australia [2007] NSWCA 49 at [87].

\textsuperscript{246} Transgrid v Siemens Ltd (2004) 61 NSWLR 521 at 539 (Hodgson J). 

\textsuperscript{247} Brodyn Pty Ltd \textit{t/a Time Cost and Quality} v Davenport (2004) 61 NSWLR 421 at 442 (Hodgson JA); Transgrid v Siemens Ltd (2004) 61 NSWLR 521 at 539 (Hodgson J A).

\textsuperscript{248} Brodyn Pty Ltd \textit{t/a Time Cost and Quality} v Davenport (2004) 61 NSWLR 421 at 442 (Hodgson JA); Transgrid v Siemens Ltd (2004) 61 NSWLR 521 at 540 (Hodgson J A); Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd [2006] NSWSC 375 at [73]-[75] (White J); Lansky Construction Pty Ltd v
h. The requirement of good faith is not a reference to dishonesty, or its opposite, but to the necessity for there to have been an effort to understand and deal with the issues in the discharge of the statutory function.\textsuperscript{249}

i. An adjudicator is only required to consider submissions which are “duly made” under section 22(2)(d). A submission which is included in an adjudication response contrary to the requirements of section 20(2B) of the Act is not duly made within section 22(2)(d), although it could be duly made if made in response to a request under section 21(4)(a), or in a conference by an adjudicator under section 21(4)(c).\textsuperscript{250}

j. For a valid payment schedule, section 14(2) provides that the payment schedule must identify the payment claim to which it relates and must indicate the amount of the payment (if any) which the recipient of the payment claim proposes to make. Section 14(3) requires the respondent to indicate why payment in full is withheld and the reasons for so doing. The joinder of issue thus achieved sets the parameters for the matters which may be contested if an adjudication under the Act ensues.\textsuperscript{251}

k. Both sub-section 22(2)(c) and (d) make reference to “submissions (including relevant documentation).” The words in brackets indicate that the legislature had in mind that the word “submissions” was not to be construed in a narrow manner and that the submissions might include relevant documentation in support.\textsuperscript{252}

l. Under section 22(2) the adjudicator is required to consider the provisions of the NSW Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant and considers those of the submissions they believe to have been duly made, an accidental, or erroneous omission to consider a particular provision of the Act, or a particular provision of the

\textsuperscript{249} Noxequin Pty Ltd (In Liquidation) t/a Fyna Formwork [2005] NSWSC 963 at [20] (Associate Justice Macready); Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 at [90]-[92] (Palmer J).

\textsuperscript{250} Temwin Construction Pty Ltd v Façade Innovations Pty Ltd [2005] NSWSC 548 AT [38] (McDougall J).


\textsuperscript{252} Clarence Street Pty Ltd v Isis Projects Pty Ltd (2005) 64 NSWLR 448 at 455 (Mason P).
contract, or a particular submission is not sufficient to invalidate the determination. This is either because an accidental, or erroneous omission does not amount to a failure to comply with section 22(2), so long as the specified classes of consideration are addressed, or because the intention of the legislature cannot have been to invalidate the determination for this sort of mistake.\textsuperscript{253}

m. The legislature entrusts to the adjudicator the role of determining whether the submissions are, or are not duly made and, if the adjudicator addresses that question and comes to the conclusion that a submission was not duly made, a failure to take account of that submission is not a failure to afford the measure of natural justice contemplate by the Act.\textsuperscript{254}

2.73. Hammerschlag J went on to point out that these principles do not (and could not) provide a yardstick for when an erroneous decision that an essential pre-condition has been satisfied is not jurisdictional error voiding the adjudication, or elaborate on the measure of natural justice that the Act requires to be given; and that they give guidance as to when an omission to consider a submission is merely accidental or erroneous so as to not amount to a failure to comply with section 22(2) as opposed to when that omission constitutes a failure to afford the required level of natural justice. For example, a failure to consider a submission may be erroneous because it is accidental (in the sense of inadvertent) or because of some other error not due to inadvertence.\textsuperscript{255}

2.74. Hammerschlag J further mentioned that it is necessary to consider the nature, gravity and effect of the errors, if any, made by the adjudicator, and to assess, in the context of the purpose and operation of this particular statute, whether the adjudicator breached a basic and essential requirement of the Act by not considering submissions duly made or by failing to make a \textit{bona fide} attempt to exercise his or her powers under the Act or whether the claimant was denied natural justice to a degree sufficient to void the adjudication. The required


\textsuperscript{254} John Holland Ltd v Roads & Traffic Authority of New South Wales [2007] NSWCA 19 at [63] and [71] (Hodgson J A); Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229 (Bergin J).

\textsuperscript{255} [2007] NSWSC 941 at [31] (Hammerschlag J).
exercise is to determine whether what occurred worked “practical injustice” on the plaintiff sufficient to vitiate the adjudication.256

The position in 2010

2.75. There was some further development in the case law six years after Brodyn. The NSW Court of Appeal in Chase considered whether an adjudicator had power to determine an adjudication application not made in compliance with s 17(2)(a) of the NSW Act. In that case, the plaintiff submitted that, to the extent that Brodyn so decided, the decision cannot stand having regard to the decision of the High Court of Australia in Kirk v Industrial Relations Commission of New South Wales257 (Kirk). In that case, it was held that it is not permissible for a State legislature to enact a privative clause which prevents the exercise by the Supreme Court of its supervisory jurisdiction with respect to jurisdictional error.258 Accordingly, two essential issues were raised for decision in Chase. The first is whether, as a matter of principle, the determinations of adjudicators are amenable to relief in the nature of certiorari for jurisdictional error of law. The second is whether the determination of the adjudicator is vitiated by jurisdictional error.259

2.76. McDougall J260 pointed out that in Brodyn, Hodgson JA was concerned to inquire on what basis, other than the grant of certiorari for jurisdictional error of law, the court could intervene in the determinations of adjudicators that lacked some essential foundation for validity.261 He further said that it may be the case that Hodgson JA saw a distinction between a jurisdictional condition, or jurisdictional fact, on the one hand, and a basic and essential condition of validity on the other.262 The learnt judge went on to say that it does not follow that, in looking at the question of jurisdiction, the requirements in section 17(2)(a) (which provides that an adjudication application can’t be made unless the claimant has notified the respondent, of the claimant's intention to apply for adjudication of the

256 [2007] NSWSC 941 at [33],[34] (Hammerschlag J).
258 In Kirk v Industrial Relations Commission of New South Wales [2010] HCA 1, it was held at [100]: “Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.”
260 McDougall J was the first instance judge of this case, but he sat again as part of the Court of Appeal.
261 Chase Oyster Bar v Hamo Industries [2010] NSWCA 190 at [229].
262 Chase Oyster Bar v Hamo Industries [2010] NSWCA 190 at [230].
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payment claim), may not be regarded as jurisdictional, or as establishing a fact to be proved as a condition of the exercise of jurisdiction.\textsuperscript{263} Accordingly, the court held, inter alia, that determinations by adjudicators are in principle amenable to orders in the nature of certiorari for jurisdictional error, reinstating the authority of \textit{Musico}.\textsuperscript{264}

2.77. Prior to \textit{Chase}, the NSW courts took a very restrictive approach to the review of adjudication determinations in line with the decision of \textit{Brodyn}. The areas of review were limited to the "basic and essential" requirements. Following \textit{Chase}, it is now open to the court to quash an adjudicator's determination on the basis of a jurisdictional error, including a jurisdictional fact. In summary, both \textit{Brodyn} and \textit{Chase} support the proposition that where there are preconditions that underpin the existence of a valid adjudication, the existence of those preconditions is a jurisdictional fact. Thus, an adjudicator's finding that certain preconditions have been met so as to found his or her jurisdiction is open to judicial review.\textsuperscript{265}

\textbf{The position after 2010 / (post Chase)}

2.78. Post \textit{Chase}, the NSW courts have quashed many adjudicator's determinations upon jurisdictional grounds including the following cases:

a. The claimant failed to serve payment claim and notices required by section 17(2)(a) to the respondent. Accordingly, the respondent was not given an opportunity to provide a payment schedule to the claimant pursuant to section 17(2)(b) of the Act. Accordingly, the court applied the authorities of \textit{Chase} and held that it is not bound by the Adjudicator’s decision.\textsuperscript{266}

b. The claimant served the notice required under s 17 (2)(a) prematurely, therefore, the respondent was deprived of the full statutory period. Accordingly, adjudication application was ineffective with the consequence

\textsuperscript{263} \textit{Chase Oyster Bar v Hamo Industries} [2010] NSWCA 190 at [231].
\textsuperscript{264} \textit{Musico v Davenport} [2003] NSWSC 977 at [52]-[54] (McDougall J).
\textsuperscript{265} These legal principles were summarized in \textit{H M Australia Holdings Pty Limited v Edelbrand Pty Limited t/as Domus Homes} [2011] NSWSC 604 [16]-[23] (Einstein J).
\textsuperscript{266} \textit{Steel v Beks} [2010] NSWSC 1404 (Macready AsJ)
that the adjudication determination was made without jurisdiction and was liable to be quashed.\textsuperscript{267}

c. The adjudicator failed to exercise the jurisdiction given to him by the NSW Act as his determination neither gives intellectual justification for the decision that was made, nor involves any process of consideration or reasoning.\textsuperscript{268}

d. The adjudicator acknowledged that the work was pursuant to a single head contract, but held that the reference to separable portions meant that there were in effect 25 separate contracts. As a result, he decided that he was authorised to proceed to hear the adjudication applications. Though, neither party had taken this view of the contract. The court held that as neither party was given notice of the adjudicator's intention to determine the jurisdiction point in the way that he did, nor offered an opportunity to be heard on the point, the parties were denied natural justice in a material way. Accordingly, the adjudication determination was void for denial of natural justice.\textsuperscript{269}

e. The requirements of section 21 (3) are not jurisdictional as it would be quite extraordinary if the legislature intended that a claimant who had overcome the various hurdles that the Act imposes, in the path of obtaining a favourable determination, should be disqualified simply because the adjudicator did not comply with the statutory time limit.\textsuperscript{270}

2.79. In Owners Strata Plan 61172 v Stratabuild Ltd,\textsuperscript{271} the respondent served a payment schedule indicating its reasons for withholding payment were because there were defects in painting work carried out by claimant and the likely cost to rectify those defects would exceed the claim. Subsequently, in its adjudication response, the respondent relied upon an expert report regarding defects in the painting work and an updated quotation regarding the cost to rectify those defects in its adjudication response. The adjudicator did not take into account the expert report or the quotation when making his determination on the basis that, pursuant to section 20(2B) of the NSW Act, the respondent cannot include in the

\textsuperscript{267} Jantom Construction Pty Ltd v S&V Quality Interiors (NSW) Pty Ltd [2011] NSWSC 670 (Hammerslag J).
\textsuperscript{268} Bauen Constructions v Westwood Interiors [2010] NSWSC 1359 (McDougall J).
\textsuperscript{269} Rail Corporation of NSW v Nebax Constructions [2012] NSWSC 6 (McDougall J).
\textsuperscript{270} Cranbrook School v JA Bradshaw Civil Contracting [2013] NSWSC 430 [61]-[64] (McDougall J).
\textsuperscript{271} [2011] NSWSC 1000.
adjudication response any reasons for withholding payment unless those reasons have already been included in the respondent’s payment schedule. The court, however, disagreed with the adjudicator, finding that the adjudicator had confused the use of the words ‘reasons’ and ‘submissions’ in the NSW Act. As such, the court found the adjudicator had misconstrued the NSW Act, misapprehending the nature of or limits on his functions and powers and thereby committing a jurisdictional error. The court further held that by failing to consider the reports that were relevant to the adjudication, the adjudicator had failed to comply with his statutory obligations to afford procedural fairness to the plaintiff. On these grounds, the adjudicator’s determination was declared void.

2.80. The court’s decision in Owners Strata Plan 61172 v Stratabuild Ltd represents a different approach, in the way in which the courts interpret section 20(2B) of the NSW Act. Before Chase, namely, in Broad Construction Services (NSW) Pty Ltd v Michael Vadasz,272 the court refused to declare an adjudicator’s determination void on the basis that the adjudicator had failed to consider a geotechnical report submitted by the respondent in its adjudication response, stating that, “it is a matter for the adjudicator to decide... whether a submission has been duly made in support of a payment schedule. It is not a matter for the court to determine on the basis of some objective test.”

The position in 2015

2.81. Notably, the scope of judicial review has been narrowed down in Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd273 (Lewence). In that case, the NSW Court of Appeal overturned the trial judge’s finding that the adjudicator’s determination of a reference date was a finding of jurisdictional fact. The court held that the question of whether a ‘reference date’ has occurred, which gives rise to an entitlement to a progress payment under the NSW Act, is not a matter that the court can quash an adjudication determination over if the adjudicator gets it wrong.274 This means that the existence of a reference date is not an essential pre-condition for having a valid payment claim, thus it is not considered as a jurisdictional fact. Interestingly, this significant decision is

272 [2008] NSWSC 1057 at [37].
274 [2015] NSWCA 288 per Ward JA at [60], [93]; Emmet JA at [119]; Sackville AJA at [133].
completely inconsistent with the approach that have been taken in previous NSW Supreme Courts judgments\textsuperscript{275}. The decision is also inconsistent with the not dissimilar Queensland statute in which courts held that the reference date is a jurisdictional fact of which existence is required to have a valid payment claim.\textsuperscript{276} Thus, it can be argued that, as a consequence of \textit{Lewence} authorities, the respondents will be facing more difficulties in finding grounds to challenge adjudicator’s determinations in light of the further limitations established in this case. The authorities of \textit{Lewence} may also have far reaching effects upon other States running similar provisions within their legislation, namely, Victoria and Queensland.

2.82. Apparently, the summary of the above authorities emphasises that there is some uncertainty regarding the likely approach the NSW courts might follow in reviewing adjudicators’ determinations. For instance, there were several instances where adjudicators’ determinations containing errors of law on the face of the record that materially and substantially affect the adjudication outcome have been upheld by courts where it was held that such errors were not jurisdictional.\textsuperscript{277} The effect of recent authorities is that an adjudicator's failure to comply strictly with one of the essential requirements and conditions prescribed in the NSW Act will not necessarily mean that a court can quash the determination. Only failure to comply with any of such requirements that are a pre-condition of an adjudicator's exercise of the statutory power granted under the NSW Act will lead to certiorari being available to quash the determination. It is a test of time until all possible essential pre-conditions and requirements are discovered and those respondents who seek to challenge adjudicators’ determinations in courts will be susceptible to increasing uncertainty in the outcome.

\textit{Injunctions}

2.83. An aggrieved respondent may apply for court to grant \textit{ex parte} injunction either to restrain claimant from applying for the issues of adjudication certificate or from

\textsuperscript{276} See, eg, \textit{Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd} [2014] QSC 293.
filing of an adjudication certificate as a judgement for a debt under s 25 of the NSW Act following an adjudication determination; or to restrain a claimant from proceeding with the adjudication application at all. The interlocutory injunction restraining a party from filing an adjudication certificate obtained under section 24(1)(a) of the NSW Act in any competent court under section 25 may be granted when the balance of convenience is in favour of granting that injunction. If an aggrieved respondent delays the application after the release of the judgement, the respondent can still apply for the court to set the judgement aside but it would be required to pay into court as security the unpaid portion of the adjudication amount as provided in the NSW Act. In Co-ordinated Construction Co Pty Ltd v J.M. Hargreaves Pty Ltd, the aggrieved respondent applied for injunction after one week of the release of adjudicator’s determination. The respondent argued that the parties have been negotiating to resolve their differences. Palmer J considered that the profession may not have previously appreciated the policy resulting from Brodyn, accordingly, he granted the injunction. However, Palmer J pointed out that:

“I would refuse out of hand, in the exercise of the Court’s discretion, any ex parte application which is brought at such a late stage unless there are compelling reasons for the delay and there are special circumstances warranting intervention by this Court. Generally, I would simply leave the applicant to apply to the appropriate court to set aside the judgment, bearing in mind that such an application will usually be determined in circumstances affording both the court and the opponent a proper opportunity of considering the issues involved.”

2.84. In Grindley Construction Pty Ltd v Painting Masters Pty Ltd, the respondent (Plaintiff) sought injunction to restrain the claimant (first defendant) from filing the adjudication certificate. The grounds upon which the respondent relied upon in its application include that it was not open to the claimant to serve a second payment claim where it had already served a payment claim in respect of the same

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reference dates and substantially the same work. In addition, it was argued that the respondent was denied natural justice by the adjudicator in failing to give the respondent an opportunity to make submissions both on the question of whether the adjudication application was based on the earlier or later payment claims, and on whether the terms of the contract disentitled the respondent from setting-off against the claim by a counterclaim based on defective workmanship. Ball J held that the balance of convenience is in favour of granting the injunction for two reasons. First, there is risk that if a judgment is recorded against the plaintiff that could have an effect on its reputation which would be difficult to measure. Second, there is evidence that the first defendant has no assets and that consequently if the first defendant is able to enforce the judgment resulting from registration of the determination and the plaintiff subsequently succeeds there is a real risk that the plaintiff will not be able to recover the amount that it pays.\(^{283}\)

2.85. In *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*,\(^{284}\) McDougall J considered an application for an injunction to restrain a person who had served a payment claim from proceeding with an adjudication application. The plaintiff argued that the question of jurisdictional entitlement, could be decided by this court easily and quickly, and that the plaintiff ought not be put to the trouble and expense of making its response to the adjudication application. McDougall J refused the injunction and pointed out:

> “I can understand the theoretical desirability of that. However, I think, there are two problems. The first is that, having had a brief look at some of the material relied upon and an outline of the argument, I disagree fundamentally with the proposition that it would be an easy or a quick matter for this Court to determine the detailed arguments. The second is that the legislature has made it quite clear that it is adjudicators under the Act who are the primary organs for the resolution of these disputes.”\(^{285}\)

2.86. McDougall J went on and pointed out that “the court should think long and hard before interfering in the implementation, in a particular case, of that statutory

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\(^{283}\) [2012] NSWSC 234 at [28]-[30].

\(^{284}\) [2005] NSWSC 362.

\(^{285}\) [2005] NSWSC 362 at [13].
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2.6.18 Effectiveness of the NSW Act

2.87. Despite the shortcomings addressed upon the effectiveness of the NSW Act, the formal reports still indicate the continuous popularity of the scheme as the main avenue to resolve payment disputes in the construction sector. According to the latest annual report of 2013-2014 financial year, a total of 817 adjudication applications had been lodged and 556 determinations were issued comparing to a total of 1009 applications and 672 determinations in in the preceding 2012-2013 financial year. The drop in the adjudication usage rates may be presumably connected to some factors such as the recent legislative amendments and economic slowdown. In 2013-2014, the total value of claimed amounts was AUS$319,916,080, with an average claim value of AUS$392,054 and a total value of adjudicated amount of AUS$80,573,947 against AUS$221,196,608 total claimed amount upon which determinations were released. Around 23% of payment claims exceeded AUS$100,000 and the average fees for adjudications were AUS$4,235.

2.6.19 The future of the NSW Act

2.88. In December 2015, NSW Government released a further discussion paper (the Paper) aiming to have a comprehensive review of the NSW Act and find out if

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287 See, eg, Lifestyle Retirement Projects (No 2) Pty Ltd v Parisi Homes Pty Ltd [2005] NSWSC 411 (Palmer J); Energetech Australia v Sides Engineering [2005] NSWSC 1143 (Campbell J).
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the current security of payment laws are meeting the objectives and if the NSW Act is operating as intended. The Paper mentioned that the amendments to the NSW Act (discussed above) have delivered significant changes to strengthen the industry and appear to be working well. However, there is always room for improvement. Interestingly, the report published the results of an online survey in which 367 responses were received. The results indicate that around 35% of respondents believe the NSW Act sometimes helps subcontractors to be paid promptly for completed work, while 20% believe the NSW Act does not help at all. 53% of the respondents believe that the ‘supporting statements’ are ineffective in ensuring subcontractors are paid on time. 27% believe that Adjudication is not an effective way to settle most disputes over payment. 70% believe that adjudicator’s fees must be prescribed. Around 58% believe that NSW should adopt Queensland model of an adjudication registrar to replace the ANAs and also support the approach to establish different deadlines to adjudicate complex matters.

2.89. The Report raised many questions and sought submissions from the industry. The questions perhaps indicate how the future reform in NSW will look like. Many key questions are related to the possibility of adopting the effective features in the West Coast model as well as Queensland. The key improvement areas address the appointment and regulation of adjudicators, adjudication timeframes of complex claims and whether the previous three amendments to the NSW Act need to be revisited. Notably, there was no question that directly deals with the very problem that frustrates the operation of the NSW Act regarding the excessive court’s involvement which cannot only be addressed by catering for longer time frames and better quality adjudicators.

2.90. The tactics of respondents in raising jurisdictional objections (whether or not valid) before the adjudicator and/or court will remain as an effective game to delay payments to claimants and/or frustrate the very object of the legislation. This might be addressed by separating the jurisdictional issues from the merits of the payment claim so the adjudicator (who is often not legally trained) can just

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focus on the merits of the payment and ignore complex jurisdictional arguments that he or she is not competent to deal with.\textsuperscript{292}

2.91. Also, the court’s interference together with the heavy involvement of lawyers can be drastically minimised if a proposal is made where jurisdictional objections and/or erroneous adjudication determinations could be reviewed by the means of introducing an intermediate informal platform that is capable of quickly and inexpensively deal with the referred matters.\textsuperscript{293} Tasmania is currently amending its Act by introducing a review mechanism of adjudication determinations by a panel of experts which is yet to be assented.\textsuperscript{294} Before that, similar measures have been successfully adopted in WA\textsuperscript{295} and Singapore\textsuperscript{296}, although both legislation impose certain limitations on the adjudication review. The proposal of introducing adjudication review in NSW based on the successful experience in other jurisdictions may stand as a blunt instrument that would definitely require further research before any deliberate suggestion is made before the NSW legislatures for reform.


\textsuperscript{293} As to the use of the discretion to deny certiorari where there lies another review option, see for instance, the High Court's decision in \textit{The Queen v Cook; Ex parte Twigg} (1980) 147 CLR 15; [1980] HCA 36 [29], [30] and [34] (rights of appeal held by way of rehearing to the Family Court in that case against a judge of the Family Court); \textit{Re Baker; Ex parte Johnston} (1981) 55 ALJR 191 and Martin CJ in \textit{Re Carey; Ex parte Exclude Holdings Pty Ltd} [2006] WASCA 219; (2006) 32 WAR 501 [128] - [140]. As cited in \textit{Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd} [2011] WASC 172 at [64].


\textsuperscript{295} Construction contracts Act 2004 (WA), section 46.

\textsuperscript{296} Building and Construction Industry Security of Payment Act 2004 (Singapore)
3. CHAPTER 3: THE BIG PICTURE: CAUSES OF COMPROMISED OUTCOME OF COMPLEX STATUTORY ADJUDICATIONS IN AUSTRALIA

Journal Paper, Peer reviewed.


This thesis chapter is an exact copy of the journal paper in its final published form (except for formatting, numbering and referencing that were varied to reconcile with the format of the thesis).

ABSTRACT

Statutory adjudication has been enacted progressively throughout Australia on a state-by-state basis over a period of 10 years. The legislation with more emphasis on the Eastern States has come under much criticism recently for failing to facilitate decisions of sufficient quality with respect to complex adjudications. This paper reviews this criticism and therefrom distils and discusses the key causes of the unsatisfactory outcome of complex adjudications in Australia. The identified causes are namely flawed appointment, relaxed eligibility and regulation, intimidation of adjudicators, fuzzy jurisdictional boundaries, abbreviated timeframes, limited inquisitorial powers and want of review mechanism. The implication of the research is a better understanding of the nature of the quality of complex adjudication outcome and the relevant worthwhile reform opportunities in Australia, especially with regard to introducing legislative review mechanisms.

Keywords: adjudication decision, adjudication quality, complex adjudication, review mechanism, statutory adjudication.
3.1 Introduction

Statutory adjudication has been enacted progressively throughout Australia on a state-by-state basis over a period of 10 years starting in 1999. The first Australian jurisdiction to introduce statutory adjudication was New South Wales (NSW) by virtue of the *Building and Construction Industry Security of Payment Act 1999*. Despite the many differences between all of the Acts in Australia, they can be broadly grouped on the basis of similarity into the East Coast model Acts (including New South Wales, Queensland, Victoria, South Australia, Tasmania and Australian Capital Territory) and the West Coast model Acts (including Northern Territory and Western Australia). The East Coast model Acts were modelled after the original NSW Act and provide, in addition to an adjudication scheme, for a highly regulatory statutory payment scheme which runs alongside the contractual payment scheme. The West Coast model Acts are more similar to the UK Act, affording primacy to the contractual payment scheme. The common object of all the legislation is to facilitate timely cash flow within the construction contractual chains.

The East Coast model’s adjudication scheme was originally intended to assist, in particular, vulnerable contractors to get paid quickly and, as such, to be a rapid and inexpensive process. The resulting adjudication determination is provisionally binding in nature. The West Coast model’s adjudication scheme has an express object within the legislation that the adjudication process aims to resolve disputes fairly and as quickly, informally and inexpensively as possible. In Western Australia (WA), the Minister stated in her second reading speech:

“The rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.”

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298 The relevant legislation is: *Construction Contracts (Security of Payments) Act 2004* (NT) and *Construction Contracts Act 2004* (WA).
300 The WA Act, section 30.
Introducing Review Mechanisms into Statutory Construction Adjudication

Over the recent years, a considerable number of adjudication applications for large and complex payments claims have been lodged in NSW, Queensland, Victoria and WA as illustrated in table 2.

Table 2: Number of adjudication applications lodged and determined in NSW, Queensland, Victoria and WA

<table>
<thead>
<tr>
<th>Claimed amount (AUS)</th>
<th>New South Wales</th>
<th>Queensland</th>
<th>Victoria</th>
<th>WA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lodged applications</td>
<td>1112</td>
<td>1109</td>
<td>817</td>
<td>721</td>
</tr>
<tr>
<td>determination released</td>
<td>779</td>
<td>672</td>
<td>556</td>
<td>531</td>
</tr>
<tr>
<td>Less than $100,000</td>
<td>573</td>
<td>523</td>
<td>385</td>
<td>375</td>
</tr>
<tr>
<td>$100-249,999</td>
<td>106</td>
<td>83</td>
<td>70</td>
<td>45</td>
</tr>
<tr>
<td>$250-499,999</td>
<td>46</td>
<td>26</td>
<td>46</td>
<td>40</td>
</tr>
<tr>
<td>Greater than $500,000</td>
<td>54</td>
<td>40</td>
<td>55</td>
<td>71</td>
</tr>
</tbody>
</table>

Table (2) also demonstrates that the number of small adjudicated claims in WA is much lesser than other jurisdictions. This issue has been raised in the recent discussion paper for the review of the WA Act. Notably, Victoria also has been dealing with a considerable number of large payment claims despite the fact that the regime is unique

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302 Note: The numbers in NSW and Queensland relate to adjudication claims upon which determinations released in the reported financial year. All figures are extracted from the formal annual reports in each State as being published by (NSW: the Office of Finance & Services; Queensland: Building and Construction Industry Payments Agency; Vic: Victorian Building Authority; WA: Building Commissioner).

amongst the East Coast model Acts in excluding certain classes of amounts (generally of a complex nature) from being allowed in statutory payment claims.

The parties to large payment disputes in adjudication typically invest a lot of resources in the adjudication process, including the engagement of lawyers and technical experts to reinforce their positions. This has the tendency to force the adjudication process to drift away from the simple process intended towards a more complex process more akin to curial proceedings with substantial amounts of legal and technical submissions before adjudicators. This provides a challenge to adjudicators of such claims, whereas McDougall J noted that: “[the NSW Act] provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents.”

This paper aims to identify and review the key causes that compromise the quality of adjudication decisions with respect to complex payment disputes. To do so, the paper begins with an overview of the Australian statutory adjudication mechanisms. Next, the evidence for unsatisfactory quality of complex adjudications outcome is reviewed, and the definitions of the terms ‘quality’ and ‘complexity’ is considered in the context of adjudication decisions. Finally, the causes of compromised outcome of complex adjudications are distilled from the literature and discussed. The paper adopts a desktop study approach to research, whereby evidence is garnered from three primary sources: government reports, commentaries and judicial decisions.

3.2 Statutory adjudication mechanism

While it is important to point out that all Acts are different, there are a number of common mechanisms. Typically, a person entitled to a progress payment for carrying out construction work (or supplying related goods and services) had to seek recovery of any unpaid amounts via lengthy legal proceedings in arbitration or court. As such, parliament enacted the Security of Payment (the SOP) legislation to protect the rights of such persons and facilitate rapid recovery of due payment. The SOP legislation provides statutory rights enabling quick and inexpensive recovery of progress payment for any sub-contractor or supplier performing construction works or supplying related

304 Chase Oyster Bar v Hamo Industries [2010] NSWCA 190 at [207]-[209].
goods and services. To facilitate these rights, the SOP introduced a rapid adjudication process to resolve payments disputes.

Under the East Coast model, the statutory mechanism starts when a person who carried out construction work (the claimant) under a construction contract serves a proper payment claim on the paying party (the respondent), who may then serve what is called a “payment schedule”. The “payment schedule” must state how much, if anything, the respondent will pay the claimant and the respondent’s grounds for withholding payment of any of the claimed amount. If the respondent fails to serve a payment schedule on the claimant within a prescribed time, the respondent must pay the claimant the whole of the claimed amount by the due date for payment. If the respondent fails to pay, the claimant is entitled to suspend work and recover the whole of the claimed amount as a debt. Alternatively, the claimant can seek adjudication of the payment claim. The reason why a claimant may choose the option of adjudication rather than suing on the statutory debt is to avoid the requirement to issue a summons for the statutory debt. If the respondent has provided a payment schedule that includes reasons for withholding payment of the claimed amount or any part of the claimed amount, the claimant may seek adjudication of the payment claim.

Except in Queensland, all East Coast model Acts provide for authorised nominating authorities (ANAs), appointed by the relevant Minister, to train and nominate adjudicators. The adjudication process must be completed within a prescribed time, typically, within ten business days after the adjudicator is appointed. An adjudication decision is binding and ‘temporarily final’ pending any final curial proceedings. The role of the adjudicator under this model is largely that of a ‘statutory certifier’ who essentially determines the amount of the progress payment due but does not decide any claims for debt or damages. The progress payment to which a claimant is entitled is an amount calculated under the construction contract or, if the contract does not provide for the calculation, an amount calculated in accordance with the SOP legislation. Some construction contracts provide that in calculating the amount of a progress payment, account must be taken of claims for damages by the claimant or claims by the respondent for set off of debt or damages. When the construction contract so provides, the adjudicator will have to decide the amount of the progress payment

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taking into account such claims or set offs. Adjudication decisions under this model are not subject to judicial review except upon limited grounds related to jurisdictional errors and/or denial by the adjudicator of natural justice.

The West Coast model legislation provides a default interim progress payment regime, leading to a rapid adjudication process. However, unlike the East Coast model, the West Coast model gives primacy to the parties’ agreed contractual payment mechanism, and the default statutory payment provisions only apply where the contract remains silent. Further, unlike the East Coast model, payment claims can be made both up and down the contractual chain. Also, the notion of “payment schedule” is not applicable as a precondition to entitle a respondent to make submissions and to be heard in any subsequent adjudication, and there is no limitation on what might be included in the adjudication response. After the dispute arises, either party may, within a prescribed time, seek adjudication of a payment dispute, which arises if an amount claimed has not been paid in full, or rejected, or has been wholly, or partially, disputed by the time it is due under the contract.

The process under this model somewhat mirrors a court process and the adjudicator’s role is analogous to an inferior court, rather than an administrative tribunal. Accordingly, the test and ambit of jurisdictional error is very narrow, as inferior courts would commit a jurisdictional error when purporting to act wholly, or partly, outside their jurisdiction, or whilst acting within their jurisdiction, but doing something for which they lack authority. The adjudicator has an authority to decide questions of law authoritatively and wrongly as long as the error is not jurisdictional. The adjudicator also has 14 days to release his or her determination regardless of the size and nature of the payment dispute.

Contrary to its counterparts in Australia, the Queensland Act has been significantly amended in 2014 to provide a unique dual mechanism retaining the proceedings of the standard payment claims as stated in the original Act with a few alterations, and introducing a separate mechanism for large claims which has longer timeframes and

307 See Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd 2011 WASCA 217 at [118].
308 See Craig v South Australia [1995] HCA 58 at [12].
309 See, eg, O’Donnell Griffin Pty Ltd v John Holland Pty Ltd [2009] WASC 19 at [102]; Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd [2014] NTSC 20 at [31].
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allows a respondent to raise any arguments in its adjudication response even if not previously included in its payment schedule.

There is a general consensus that the “broad brush” approach of the legislation makes it very much suitable for dealing with simple claims disputes. However, in recent years, as illustrated in Table 2, an increasing number of complex claims involving large amounts, expert reports and legal submissions have been considered by adjudicators. This has led to a major drift in the application of the SOP legislation. This was not the intention of the Act in NSW upon which all the subsequent East Coast model legislation were based.

3.3 The evidence for unsatisfactory adjudication outcome

Although, there is a general view that statutory adjudication has improved cash flow within the industry, the East Coast model has received a lot of criticism from practitioners for reasons relating to many procedural issues. These criticisms have, in particular, pointed at the unsuitability of the legislation in its current form (save for Queensland) to satisfactorily deal with complex adjudications that involve large payment disputes with large volumes of documents. Notwithstanding the provisional “pay now, argue later” nature of statutory adjudication, the interim enforcement of adjudication determinations that are perceived as lacking in quality has many negative ramifications not least of which is a proliferation of judicial challenges to adjudication decisions which results in not only late or non-payment for the claimants but also extra costs to both disputing parties, and a general undermining of faith which the construction industry has in the adjudication process. Under the East Coast model, as at the end of 2013 there had been a total of 197 cases challenging the adjudicator’s determinations in the NSW, Queensland and Victorian courts, 48% of which were successful. Table 3 provides a breakdown of those cases by years.

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312 In the Australian Judiciary system, this term appeared first in Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 at [96] (Palmer J). Since then, it has repetitively appeared in various court cases related to the security of payment legislation across all States.
According to the Society of Construction Law Australia, the courts have lost confidence in the adjudication process after seeing “more and more cases where the quality of the adjudication decision making process has been so poor that the courts have been increasingly willing to intervene.”

In 2014, courts in the East Coast model jurisdictions dealt with around 50 applications in relation to adjudication decisions (20 in NSW, 19 in Queensland, three in Victoria, four in the Australian Capital Territory, three in South Australia and one in Tasmania). This, it is contended, is representative of the evolving dissatisfaction of respondents with the adjudication process.

In WA, since the commencement of the WA Act in 2005 until end of June 2015, the State Administrative Tribunal of Western Australia (WASAT) has reviewed 37 decisions of adjudicators dismissing applications without considering the merits. In 25 cases, the adjudicators’ decisions were confirmed while 12 cases (amounting to 37%) were set aside and remitted to the original adjudicator to revisit the original decision to dismiss. On the other hand, there have been 32 out of 1,421 cases referred to the Western Australian Supreme Court to review appointed adjudicator determinations. Thirteen out of the 32 matters heard (amounting to 40%) have been considered and the adjudicator’s determination was quashed.

In Northern Territory (NT), there have been a total of 137 adjudication applications since the commencement of the Act in August 2006 up until June 2015, and 15 judicial challenges of adjudication determinations, five of which (amounting to 33%) resulted in the adjudication determinations being quashed.

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314 The SOCLA Report, above fn 312, p 38.
315 The figures are deemed approximate, although being extracted with care from searching in reliable databases, namely, Australasian Legal Information Institute (Austlii) and Judgments and Decisions Enhanced (Jade). Deliberate key words were used such as “name of the legislation” and “adjudication determination/decision.”
Introducing Review Mechanisms into Statutory Construction Adjudication

Table 3: Judicial challenges to adjudicator’s determinations in NSW, Queensland and Victoria to the end of 2013

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Upheld</th>
<th>Quashed</th>
<th>% Quashed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>9</td>
<td>5</td>
<td>4</td>
<td>44%</td>
</tr>
<tr>
<td>2004</td>
<td>18</td>
<td>14</td>
<td>4</td>
<td>22%</td>
</tr>
<tr>
<td>2005</td>
<td>18</td>
<td>12</td>
<td>6</td>
<td>33%</td>
</tr>
<tr>
<td>2006</td>
<td>18</td>
<td>11</td>
<td>7</td>
<td>39%</td>
</tr>
<tr>
<td>2007</td>
<td>16</td>
<td>6</td>
<td>10</td>
<td>63%</td>
</tr>
<tr>
<td>2008</td>
<td>16</td>
<td>10</td>
<td>6</td>
<td>38%</td>
</tr>
<tr>
<td>2009</td>
<td>19</td>
<td>14</td>
<td>5</td>
<td>26%</td>
</tr>
<tr>
<td>2010</td>
<td>22</td>
<td>7</td>
<td>15</td>
<td>68%</td>
</tr>
<tr>
<td>2011</td>
<td>16</td>
<td>7</td>
<td>9</td>
<td>56%</td>
</tr>
<tr>
<td>2012</td>
<td>23</td>
<td>11</td>
<td>12</td>
<td>52%</td>
</tr>
<tr>
<td>2013</td>
<td>22</td>
<td>5</td>
<td>17</td>
<td>77%</td>
</tr>
<tr>
<td>Total</td>
<td>197</td>
<td>102</td>
<td>95</td>
<td>48%</td>
</tr>
</tbody>
</table>

These statistics suggest that there is also scope for improvement of adjudication quality under the West Coast model, with the proportion, although not the sheer number, of judicial reviews and quashings as compared to total number of adjudication determinations not being too dissimilar to that in the East Coast model jurisdictions.

318 This data obtained from an analysis of judicial challenges to adjudicators’ determinations previously carried out by one of the authors of this paper.
Introducing Review Mechanisms into Statutory Construction Adjudication

Further, this is the case despite the existence of the unique review mechanism within the West Coast model legislation\(^{319}\) that allows an aggrieved adjudication party to apply for a review\(^{320}\) of an adjudicator’s decision to dismiss an adjudication application on the basis of certain grounds\(^{321}\) and, therefore, acts as a filtering system to keep challenges away from the Supreme Court as mentioned above. As such, the recent discussion paper for review of the WA Act sought submissions for possible improvement within the Act to better deal with complex and/or large payment disputes.\(^{322}\) Apparently, there is a dearth of a proper empirical research as to the performance of the West Coast model as it lacks appropriate evaluations.\(^{323}\)

### 3.4 What is complex adjudication?

Many commentators have suggested that,\(^{324}\) the “one size fits all” approach taken by the East Coast model legislation is no longer appropriate (if indeed it ever was) for producing quality outcomes in adjudicating complex payment claims, where larger and more difficult payment disputes are involved. In the search for existing parameters to diagnose what might be a complex adjudication, the most obvious point of initial reference is the Wallace Report,\(^{325}\) upon which the Queensland Parliament based its key reform to the Act, introducing a dual scheme of adjudication, that came into effect on 15 December 2014. For the purposes of its dual scheme, the amended Queensland Act classifies all claims greater than AUS$750,000 as complex payment claims. Regarding his basis for choosing this amount, Andrew Wallace, whilst acknowledging

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319 See, for example, WA Act, s 46.
320 In WA, this review is conducted by the WA State Administrative Tribunal (WASAT). In NT, the review is conducted by the Local Court.
321 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 WA Act, s 31(2)(a).
that such value was likely to be a source of great debate, decided to use the monetary limit to tie it in with that of the civil jurisdiction of the District Court of Queensland.326

Notably, however, Parliament adjusted the definition of complex payment claims recommended by the Wallace Report, which originally classified complex payment claims as claims above AUS$750,000 or any claims on the basis of time-related or latent condition cost. Upon further investigation, the Parliamentary Committee set up to examine and report on the relevant Bill advised against accepting the Wallace Report’s inclusion of claims on the basis of time-related or latent condition cost.327 This advice was based upon concerns about the ambiguity and potential for confusion amongst contractors with respect to the meaning of latent condition and time-related costs, as well as the potential for these types of costs to have a broad scope of application meaning that even some simple claims (e.g. claims based on time sheet day work or discovery of hard rock during excavation) could be considered as complex claims.

The eventual definition of complex payment claims ignores the fact that the claimed amount is no indication of the real amount and issues in dispute.328 Indeed, the claim complexity would not be diagnosed properly unless the respondent has disputed the payment claim by the means of payment schedule and adjudication response. Also, it can be argued that the Queensland Amended Act fails to completely address the problem of ‘the one size fits all’ approach for large payment claims significantly above the AUS$750,000 threshold, such that a $10 million claim follows the same timeframes and procedures as that of $1 million claim.

If the nature of the claim is excluded from any definition (as happened in Queensland), large and complex claims would be defined by a monetary amount alone. A large claim per se does not, of course, necessarily reflect complexity in the submission as some large claims are straightforward calculations of the quantity and amount of executed works. To counter this, Queensland has regulated the appointed process so only senior adjudicators are appointed in light of material issues in dispute regardless of the value

326 Wallace Report, above fn 324, p 183.
of the payment claim. 329 Those issues usually include delay claims, latent condition, jurisdictional arguments and contractual interpretation.

Nonetheless, as Yung et al found, larger claims are more likely to involve complex legal issues. 330 Thus, it may be valid to diagnose complex adjudications for the purpose of a dual adjudication scheme according to the amount of the disputed payment claim only.

Looking elsewhere for indicators of claim complexity in relation to adjudication, section 10(B) of the Victorian Act excludes many types of payment claims with likely complexity from being adjudicated including claims for certain disputed variations, damages under or in connection with the contract, time-related costs, latent conditions or changes in regulatory requirements. Such exclusions indicate that the Victorian Parliament did not regard the ‘one size fits all’ adjudication scheme appropriate for complex claims. This raft of exclusions, however, has been blamed for adding to the complexity of the Victorian Act itself, resulting in a lower adjudication usage rate comparing to NSW and Queensland (See table 2). 331

Section 31(ii)(iv) of the WA Act provides that an adjudicator must dismiss an adjudication application without making a determination of its merits if satisfied that it is not possible to fairly make a determination because of the complexity of the referred matter. The NT Act has a similar provision. Perhaps, this duty to dismiss must be exercised when complex legal arguments are raised before a non-legally trained adjudicator. Apparently, the legislatures in Western States are content to leave the decision about complexity of a payment dispute up to the adjudicator. Having said that, an adjudicator must provide adequate reasons for dismissal due to complexity and “not to too readily form a view that a matter is too complex to be fairly determined.” 332 Notably, in the English High Court decision of CIB Properties Ltd v Birse Construction, 333 the court preferred that the suitability of a matter for adjudication not

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329 See Adjudicator Grading and Referral Policy 2015, Queensland Building and Construction Commission, p 8
330 A survey of 22 adjudicators in Western Australia carried out by Yung et al found that while larger claims are not by virtue more complex, they have a greater potential to involve complex points of law – see Yung et al., above fn 322, p 61.
be assessed on whether it was too complicated, but whether the adjudicator was able to reach a fair decision within the statutory timeframes.

3.5 Parameters of adjudication quality

Before discussing the key causes of compromised quality of adjudication outcome, it is necessary to briefly consider what is meant by the quality of adjudication outcome. The ultimate yardstick by which adjudication quality can be measured is to be found in the legal accuracy – both in terms of procedural and substantive fairness – of adjudication decisions whether such decisions involve a determination on the merits or dismissal for want of jurisdiction. However, recognising that there is a trade-off between fairness and efficiency in dispute resolution, this criterion needs to be calibrated in the light of the legislative object, being to provide a rapid and interim dispute resolution platform in order to expedite cash flow on construction contracts. Thus, it would clearly be absurd to hold adjudication decisions up to as higher level of scrutiny as in arbitration or litigation.

On the other hand, there surely must be a “quality floor” below which the quality of adjudication decisions must not fall otherwise the overemphasis on efficiency in lieu of justice would result in a process that the parties would perceive as unfair with the consequence that they are more likely to seek to undermine it. In the context of adjudication, it is proposed, an adequate level of quality be defined in terms of adjudication decisions that meet the basic and substantial requirements of a satisfactory dispute resolution system. The criteria of that definition may be sought as follows:

1. Adjudicators ensure they have jurisdiction to hear the matter.
2. Adjudicators stay within their legislative jurisdiction.
3. The key elements of natural justice or procedural fairness are afforded.
4. Adjudicators make a good faith attempt to exercise their powers under the legislation.


5. Adjudication decisions are free from gross non-jurisdictional errors of law that materially and substantially affect the decision.

3.6 Causes of poor adjudication outcome

A review of the relevant literature identifies the following seven key causes of poor quality complex adjudication outcomes which are discussed in more detail below. It is noted, however, that the list is not exhaustive and there may exist some other causes that fall beyond the scope of this paper.

1. Flawed adjudicator appointment.
2. Relaxed regulations of adjudicators.
3. Intimidation of adjudicators.
4. Fuzzy jurisdictional boundaries of adjudicators.
5. Abbreviated adjudication timeframes.
7. Want of review mechanism.

3.6.1 Flawed adjudicator appointment

The way in which an adjudicator is appointed may have a direct bearing on the quality of the outcome. Under the East Coast model (save for Victoria), the claimant is solely allowed to choose its preferred ANA. Thus, the appointment of adjudicators by the ANAs has been criticised for its leading to: perceptions that profit-driven ANAs are biased towards claimants, allegations of adjudicator shopping whereby a claimant or its representative demand that an ANA either appoint or not appoint certain adjudicators, otherwise the claimant would refer its adjudication application to another ANA, and accusations that some ANAs maintain an unhealthy relationship with claims preparers, whereby preparers are recommended to claimants by an ANA with the expectation that the preparer will direct the adjudication application to the ANA or in expectation of receiving future appointments as an adjudicator from the ANA.

336 The Vic Act, section 18(4) provides: If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.
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Such matters clearly contravene one of the fundamental tenets of natural justice, that the decision makers conduct themselves in a manner free from actual or apprehended bias. Accordingly, the recent reform of the Queensland Act abolished appointment by ANAs replacing that with appointment process by a single government registry within the Queensland Building and Construction Commission.

The mutual agreement between the parties on the adjudicator, especially on complex payment disputes, is more likely to increase not only their satisfaction that a suitable adjudicator has been appointed for their dispute but also their confidence in the outcome (and, hence, their ability to abide by the adjudicator’s determination).341

Having said that, the annual reports in relation to adjudication under the WA Act, where mutually agreed adjudicator appointment is provided for, show that mutual agreement on the identity of adjudicator has been used very rarely (amounting to 3.4% of applications in 2014-2015).342 Rather, it has been left to the prescribed appointers (the WA Act’s equivalent of the ANAs), but it was not clear from the reports whether such appointers were mutually agreed or chosen by the applicants. It should also be noted that, unlike the case in the Eastern States, none of the prescribed appointers in WA are for-profit companies and either party may commence adjudication and choose the appointer if not stated in the contract. Table 4 demonstrates the difference in the appointment regulation of adjudicators across States as distilled from relevant regulations and codes of practice.

In practice, therefore, it is left to ANAs as part of their obligations to ensure adjudicators are suitably qualified, trained and experienced. Uniquely, the legislation in South Australia requires that an ANA must not nominate an adjudicator that has been found by an Australian court to have made technical errors in performing adjudications unless the ANA is satisfied that the cause of the error has been resolved. An ANA must not appoint a person as an adjudicator if that person has been found to have not acted in good faith twice or more within the last five years in relation to adjudication duties.343 In Victoria, the legislation provides that adjudicators must not accept an adjudication application or undertake an adjudication review if doing so

would create any actual or likely conflict of interest, or any perception of conflict of interest or bias on their part. Adjudicators must accept nominations only if they consider they are competent in view of the nature and complexity of the matter.344

Table 4 Comparison of appointment regulation of adjudicators in Australia

<table>
<thead>
<tr>
<th>Regulations of adjudicator’s Appointment</th>
<th>NSW</th>
<th>QLD</th>
<th>VIC</th>
<th>SA</th>
<th>TAS</th>
<th>ACT</th>
<th>WA</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulation for the conduct of appointer.</td>
<td>√</td>
<td>NA</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>×</td>
</tr>
<tr>
<td>Single Registration System of Adjudicators.</td>
<td>×</td>
<td>√</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>√</td>
<td>√</td>
<td>×</td>
</tr>
<tr>
<td>Registration Renewal</td>
<td>×</td>
<td>√</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
</tr>
<tr>
<td>Registration Cancellation/suspension</td>
<td>×</td>
<td>√</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>√</td>
<td>√</td>
<td>×</td>
</tr>
<tr>
<td>Selection of the appointer by mutual agreement.</td>
<td>×</td>
<td>×</td>
<td>√</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Adjudicator’s Appointment by mutual agreement.</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>√</td>
<td>√</td>
<td>×</td>
</tr>
<tr>
<td>The Adjudicator to declare any conflict of interest.</td>
<td>×</td>
<td>√</td>
<td>×</td>
<td>√</td>
<td>×</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>The appointer to ensure adjudicator is competent.</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>×</td>
<td>√</td>
<td>√</td>
<td>×</td>
</tr>
<tr>
<td>Adjudicators to accept appointment if only competent.</td>
<td>×</td>
<td>×</td>
<td>√</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>×</td>
</tr>
</tbody>
</table>

In the absence of strict criteria governing adjudicator appointment and disciplinary arrangement for non-compliance, it is also possible for ANAs to select an adjudicator based upon availability rather than experience and qualifications in order to meet the strict time limits. Anecdotally, it is not uncommon for unqualified adjudicators to accept nominations, no matter how complex the cases are. Accordingly, Andrew Wallace noted that: “Adjudicators accept appointment by an ANA at a time when they have little or no knowledge of the issues in dispute.”345

344 See ‘Authorised Nominating Authorities Conditions of Authorisation’, the Vic Act, 2013
In addition, the SOP legislation allow the adjudication response to be lodged after the adjudicator’s acceptance of the referral.\(^{346}\) Where this occurs, it will mean that the adjudicator may not have sufficient information to properly assess whether he or she possesses the required competencies to hear the referred dispute since, in practice, most legal or technical submissions (such as jurisdictional arguments and expert reports) are only included in the adjudication response to support the reasons identified in the payment schedule.

### 3.6.2 Relaxed regulations of adjudicators

Regulation of adjudicators has an impact upon adjudication quality both in terms of eligibility and training as well as the ongoing monitoring of their performance. The importance of setting appropriate criteria for eligibility and training is clear, directly impacting upon the ability of an adjudicator to both run the adjudication process in a procedurally fair manner as well as having the requisite knowledge and experience to arrive at an appropriately just and accurate outcome. The risk of injustice in rapid adjudication requires a high standard of adjudicator’s expertise.\(^{347}\) The regulation of adjudicators varies widely from State to State, with regulations being generally quite relaxed. With the exception of Queensland,\(^{348}\) Victoria\(^{349}\) and South Australia,\(^{350}\) the regulations governing the eligibility and conduct of adjudicators under the East Coast model appear to be wanting. The NSW and Tasmanian legislation, for instance, requires adjudicators to have such qualifications, expertise and experience to be eligible to perform adjudication but no relevant regulations listing such have ever been made.

The Victorian legislation sets out minimum years of experience and qualifications of adjudicators to be eligible.\(^{351}\) However, it was also judicially observed that “there is no statutory requirement that they have formal legal qualifications or practical legal training.”\(^{352}\) This observation also applies to all other States. In WA, although the

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\(^{346}\) As per the NSW Act, the respondent can submit the response within 2 business days after the adjudicator’s acceptance.


\(^{348}\) See: Building and Construction Industry Payments Regulations 2004 (Queensland), section 2A (3).


\(^{352}\) Grocon Constructors v Planit Cocciardi Joint Venture [No 2] [2009] VSC 426) at [38].
regulations prescribe detailed eligibility criteria, legal qualifications are not mandatory. A recent empirical research has found that “73 per cent of adjudicators in WA are not legally trained but quite a number of claims has been prepared by lawyers and included detailed legal submissions.” This may somewhat explain the considerable number of successful challenges to adjudication decisions in WA as explained before.

Empirical research conducted by interviewing 12 highly experienced lawyers in NSW found that there was dissatisfaction with the quality of adjudicators. The research found that the ANAs in NSW do not have consistency in their quality control over adjudicators and their training courses significantly vary. The research also mentioned that some ANAs provide training for months whilst others provide training for a few days only. It was observed that “adjudicators are often called upon to consider complex areas of building and contract law, yet they are not required to be legally qualified.” It is likely that one of the reasons for the recent high rate of adjudication determinations that have been quashed by courts under the East Coast model is linked to shortcomings in the way adjudicators are regulated (see table 5).

Perhaps, it could be argued that the formalisation of the adjudication process in Australia puts the majority of adjudicators in a situation where any adjudication case could be a complex one if jurisdictional issues are to be considered by the adjudicator. The duty of an adjudicator to decide upon his or her jurisdiction to hear the matter before proceeding with the merits seems very challenging unless the adjudicator is competent enough (presumably by virtue of legal qualifications and/or proper legal training). In Singapore which has modelled its legislation on the NSW Act, it was judicially held that adjudicators are not competent to deal with jurisdictional issues apart from the basic function required by the legislation. Thus it was suggested that reform be made to separate jurisdictional issues from the merits in order that either party can have certainty about the likely outcome of the real issues in dispute.

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353 Yung et al., above fn 322, p 71.
356 Lee Wee Lick Terence v Chua Say Eng [2012] SGCA 63 at [64].
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Table 5 presents a comparison of adjudicators’ regulations in all Australian jurisdictions which clearly emphasises the inconsistency in how the ANAs/appointers and adjudicators are regulated. The lack of regulations of adjudicators makes it almost impossible for a party to object to the appointment of an adjudicator, or his/her determination, on the basis of being under qualified and lacking the required skills and knowledge to competently adjudicate the dispute in question. However, where benchmark eligibility criteria do exist, adjudicators’ quality can be enforced by courts – such as in the South Australian case of *Kennett Pty Ltd v Janssen* (2013),\(^{358}\) where the judge referred to the express detailed provisions within South Australian regulations to reach his decision to quash the adjudicator’s determination on the grounds of failing to meet the prescribed eligibility criteria.

*Table 5 Comparison of adjudicators’ regulations in Australia.*\(^{359}\)

<table>
<thead>
<tr>
<th>Regulation of adjudicators</th>
<th>NSW</th>
<th>QLD</th>
<th>VIC</th>
<th>SA</th>
<th>TAS</th>
<th>ACT</th>
<th>WA</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulation for the conduct of</td>
<td>x</td>
<td>✓</td>
<td>✓</td>
<td>x</td>
<td>x</td>
<td>✓</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Regulation for the eligibility of</td>
<td>x</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>x</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Minimum qualifications requirements</td>
<td>x</td>
<td>x</td>
<td>✓</td>
<td>✓</td>
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\(^{358}\) SASC 20 July 2013 (unreported).

\(^{359}\) Some states such as NSW and Victoria do not have express regulations in conjunction with the legislation but do include express requirements in separate guidelines, policies or code of practice of the ANAs and/or adjudicators.
3.6.3 Intimidation of adjudicators

In the UK, disputants (with the decline of formality of statutory adjudication) increasingly became more bullish and aggressive in their approach when dealing with adjudicators.\textsuperscript{360} Therefore, intimidation of adjudicators has become a growing concern although it is not yet popular or common. Either party may attempt to influence adjudicators by raising sensitive matters such as the jurisdiction of adjudicator, or potential conflict of interest due to the adjudicator’s past dealing with the opponent. The tactics that may be adopted by parties to intimidate the adjudicator and manipulate the decision in their favour include:\textsuperscript{361}

1. Making spurious challenges to the adjudicator’s jurisdiction.
2. Causing delay with the intention of obtaining an extension of time.
3. Deliberately confusing the adjudicator through the use of technical or esoteric legal arguments.
4. Threatening to take no further part in the adjudication or to take legal action against the adjudicator, or to report him to his professional institution.

The short timeframes in the Australian legislation discourage adjudicators from running hearings, hence parties have a narrower scope for intimidating adjudicators during the process.\textsuperscript{362} Having said this, there is a need for further research to examine the extent of the phenomenon of intimidation and its impact on the statutory adjudication outcome in all States.

3.6.4 Fuzzy jurisdictional boundaries of adjudicators

There are two limbs of adjudication jurisdiction. An adjudicator must always make sure that:

1) The adjudicator has the jurisdiction to hear the matter.
2) The adjudicator stays within the boundaries of that jurisdiction during the decision making process.

With regard to the first limb, the examination of the tremendous case law generated in connection with adjudication indicates that deciding upon jurisdiction is very challenging. The courts have been inconsistent in their approaches to defining jurisdictional facts upon which the jurisdiction of adjudicator can be determined. A very recent example is the case of *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd*. In that case, the NSW Court of Appeal overturned the trial judge’s finding that the adjudicator’s determination of a reference date was a finding of jurisdictional fact. The court held that the question of whether a ‘reference date’ has occurred, which gives rise to an entitlement to a progress payment under the NSW Act, is not a matter that the court can quash an adjudication determination over if the adjudicator gets it wrong. This decision overrules many previous authorities in NSW. The decision is also inconsistent with the not dissimilar Queensland legislation in which courts held that the reference date is a jurisdictional fact of which existence is required to have a valid payment claim. Interestingly, the recent judgment of the Victorian Supreme Court of Appeal in *Saville v Hallmac Constructions Pty Ltd* about “reference dates” was completely contrary to its counterpart in NSW. Such inconstancy in case law may result from the fact that there is nothing in the legislation that defines those essential jurisdictional facts that must exist in order for an adjudicator to have jurisdiction leaving the door always ajar for adjudicators erring in their jurisdictions and subsequently ending up by further court applications to void erroneous decisions.

With regard to the second limb, the situation has some sources of ambiguity. In the UK, the court in *Hyder Consulting (UK) Ltd v Carillion Construction Ltd* held that there was no breach of the rules of natural justice when the adjudicator adopted a different methodology in his calculations using the figures of the parties. The parties had not commented on the adopted methodology. The Court clarified this wasn’t a case of the adjudicator using his own knowledge, or using material not submitted by
either party. In WA, Beech J in *Hamersley Iron Pty Ltd v James*,\(^{368}\) referred to some authorities and followed a similar approach to that of the UK by stating:

“A decision maker is generally not obliged to invite comment on his evaluation of a person’s case, or to provide an opportunity to review the proposed conclusion. The position may be different where the decision maker draws an adverse conclusion on materials supplied by or known to the subject which is not a natural evaluation of that material and could not reasonably have been anticipated.”

Under the East coast model, the jurisdiction of adjudicators is much confined which appears to be a major challenge for those several adjudicators who also act as arbitrators. It is often the case that such adjudicators (by wrongly putting the arbitrator’s hat in an adjudication case) exceed their jurisdictions. In *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd*,\(^{369}\) the determination was voided as the adjudicator decided an issue on a basis not advocated by the parties. In *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd*,\(^{370}\) the court held that the adjudicator was not entitled to accept the claimant’s figure for overheads using the adjudicator’s own industry knowledge and experience.

It does not look that easy, having considered the above cases, to draw a line to identify the limitations of adjudicator’s jurisdiction when using his or her own knowledge or experience. Indeed, the existing case law so far suggests that many adjudicators (whether legally trained or not) do not understand or at least appreciate the limits of their jurisdiction, mainly because of the absence of any legislative or reliable guidelines on what adjudicators must not do in their journey of decision making process. Legislatures may need to mitigate the uncertainty of the first limb by introducing express provisions within the legislation that set out essential jurisdictional facts within the purpose of the legislation. To counter the uncertainty of both limbs and in the absence of any such legislative arrangement, it would be beneficial to introduce appropriate guidelines for adjudicators, on a State-by-State basis to cater for

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368 [2015] WASC 10 at [103].
370 [2009] NSWSC 61 at [38].
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the differences between legislation to assist adjudicators in appropriately deciding and maintaining their jurisdiction, similar to that in the UK.\textsuperscript{371}

3.6.5 Abbreviated timeframes

There is no doubt that the ‘one size fits all’ timeframes in Australia, allowing two weeks only for an adjudicator to make determination (save for adjudications of complex claims in Queensland) are expeditious when compared with the international legislation. Adjudicators in Malaysia have 45 working days to make their decision, and adjudicators in Ireland and the UK have 28 days to do so. Marcus Jacobs comments that "unfairness may arise, where large complex claims are submitted to the lay adjudicator for determination within the "pressure-cooker" time limits set by the relevant [Australian] Acts."\textsuperscript{372} As such, the issue of whether extended timelines of complex adjudication should be extended have been raised in the recent discussion papers in NSW,\textsuperscript{373} WA\textsuperscript{374} and South Australia.\textsuperscript{375}

Whilst the adjudication timeframes may be appropriate for smaller straightforward payment claims, there is mounting evidence – in the form of adjudicators’ determinations being quashed by courts for substantial denial of natural justice\textsuperscript{376} and/or failure to exercise their power in good faith\textsuperscript{377} to suggest they are inadequate to afford adjudicators enough time to meet the key requirements for a fair determination.

The entire adjudicator’s task has been made more difficult by the formalisation of the adjudication process that has occurred for complex adjudications with parties typically engaging lawyers to prepare their adjudication applications and responses, and often

\textsuperscript{371} See Guidance Note: Jurisdiction of the UK Construction adjudicator, May 2011, Adjudication Society and CIArb.


submitting copious amounts of documentation – including statutory declarations, legal submissions, delay analyses, site inspections, photographs and technical expert reports – to support their cases. Given the East Coast model’s requirement for an adjudicator to ‘consider’ (interpreted by the courts in *Tickner v Chapman* [1995] FCA 1726 at paragraph [39] to mean an “active process of intellectual engagement”) all duly made submissions and to make this apparent in their reasoning, the adjudicator is faced with a very challenging task. This was acknowledged by McDougall J as follows,

“I accept, too, that the adjudicator was required to assimilate a huge mass of material and to deal with it, to the extent of producing a reasoned conclusion, in a very short space of time. But even allowing for those matters, it is in my view clear, when this aspect of the determination is considered as a whole..., that the adjudicator did not turn his mind to, and thus did not consider, those features of [plaintiff]’s defence that I have mentioned.”

There is a limit to how much material a single adjudicator can intellectually engage within just 10 business days. Presumably, the current practice of overwhelming adjudicators by sheer volume of paperwork may always leave the door ajar for a potential judicial challenge on the grounds of breach of natural justice and/or want of good faith.

Notably, in the recent reform of the Queensland Act these timeframes have been extended for complex claims to 15 business days for both delivery of payment schedule and adjudication response. The timeframe for serving a payment schedule is further extended to 30 business days if the claim is submitted more than 90 days after the relevant reference date. Under the West Coast model, ambush claims are not a concern as there is a 28-day timeline for starting an adjudication.

### 3.6.6 Limited inquisitorial powers

Whilst the West Coast model encourages adjudicators to be evaluative, the East Coast model Acts impose many restrictions on the way in which adjudicators make their determinations. Under the East Coast model, adjudicators are limited to a

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378 See *Laing O’Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818 at [73].
379 *Laing O’Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818 at [112].
380 The Queensland Act, s 18A.
381 Yung et al., above fn 322, p 64.
382 See (the WA Act, s 32(1)(b) and the NT Act, s34(1)(b)).
consideration of the Act and documents submitted by the parties. Such a restrictive approach has the potential to negatively impact upon the quality of adjudication determinations. It was thus argued that:

"an active, inquisitorial approach to adjudication therefore allows the merits of the dispute to be fully investigated, and is said to result in a more reasoned and accurate determination... it is clear that a passive, ‘rubber stamp’ approach [referring to the East Coast model] to adjudication is not conducive to the final and just determination of a dispute."

Both East and West Coast models give the adjudicator the authority to conduct informal conferences although they are silent on how such conferences should be conducted and whether the conference outcome must be considered. Unlike the East Coast model (save for Victoria as permitted by adjudicators), the West Coast model allows legal representation in conferences and allows an adjudicator to engage an expert (presumably to assist in assessing complex technical or legal matters) or arrange for testing unless all parties object. In WA, however, a research involving interviews with 22 adjudicators found that the interviewees have a neutral position regarding the necessity of experts or the connection between legal representations and winning the case.

Having said this, the strict time limits imposed by the legislation in all States deter adjudicators from using any of the investigative powers allowed by the legislation which may jeopardise the validity of the outcome. In Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd, the adjudicator’s determination was set aside for lack of procedural fairness where the adjudicator failed to seek additional documents from the parties as the submissions about the dispute lack proper evidence. In Ku-Ring-Gai Council v Ichor Constructions Pty Ltd, the Court rejected the claimant’s argument that the adjudicator should have sought further submissions from the parties to overcome the shortcomings of an expert report submitted by the claimant on the

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384 Yung et al., above fn 322, p 67.
386 [2014] NSWSC 1534.
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basis the adjudicator had only 10 business days to complete the complex task of adjudicating the issues in question.

As such, some adjudicators, nowadays, accept nominations provided they will be granted any reasonable request for extension of time, so they become more comfortable in seeking further submissions or conduct conferences. This tactic, although being a pragmatic tool to overcome the strict time limits, would provide some uncertainty for the parties on the period an adjudication should take until a valid determination is issued. It could be useful then if the legislatures give adjudicators the jurisdiction to extend the time up to a certain limit in complex cases as the case in Queensland so they will be encouraged to use the available investigative powers if need.387 Therefore, empowering adjudicators in the Eastern States with additional powers similar to that in the Western States may not be a feasible option unless they are also given longer time or at least empowered to reasonably extend the time limits in complex adjudications.

3.6.7 Want of review mechanism

Adjudication, with its abbreviated timeframes, has always been acknowledged as a somewhat “rough and ready” dispute resolution process. As such, Australian courts (as well as their English counterparts) have generally been happy to uphold adjudicator’s decisions containing non-jurisdictional errors of law, only quashing those where adjudicators have strayed outside the boundaries of their jurisdiction. Consequently, as long as an adjudicator has been duly appointed in accordance with the Act’s mechanisms and has considered the correct issues in dispute, it will be very difficult for a disgruntled party to have the adjudicator’s determination quashed in court even where the adjudicator has determined the issues in the wrong way. Thus, there are several instances where adjudicators’ determinations containing errors of law on the face of the record that materially and substantially affect the adjudication outcome have been upheld by courts.388

However, this doesn’t mean that such errors are not an indicator of adjudication quality. Indeed, it is argued that an optimal adjudication scheme should strive to

387 The Queensland Act, section 25B(2).
encourage as much legal accuracy as possible in adjudication decisions within the designated timeframes. The minimisation of errors of law and even errors of fact has a direct bearing on stakeholders’ confidence in the adjudication process. The more accurate an adjudicator’s decision, the less likely it is for a losing party to either search for grounds upon which to challenge the determination, or to subsequently pursue the claim for a final binding decision in arbitration or litigation. The potential for adjudication to reduce the overall disputing costs to the construction industry should not be understated, and the failure of parties to accept an adjudicator’s decision as a final resolution should be seen as a lost opportunity to reduce disputing costs.

Aside from judicial review, there are limited rights to review expressly provided for in the Victorian and West Coast model Acts. In the Victorian Act (section 28(b)), adjudication determinations may be subject to review on the basis that the determination exceeds AU$100,000 and includes ‘excluded amounts’. The review is carried out by a second adjudicator appointed by the original appointing ANA. However, there is a general consensus within the industry that the Victorian review mechanism is completely ineffective being very rarely used.

Notably, Tasmania is in the process of enacting an Amendment Bill to its SOP legislation by introducing a review mechanism of poor adjudication determinations by an expert panel appointed by the government at no cost to parties.389 However, the proposed review mechanism lacks clarity and transparency in various aspects. For instance, the Bill does not explain a mechanism of initiating the review process and does not consider the criteria to be followed by the SOP Official to identify what could be an “inappropriate or unfair” decision that would be susceptible to review by the expert panel. The Bill is also silent upon the referral period if it is to be made, adding a layer of uncertainty regarding the finality of the adjudication decision since the parties would have uncertainty upon the receipt of adjudication decision for a while before realising whether the review will take place or not.

The WASAT, in reviewing adjudicators’ “decision to dismiss”, was successful in keeping around 50% of the caseload away from the WA Supreme Court, achieving the four objects of the Act (i.e., informality, cost and time effectiveness and fairness).

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Notably, the Singaporean Act (section 18) provides a quick review mechanism on the merits which is “worthy of serious consideration by Australian Parliaments contemplating review of their security of payment statutes.” The mechanism is only accessible by a respondent who must pay the adjudicated amount directly to the claimant as precondition to apply for review provided that the difference between the adjudicated amount and adjudication response exceeds SG$100,000. This review system, however, does not entertain the review of jurisdictional challenges which is best dealt with by courts to decide upon.391

Notwithstanding these limited avenues of review, it is argued that the general absence of any sufficient and effective mechanism by which to review the merits of an adjudicator’s decision made within jurisdiction, as well as adjudicator’s decision to dismiss or not to dismiss applications on jurisdictional grounds, directly impacts upon the quality of adjudication outcome. An optimal adjudication process should maximise, within the legislative object of expediency, the opportunity that adjudication decisions are made in accordance with the correct and relevant law away from court’s involvement.

In the immediate wake of Brodyn Pty Ltd v Davenport,392 it was argued that the challenge to uphold the integrity of the adjudication regime now fell to government and industry by implementing the necessary systems and procedures to ensure that adjudication determinations are of the highest possible standard.393 In order to achieve such quality control, it is proposed that a swift system of review within the legislation is needed.

Apparently, a deliberate hybrid review mechanism based on the Western Australian and Singaporean review mechanisms, it is proposed, may be a relief to capture most of the erroneous decisions of complex adjudications which may eventually minimise the courts’ as well as lawyers’ involvement in statutory adjudication.394 Thus, further

391 Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) [2012] SGCA 63 at paragraph 64.
394 As to the use of the discretion to deny certiorari where there lies another review option, see for instance, the High Court's decision in The Queen v Cook; Ex parte Twigg (1980) 147 CLR 15; [1980] HCA 36 [29], [30] and [34] (rights of appeal held by way of rehearing to the Family Court in that case against a judge of the Family Court); Re Baker; Ex parte Johnston (1981) 55 ALJR 191 and Martin CJ in Re Carey; Ex parte Exclude Holdings
empirical research is currently being undertaken to further investigate the need and features of an appropriate review mechanism.

3.7 Concluding remarks

Despite the general consensus that statutory adjudication has helped expedite cash flow in the Australian construction industry, it would appear that the legislation is proving ineffective at delivering quality outcomes in the adjudication of complex payment disputes. The review of the relevant case law and commentaries reveals the need for an appropriate scheme to deal with complex adjudications in all States.

As a starting point for a big picture consideration of such reform, this paper has addressed the evidence for poor adjudication outcomes and diagnosed the complexity and quality parameters in statutory adjudication. Then, the paper identified and discussed seven key causes of compromised quality of complex adjudications outcome, namely flawed appointment, relaxed eligibility and regulations, intimidation, fuzzy jurisdiction of adjudicators, abbreviated timeframes, limited inquisitorial powers and absence of review mechanism.

It is proposed that each of the key causes compromising the quality of complex statutory adjudications represents a potential avenue for further research with the overall objective being the optimisation of the adjudication process for complex payment disputes. One of the worthwhile areas of potential reforms is the introduction of an internal quick mechanism of adjudication review (based on the Singaporean and Western Australian review mechanisms). Such review mechanism could act as a safety net to keep most of the erroneous adjudication decisions, as a result of the hasty highly formalised adjudication process, away from courts. Indeed, this proposal is currently being further examined by an empirical research in terms of its need and features as part of the lead author’s PhD study.
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4. CHAPTER 4: TAKING STATUTORY ADJUDICATION TO THE NEXT LEVEL: A PROPOSAL FOR REVIEW MECHANISM OF ERRONEOUS DETERMINATIONS

Journal paper, peer reviewed


An edited version of this paper has received “High Commendation” in the 2016 Australian Brooking Prize in Construction Law: Issued by Society of Construction Law Australia, May 2016.

This thesis chapter is an exact copy of the journal article in its final published form. (except for formatting, numbering and referencing that were varied to reconcile with the format of the thesis)

ABSTRACT

Statutory adjudication was introduced in the security of payment legislation to quickly and fairly resolve payment disputes in the construction industry. One of the interesting features in some legislation is the availability of an express limited right of aggrieved parties to apply for review against erroneous adjudication decisions. In Singapore, the legislation has no equivalent elsewhere in that it provides for a full review mechanism for erroneous determinations considering the fact that adjudicators often have to grapple with complex issues and sheer volume of documents within a very tight timeframe. This paper discusses the various review mechanisms of erroneous adjudication determinations then asks the question as to whether an appropriately devised legislative review mechanism on the merits, should be an essential characteristic of any effective statutory adjudication scheme. The paper concludes with making the case that an appropriately designed review mechanism as proposed in the paper could be the most pragmatic and effective measure to improve the quality of adjudication outcome and increase the disputants’ confidence in statutory adjudication.

Keywords: ADR, judicial review, merits review, review mechanism, statutory adjudication.
4.1 Introduction

Statutory adjudication is a fast-track payment dispute resolution process established within the Security of Payment (SOP) legislation to resolve payment disputes to keep the cash flowing down the contract chain in construction projects. Its rapid, highly regulatory and temporarily binding nature has led to it being often described as a “quick and dirty”\textsuperscript{395} process that delivers “rough and ready”\textsuperscript{396} justice. In the context of small or simple payment claims, it could be argued that the nature of such claims is both appropriate and justified in order to protect a vulnerable class of smaller businesses within the construction sector. However, the eventuating ‘one size fits all’ coverage of the adjudication scheme has resulted in a mounting swell of complaints and dissatisfaction with the adjudication outcome of larger and/or more complex cases, particularly in Australia.\textsuperscript{397} Adjudicators of such cases often have to grapple with complex legal arguments and large volumes of submissions within very limited timeframes. Such dissatisfaction is manifest in the large number of judicial challenges to adjudicators’ determinations in recent years which has frustrated the object of the SOP legislation and deterred many construction firms from using the adjudication scheme to resolve their payment disputes.\textsuperscript{398}

In addition, parties to any payment dispute seek to have that dispute resolved in a quick, inexpensive and informal manner. Not only does a contractor seek to recover disputed progress payments from its employer but that contractor also has a keen interest in having all its payment disputes resolved with finality to ensure certainty in business. It is advantageous for both parties to have a trustworthy opinion (albeit one that is made on an interim basis) upon the merits of the payment dispute which would stand as a reliable indicator of the likely final outcome should the parties initiate further legal proceedings on the same dispute. Accordingly, both parties will be in a better

position to deal with similar future disputes and plan their financial resources to mitigate the effect of the dispute resolution outcome.

As such, it is submitted that there is no valid reason to restrict the operation of the statutory adjudication scheme in a way that keeps it too far from operating as an effective alternative dispute resolution (ADR) for most of the payment disputes cases. This could be achieved by optimising the adjudication scheme to increase the confidence of disputants in the adjudication outcome. To optimise adjudication as an effective binding dispute resolution, there are three key essential requirements: procedural fairness, accessibility and finality.\textsuperscript{399}

To attain some (if not all) of the above essential requirements, a range of different legislative review mechanisms of erroneous determinations have been introduced in certain jurisdictions. The main purpose of having such review mechanisms is to provide aggrieved parties with a convenient remedy to appeal the decision of errant adjudicators in certain situations. Among those, the Singaporean and the prospective Tasmanian review mechanisms are the only schemes that allow for a full legislative review of the merits of erroneous adjudication determinations.

This paper critically examines the various limited and full review mechanisms of erroneous determination then asks the question as to whether an appropriately devised review mechanism within the SOP legislation, should be an essential characteristic of any effective statutory adjudication scheme, or would it merely add an unnecessary and undesirable extra layer of time, cost and complexity?

4.2 Limited review mechanisms

Many jurisdictions expressly grant aggrieved parties the right to challenge adjudication decisions. Such right is typically limited, albeit to varying degrees. The limited right for review is expressly provided for in the SOP legislation in New Zealand, Malaysia, Ireland, the Australian Capital Territory, Western Australia, Northern Territory and Victoria as discussed below:

\textsuperscript{399} Gerber, P & Ong, B, \textit{Best Practice in Construction Disputes: Avoidance, Management and Resolution}, (LexisNexis, 2013).
4.2.1 New Zealand

The New Zealand’s Construction Contracts Act 2002 as amended in December 2015 applies to both general and residential construction works. An adjudicator’s determination is binding on the parties to the adjudication and continues to be of full effect even though a party has applied for judicial review of the determination; or any other proceeding relating to the dispute between the parties has been commenced (s 60). In Rees v Firth, the Court of Appeal noted that the ambit of judicial review should not be restricted to jurisdictional errors as is the case in other jurisdictions. The Court went on to opine at paragraph [22] that a person who does not accept an adjudicator’s determination should not seek relief by way of judicial review but rather litigate, arbitrate or mediate the underlying dispute.

Furthermore, the NZ Act expressly gives the defendant the right to oppose enforcement of the adjudication determination by the claimant in the context of enforcement proceedings. The defendant must apply within five working days after receipt of a copy of the enforcement application for an order that entry of the adjudicator’s determination as a judgment be refused (s 74(1)). This time limit was originally set out as 15 working days but was reduced by virtue of 2015 Amendment Act to avoid unnecessary delays in enforcement proceedings. The application for such order may be made only on strictly limited grounds which include, mainly, that: the contract to which the adjudicator’s determination relates is not a construction contract; a condition imposed by the adjudicator in his or her determination has not been met or that due to a change in circumstances, which was not caused in any part by the defendant; or it is not possible to comply with the adjudicator’s determination (s 74(2)). The High Court of New Zealand further clarified the ambit of judicial review in statutory adjudication and held that:

“The jurisdiction of this Court in judicial review is discretionary. It is not exercised to interfere with the conventional procedures of the District Court or of statutory tribunals in relation to which there are statutory appeal processes permitting access to this Court on appeal. This Court exercise its judicial

review jurisdiction unless there is some residual risk of uncorrected illegality that cannot conveniently be dealt with by the District Court or the tribunal."  

The Act, however, provides for a limited alternative avenue for review of an adjudicator’s determination in respect of an owner/employer who was not the respondent (s 71A). Such an owner may apply to the District Court for a review of the adjudicator’s determination in circumstances where the owner is jointly and severally liable with the respondent to make a payment to the claimant. An application for review must be made by filing a notice in the nearest District Court and the notice must be filed within 20 working days after the date of the determination or within any further time that the District Court may allow (s 71B). The review must be conducted as a hearing de novo and the Court may quash the determination, and substitute for it any other determination that the adjudicator could have made in respect of the original proceedings or refuse the application (s 71C). An application for review does not operate as a stay of the adjudicator’s determination unless a District Court Judge, on application, so determines (s 71D).

4.2.2 Malaysia

The Malaysian Construction Industry Payment and Adjudication Act 2012 came into operation in April 2014. The legislation differs from other commonwealth jurisdictions in that it specifically allows for aggrieved parties in an adjudication to directly apply to the High Court to set aside a decision on specific grounds (s 13 (a)). The grounds include denial of natural justice, bribery, fraud, lack of impartiality or independence and excess of jurisdiction (s 15). Section 15, however, does not provide any requirement for the time within which an application to set aside can be made. However, the High Court clarified this point by noting: “Presumably and logically, this must be before the adjudication decision is enforced under section 28.” Judicially, it was explained that an application to set aside the adjudication decision cannot be deemed as an appeal against the adjudication decision. Rather, the court

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401 Concrete Structures (NZ) v Palmer, HC ROT, CIV-2004-463-825, 6 April 2006, at paragraph [15].
402 WRP Asia Pacific v NS Bluescope Lysaght Malaysia [2015], Kuala Lumpur High Court Originating Summons No: 24C-8-04/2015 at paragraph [36].
403 ACFM Engineering & Construction v Esstar Vision, Kuala Lumpur High Court Originating Summons No: 24C-20-06/2015, at paragraph [34].
exercises its jurisdiction as conferred by section 15, guided by the principles and purpose of the relevant legislation.

In *ACFM Engineering & Construction v Esstar Vision*, the court clarified the scope of judicial intervention and held at paragraph [65] that “Section 15 provides for only four grounds upon which the adjudication decision may be set aside. This Court cannot rewrite that jurisdiction. The Court should not re-evaluate the adjudication decision”. The court went on to say at paragraph [70]:

> “the Adjudicator does not need to get the correct answer. All the Adjudicator needs to do is to decide and give the parties an answer to their dispute. He has done precisely that and he cannot be faulted. Further, he cannot be faulted for analysing each of those issues, and perhaps getting any of them wrong, which we shall soon see, he in fact did not, even if that, for any moment, is a relevant consideration.”

It could be argued then that section 15 is intended by Parliament to act as an ouster (privative) clause so as to limit judicial intervention in the operation of statutory adjudication. Although that section provides for narrow or limited grounds, some of those grounds have an extensive application, namely, the denial of natural justice. On that basis, the door may always be left ajar for aggrieved parties to challenge adjudication decisions even if an adjudicator’s breach of natural justice has not necessarily affected the outcome, which is in contrast to the settled law in Australia that the adjudicator’s denial of natural justice must be substantial in order for a challenge to be successful in court. It is therefore submitted that until the Malaysian case law upon the interpretation of the ambit of judicial review reach some maturity over the next few years, the boundaries of the grounds laid down in section 15 will remain blurred and uncertain.

Aggrieved parties of erroneous determinations on other grounds are, by contrast, left without remedy but to bring curial proceedings to finally resolve their payment

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404 Kuala Lumpur High Court Originating Summons No: 24C-20-06/2015.
405 WRP Asia Pacific v NS Bluescope Lysaght Malaysia [2015], Kuala Lumpur High Court Originating Summons No: 24C-8-04/2015 at paragraph [29].
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disputes. Having said that, it is submitted that adjudicators under the Malaysian scheme will be less prone to errors as they enjoy extensive range of powers and much longer timeframes to reach decisions (i.e. 45 working days) compared to other jurisdictions (e.g. 14 days in Australia and 28 days in the UK).

5.2.3 Ireland

The Irish Construction Contracts Act 2013 is yet to commence operation. The legislation, unlike its counterpart in the UK, is limited to dealing with payment disputes (Section 6(1)). Section 6(10) provides that:

“The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator’s decision.”

Accordingly, an aggrieved party has an express right under the legislation to challenge an adjudication determination in the High Court by way of judicial review, but the legislation is silent upon the grounds that an aggrieved party may rely upon to seek judicial review. Under Irish law, however, an aggrieved party may rely (alongside jurisdictional errors) on other grounds such as unreasonableness, disproportionality, and insufficient reasons by the administrative decision-maker. As such, it has been argued that whilst the judicial review is primarily concerned with the procedural legality of the decision, the doctrines of reasonableness, irrationality and proportionality require a rigorous scrutiny of the merits of the decision itself and not simply the decision-making process. The increased ‘Europeanisation’ of Irish law may have influenced the Irish courts to widen the existing categories of relief, which may be observed from recent judgments relating to the obligation upon

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decision-makers to give reasons, the right of parties to an oral hearing and a widened test of irrationality/unreasonableness.\textsuperscript{411}

According to the Rules of the Superior Courts (Judicial Review) 2011,\textsuperscript{412} no application for judicial review shall be made unless the leave of the court has been obtained (r 20(1)). This condition acts as a filter to exclude trivial applications and limit judicial review to those applications which have arguable cases in law. The applicant must precisely state and detail the reasons and grounds on which relief is sought (a mere assertion in general terms will not suffice) (r 20 (3)) accompanied by an affidavit which verifies the facts relied on (r 20 (2)(b)). An application for leave shall be made within three months from the date when grounds for the application first arose. The court, however, may on an application for that purpose, extend that time in specific circumstances (rule 21 (3)). If leave to appeal is granted, the applicant may then proceed with judicial review proceedings. The court has jurisdiction, in addition to quashing an erroneous decision, to remit the matter to the decision-maker with a direction to reconsider it and reach a decision in accordance with the findings of the court (rule 27(4)).

Ireland would therefore at this early stage appear to allow a broader right to review of adjudication decisions than its counterparts in the UK and Australia. Aggrieved parties have a greater opportunity to challenge unfavourable administrative decisions (e.g. adjudication decisions) in light of recent case law developments.\textsuperscript{413} The extent to which merits review of erroneous adjudication determinations is permitted by courts remains however to be seen in time, after the Irish scheme comes into operation.

\textbf{4.2.4 The Australian Capital Territory (ACT)}

The \textit{Building and Construction Industry (Security of Payment) Act 2009} (the ACT Act) provides that an appeal may be made to the ACT Supreme Court on any question of law arising out of an adjudication decision subject to certain conditions being satisfied.\textsuperscript{414} Either party may appeal from an adjudication decision with either the

\textsuperscript{412} SI 2011/691. The rules replace the previous Rules 18 to 28 of Order 84 of the Rules of the Superior Courts 1986.
\textsuperscript{414} \textit{Building and Construction Industry (Security of Payment) Act 2009} (ACT), s 43 (2).
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consent of the other party or leave of the Supreme Court. According to Court procedural Rules (ACT) 2006, an application for leave to appeal should be filed not later than 28 days after the day on which the order appealed from is made, or any further time allowed by the Court.

The Supreme Court must not grant such leave unless it considers that having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the adjudication decision; and there is either a manifest error of law on the face of the adjudication decision, or strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law. These restrictions on appeal are very similar to an appeal against an arbitral award pursuant to section 38(5) of the Commercial Arbitration Act 1986 (ACT).

In its first decision regarding a respondent’s appeal from an adjudicator’s decision, the Supreme Court in Walton Construction Pty Ltd v Pines Living Pty Ltd held that since the ACT Act is very similar to the NSW Act, and considering the fact that the NSW Act has been in force for a substantial period of time and the subject of a very detailed consideration in the NSW Supreme Court and Court of Appeal, the decisions of those courts will be of significant utility in interpreting the ACT Act. The Court went on to highlight the significant difference of the ACT Act which provides for a limited capacity to appeal from an adjudicator’s decision. The Court held that:

“The grounds sought to be agitated in the s 43 appeal and in the certiorari proceedings are similar. The certiorari proceedings have been brought in order to avoid the consequences of the fact that the application for leave to appeal is out of time. There is even an argument that the certiorari proceedings are out of time because they have been filed later than 60 days after the date when the grounds for the grant of the relief sought first arose.”

The Supreme Court may confirm, amend or set aside the adjudication decision; or remit the adjudication decision, together with the Supreme Court’s opinion on the

415 Building and Construction Industry (Security of Payment) Act 2009 (ACT), s 43 (3).
416 Court Procedures Rules 2006 (ACT), r 5072, Pt 5.2.
418 [2013] ACTSC 114 at [18].
419 [2013] ACTSC 114 at [12].
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cconcerned question of law to either the original adjudicator for reconsideration; or a new adjudicator as may be appointed by the Supreme Court.\textsuperscript{420} If an adjudication decision is remitted, the adjudicator must make the new adjudication decision within 10 business days after the day the decision was remitted or within the time directed by the Supreme Court.\textsuperscript{421} The ACT Supreme court has exercised its remittal authority for the first time in \textit{Fulton Hogan Construction Pty Ltd v Brady Marine & Civil Pty Ltd}.\textsuperscript{422} In that case, Mosspop AsJ found that the adjudicator made a manifest error of law that could substantially affect the legal rights of the parties and held:

\begin{quote}
"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. The reasons given by the adjudicator reflect a diligent attempt to disentangle the complicated factual and legal arguments put forward by the parties and there is nothing to suggest that it would not be appropriate for the same adjudicator to complete the adjudication upon remittal from this Court."
\end{quote}

In addition, the ACT Act provides that the Supreme Court has jurisdiction to entertain any question of law if the adjudicator consents, or if the parties agree, provided that the determination of the question ‘might produce substantial savings in costs to the parties, and that the question of law is one in respect of which leave to appeal would be likely to be granted.\textsuperscript{423} This section is modelled closely on the appeal provisions under section 39 of the \textit{Commercial Arbitration Act 1986 (ACT)}. As such, it was argued that the right of appeal under the ACT legislation makes adjudication a judicial process and, further, that the inherently substantial cost of defending Supreme Court proceedings will deter many small contractors from pursuing progress claims.\textsuperscript{424}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{420} \textit{Building and Construction Industry (Security of Payment) Act 2009 (ACT)}, s 43 (6).
\textsuperscript{421} \textit{Building and Construction Industry (Security of Payment) Act 2009 (ACT)}, s 43 (7).
\textsuperscript{422} [2015] ACTSC 384 at [67] (Mosspop AsJ).
\textsuperscript{423} \textit{Building and Construction Industry (Security of Payment) Act 2009 (ACT)}, section 44.
\end{footnotesize}
\end{flushleft}
4.2.5 Western Australia and Northern Territory

Under the Western Australian Construction Contracts Act 2004, 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. The 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 (section 31(2)(a)). This review is carried out by the State Administrative Tribunal (WASAT). Similarly, the Northern Territory’s Construction Contracts (Security of Payments) Act 2004 allows a review of an adjudicator’s decision by a Local Court to dismiss an adjudication application without making a determination of its merits (s 48). The grounds for dismissing applications are similar to those in Western Australia (s 33 (1)(a)).

The WASAT has jurisdiction to review the adjudicator’s decision to dismiss upon application by either party. 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.425 If the decision is reversed and remitted, the adjudicator is to make a determination within 14 days after the date on which the decision was reversed, or any extension of that time consented to by the parties (section 46 (2)).

A review by the WASAT involves a hearing de novo on the merits in which material that was not before the decision-maker may be considered.426 Apparently, there is an inconsistency between the Construction Contracts Act and a hearing de novo. In Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture,427 strict limitations have been imposed on allowing new submissions before the WASAT and it was held at paragraphs [70-71]:

“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

425 Under the State Administrative Tribunal Act 2004 (WA), section 29 (3).
426 The State Administrative Tribunal Act 2004, s 27.
consider that the adjudicator must remain bound to decide the matter on the material which was originally before the adjudicator in accordance with s 32 of the CC Act. Accordingly, to the extent that any of the material provided to me was not before the adjudicator, I have had no regard to it. Of course, that does not include submissions on the law based on the material which was before the adjudicator.”

Interestingly, section 46 (3) of the WA Act 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 appealing before the Tribunal, while judicial review will still be open for the aggrieved party. Also, section 105 of the WASAT Act provides for an appeal to the Supreme Court from a decision of the WASAT provided the Court gives leave to appeal which is limited only on a question of law.

### 4.2.6 Victoria

The Victorian *Building and Construction Industry Security of Payment Act 2002* was amended in 2006 to introduce, inter alia, a review mechanism for adjudication determinations valued in excess of AUS$100,000 (accounting also for any ‘excluded amounts’, which are defined under section 10B to encompass, inter alia, non-claimable variations, amounts relating to latent conditions, time-related cost and breach of contract). In the second reading speech of the 2006 amendment Bill, it was confirmed that such limit is given in order not “to disadvantage small subcontractors who rely on prompt payment to stay in business.”

The respondent can only apply for review if he or she has identified that amount as an excluded amount in the payment schedule or the adjudication response, has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts and has paid the alleged excluded amounts into a designated trust account (s 28B (4 to 6)). The review is carried out by a second adjudicator appointed by the original appointing ANA. The ANA must provide information to the review

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428 [2014] WASC 52 at [72]-[76].
429 *Building and Construction Industry Security of Payment Act 2002*, s 28A (a) & 10B.
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adjudicator (s 28H) which includes the original adjudication application and response from the original adjudicator. The features of the review system are further summarised in table 6 below.

This legislative solution would therefore appear to facilitate enforcement of the unaffected portion of a partial valid adjudication determination. Having said that, both the adjudication determination and review determination are susceptible to judicial review as demonstrated in Grocon Constructors v Planit Cocciardi Joint Venture [No 2]. In that case, the Court upheld both the adjudicator’s determination and the review determination, and dismissed the appellant's application. Interestingly, the Victorian Supreme Court has accepted at least two applications by respondents for judicial review. In doing that, the court has bypassed the review mechanism which emphasises that parties have the discretion to use either the review mechanism or the readily available judicial review avenue. In one of these applications, the respondent sought judicial review instead of review under the available legislative mechanism, and the court quashed the adjudicator’s determination remitting it back to the same adjudicator for reconsideration. A possible strategic reason for a respondent's bypassing the legislative mechanism and seeking judicial review would be to avoid making payment to the claimant. In the context of judicial review, the respondent will only be required under the Act to pay the unpaid adjudicated amount (usually the full amount) in court as security (s 28R 5 (b)). This contrasts with the more demanding requirement under the legislative scheme to pay the claimant the adjudication award value, as well as to pay the alleged excluded amounts into a designated trust account.

Interestingly, Victoria has very recently introduced the Building Legislation Amendment (Consumer Protection) Act 2016 which will come into force on 1 July 2017. That Act introduced a new ground for discipline of building practitioners who fail to pay the adjudicated amount due to be paid under the Building and Construction Industry Security of Payment Act 2002 within the relevant adjudication review time period (s 179 (1)(n)). The form of disciplinary action includes, inter alia, imposing a penalty, suspending registration, cancelling registration and/or disqualifying the

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432 VSC 426 at [35] & [102].
434 See Maxstra Constructions Pty Ltd v Gilbert t/as AJ Gilbert Concrete [2013] VSC 243.
practitioner from being registered for a specified period of up to 3 years (s 178). Whilst this novel legislation is deemed a step in the right direction to give the adjudication decision some “teeth” it has long needed; it does not address the situation where the practitioner bypasses the legislative review mechanism and seeks judicial review as explained above.

In his final report on improving the SOP legislation in Queensland, Andrew Wallace noted receiving a suggestion to limit the number of applications to the court by providing a mechanism for the review of an adjudication decision by another adjudicator, in a way that is similar to the mechanism established under the Victorian Act. Wallace objected to this concept of adjudication review on the grounds that it is neither consistent with the object of the Queensland SOP legislation, nor supports its interim and rapid nature. Regarding the popularity of the Victorian review scheme, Andrew Wallace said:

“during my discussions with the responsible officer in charge of administering the Amended Victorian Act, I was advised that the review adjudication process had only been used on one occasion since the amendments commenced in 2006.”

4.3 Full review mechanisms on the merits

Having examined the various limited avenues of review, this paper now turns its attention to critically discuss the review mechanisms in Singaporean and Tasmanian SOP legislation which uniquely provide for full review of erroneous adjudication determinations on the merits. Since Singapore has a long-established and much utilised merits review mechanism, it is worthwhile to discuss the Singaporean scheme in some more detail before addressing the question of whether a full review mechanism is needed.

4.3.1 Singapore

The Singapore Building and Construction Industry Security of Payment Act 2004 (the SG Act) sought to establish a fast and low-cost adjudication system to resolve payment disputes. It substantially followed the NSW model with some key differences. The

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435 Wallace Report, above fn 394, p 225.
most significant difference is the introduction of an adjudication review mechanism allowing an aggrieved respondent to have the adjudicator’s determination reviewed by another adjudicator or a panel of adjudicators on its merits. This review mechanism was judicially described as “a way of remedying injustice to any of the parties inflicted by the rather hasty process of adjudication.” In the second reading speech, the Minister of State for National Development justified the introduction of the review mechanism as a novel feature within the Singaporean legislation by stating: “The industry practitioners have told us that sometimes amounts can be very large, and a single arbitrator sitting in determination of the case may not do sufficient justice.” It was also argued that the time limits of adjudication determination prevent adjudicators from conducting a proper analysis of the facts and law related to the dispute. In SEF Construction Pte Ltd v Skoy Connected Pte Ltd, Justice Prakash commented:

“This must have been why the legislature decided in our case to introduce the adjudication review procedure. The adjudication review procedure provides the parties with an opportunity to re-argue their respective cases with regard both to the facts and the law. The review adjudicator is able to go into the substantive merits of the original adjudicator’s decision.”

The Singaporean review mechanism is only accessible to respondents provided they have served a payment response and have paid the unpaid adjudicated amount to the claimant. The respondent must pay the adjudicated amount to the claimant in the first place to be entitled to apply for review (s 18(3)). This seeks to ‘fulfil the legislation mission and purpose of facilitating smooth and prompt cash flow.’ The review application must be lodged within seven days of obtaining the adjudication determination (s 18(2)) provided that there exists a disparity between the adjudicated amount and the relevant response of SG$100,000 or more. This threshold requirement helps prevent respondents from routinely exploiting the freely available review

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439 [2009] SGHC 257 [38].
mechanism and thereby frustrating the object of the legislation by adding a tier of additional expense.\textsuperscript{441} In this regard, Justice Prakash noted:

\textit{“The drafters of the [SG Act] must have considered that it would not be convenient or economical to provide a review process for a dispute that did not have sufficient substance in economic terms. In those cases, the respondent’s arguments on principle or facts would have to be taken up subsequently in court or in arbitration proceedings.”}\textsuperscript{442}

The respondent must apply for the review to the same authorized nominating body with which the original application was served. As at the time of writing, the Singapore Mediation Centre (SMC) is deemed the only authorized nominating body in Singapore. The review application must include a proof of payment of the adjudicated amount to the claimant and a copy of adjudication determination (s 10(2)). The condition precedent upon a respondent requiring it to pay the claimant first, in order to be granted access to review mechanism, can be considered a double-edged sword. As such, whilst that precondition avoids an “abuse of process” and safeguards the object of the legislation of timely and speedy recovery of payment, there is an inherent risk of the claimant’s inability to repay such payment if the original determination is quashed and substituted by a review decision. Having said that, it was argued that since the adjudication review is a fast track process, the respondent’s risk exposure will be limited.\textsuperscript{443}

Upon receipt of the review application, the SMC has seven days only (s 18(6)) to appoint one adjudicator or a panel of three adjudicators if the difference exceeds SG$1 Million.\textsuperscript{444} The review adjudicator must only have regard to the matters referred to in section 17 (3) and the adjudication determination that is the subject of the adjudication review (s 19 (6a)). This could mean that new reasons and fresh evidence from parties cannot be entertained in the review proceedings. In this context, it was argued that adjudication review is not an appeal against the first instance adjudication determination nor should it be considered as a completely \textit{de novo} adjudication of the original dispute, as it is limited to the issues relating to the difference between the


\textsuperscript{442} \textit{SEF Construction Pte Ltd v Skoy Connected Pte Ltd} [2009] SGHC 257 [24].


\textsuperscript{444} Building and Construction Industry Security of Payment Regulations 2005, Singapore, s 10(1).
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adjudicated amount and the adjudication response. Although the review application may include reformulated arguments based on the facts previously canvassed, it must exclude new facts, reasons or evidence, even if they have arisen after the completion of the original adjudication. In his review determination, a review adjudicator opined that:

[I]t appears to me that I am entitled to consider new submissions that may be made especially since in a review process, the Respondent will need to address specific points in the adjudication determination as part of its challenge. This must therefore include new submissions to deal with such points.”

The review determination must be issued to the parties within 14 days (s 19(3)). It may replace the original determination or reject the review application. The cost of adjudication review will be proportionally borne by the parties to the extent each party was successful (s 19 (5d)). Table 6 below demonstrates the key differences and features between the review mechanisms in Victoria, Western Australia and Singapore.

The ambit of adjudication review was not clear until the Singaporean Court of Appeal handed down its decision in Lee Wee Lick Terence v Chua Say Eng. In that case, the court held that adjudicators do not have the competency to deal with jurisdictional issues apart from the basic function required by the legislation. The Court also held that any jurisdictional objection must be raised immediately with the court and not before the adjudicator. The court justified this position by saying: “since the objection is against the adjudicator’s jurisdiction as an adjudicator, he has no power to decide if he has jurisdiction or not. He cannot decide his own competency to act as an adjudicator when such competency is being challenged by the respondent.”

Hence, it could be interpreted that review adjudicators do not have jurisdiction to consider jurisdictional objections as a basis for review which means than the aggrieved party has no option but to challenge the jurisdiction of original adjudicator by way of judicial review. Moreover, Andrew J in RN & Associates Pte Ltd v TPX Builders Pte

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446 Ibid, p. 823.
449 [2012] SGCA 63 [64].
450 [2012] SGCA 63 [36].
451 [2012] SGCA 63 [36].
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_Ltd._452 provided some useful guidance regarding the ambit of adjudication review by saying:

“[The respondent] having chosen not to apply for an adjudication review, it is not for me to set aside the Adjudication Determination on grounds which properly belong to an adjudication review. Any mistake as to validity requires an examination of the evidence and an application of the law and is a substantive issue going to the merits, which the Adjudicator has the right to decide and which I cannot interfere with.”

**Table 6 The key differences of review mechanisms in Singapore, WA and Victoria**

<table>
<thead>
<tr>
<th>Description</th>
<th>Victoria</th>
<th>WA</th>
<th>Singapore</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Threshold for review</strong></td>
<td>Adjudicated amount &gt; AUS$100,000</td>
<td>Not applicable</td>
<td>Adjudicated amount – adjudication response &gt; SG$ 100,000</td>
</tr>
<tr>
<td><strong>Authorised Applicant</strong></td>
<td>Either party</td>
<td>Either party</td>
<td>Respondent</td>
</tr>
<tr>
<td><strong>Application Grounds</strong></td>
<td>Inclusion or exclusion of excluded amounts in adjudicated amount.</td>
<td>1-Adjudicators decision to dismiss applications without deciding its merits on grounds related to existence of contract, valid payment claim, complexity of the case, etc. 2-Disqualified adjudicator due to conflict of interest.</td>
<td>General review with limited implied exclusions as stated in case law.</td>
</tr>
<tr>
<td><strong>Precedent conditions on respondents</strong></td>
<td>1-Adjudication response to include the grounds. 2- Payment of the adjudicated amount less the alleged excluded amount. 3-Payment of the alleged excluded amount in to a trust account.</td>
<td>Not applicable.</td>
<td>Payment of the adjudicated amount to the claimant.</td>
</tr>
</tbody>
</table>

452 [2012] SGHC 225 [61].
<table>
<thead>
<tr>
<th>Application time limits</th>
<th>Within 5 business days from the receipt of adjudication determination.</th>
<th>Within 28 days from the receipt of adjudication determination.</th>
<th>Within 7 days from the receipt of adjudication determination.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights to make submissions</td>
<td>Allowed within 3 business days after receiving of review application.</td>
<td>Allowed</td>
<td>No express provision.</td>
</tr>
<tr>
<td>De novo Rehearing</td>
<td>Prohibited</td>
<td>Allowed</td>
<td>Prohibited</td>
</tr>
<tr>
<td>Appointment of review adjudicator by ANA</td>
<td>Within 5 business day from receipt of application.</td>
<td>Not applicable. Review by SAT.</td>
<td>Within 7 days from the receipt of application.</td>
</tr>
<tr>
<td>Selection criteria of review adjudicator</td>
<td>Same as the original adjudicator.</td>
<td>SAT may reverse and remit the decision to same adjudicator for reconsideration.</td>
<td>Same as the original adjudicator provided the adjudicator has no determination under adjudication review.</td>
</tr>
<tr>
<td>Notice to original adjudicator by ANA</td>
<td>Required</td>
<td>Not required</td>
<td>Not required</td>
</tr>
<tr>
<td>Number of adjudicators</td>
<td>Single adjudicator</td>
<td>Single adjudicator as might be remitted by SAT.</td>
<td>Single adjudicator or A panel of 3 adjudicators if the threshold exceeds SG$1m.</td>
</tr>
<tr>
<td>Time limit of review determination</td>
<td>Within 5 business after appointment or within max 10 days if agreed by the applicant.</td>
<td>No express provision.</td>
<td>Within 14 days or any longer period as agreed by claimant and respondent.</td>
</tr>
<tr>
<td>Payment timeline</td>
<td>Within 5 business days after receipt of review determination or any later time determined by the adjudicator.</td>
<td>Not applicable</td>
<td>Within 7 days after receipt of review determination or any later time determined by the adjudicator.</td>
</tr>
</tbody>
</table>
4.3.1.1 Shortcomings of the Singaporean review mechanism

Whilst the Singaporean review mechanism is an effective platform to achieve justice away from courts, it is infected with a number of restrictions as well as ambiguities in the procedures. Aggrieved respondents are deprived of using the review mechanism where the difference between adjudicated amount and adjudication response is less than SG$100,000. As well, aggrieved claimants are left with no alternative but to seek subsequent final proceedings in arbitration or litigation to have the case reviewed on the merits. The option of judicial review seems readily available for both parties on grounds relating to procedural injustice and adjudicator’s excess of jurisdiction. Some respondents may use the option of judicial review as a delaying tactic hoping that the claimant may become insolvent by the time the case is judicially decided. Another incentive for respondents seeking judicial review is to avoid paying the claimant directly as a precondition to access the review mechanism since respondents would only be required to pay the unpaid adjudicated amount in court. Having said that, some aggrieved parties may not be able to afford judicial review. As well, aggrieved claimants, who are often vulnerable, have no option but to seek expensive and lengthy judicial review where adjudicators erred in their decisions to dismiss applications without making determinations on the merits on the basis of lack of jurisdiction.

On the other hand, the procedure of the review mechanism lacks clarity. For instance, there is no express provision giving the claimant the entitlement to serve a reply on the review application to conform to principles of procedural fairness. The legislation provides that the adjudication review application must contain such information or be accompanied by such documents as may be prescribed, however, no regulations were ever made to clarify whether new arguments or information can be raised in the review application. There is no regulation governing the selection of the review adjudicator, to ensure he or she holds a considerable relevant experience and seniority compared to the original adjudicator. The size of the tribunal is only decided by the monetary value rather than the complexity of the dispute. However, it was observed that the appointments made so far in Singapore have considered such matters.453 The time limit of the 14 days for adjudication review is fixed, irrespective of whether the difference is SG$100,000 or SG$10,000,000, which may be too tight in larger and/or more

complex cases. Moreover, since the identity of the original adjudicator is disclosed, there is a possibility of perceived bias or conflict of interest where the review adjudicator might be influenced by the reputation of, or previous dealings with the original adjudicator. It is also unclear whether the original adjudicator can participate or provide input during the review process.

4.3.2 Tasmania

The Tasmanian Building and Construction Industry Security of Payment Act 2009 came into operation on 17 December 2009 and followed the same pattern of the NSW Act. In October 2015, the Tasmanian Government introduced the Building and Construction Industry Security of Payment Amendment Bill 2015 (the Bill) which is yet to be assented. The Bill mainly established a review mechanism for erroneous adjudication determinations at no cost to either party. If the Bill is assented to and becomes an Act, Tasmania will be the only Australian jurisdiction to have a review mechanism on the merits of erroneous determinations.

Section (38A) of the Bill provides that the SOP Official has the discretion to appoint an independent expert panel (the Panel) to review a decision of an adjudicator. The SOP Official may refer an adjudication decision to the Panel if he or she believes the decision is ‘inappropriate or unfair’.\(^{454}\) The authorised nominating authority (the ANA) is required to provide a copy of adjudication decisions immediately instead of annually to facilitate timely outcome of the review process. The SOP Official will not be involved in the review of the decision and the Panel will be drawn from practitioners within the building and construction industry, following consultation with major industry representative bodies. The Treasurer and Minister for Planning and Local Government, explained the purpose of the review mechanism by saying:\(^{455}\)

“Where a decision is prima facie out of step with the intent of the legislation then this expert panel review will provide an alternative which does not involve costly litigation. This new review will not be commonly used, but will be available for those rare occasions where something goes wrong.”


\(^{455}\) Ibid.
If the SOP Official makes a referral, he or she must inform the parties to the dispute and the ANA. The adjudication decision will be suspended until the Panel completes its review. The Panel must complete the review with seven working days after the referral. If the Panel fails to make a decision within the given timeframe, that adjudication decision ceases to be suspended and the decision of the adjudicator appointed by the ANA takes effect. The Panel may, in turn, confirm the adjudicator’s decision or quash it. The Panel may also substitute an alternative adjudication decision. Any substituted decision will have the same status as the decision by the adjudicator. The Bill also provides that the Panel is protected from liability which is similar to the existing protection for adjudicators under the SOP legislation.

4.3.2.1 Shortcomings of the Tasmanian review mechanism

Despite looking, on its face, a promising step towards improving the finality of adjudication outcome away from courts, the Tasmanian review mechanism lacks clarity and transparency in various aspects. The Bill does not provide a mechanism for initiating the review process and whether it is activated by the own initiative of the SOP Official or by a formal complaint from either party. The Bill does not address the criteria to be followed by the SOP Official to identify what would be an ‘inappropriate or unfair’ decision as a basis for review and whether the scope of review will cover any determination regardless of the size or nature of the payment dispute. The Bill does not define the referral period within which a referral by the SOP Official can be made, which will add an unnecessary layer of uncertainty to the parties. The Bill also does not include any details relating to the selection criteria and powers of the Panel and whether the Panel will be paid from the public fund or engaged on a voluntary basis. Offering a review mechanism at no extra cost is a promising feature but may not be a sustainable approach in the long term.

4.4 Is a review mechanism on the merits needed?

Notwithstanding the interim and rapid nature of statutory adjudication, it was judicially noted that there is ‘no proper basis to distinguish an adjudication for the purpose of maintaining cash flow from an adjudication to determine a party’s ultimate rights and entitlements.’ Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd (2014) 34 NTLR 17; NTSC 20 [45] (Barr J).

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456 Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd (2014) 34 NTLR 17; NTSC 20 [45] (Barr J).
maximise, within the legislative object of expediency, the opportunity that adjudicators’ determinations are made in accordance with the correct and relevant law.

Typically, an aggrieved party in adjudication has no option but to initiate lengthy and expensive proceedings such as arbitration or litigation but the inherent cost of such proceedings may prevent the party from seeking justice. The remedy by way of judicial review is available in very limited situations. Therefore, many erroneous adjudication determinations have become final and binding decisions. In *Uniting Church in Australia Property Trust (Qld) v Davenport*, the adjudicator, after releasing his original decision and upon a request from the claimant, conceded that he had misinterpreted the claimant’s submissions and made a miscalculation, so he attempted to correct it. Daubney J held that the adjudicator committed a jurisdictional error as this type of error is not a ‘Slip Error’ that can be corrected within the jurisdiction of the adjudicator. As a result of upholding the first flawed decision, the claimant was underpaid by AUSS148,226 and left without any effective remedy to obtain a revised and correct decision. In such cases, the significance of a legislative review mechanism on the merits is manifest as a fair and convenient remedy which will avoid unnecessary expenses in seeking subsequent curial proceedings on the same dispute.

In addition, with the availability of the review mechanism, courts are likely to be more reluctant to exercise their discretionary powers to set aside adjudication decisions. In Singapore, Prakash J held in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* that the availability of a statutory merits review, with other factors, impliedly restricted judicial review in the High Court. In *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd*, Kenneth Martin J also noted that:

“As to discretion, the availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review. Circumstances where parties have been

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457 *Uniting Church in Australia Property Trust (Qld) v Davenport* [2009] QSC 134 (Daubney J).
458 As to the use of the discretion to deny certiorari where there lies another review option, see for instance, the High Court’s decision in *The Queen v Cook; Ex parte Twigg* [1980] HCA 36 [29], [30] and [34]; *Re Baker; Martin C3 in Re Carey; Ex parte Exclude Holdings Pty Ltd* [2006] WASCA 219 [128] - [140].
460 [2011] WASC 172; 42 WAR 35 [64].
granting and hold alternative review options bear upon the availability of prerogative relief as a matter of discretion.”

The SOP legislation grant claimants the right to suspend work if respondents do not pay the adjudicated amounts. However, the consequences of any work suspension may be devastating if the adjudication determination is eventually quashed by way of judicial review. Vickery J observed this dilemma in Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and noted:461

“A contractor would be seriously inhibited in the exercise of its statutory right to suspend works if it suspected that its payment claim and the adjudicator’s determination made upon it could be vulnerable to attack on technical legal grounds. If the contractor made the wrong call, the consequences of suspending work could be prohibitive.”

On the other hand, improving the quality of adjudicators may not be a sufficient measure to avoid erroneous determinations.462 In Queensland, major amendments have been made to its SOP legislation in December 2014 to increase the quality of adjudication outcome such as allowing longer timeframes for complex claims and improving the selection and regulation of adjudicators. Interestingly, seven judicial review court applications were lodged after the amendment, (compared to 15 applications in the preceding year), in which the Queensland Supreme Court found that adjudicators committed jurisdictional errors in three cases.463

Introducing an appropriate review mechanism would offer a pragmatic and practical solution that acknowledges the existing variety of adjudicators’ qualities and competencies and the difficulty of attaining quality adjudication outcome due to the hasty adjudication process. Michael Christie, a well experienced Senior Council in NSW, noted that the Singaporean review mechanism is worth serious consideration by Australian legislatures envisaging reform of their existing schemes.464 The review mechanism may act as an effective safety net to capture erroneous determinations away from curial proceedings to help control the overall cost and improve the finality

461 [2009] VSC 156; 26 VR 112 [47].
and informality of statutory adjudication. As such, it is proposed that a swift system of adjudication review within the SOP legislation is needed. This paper now turns its attention to develop a proposal of an appropriate review mechanism which is largely modelled on the Singaporean model with significant improvement.

4.4 A proposal for an optimised review mechanism

4.4.1 The ambit of the proposed review mechanism:

Drawing the distinction between errors of facts or errors of law, on the one hand, and jurisdictional errors of law and non-jurisdictional errors of law, on the other hand, has proven to be a complex and tricky legal exercise.\textsuperscript{465} To avoid the burden of these complexities, it is submitted that the ambit of the proposed review mechanism should include all types of errors whether errors of law or fact excluding errors related to the adjudicator’s jurisdiction to decide the referred matter. Removing restrictions upon what could be a reviewable decision will help avoid unnecessary jurisdictional challenges that might frustrate the smooth and simple operation of the review mechanism. Accordingly, any error of law or fact (other than jurisdictional facts) by adjudicators during the decision making process should be reviewable. Reviewable errors of law, it is proposed, may include jurisdictional errors emerging from procedural injustice or non-jurisdictional errors such as misinterpretation of the contract.

Having said that, legislatures in some jurisdictions may be concerned with a considerable number of applications of judicial review challenging the validity of adjudicators’ appointments. In such case, it may be appropriate to expand the proposed scope to include errors by adjudicators in deciding on their jurisdiction to hear the referred applications. As such, the ambit of the proposed review mechanism may also include jurisdictional objections, whether by a respondent challenging the valid appointment of an adjudicator or a claimant challenging the adjudicator’s decision to dismiss the application without making a determination on the merits. It is incumbent that the review adjudicator of such cases should be appropriately qualified to increase the confidence and satisfaction of the parties with the review decision which could help avoid unnecessary judicial intervention. It is also worthwhile to note that the

procedure of reviewing this type of error should be different to other errors since the challenge is usually made where there is no adjudication determination. However, the scope of this paper does not cover the likely procedures due to space limits.

4.4.2 Accessibility

Most of the applications challenging the determination of adjudicators in courts are initiated by aggrieved respondents. Some claimants may also be aggrieved by erroneous determinations but it is often the case that they are too vulnerable to afford expensive and lengthy curial proceedings to seek justice. As a result, vulnerable claimants usually stick with those determinations. Therefore, the review mechanism should be available to both parties as a matter of equity.

A respondent, seeking review, must pay the adjudicated amount to the claimant in full within five business days after the release of the adjudication determination in order to access the review system. This requirement would serve to maintain the object of the legislation for a quick cash flow recovery. This precondition would satisfy many practitioners who vote against the introduction of a review mechanism as an additional layer. However, this condition may not be appropriate if the respondent provides reasonable evidence to the governing authority that the claimant has a weak financial standing and there is a high risk of non-recovery of payment. In such cases, the governing authority may request the claimant to provide a bank guarantee in order for it to be paid, otherwise, the respondent must pay the amount into a trust account.

To avoid an “abuse of process” by either party, a minimum monetary threshold should be fixed as a precondition to access the review mechanism. Such limitation will help close the floodgates for lodging applications without sufficient substance in economic terms. The threshold limit should consider the actual or real amount in dispute. The real amount in dispute will appear from the review application. It may be the difference between the amount in the payment claim and the adjudicated amount. It may be that only part of the adjudicated amount is in dispute in the review. The criteria of fixing the threshold amount should consider the minimum amount that either party would find it feasible to challenge the determination in court where a review mechanism is devised to stand as a viable alternative. For example, McDougall J noted that: “considerations of proportionality and, equally, considerations of common sense must
suggest that the conduct of litigation involving numerous volumes of documents over less than $37,000.00 is unlikely to be a cost-effective process.466

4.4.3 Selection and jurisdiction of review adjudicators

Where a nominating authority has appointed the original adjudicator, the governing authority must solely have the jurisdiction to receive adjudication applications and appoint review adjudicators. A review adjudicator will ideally, and only where possible, be of greater seniority than the original adjudicator and must in any event have competencies and expertise relevant to the referred disputed matters. A panel of three adjudicators may only be needed if the governing authority is of the opinion that the case is very complex, the amount in dispute is very large or where the original determination was issued by a senior and well experienced adjudicator regardless of the value of the adjudicated amount to ensure a credible and correct outcome. As such, a pool of accredited review adjudicators must be arranged for that purpose. The review adjudicator must have jurisdiction to answer questions of law as well as fact. The identity of the original adjudicator must be kept confidential and not disclosed to the review adjudicator to ensure unbiased review process. The review adjudicator may affirm, quash or substitute the adjudicator’s determination with the ‘review decision’ that shall have the same legal effect of the original determination. The review adjudicator must also have jurisdiction to decide on costs associated with original and review adjudications.

4.4.3 New submissions

In principle, the review must be conducted on records that were available before the original adjudicator. However, the review adjudicator must also consider the original determination, the ‘review application’ and any response to that application if any. The ‘review application’ may state the reasons for applying for review and identify the alleged errors. Whilst the review adjudicator must enjoy the same inquisitorial powers that were available to the original adjudicator, it would be difficult for a review adjudicator to consider any information emerging from conducting conferences or site inspection unless the legislation expressly allows therefore.

466 Seabreeze Manly v Toposa [2014] NSWSC 1097 [51].
4.4.4 Timeframes

The ‘review application’ must be made to the governing authority within five business days from the receipt of the adjudication determination with a copy to the other party. The other party must be allowed to serve a ‘review reply’ to the governing authority or to the review adjudicator if appointed within two business days to afford it procedural fairness. The governing authority must refer the ‘review application’ to a review adjudicator within four business days after the receipt of the application. The ‘review decision’ must be released as soon as possible but not later than 10 business days from receipt of the ‘review reply’. The review adjudicator, however, may extend that period up to an additional five business days in complex cases by requesting the consent of the governing authority. This means that the overall additional time will be between 16 to 21 business days only from the time of serving a ‘review application’ until a ‘review decision’ is issued depending on the complexity of the referred matter. Thus, it could be argued that this additional period reinstates the pendulum to a position of balance between efficiency and fairness. That may be a little price to pay for achieving this goal.

4.4.5 Costs

One of the main inhibiting factors in advocating a review mechanism is the additional cost to the disputants. Therefore, the proposed review mechanism should be devised to counter that factor. In principle, a review adjudicator must be entitled for a fixed fee per hour but that fee must not exceed a certain defined amount to provide either party with certainty of the likely costs of the review. Each party must bear its own costs in the review. The fee of the review adjudicator will be proportionally borne by the parties to the extent each party was successful in the ‘review decision’. A ‘base fee rate’ for an errant original adjudicator should be introduced in regulations made for that purpose in case the original determination is substantially revised by the review adjudicator. Accordingly, the original adjudicator must refund the difference to the party that paid the original adjudication fees. This proposed approach may stand as not only an appropriate compensation to parties affected by having the original determinations quashed but also a reasonable discipline to errant adjudicators. In addition, the approach would be more sensible and convenient to the tough approach
in the UK, where it was judicially held that errant adjudicators are not entitled for their fees.\(^\text{467}\)

On the other hand, parties to adjudication review should have the discretion to retain legal counsels. However, the associated legal fees should not be recoverable even if the party is successful. This proposition will help deter many parties from engaging counsel unnecessarily which will help not only keep the review process informal and less legalistic, but also confine the eventual costs borne by either party as a result of participating in the review. Having said that, since parties may seek adjudication review on unreasonable grounds where the other party may incur unnecessary additional costs, it could be worthwhile to equip review adjudicators with the discretion to make an order for legal costs to compensate a party for any expenses, loss or inconvenience as a result of the other party’s conduct. This would include situations when a party conducts itself unreasonably or where a case is obviously frivolous, vexatious or unmeritorious.\(^\text{468}\) Such measures may stand as another safeguard against the abuse of review process.

Alternatively, the government may decide to establish a review mechanism at no cost to the parties as currently proposed in Tasmania but this approach may not be sustainable assuming a considerable number of review applications that will be lodged annually. It could be argued then that imposing a nominal fee on all adjudication applications may be sufficient to finance the review mechanism so the government can avoid extra financial burden.

### 4.5 Concluding remarks

This paper has examined the various review mechanisms associated with statutory adjudication worldwide in order to answer the question whether the SOP legislation may benefit from adopting an appropriately designed legislative review mechanism on the merits. The paper found that such review mechanism would be the most pragmatic and effective measure to increase certainty and confidence in the adjudication outcome and reduce the opportunity for subsequent litigation or arbitration. Features of the proposed review mechanism were demonstrated in detail. The proposal represents something of a “blunt instrument” which will require further consultation with the

\(^{467}\) PC Harrington Contractors v Systech International [2012] EWCA Civ 1371.

\(^{468}\) See WA Act, s 34 (2).
industry’s stakeholders. The paper demonstrated novel measures to counter the resulting additional time and cost. With the proposed review scheme, it is anticipated that statutory adjudication will firmly stand as an effective alternative platform and a final resort for most payment disputes which will help attain its very purpose to be a speedy, inexpensive, fair and informal process.
5. CHAPTER 5: TOWARDS DIMINISHING JUDICIAL INTERVENTION IN STATUTORY ADJUDICATION: A PRAGMATIC PROPOSAL

Journal Paper, Peer reviewed


This thesis chapter is an exact copy of the journal paper in its final accepted form. (except for formatting, numbering and referencing that were varied to reconcile with the format of the thesis)

ABSTRACT:

Statutory adjudication was introduced into the Security of Payment (SOP) legislation as a fast-track payment dispute resolution process aiming to achieve the object of the legislation to facilitate cash flow within the construction contractual chain. However, there have been numerous judicial review applications with respect to adjudicators’ determinations, particularly in Australia, which have eroded the original object of the SOP legislation. The mission has been compromised particularly in ensuring that subcontractors are paid quickly for the work they do on an interim basis. This article reviews the evolving tension between the object of the legislation and judicial intervention and addresses the shortcoming of the main available approaches to diminish judicial intervention. The article then introduces a pragmatic proposal to address the problem going forward. The proposal calls for separating jurisdictional challenges from the merits in adjudication and establishing a legislative review tribunal to deal with jurisdictional challenges. This proposal may be applicable to many other jurisdictions having the SOP legislation.

Keywords: judicial review, jurisdictional errors, review mechanism, security of payment, statutory adjudication.
5.1 Introduction

Statutory adjudication was introduced into the Security of Payment (SOP) legislation as a fast-track payment dispute resolution process aiming to achieve the object of the legislation to facilitate cash flow within the construction contractual chain. As such, adjudication determinations were usually released and enforced on a “pay now, argue later” basis in order to protect a vulnerable class of smaller businesses within the building and construction industry. The SOP legislation was extremely successful in attaining the stated object in the context of small adjudicated payment claims where both parties used to comply with the adjudication determination.

However, where larger payment claims are adjudicated, consequences of adjudication outcome become more significant to stay in business. Accordingly, parties were more inclined to challenge adjudication by way of judicial review as demonstrated in table 7 below. Some paying parties aggrieved by adjudication determinations strive to challenge determinations in court in order to delay paying or avoid payment of the adjudicated amounts. Therefore, they engage lawyers to identify any fine legal flaws or loopholes to challenge determinations so that they may eventually succeed in having the adjudication determinations quashed. Other paying parties seek to frustrate the adjudication process even before a determination is made. Challenging adjudication determinations is typically pursued on jurisdictional grounds related to lack of adjudicator’s jurisdiction to hear the matter and/or adjudicators exceeding their jurisdiction during the adjudication decision-making process.

It is a frequent problem that a claimant, which obtains a favourable adjudicator’s determination is denied the benefits and certainty of that determination if the paying party opts to challenge the determination by invoking judicial review proceedings. Judicially, Basten JA explained the uncertainty issue by noting that “between the date of a purported determination and an order of the court setting it aside, no-one could be sure whether the adjudicator had failed to validly determine the application and it was only the order of the court which would resolve that question.”

471 *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399 [50].
Furthermore, Macfarlan JA has observed that “a long period of time might elapse between a purported determination and a court declaring it void. In the present case that period was seven months, but in others the period might be much longer.”\textsuperscript{472}

As a result, the claimant will be at a considerable risk of not only becoming insolvent but also exercising its statutory right to suspend work in case of non-payment.\textsuperscript{473} In addition, the claimant will be more hesitant and reluctant to apply for further adjudications on other payment claims until certainty manifests upon the outcome of the judicial review of the first payment claim. The claimant may also compromise its right and be compelled to settle the issue with the paying party so as to avoid the huge expense and delay in going to court to defend the validity of the adjudication determination. However, the worst consequence it to have lost the right to use the statutory scheme because of the effluxion of time.\textsuperscript{474}

This article sets out to firstly examine the evolving tension between the object of the SOP legislation and judicial intervention and address the shortcoming of the main available approaches to diminish judicial intervention. Then, the article proposes two pragmatic measures to diminish judicial intervention in statutory adjudication.

5.2 The evolving tension

Notwithstanding the fact that legislatures had attempted to insert privative clauses\textsuperscript{475} to exclude adjudication determinations from judicial review in order to safeguard the SOP legislative object, those clauses became ineffective following the decision of the High Court in Kirk v Industrial Relations Commission of New South Wales\textsuperscript{476} (Kirk) that: “Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.”

As a Consequence, the mission of the SOP legislation has drifted away from its original intent. Paying parties are left with no constraints (save for the high legal cost

\textsuperscript{472} Cardinal Project Services Pty Ltd v Hanave Pty Ltd [2011] NSWCA 399 [99].
\textsuperscript{473} The risk of such suspension was well noted in Brodym v Davenport [2005] NSWCA 394 [51] (Hodgson JA); Hickory Developments Pty Ltd v Scharbello (Vic) Pty Ltd [2009] VSC 156 [46]-[47] (Vickery J).\textsuperscript{474} This arises for example by the application of section 13(4) of the NSW Act and the decision of the court in Cardinal Project Services Pty Ltd v Hanave Pty Ltd [2011] NSWCA 399.
\textsuperscript{475} See, eg, sections 90 and 91 of the Justice and Other Legislation Amendment Act 2007 (Qld) which amended Schedule 1, part 2 of the Judicial Review Act (Qld) to exclude the operation of that Act to decisions made under part 3, division 2 of the Building and Construction Industry Payments Act 2004 (Qld); Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (2015) 297 FLR 203 [68] (Vickery J).
\textsuperscript{476} (2010) 239 CLR 531 [100].
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and the potential cost of interest accumulating upon the adjudicator’s determination if upheld by judicial review) by seeking judicial review in order to frustrate the adjudication process. It is submitted that these cost factors are often ignored by paying parties when balanced against the benefits of retaining the large amounts in dispute as long as possible by seeking juridical review as a delaying tactic. In practice, some aggrieved paying parties seek judicial review by exhausting all appeal measures\textsuperscript{477} to the very end, with the hope, the claimant may become insolvent by the time the case is eventually decided, so that the paying party may not be obliged to pay. There have also been a small number of claiming parties seeking review, principally to prevent the loss of future claims by the statute binding subsequent adjudicators.\textsuperscript{478}

Table 7 below demonstrates the proportion of determined adjudication applications which were the subject of judicial review applications before the Supreme Court in New South Wales between 2012 and 2014.\textsuperscript{479} The average figures provide more representative figures for two reasons. First, judicial review applications are usually decided by the court long after the release of the adjudication decision. Secondly, it is extremely difficult and time-consuming to marry judicial review applications with those reported in the financial year for the sake of comparison to derive representative proportions.

As shown in table 7, disputed payment claims below AUS$25,000 do not reach the Supreme Court for judicial review; even claims between AUS$25,000 and AUS$40,000 are rarely dealt with by the Supreme Court. As such, McDougall J noted that: “considerations of proportionality and, equally, considerations of common sense must suggest that the conduct of litigation involving numerous volumes of documents over less than $37,000.00 is unlikely to be a cost-effective process.”\textsuperscript{480} That observation is well demonstrated in table 7 which shows that the proportions of juridical review applications from the relevant adjudicated claims are much higher as

\textsuperscript{477}To this end several applications have been made to the High Court for review of the appellate courts findings in SOP actions. At the date of writing the High Court has not accepted any applications for special leave in this area. See for example Coordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd [2006] HCATrans 9.

\textsuperscript{478}See John Goss Projects v Leighton Contractors [2006] NSWSC 798.

\textsuperscript{479}At the time of writing, the 2015 annual report of NSW has not been issued. Figures of lodged applications are extracted from the formal annual reports as being published by the Office of Finance & Services. Figures of Judicial review applications are derived from Supreme Court judgements extracted from the databases of Australasian Legal Information Institute (Austlii). Among those, there were a few applications which did not mention the amount in dispute, hence ignored.

\textsuperscript{480}Seabreeze Manly v Toposa [2014] NSWSC 1097 [51].
the amount in dispute increases. For example, the average percentage of judicial review applications of disputed amounts between AU$40,000 and AU$99,999 is only 3% and it steadily increases until it reaches 11% for disputed amounts between AU$500,000 and AU$999,999. A brief analysis of these judgments discloses that the majority of the adjudications deal with complex contractual entitlement issues and facts such as delay claims, liquidated damages and variations of high value.

Table 7 Proportion of judicial review applications in NSW

<table>
<thead>
<tr>
<th>Claimed mount / amount in dispute (AUS$)</th>
<th>Determination released (financial year)</th>
<th>Judicial review challenges (calendar Year)</th>
<th>% Judicial review applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-24,999</td>
<td>341</td>
<td>357</td>
<td>234</td>
</tr>
<tr>
<td>25,000-39,999</td>
<td>102</td>
<td>69</td>
<td>53</td>
</tr>
<tr>
<td>40,000-99,999</td>
<td>130</td>
<td>97</td>
<td>98</td>
</tr>
<tr>
<td>100,000-249,999</td>
<td>106</td>
<td>83</td>
<td>70</td>
</tr>
<tr>
<td>250,000-499,999</td>
<td>46</td>
<td>26</td>
<td>46</td>
</tr>
<tr>
<td>500,000-999,999</td>
<td>25</td>
<td>13</td>
<td>18</td>
</tr>
<tr>
<td>≥ 1,000,000</td>
<td>29</td>
<td>27</td>
<td>37</td>
</tr>
<tr>
<td>Total</td>
<td>438</td>
<td>315</td>
<td>322</td>
</tr>
</tbody>
</table>
Table 7 shows the challenges as a proportion of the determinations. Since many determinations are in favour of the respondent in that they do not require the respondent to make any progress payment or require a very small progress payment, the challenges as a proportion of determinations requiring the respondent to pay a significant amount would be much higher.

It could be argued that those average percentages tentatively represent those claimants who struggle to get their payments following adjudication. The higher percentages of judicial review with respect to larger adjudication determinations are destructive to the statutory object “to ensure cash flow to businesses in the building industry, without parties get tied up in lengthy and expensive litigation or arbitration.”\(^481\) As such, they present a significant problem for the efficacy of the SOP legislation. In his Second Reading Speech for the NSW Building and Construction Industry Security of Payment Bill 1999, the Minister (the Right Honourable Morris Iemma) made it clear that:

> “further adjudication appeal process between the adjudicator’s interim decision and the final decision would be unnecessarily burdensome and costly for parties to construction contracts. It can also be a source of abuse by a desperate respondent seeking to delay payment.”\(^482\)

This led the Honourable Justice Robert McDougall to comment that “parliament specifically wished for the courts not to be too readily involved.”\(^483\) Furthermore, the Western Australian SOP legislation has an express object that the adjudication process aims to resolve disputes fairly and as quickly, informally and inexpensively as possible.\(^484\) The Minister (the Right Honourable Alannah MacTiernan) stated in her second reading speech:

> “The rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim

\(^{481}\) Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture 26 VR 172; [2009] VSC 426 [33] (Vickery J); see also, Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394 (Hodgson JA) [87].

\(^{482}\) Iemma, M, NSW Parliamentary Debates, Legislative Assembly, 29 June 1999, p.1598.


\(^{484}\) Construction contract Act 2004 (WA), s 30.
is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. “

5.3 Approaches to diminish judicial intervention

Various judicial and legislative approaches exist to diminish the scope for judicial review, or to reduce its negative impact upon the efficiency of the adjudication process. The main approaches, which are discussed in further detail below, include the following:

1. The courts’ treatment of jurisdicational facts in a broad sense, as opposed to a narrow sense.

2. Remittal of jurisdictionally - defective determinations by the court to the adjudicator for reconsideration.

3. Severance of the infected part of an adjudicator’s determination, rather than quashing the entire decision.

4. Improving the quality of adjudication determinations.

5. Legislative review of adjudicators’ “decisions to dismiss”, without making determinations on the merits for lack of jurisdiction.

5.3.1 Broad approach to jurisdicational facts

As previously discussed, the courts in the East Coast model jurisdictions have adopted a narrow approach when considering jurisdicational facts for the purpose of judicial review, which has led to the quashing of many determinations. 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.”

487 See Sugar Australia Pty Ltd v Southern Ocean Pty Ltd [2013] VSC 535 at [107].
not required by the legislation to be adopted by courts when considering essential jurisdictional facts, other than those established in Brodyn, stating:

“If 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.’”

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.”

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. However, in the recent judgment of Laing O’Rourke Australia Construction Pty Ltd v Samsung C & T Corporation, Mitchell J, expressed his reservations about the broad sense approach which an adjudicator is empowered to authoritatively to determine.

A report by the Society of Construction Law Australia recommended that:

“It would be desirable for any new legislation to discourage applications for judicial review by making it plain that the jurisdictional facts relevant to an application for adjudication are jurisdictional facts in the broad sense... For

488 Grocon Constructors Pty Ltd v Planit Cocciardi Joint-Venture [2009] VSC 426 at [115].
489 Grocon Constructors Pty Ltd v Planit Cocciardi Joint-Venture [2009] VSC 426 at [116].
490 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].
491 [2015] WASC 237
example, 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 the above 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 arising due to jurisdictional errors will still remain high.

5.3.2 Remitting jurisdictionally defective determinations

Australian case law has been inconsistent regarding the remittal of invalid determinations to adjudicators. The legislation of Australian Capital Territory (ACT) 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

492 The SOCLA Report, above fn 397, p. 68.
493 *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 43 6(b).
495 [2015] ACTSC 384 at [67] (Mossop AsJ).
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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 the relevant Authorised Nominating Authorities for further remittal to the original adjudicator496. In Maxstra Constructions Pty Ltd v Joseph Gilbert,497 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 Plenty Road v Construction Engineering (Aust) (No 2),498 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.”499

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 Trsams Pty Ltd v Club Constructions (NSW) Pty Ltd.500 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).”501

Eventually, the NSW Court of Appeal in Cardinal Project Services Pty Ltd v Hanave Pty Ltd502, 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

496 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.
497 [2013] VSC 243 at [72].
499 Plenty Road v Construction Engineering (Aust) (No 2) [2015] VSC 680 at [31].
500 [2008] NSWSC 399 at [80]-[89].
501 [2008] NSWSC 399 at [90].
502 Cardinal Project Services Pty Ltd v Hanave Pty Ltd [2011] NSWCA 399 at [100-103].
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:

“If 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 application should remain on foot but be remitted to the original adjudicator.”

In Queensland, the Court of Appeal, in *Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd*, 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*, 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. It was 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.

### 5.3.3 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.” However, in *Emergency Services Superannuation Board v Sundercombe*, McDougall J, in an

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503 *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399 at [97].
504 [2013] QCA 386 at [67].
505 [2013] QCA 394 at [87].
507 *Sunshine Coast Regional Council v Earthpro Pty Ltd* [2015] QSC 168 at [73] (Byrne SJA).
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* \(^{509}\), 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.” \(^{510}\)

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 cases \(^{511}\). The logic of allowing severance was explained 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 adjudication decision then there will be significant cost advantages in doing so.” \(^{512}\) 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.” \(^{513}\)

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 stand \(^{514}\). 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.

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\(^{509}\) NSWCA 399 at [52].

\(^{510}\) *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) NSWCA 399 at [52].

\(^{511}\) *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].


\(^{513}\) *Building and Construction Industry Payments Act 2004* (Queensland), s 100(4).

\(^{514}\) 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 Lukens* [2003] NSWSC 1140 at [90-92] (Palmer J); *Lanskey Constructions Pty Ltd v Noxequin Pty Ltd* [2005] NSWSC 963 at [21-22].
and application. For instance, it was 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.  

5.3.4 Improving the quality of adjudication determinations

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 2014. The amendments include, *inter alia*, allowing longer timeframes for adjudicators, as well as respondents, in complex cases and strict regulations to appoint, 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 course. 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 adjudicators, and imposing further training on adjudicators were also criticized for the Registrar’s lack of probity.

Nevertheless, despite these amendments in Queensland, there have been seven judicial review court applications between December 2014 and November 2015 (compared to 15 applications in the preceding year), in which the Queensland Supreme Court found that adjudicators committed jurisdictional errors in three cases. This may further emphasise that many desperate respondents may always seek to knock at the door of judicial review as a gaming tactic, in an attempt to delay payment, regardless of the

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516 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.
518 See the *Building and Construction Industry Payments Regulation* 2004, schedule 1, part 2.
519 Davenport, P, 'An update on security of payment in the construction industry in Queensland', paper presented to RICS Cobra 2015, Sydney, p 8. Also, there has been seven judicial review applications made in 2015 (compared with 15 applications in the preceding year) following the amendment, where the court found that adjudicators committed jurisdictional error in three cases as reported by the Queensland Building and Construction Commission in the monthly report, December 2015.
quality of the adjudication outcome. Having said this, it is probably too early to draw any firm conclusions as to the effectiveness of the recent amendments to the Queensland legislation.

5.3.5 Internal review of adjudicators “decisions to dismiss” applications for lack of jurisdiction

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, e.g. 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.\textsuperscript{522}

Judicially, it was decided that all grounds upon which a review is sought are jurisdictional facts.\textsuperscript{523} In O’Donnell Griffin Pty Ltd v John Holland Pty Ltd,\textsuperscript{524} 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

\textsuperscript{521} State Administrative Tribunal Act 2004 (WA), s 29 (3).
\textsuperscript{522} See Construction Contracts Act 2004 (WA), section 46 (2).
\textsuperscript{523} See Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd [2011] WASCA 217 [16].
\textsuperscript{524} [2009] WASC 19 (Beech J).
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‘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, section 46(3) of the WA Act 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.

525 [2009] WASC 19 [122].
528 State Administrative Tribunal Act (2004), s 27.
529 [2005] WASAT 269 [70]-[71].
530 [2014] WASC 52 [72]-[76].
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 confirmed, whilst 12 cases (amounting to 37%) were set aside and 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 8 below demonstrates an extract from the relevant annual reports on the operation of the review mechanism from 2008 until 2015.

Table 8 Operation of the review mechanism 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>

5.4 A pragmatic proposal to diminish judicial review

Having examined the current tension between judicial review and the legislative object as well as the shortcomings of the main existing approaches to diminish judicial intervention, this article now turns its attention to the future by proposing two pragmatics solutions as follows:

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531 Figures are extracted from the relevant annual reports on the WA Act as released by the Building Commissioner.
1. separating jurisdictional issues from the merits in adjudication;
2. establishing an internal adjudication review mechanism with respect to jurisdictional issues.

This proposal starts from the position that there is a need for a better legal framework to reinstate the original mission of the SOP legislation as detailed below:

5.4.1 Separating jurisdictional objections from the merits in adjudication.

Since the majority of adjudicators possess no appropriate legal training, many of them lack the competency to deal with jurisdictional objections, especially those related to invalid appointment. In Singapore, which has modelled its SOP legislation upon the NSW Act, Chan Sek Keong CJ in the Court of Appeal held that adjudicators do not have the competency to deal with jurisdictional objections apart from the basic function required by the legislation. Keong CJ also held that any jurisdictional objection must be raised immediately before the court and not the adjudicator by explaining that “since the objection is against the adjudicator’s jurisdiction as an adjudicator, he has no power to decide if he has jurisdiction or not. He cannot decide his own competency to act as an adjudicator when such competency is being challenged by the respondent.”

This might be the reason for Keong CJ, in another forum, to suggest reform to the Singaporean SOP legislation so as to separate jurisdictional issues from the merits of the dispute, so that the adjudicator’s duty is only confined to deal with the merits. This measure would enable both parties to adjudication to have certainty about the likely outcome of the real issues in dispute and to plan their further actions as well as financial resources accordingly. As such, it is proposed that the Singaporean approach may “kill many birds with one stone”. First, adjudicators can proceed comfortably with the determination on the merits only, whereas jurisdictional objection are dealt with by a review tribunal as detailed under the second proposed solution below. Secondly, there would be no crucial need to legally train adjudicators about administrative law principles. Thirdly, with adjudicators focusing upon the merits only, they would be

533 Lee Wee Lick Terence v Chua Say Eng [2012] SGCA 63 [64].
better capable of abiding by the set time limits, which promotes the legislative object quickly and inexpensively resolving payment disputes on the merits.

It is worthwhile to note that, sometimes, it is incumbent upon adjudicators to consider a question of mixed fact and law relating to a payment claim in which jurisdictional issues cannot be divisible. As such, adjudicators must have an express jurisdiction to decide upon such questions as long as that jurisdiction is necessary so that they can perform their basic statutory functions. Therefore, any error in considering that questions may be deemed an error within jurisdiction rather than an error going to jurisdiction.536

5.4.2 Establish a legislative review mechanism for jurisdictional challenges.

The review mechanism by the WASAT was capable of taking substantial caseload of judicial review applications out of the Supreme Court. Since the commencement of the legislation until June 2015, the WA Supreme Court had only reviewed 32 cases in connection with adjudication decisions. This means that the 37 cases before the WASAT, as mentioned above, would have been an extra burden doubling the caseload of the Supreme Court. Furthermore, there was only four Supreme Court cases out of the 37 cases that were identified in which the WASAT’s decisions were challenged unsuccessfully.537 It could then be argued that this fact is a good indication of an ongoing satisfactory quality of the WASAT’s decisions and/or reluctance on the part of the Supreme Court to interfere with the WASAT’s decisions.

As such, there is no reason to believe that an intermediate platform between adjudication and judicial review should not sound as a worthwhile option, save for the main two barriers of extra time and cost. Those barriers can be managed by deliberately devising an effective review scheme, as next proposed. The alternative review remedy would have the potential to help diminish judicial intervention of supreme courts in statutory adjudication by capturing and correcting erroneous adjudications through a legislative informal process. In BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No 2),538 Applegarth J referred to various authorities and noted

536 See Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport [2004] NSWCA 394 [66].
537 The identified cases are: Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd [2015] WASC 60; Hire Access Pty Ltd v Michael Ebbott t/a South Coast Scaffolding and Rigging [2012] WASC 108; Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd [2011] WASCA 217; Thiess Pty Ltd v MCC Mining (WA) Pty Ltd [2011] WASC 80.
538 [2013] QSC 67 [8].
that ‘one discretionary ground to decline to order certiorari is where there are alternative and adequate remedies for the wrong of which complaint is made’.

In *Field Deployment Solutions Pty v Jones*, Mitchell J considered a juridical review application against two adjudicator’s decisions to dismiss (bypassing the available review mechanism by the WASAT) and held that: “The fact that an alternative remedy was available but not engaged is ordinarily a powerful factor against the grant of a discretionary remedy by way of judicial review.” Furthermore, as to the use of the discretion to deny certiorari where there lies another review option, the WA Supreme Court in *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* referred to various authorities including the High Court’s decision in *The Queen v Cook; Ex parte Twigg* and held that “availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review.”

### 5.4.2.1 Forming the review mechanism

It is therefore proposed to introduce an alternative convenient review mechanism of jurisdictional challenges. The review should be conducted by an institutional ‘review tribunal’ exclusively established for statutory adjudication and funded by the government. However, parties are not required to be legally represented but have the discretion to engage counsels provided that each party bear its own costs. The members of the ‘review tribunal’ should be selected from well experienced legal practitioners such as retired judges, arbitrators or legally qualified senior adjudicators. The ‘review tribunal’ should enjoy similar powers and functions to those of the WASAT, particularly, in its capacity to determine questions of law and the limited appeal from the tribunal’s decision provided that a leave to appeal is granted by a court.

The scope of the ‘review tribunal’ should, in principle, extend to cover any jurisdictional objection upon the valid appointment of the adjudicator whether or not that adjudicator dismisses the case. Also, the scope should include errors of law during the adjudication decision making process that is judicially reviewable. Accordingly,

539 [2015] WASC 136 [18].
540 [2011] WASC 172 [64].
542 The ‘no cost’ approach was also adopted in the Building and Construction Industry Security of Payment Amendment Bill (2015) 55 (Tas).
the review mechanism should have two different processes to deal with challenges related to ‘no jurisdiction’ as well as challenges related to ‘excess of jurisdiction’ as detailed next. Regardless of the outcome of that review, the claimant and respondent must be each liable to contribute to the payment of the adjudicator's fees in such proportions as the adjudicator may determine.

5.4.2.2 Challenging the jurisdiction of adjudicator

The first proposed solution provides that an adjudicator should automatically assume he or she has jurisdiction and immediately proceed with the determination on the merits. However, an adjudicator may still dismiss an application if it obviously appears on the face of the record that they do not have jurisdiction unless both parties agree to extend the adjudicator’s jurisdiction. For example, it could be easily found that the payment claim was made out of time. Another example is where a claimant does not hold a requisite license to be eligible to use the legislation as is the case in Queensland.543 In those circumstances, the claimant should not be permitted to lodge a new adjudication application, or further invoke the review mechanism in order to avoid an ‘abuse of process’. This will of course save the time and efforts of both parties. The adjudicator, however, should still be entitled to recover his or her adjudication fees from the claimant following the dismissal.544

On the other hand, if a respondent opts to object the valid appointment of the adjudicator due to lack of jurisdiction, that respondent may access the review mechanism by lodging a ‘review application’ with a copy to the claimant. The ‘review application’ must be lodged within the same time allowed for that respondent to lodge an adjudication response on the merits of the payment dispute. An express provision should be made that the silence or failure of a respondent to make a ‘review application’ within the prescribed time is deemed as an acceptance of that respondent of the adjudicator’s jurisdiction to hear the matter provided that the grounds of jurisdictional objection could have been reasonably known to the respondent as at the time the adjudication application was made.545 A claimant must be allowed to serve a ‘review reply’ in response to the ‘review application’ within two business days to afford it procedural fairness. The ‘tribunal’s decision’ must then be released as soon

543 See Cant Contracting Pty Ltd v Casella [2006] QCA 538.
544 The entitlement to remuneration is now express in the BCIPA at section 35.
545 Adopted from Rhodia Chirex Ltd v Laker Vent Engineering [2004] BLR 75 [40].
as possible but not later than 10 business days from receipt of the ‘review reply’. If the adjudicator determines that the respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant within five days after the release of the ‘tribunal’s decision’ provided that the ‘review application’ is dismissed.

5.4.2.3 Challenging the adjudicator’s excess of jurisdiction

If either party opts to challenge an adjudicator’s determination for excess of jurisdiction, the applicant should invoke the review process by lodging a ‘review application’ no later than five business days from the release of the determination with a copy to the other party ‘responding party’. The ‘responding party’ should be allowed to lodge a ‘review reply’ within two business days from receipt of a copy of the ‘review application’. The review should be conducted by way of de novo rehearing but no new submissions should be permitted except, of course, for those submissions on the law based on the material provided to the adjudicator. The ‘review tribunal’ must complete the review within seven business days after the receipt of the ‘review reply’ and can reasonably extend this period by making a request to the relevant Governmental Official to extend the time up to additional five business days depending on the complexity of the matter. During that time, the adjudicator’s determination will be kept on hold and will not take any legal effect until the ‘tribunal’s decision’ is issued.

The ‘review tribunal’ should have jurisdiction to substitute, severe and/or remit the determination to the original adjudicator for correction within a specific timeframe depending upon the case, but not exceeding five business days from remittal. The remittal should only be construed if the identified error will require lengthy or technical re-consideration of relevant matters. If remitted, the adjudicator should only charge a discounted fee rate (i.e. say AUS$100 per hour) to release the amended determination as a reasonable compensation to the parties affected by the consequences of the first erroneous determination.

5.4.2.4 Benefits

The unsuccessful respondent, challenging the adjudicator’s jurisdiction, will be faced with a further strong reason to release the due payment rather than seeking judicial review. In this case, there will be no costs (other than the party’s own costs) or time implications on the adjudication process which would be consistent with the object of
the SOP legislation. It is submitted that even in a case where the determination is set aside by the ‘review tribunal’ on the basis of adjudicator’s lack of jurisdiction, and as such, the determination is deemed never to have existed, both parties have, at least, gained the significant advantage by knowing the likely outcome of the underlying dispute if they further seek negotiation or other proceedings to finally settle their payment dispute.

Moreover, both parties will enjoy an increasing level of certainty with the ‘tribunal’s decision’ even if an aggrieved party seeks further challenges in court where the opportunity of success may be very limited. This is because, not only will the room for jurisdictional errors be drastically reduced down, but also the Supreme Court (in excising its discretionary power) will be more reluctant to grant relief with the availability of an appropriate remedy, as demonstrated above.

5.4.2.5 Barriers

In the case of review on the basis of ‘excess of jurisdiction’, an additional 14 business days may be added to the adjudication process in most of the cases until a successful claimant actually gets paid. Having said that, the review mechanism remains as a much faster and more inexpensive option than the judicial review, especially in large cases, where either party, particularly the claimant, may not be able to afford to go to court to defend a favourable adjudicator’s determination.

There is also a possibility for an ‘abuse of process’ in using the review mechanism. To counter this barrier, it could be worthwhile to equip the ‘review tribunal’ with the jurisdiction to make an order for a reasonable monetary penalty as well as legal costs to compensate a party for any expenses, loss or inconvenience as a result of the other party’s conduct. This would include situations when a party conducts itself unreasonably or where a case is obviously frivolous, vexatious or unmeritorious. In addition, the ambit of review can be curtailed by fixing a minimum monetary threshold. Also, respondents should be required to pay the unpaid adjudicated amount into a trust account.

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546 See WA Act, s 34 (2).
5.5 Concluding remarks

There have been numerous judicial review applications with respect to adjudicators’ determinations, which represent a drift in the original mission of the SOP legislation. The article reviewed the evolving tension between the object of the legislation and court’s involvement and addressed the shortcoming of the main available approaches to diminish judicial review. Then, the article proposed two pragmatic solutions moving forward, namely: separating jurisdictional challenges from the merits in adjudication; and establishing a legislative review tribunal to deal with jurisdictional challenges. It is suggested that both solutions may work together for the maximum efficiency of the SOP legislation by diminishing judicial intervention and therefore countering the effect of Kirk’s authority upon the operation of the SOP legislation as originally intended. If adjudicators are to continue dealing with jurisdictional issues, the proposed review mechanism becomes more critical and crucial as a safety net to capture most of determinations infected by jurisdictional errors away from judicial system. Both proposals represent something of a “blunt instrument” and further consultation with the building and construction industry will be required.

Journal Paper, Peer reviewed


This thesis chapter is an exact copy of the journal paper in its final published form. (except for formatting, numbering and referencing that were varied to reconcile with the format of the thesis).

ABSTRACT

Paying parties often rely upon jurisdictional objections as a delaying tactic, in order to “frustrate” adjudication process, which may undermine the attainment of the legislative intent of the security of payment legislation. Encouraging adjudicators (who are not required to be legally trained) to determine questions relating to their jurisdiction is only the tip of the iceberg. This article explores, not only the hidden complexities associated with the jurisdiction of adjudicators, but also the unhealthy practices adopted by stakeholders as an inevitable result of lack of legislative direction and inconsistent case law on dealing with jurisdictional issues. Moving forward, the article proposes a roadmap with six identified hold points to address the problem towards necessary reform in the security of payment legislation. The proposed roadmap stands as an alternative path to the introduction of review mechanisms within the SOP legislation and it is devised to suit any jurisdiction operating SOP legislation.

Keywords: adjudicator’s jurisdiction, judicial review, jurisdictional error, security of payment, statutory adjudication.
6.1 Introduction

The intent of the Security of Payment (SOP) legislation in many jurisdictions\(^{547}\) was set out to help vulnerable class of subcontractors get paid in a timely manner. As such, rapid statutory adjudication was introduced within the legislation whereas adjudication decisions are binding and interim pending any subsequent final resolution of the dispute by arbitration or litigation. However, adjudication decisions can mainly be set aside\(^{548}\) by way of judicial review on grounds of jurisdictional errors which invalidate adjudication process. Adjudicators are always susceptible to errors when deciding upon jurisdictional issues due to many factors including the complex drafting of the SOP legislation, tight timeframes, complexity of raised arguments, a failure by disputants to raise jurisdictional issues not apparent on the submissions as well as the inappropriate selection of adjudicators where the referred matter requires a particular expertise.

There are two types of jurisdictional errors in adjudication. The first type relates to the existence of essential jurisdictional facts upon which the validity of the adjudicator’s appointment is founded, including the existence of a construction contract and a duly made payment claim. The second type relates to the adjudication making process where adjudicators may exceed their jurisdiction by, for instance, failing to give either parties sufficient opportunity to respond to any issue raised by the other party or making a decision which has not been advanced by either party. The scope of this article mainly addresses the first type of jurisdictional errors.

Although respondents often rely upon jurisdictional objections in their adjudication response to frustrate adjudication process, the SOP legislation seem to be ill-equipped to appreciate this critical matter which could eventually erode the legislative intent. Adjudicators are usually appointed before being served the response to the adjudication application and neither the appointing authority\(^{547}\) nor the adjudicator

\(^{547}\) The legislation is based upon two distinct models adopting either United Kingdom (UK) or New South Wales (NSW) model. The legislation in Queensland, Australian Capital Territory, Victoria, Tasmania and South Australia, are largely based on the NSW Act, which is often called “the default model”. The legislation in Isle of Man, Ireland are largely based upon the Housing Grants, Construction and Regeneration Act 1996 (UK), which is often called “the evaluative model”. The legislation in New Zealand, Singapore, Malaysia, Western Australia and Northern Territory also follow the UK model but have much more detailed procedures and provisions. The key difference between the two models is that the “evaluative model” gives primacy to the parties’ contractual terms relating to payment whilst the “default model” provides statutory right to payment if the paying party fails to provide what is called a “payment schedule”.

\(^{548}\) The main remedies in judicial review to set aside adjudication determinations are pregroative writ of certiorari, injunction or declaration.

\(^{549}\) In this article, this term is used to broadly unify the description of the appointer used in different jurisdictions such as authorised nominating authorities, registrar, authorised nominating bodies, prescribed appointers, etc.
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would have certainty whether or not new jurisdictional objections will be raised in the adjudication response. Some adjudicators prefer to wait until the adjudication response is lodged or time barred so they can commence examining the referred disputed matters.

Moreover, in some jurisdictions such as NSW and Victoria, adjudicators have 10 business days to determine adjudication cases from the date of accepting the appointment not the date of receiving adjudication response. The problem with this arrangement becomes manifest if the adjudicator appointment is made on the same day of the lodgement of adjudication application. In that case, the adjudication response can be made within five business days from the appointment. This means that the appointed adjudicator is left with five business days only to make a determination. This flawed arrangement ignores the very possibility that the adjudication response may include complex jurisdictional arguments that would need much more time by adjudicators, let alone the legal expertise, to be properly considered in order to reach a reasoned determination that can resist challenges in court.

The supreme courts have a supervisory role over the statutory adjudication process. In this role, the courts have quashed many adjudication determinations on the grounds of jurisdictional error in recent years. This is a problem as the courts’ involvement in statutory adjudication is contrary to the object of the SOP legislation and its own early pronouncements relating to minimal intervention by courts.

The courts, by way of judicial review, have dealt with many latent problems related to jurisdictional issues and there has been an increasing number of court applications that

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550 In NSW and Victoria, the ten-day period is calculated from the date of adjudicator’s acceptance of appointment (see, eg, s 21(3) NSW Act (NSW Act)), while it is calculated in many other Jurisdictions, from the date of receipt of adjudication response (see, eg, s23(3) Building and Construction Industry Security of Payment Act 2009 (ACT) (ACT Act); s(31) Construction Contracts Act 2004 (WA) (WA Act)).

551 Under the NSW Act, the respondent has the right to serve an ‘adjudication response’ within five business days after receiving the adjudication application or two business days after the adjudicator is appointed whichever time expires later (s 21 (1)), provided it had served a payment schedule (s 22 (2A)). The adjudicator’s notice of accepting the nomination should be served within four business days after the adjudication application is made, otherwise, the claimant may opt to withdraw its application (s 26 (1)). Under the WA Act, within 14 days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application (s 27). If an application for adjudication is served upon a prescribed appointor, the appointor, within five days after being served, must appoint a registered adjudicator to adjudicate the payment dispute concerned and send the application and any response received by it to the adjudicator (s 28). The adjudicator must release the determination within 14 days after the date of the service of the response (s 31).

552 Recently, the NSW Supreme Court of appeal concluded that relief is not available to quash an adjudicator’s determination on a ground other than jurisdictional error in Shade Systems Pty Limited v Probuild Constructions (Aust) Pty Limited [2016] NSWCA 379.

553 Brodyn Pty. Limited. vlas Time Cost and Quality v Davenport [2004] NSWCA 394 at [51].
have been successful in challenging adjudication determinations. For example, in NSW, Queensland and Victoria, there has been 197 cases challenging the adjudicator’s determinations in courts to the end of 2013, 48% of which have been successful. In 2013 alone, there has been 22 challenge applications, 77% of which have been successful and adjudication determinations were set aside. In Western Australia (WA) and Northern Territory (NT), to the end of June 2015, eighteen out of the 47 matters referred to Court (amounting to 38%) have been considered and the adjudicator's determination was quashed. It is worth mentioning that the lower percentage in WA and NT compared to other Australian States, as addressed above, may be influenced by the existence of the unique review mechanism within the legislation that allows an aggrieved party to apply for a review of an adjudicator’s ‘decision to dismiss’ an adjudication application without making a determination on the merits on the basis of certain grounds and, therefore, acts as a filtering system to keep many challenges away from the Supreme Court.

The general pattern of the courts’ decisions has been to not support a pre-emptive application to prevent the adjudication proceeding, thus allowing adjudicators to determine their own jurisdiction on an interim basis. This view is widely supported with, for example, the duty of adjudicators to “intellectually engage” with the issues of the dispute. In *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd*, Fryberg J commented that: “It is most unlikely that the legislature would have intended that adjudicators should be able conclusively to define the scope of their own jurisdiction.” Vickery J in *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd*, suggested that:

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556 The WA Act requires an appointed adjudicator to first consider an application against qualifying criteria in the Act that defines a valid claim (s.3) and a payment dispute (s.6). The application must be dismissed if it also fails on any one of further hurdles in s.31(2)(a)(i to iv). The adjudicator is required to consider whether the payment claim comes from a valid construction contract, is served in time and in a prescribed manner and is not too complex to decide within set time limits.
558 Laing O’Rourke Australia Construction v H and M Engineering and Construction [2010] NSWSC 818 at [36]
560 [2013] VSC 553 at [114].
“Clearly, if an adjudicator is presented with material or submissions which bring into question the jurisdiction of the adjudicator, he or she should determine the question and give reasons for the findings of fact or rulings on law. If however, the adjudicator’s decision on jurisdiction is challenged in Court on judicial review, the Court may deal with the matter afresh and receive additional evidence on the matter if the additional evidence is relevant to the determination of the question.” (emphasis added)

Encouraging adjudicators to determine questions relating to their jurisdiction, as judicially suggested, is a problem considering the fact that adjudicators are not required by the statute to be legally trained or may not be competent to deal with these issues as uniquely decided by the Singaporean Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng*. However, this problem is only the tip of the iceberg. This article examines not only the problems emerging from the ambiguous SOP legislation and inconsistent case law in dealing with jurisdictional issues but also their impact upon the operation of the legislation. The article also demonstrates the dilemma facing adjudicators in dealing with jurisdictional issues. Moving the research forward, the article concludes with setting out a proposed roadmap to address the emerging problems.

### 6.2 The object of the SOP legislation

Understanding of the object of the SOP legislation helps justify the ‘pay now, argue later’ policy inherent in the adjudication process. The SOP legislation across jurisdictions have a similar object of facilitating cash flow down the hierarchy of construction contractual chain through a rapid, cost effective and enforceable adjudication scheme of resolving payment disputes. This contrasts with the traditional lengthy, expensive but more comprehensive avenues of litigation and arbitration.

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561 Amongst all jurisdictions operating SOP legislation and encouraging adjudicators to initially decide upon jurisdiction, Singapore is an exception where it was held by the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2012] SGCA 63 that the adjudicator is not competent to decide whether he or she was validly appointed to adjudicate the matter and any jurisdictional objection should be made before the High Court not the adjudicator. The court held that the issues relating to the validity of the payment claim or payment response, were jurisdictional issues which went to the validity of the appointment of the adjudicator.

562 [2012] SGCA 63 at [64].

563 A description originating in the UK but adopted by the courts of Australia, for example *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 140.

564 In some jurisdictions such as UK, WA and NT, liability flows both up and down the contracting chain.

565 See *Grocon Constructors Pty Ltd v Planit Cacciardi Joint Venture* [2009] VSC 426 at [33].
As such, any delay in enforcing the due payment following an adjudication decision by further litigation hinders the legislative object.

There is no doubt that adjudication process was intended to be simple and handy vehicle to vulnerable subcontractors and suppliers to quickly and inexpensively recover due payments on an interim basis and avoid the financial burden of engaging experts and lawyers. The Victorian Building Authority emphasised on that intent of the legislation and stated that “it is designed to provide a fast and inexpensive process to recover payments due under a construction contract, without the need for lawyers to become involved.” This may justify the very tight adjudication timeframes as well as the relaxed regulation and eligibility criteria of adjudicators set out by the legislatures to serve that purpose. In WA and NT, the SOP legislation have an additional express object of determining the dispute fairly and as rapidly, informally and inexpensively as possible. The design and purpose of the rapid adjudication process was well explained as “a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.”

Judicially, it was noted that the intention of the SOP legislation is to resolve payment disputes with minimum of delay as well as minimum of opportunity for court involvement. Also, it was observed that the SOP legislation emphasises speed and informality. Vickery J mentioned the deficiency of the NSW Act in achieving its object due to the vast amount of judicial review in a very short period of time, and stated: “If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.” In another judgment, the same judge stated: “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.”

568 See the Minister's Second Reading Speech (WA Hansard, 3 March 2004, 275).
569 Brodyn Pty. Ltd. v/As Time Cost and Quality v Davenport [2004] NSWCA 394 at [51].
570 Minimax Fire Fighting Systems Pty Ltd v. Bremore Engineering (WA Pty Ltd) [2007] QSC 333 at [20].
571 Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd [2009] VSC 156 at [46]-[47].
572 Grocon Constructors Pty Ltd v Planit Cocchiardi Joint Venture [2009] VSC 426 at [115].
6.3 Jurisdiction of adjudicators

Adjudicators obtain their jurisdiction to look into the referred disputed matters by accepting the referral by the appointing authority. In order for the appointment to be valid, certain jurisdictional facts must exist including the existence of construction contract and the validity of payment claim. Any error by an adjudicator in establishing these facts may give rise to jurisdictional errors that invalidate the adjudication process and any resulting determination. The emerging case law in Australia has established a key principle that adjudicators cannot obtain additional jurisdiction by reaching an incorrect conclusion as to the existence of jurisdictional facts. In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*, McDougall J followed the High Court authorities to clarify the circumstances that may lead to jurisdictional errors:

1. The mistaken denial or assertion of jurisdiction, or (in a case where jurisdiction does exist), misapprehension or disregard of the nature of or limits on functions and powers.

2. Proceeding in the absence of a jurisdictional fact; disregarding something that the relevant statute requires to be considered as a condition of jurisdiction, or considering something required to be ignored; and misconstruction of the statute leading to misconception of functions.

6.3.1 Jurisdictional objections

Whilst respondents are required to mention the reasons for withholding payment in their response to the payment claim, it is quite possible that jurisdictional objections are only raised in the adjudication response after the adjudicator has been appointed. That approach has multiple risks, including having a potentially valid ground rejected for want of prosecution or excluded by operation of the various statutory provisions excluding new reasons. The reasons why many respondents do not address

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573 In some jurisdictions, Adjudicators can also be appointed by the mutual agreement of the parties.
575 See *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QCA 276 at [77]. See also, See *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 at [107].
576 [2010] NSWCA 190 at [158].
578 See eg, NSW Act, section 20(2B).
jurisdictional issues in their response to the payment claim may basically be attributed to practical aspects including the high expenses and efforts in establishing jurisdictional arguments in responding to each payment claim\(^{580}\) as well as the proposition that claimants may not be serious to take their claim further to adjudication.

Where respondents raise new jurisdictional objections in the adjudication response, some adjudicators practicing in Queensland (in determining their fees), tend to apportion higher percentage upon respondents despite being successful in adjudication,\(^{581}\) guided by the unique legislative guidelines regarding the apportionment of fees.\(^{582}\) The rationale is that the claimant may not have proceeded with adjudication if the respondent had set out the jurisdictional challenges in its response to the payment claim and the investment of time and money in serving adjudication application probably could have prevented the claimant from withdrawing it upon its awareness of new issues raised in the adjudication response.\(^{583}\)

In cases where jurisdictional objections are only raised after the appointment of adjudicators, it is likely that adjudicators may have been selected by the appointing authority based on their technical competencies that are relevant to the payment dispute in question. However, it is also the case that many legally trained adjudicators face difficulties, in dealing with detailed jurisdictional arguments then moving to consider the merits of the payment dispute, within the rigid timeframe allowed by the legislation. In part, the issue turns on the approach of the courts, which may receive information that has not been provided to the adjudicator and will often be encouraged to consider very fine points of distinction, so nuanced as to escape all but the finest minds. Having said that, the courts also acknowledged that the administrative decision makers exercising a quasi-judicial role should not have the decision analysed by the

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\(^{580}\) In NSW, the Act no longer requires a payment claim to include a statement that it is a payment claim made pursuant to the Act. This means that any invoice or claim for payment that complies with section 13(1) of the Act is a payment claim within the meaning of the Act even though the claimant may not intend it to be a payment claim under the Act. See also, Rail Corporation of NSW v Nebax Constructions [2012] NSWSC 6 at [38] (McDougall J).

\(^{581}\) See JJB Builders Pty Limited v Civil Contractors (Aust) Pty Limited, adjudication application no. 00005417, 27/07/2015.

\(^{582}\) The Building and Construction Industry Payments Act 2004 (Qld) (Qld Act) as amended in 2014 under (section 35A) provides detailed guidelines for adjudicators for the matters to be considered about the proportion of the adjudicator’s fees including, the conduct of the parties, the relative success of either party in the adjudication and inclusion of additional reasons for withholding payment in the adjudication response.

\(^{583}\) See JJB Builders Pty Limited v Civil Contractors (Aust) Pty Limited, adjudication application no. 00005417, 27/07/2015, p 11.
equivalent of a fine tooth comb. In Singapore, the Court of Appeal described the dilemma of adjudicators when faced by jurisdictional objection in the adjudication response:

"An adjudicator who decides the issue may face one or other of the following consequences. If he accepts the respondent’s objection and dismisses the payment claim, the claimant may commence court proceedings against him to compel him to adjudicate the payment claim. If he dismisses the respondent’s objection and makes an award, the respondent could still raise the same objection in enforcement proceedings with respect to his award. Accordingly, the adjudicator should proceed with the adjudication and leave the issue to the court to decide."

Respondents may keep silent on known jurisdictional objections that may invalidate the adjudication process hoping to receive a favourable adjudication determination. Accordingly, respondents will still have the door open to challenge any determination not made in their favour by way of judicial review. In the UK, there is an established law principle that it is necessary for a party to adjudication, challenging the jurisdiction of the adjudicator, to reserve its position in relation to its challenge. If it does not reserve its position effectively, generally it cannot avoid enforcement on jurisdictional grounds.

Some respondents may not participate in adjudication and seek injunction in the supreme court to restrain the appointment of adjudicator on the basis that the question of jurisdictional entitlement could be decided by the Supreme Court easily and quickly, and that the respondent ought not be put to the trouble and expense of making its response to the adjudication application. However, it was judicially clarified that it

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584 Avopiling (NSW) Pty Limited v Menard Bachy Pty Limited [2012] NSWSC 1466 at [37]. See also, Red Ink Homes Pty Limited v Court [2014] WASC 52, where the court noted at [64]: “Frequently, the chosen adjudicator is not a lawyer and will have no legal training or expertise…Given that, any court scrutinising an adjudicator’s reasons needs to make quite considerable allowances to respect the obvious informality of a triage relief regime”.


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would not be an easy or a quick matter for the Supreme Court to determine detailed jurisdictional arguments.\textsuperscript{588}

\textbf{6.3.2 Inconsistent case law}

When reviewing adjudication determinations, it becomes apparent that the courts have adopted different approaches with respect to determining the essential jurisdictional facts that must exist in order for an adjudicator to have jurisdiction to hear a referred disputed matter. The diversification of judicial interpretation with respect to jurisdictional facts, as demonstrated in this section, is confusing to not only construction practitioners, but also many of their claims and legal advisers.

In the NSW Court of Appeal’s decision in \textit{Brodyn Pty Ltd v Davenport},\textsuperscript{589} it was held that the legislature did not intend that exact compliance with all the more detailed requirements of the NSW Act was essential to the existence of a determination.\textsuperscript{590} The court identified five basic and essential requirements\textsuperscript{591} for the existence of an adjudicator’s determination as follows:\textsuperscript{592}

\begin{enumerate}
\item The existence of a construction contract between the claimant and the respondent, to which the Act applies (sections 7 and 8);
\item The service by the claimant on the respondent of a payment claim (section 13);
\item The making of and adjudication application by the claimant to an authorised nominating authority (section 17);
\item The reference of the application to and eligible adjudicator, who accepts the application (sections 18 and 19);
\item The determination by the adjudicator of this application (sections 19(2) and 21(5), be determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (section 22(1)) and the issue of determination in writing (section 22(3)(a));
\end{enumerate}

\textsuperscript{588} \textit{Australian Remediation Services Pty Limited v Earth Tech Engineering Pty Limited} [2005] NSWSC 362 at [13] per McDougall J.
\textsuperscript{589} [2004] NSWCA 394.
\textsuperscript{590} \textit{Brodyn Pty Ltd t/a Time Cost and Quality v Davenport} [2004] NSWCA 394 at [55] (Hodgson JA).
\textsuperscript{591} An additional requirement of providing that measure of natural justice required by the Act is in addition to these five [at 55].
\textsuperscript{592} \textit{Brodyn Pty Ltd t/a Time Cost and Quality v Davenport} [2004] NSWCA 394 at [53] (Hodgson JA).
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"Brodyn" held as a good law for a period of around five years until the judicial approach once again changed track, almost turning full circle, by the authority of *Chase Oyster Bar v Hamo Industries* (Chase Oyster),\(^{593}\) to a position where jurisdictional error with relief in the form of the prerogative writ of certiorari was re-established in NSW as the basis for judicial review. In *Chase Oyster Bar v Hamo Industries*, the NSW Court of Appeal considered whether an adjudicator had power to determine an adjudication application not made in compliance with s 17(2)(a) of the NSW Act. In that case, Spigelman CJ observed at paragraph [5] that “the process of adjudication... is a public, relevantly a statutory, dispute resolution process, and as a consequence is subject to the supervisory jurisdiction.” Justice McDougall emphasised at paragraph [149] that: “The decision in Brodyn appears to assume that there is a distinction between a basic and essential requirement for the existence of an adjudicator’s determination and a jurisdictional condition, or jurisdictional fact.” His Honour went on to conclude that “the requirement of s 17(2)(a) are jurisdictional, in the sense that the giving of notice within the requisite period is a condition that must be satisfied for a valid application to be made pursuant to s 17(1).” As such, it was held that an incorrect finding by the adjudicator that an adjudication application had been given within the time limit prescribed by section 17(2)(a) of the NSW Act was vitiated with jurisdictional error.

Furthermore, “reference date” is another obvious example of the inconsistent case law regarding jurisdiction of adjudicators. In 2015, the NSW Supreme Court of Appeal in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd*\(^{594}\) (Lewence), overturned the trial judge’s finding that the adjudicator’s determination of a ‘reference date’ was a finding of jurisdictional fact. The court held that the question of whether a ‘reference date’ has occurred, which gives rise to an entitlement to a progress payment under the Act, is not a matter that the court can quash an adjudication determination over if the adjudicator gets it wrong.\(^{595}\) This decision not only overrules many previous authorities in the NSW,\(^{596}\) but also seems completely inconsistent with the position of the Queensland courts.\(^{597}\)

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\(^{593}\) [2010] NSWCA 190; Applying the High Court decision in *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1.

\(^{594}\) [2015] NSWCA 288.

\(^{595}\) [2015] NSWCA 288 per Ward JA at [60], [93]; Emmett JA at [119]; Sackville AJA at [133].


\(^{597}\) See *Lean Field Developments Pty Limited v E and I Global Solutions (Aust) Pty Limited* [2014] QSC 293.
Furthermore, two months after the decision in *Lewence*, the Victorian Supreme Court of Appeal in *Saville v Hallmarc Constructions Pty Ltd* handed down its decision which was completely in contrast to the decision in *Lewence*. In that case, the court upheld the decision of the trial judge who held that the reference date fixed by the adjudicator under the Act was wrong and that as a consequence the adjudicator ought not to have assumed jurisdiction and the adjudication determination is of no legal effect.

Notably, the High Court of Australia has recently set aside the decision made by the Court of Appeal in *Lewence*. The judgement is the first ever judgement by the High Court in relation to the Australian SOP legislation. The court decided that the existence of a reference date under a construction contract is a precondition to the making of a payment claim under the SOP legislation. However, the High Court has not taken this rare opportunity to provide guidance on the criteria of diagnosing other preconditions that must exist in order for the adjudicator to have jurisdiction to hear the matter, which keeps the door open for further analogous inconsistencies in future.

On the other hand, the courts have also followed opposing conclusions as to whether the adjudicator’s ‘decision to dismiss’ an application without making a determination on the merits is a determination within the meaning of the Act. In *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd*, Ball J held that the adjudicator’s decision on jurisdictional matter is not a determination within the meaning of the NSW Act. This finding is in contrast to the views expressed in *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd*. In that case, the court held that the adjudicator’s statement that he has no jurisdiction is a decision within the purpose of the Act. The latter proposition was followed in *Alucity Architectural Produce Supply Pty Ltd v Hick* that a determination by an adjudicator that he has no jurisdiction is a ‘determination’ for which the adjudicator is entitled to his fees.

In this regard, there is a controversial debate as to whether adjudicators erring in determining jurisdictional questions will still be entitled for their fees. In the UK, fees were required to be repaid for a total want of consideration in *PC Harrington*.

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599 *Southern Han Breakfast Point Pty Limited v Lewence Construction Pty Limited* [2016] HCA 52.
600 [2011] NSWSC 165 at [14].
602 [2016] NSWSC 608.
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Contractors Ltd v Systech International Ltd.603 In Australia, this issue has been tentatively raised in a number of matters, but does not appear to have been ultimately decided in Australia.604 The UK authority in this regard may have a little impact on jurisdictions adopting the NSW model given the facts and differences in the two legislative models.

6.3.3 Ambiguous legislative guidelines:

The SOP legislation across jurisdictions vary with regard to the clarity or sufficiency of directions for adjudicators upon how to deal with jurisdictional issues. For instance, whilst the Victorian and NSW legislation are completely silent about the duty of adjudicators to decide upon jurisdiction, dismissal of applications for lack of jurisdiction and entitlement of adjudication fees upon dismissal, the legislation in WA and Queensland provide some directions605 in this regard.

Table 9 below explains the impact of such ambiguities by illustrating a comparison between the number of adjudication applications dismissed by adjudicators for lack of jurisdiction in WA and Victoria in the last two reported financial years606. It is worth noting that the figures of WA may include a very few applications dismissed due to other reasons such as complexity of the dispute. The statistics show that the vast majority of adjudicators in Victoria have not charged any fees upon dismissal. In two cases out of the 15, the adjudicator charged fees of AUS$19,090 and AUS$4,200 respectively, upon dismissal despite the fact that there is no provision in the legislation giving the adjudicator such entitlement.607 Interestingly, in the former case, the respondent was liable to pay 50% of adjudicator’s fees.

In Queensland, the recent amendment made in 2014 imposed a duty on adjudicators that they must decide whether or not they have jurisdiction to adjudicate the application,608 and made adjudicators entitled for fees where they find an application

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603 [2012] EWCA Civ 1371.
604 See, eg, Richard Crookes Construction Pty Limited v CES Projects (Aust) Pty Limited (No.2) [2016] NSWSC 1229.
605 See WA Act, s 32(1)(a), s 44(2); Qld Act.
Building Commissioner, Construction contracts Act 2004 (WA), Annual Reports.
607 However, section 45 of the Building and Construction Industry Security of Payment Act 2002 (Vic) (the Vic Act), does allow a right to fees if an adjudicator determines an application and section 23 specifically recognises that an adjudicator may determine that no sum is payable to the claimant.
608 See Qld Act, s 25(3)(a).
to be invalid.\textsuperscript{609} That amendment was made in response to concerns that some adjudicators may improperly consider themselves economically bound to find a way of ensuring they have jurisdiction to hear the matter.\textsuperscript{610}

Table 9: Comparison of dismissed adjudication applications in WA and Victoria

<table>
<thead>
<tr>
<th>Description</th>
<th>WA</th>
<th>Victoria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total adjudication applications</td>
<td>235</td>
<td>175</td>
</tr>
<tr>
<td>Adjudication applications dismissed by adjudicators</td>
<td>52</td>
<td>47</td>
</tr>
<tr>
<td>Percentage of dismissed applications</td>
<td>22.1%</td>
<td>26.9%</td>
</tr>
<tr>
<td>Mean value of adjudicator’s fees for claims dismissed</td>
<td>$6,316</td>
<td>$4,561</td>
</tr>
<tr>
<td>Total value of adjudicator’s fees for claims dismissed</td>
<td>$301,420</td>
<td>$237,158</td>
</tr>
<tr>
<td>Smallest Claim dismissed (AUS)</td>
<td>$4,443</td>
<td>$4,871</td>
</tr>
<tr>
<td>Largest claim dismissed (AUS)</td>
<td>$82,995,300</td>
<td>$18,583,363</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

That adjudicator’s duty to decide upon jurisdiction was criticized as it lacks clarity whether an adjudicator can “give himself or herself jurisdiction by determining that he or she has jurisdiction or must the adjudicator have jurisdiction before he or she can make a determination under s 25(3)(a).”\textsuperscript{611} In the recent case of Camporeale Holdings

\textsuperscript{609} See Qld Act, s 35(5)(b).
\textsuperscript{611} Davenport, P, An update on security of payment in the construction industry in Queensland, RICS Cobra (2015), Sydney.
Pty Ltd v Mortimer Construction Pty Ltd,612 Henry J controversially interpreted that amendment by noting, obiter dicta:

“The adjudicator was obliged by s 25(3)(a) to decide whether she had jurisdiction and she reached reasoned conclusions about the validity of the payment claim grounding that jurisdiction. Given the legislature’s intent that she performs that task, an error she made in performing it would likely have been an error within jurisdiction rather than an error going to jurisdiction.”

On the other hand, the amendment does not require adjudicators to avoid unnecessary expenses or costs in adjudication proceedings.613 As such, the expended time and efforts in examining the jurisdiction can significantly vary where some adjudicators may opt to seek further submissions or continue to analyse multiple jurisdictional objections despite that they have found they do not have jurisdiction from examining the first objection. This is because some adjudicators assume that they may have been errant in determining one or more objections.614

6.3.4 Proactive vs reactive adjudicators

Adjudicators seem to follow a proactive or reactive approach in dealing with jurisdictional objections which is heavily influenced by the availability of legislative guidelines and the legal competencies of adjudicators. Proactive adjudicators tend to satisfy themselves by establishing their jurisdiction before proceeding further with the determination on the merits even if no jurisdictional objection is raised. This approach includes cases where respondents do not even participate in adjudication proceedings, where proactive adjudicators should (as a matter of good practice and indications from the court) satisfy themselves that they do have jurisdiction before proceeding with the determinations on the merits.615

Reactive adjudicators usually follow one of three basic approaches depending on the case. First, an adjudicator may opt to resign and dismiss the case due to its complexity,
by informing both parties and the appointing authority.\textsuperscript{616} Secondly, an adjudicator may purposely wait until the statutory period for releasing the determination is expired so the claimant may make a new adjudication application (often referred to as “allowing the matter to time out”).\textsuperscript{617} Similarly, some adjudicators may tend not to reach a conclusion that they do not have jurisdiction to allow a claimant pursuing its claim before another adjudicator based on the principle of issue estoppel.\textsuperscript{618} Thirdly, an adjudicator, driven by commercial factors\textsuperscript{619} or directed by courts,\textsuperscript{620} may assume that he or she has jurisdiction and proceed with the determination on the merits leaving jurisdictional issues to the court to decide upon.

It could be argued, however, that none of those approaches appear to give effect to the basic statutory obligation of adjudicators to determine the application. If presented with a matter, that is, in the view of the adjudicator, too complex, that is largely an issue that can be attributed to either insufficient training or poor practices by the appointing authority. Many experienced adjudicators deal with complex jurisdictional issues, addressing the issues extensively and to the satisfaction of the court. This may be assisted by receiving quality submissions (more prevalent in high value matters) or by requesting further submissions from the parties and possibly seeking an extension of time to be able to examine all presented arguments and reach a reasoned conclusion.\textsuperscript{621}

\textbf{6.4 The impact of ambiguous legislation and inconsistent case law}

It has become evident, after more than a decade of the operation of the SOP legislation in major jurisdictions, that the legislative intent of ensuring swift and inexpensive resolution of payment disputes is yet to be attained consistently. The adjudication process becomes more akin to curial proceedings. This is driven by the typical game of many respondents seeking to frustrate adjudication process by relying upon

\textsuperscript{616} In \textit{O’Donnell Griffin P/L v Davis} [2007] WASC 215 at [31], it was held that "an adjudicator who was faced with a complex question of jurisdiction which he or she felt unable to resolve on the papers would be obliged to dismiss the application".

\textsuperscript{617} In W.A, appointed adjudicators may use the existing provisions of the Act to allow the withdrawal request to be accommodated by enabling the application to run out of time under s.31(3) and be dismissed or by determining there is no payment dispute to adjudicate. See Building Commissioner, \textit{2014-2015 annual report, Construction Contracts Act 2004 (WA)}, page 6.

\textsuperscript{618} Wallace Report, above fn 609, p 245.

\textsuperscript{619} Wallace Report, above fn 609, p 246.

\textsuperscript{620} See \textit{Lee Wee Lick Terence v Chua Say Eng} [2012] SGCA 63.

\textsuperscript{621} See \textit{Simcorp Developments and Constructions Pty Limited v Gold Coast Titans (Property) Pty Limited}, Adjudication Application No. 1057877_1453, 14 May 2010, (Adjudicator: Andrew Wallace)
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jurisdictional arguments (with the assistance of lawyers) rather than arguing the merits of the underlying payment dispute.\textsuperscript{622} In Victoria, the recent annual reports show that both claimants and respondents have retained solicitors in at least 30\% of the adjudication cases.\textsuperscript{623} In addition to the legal representatives, there is a bank of non-lawyer preparers who, as specialists in the field may have more expertise in a certain jurisdiction than many law firms.

As a result, adjudicators become obliged to deal with two tasks (i.e. to consider jurisdictional and merits issues) within the rigid timeframe provided by the legislation, which was arguably intended to suffice for considering the merits only. Also, it becomes a crucial requirement for adjudicators to be properly trained on legal principles such as contract and administrative laws to better deal with complex jurisdictional arguments. This requirement is faced with the fact that there is no single SOP legislation that requires adjudicators to be law practitioners or legally trained to be eligible to practice. Thus, it is not surprising to see, for example, that 73\% of registered adjudicators in WA are not legally trained.\textsuperscript{624}

It is submitted that even bright and experienced lawyers advising parties on adjudication matters have become more uncertain nowadays than any time before regarding the likely approach which the court may take in dealing with any untested or controversial area of the SOP legislation. This unpredictability means that claimants relying upon a favourable adjudication determination may do so at their peril. Claimant who, for example, exercise their statutory rights to suspend works subsequent to the non-payment of adjudication decisions by respondents, or claimants who have to defend the soundness of adjudication determinations in their favour which have been challenged by way of lengthy judicial review, may end up in a serious trap potentially endangering the financial survival of their business.\textsuperscript{625} It remains of course also true, that several billion dollars have flowed through the adjudication process, and it is very likely that many more businesses would have collapsed without the legislative scheme.

\textsuperscript{622} See the SOCLA Report, above fn 553, p 67.
\textsuperscript{625} This risk was well noted in \textit{Brodyn v Davenport} [2005] NSWCA 394 at [51], per Hodgson JA; \textit{Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd} [2009] VSC 156 [46]–[47], per Vickery J.
The ambiguous SOP legislation has unnecessarily increased the traffic of challenge applications before supreme courts. The case of *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd*⁶²⁶ is one of many examples. In that case, the claimant lodged an adjudication application with the appointing authority. Two days later, the respondent wrote to the appointing authority highlighting that the work was carried out outside NSW and requesting the nominated adjudicator to consider, prior to acceptance of the nomination, whether he or she has the jurisdiction to determine the adjudication application. The claimant replied that challenging jurisdiction is not possible as it was not mentioned in the payment schedule and stated that the work was substantially carried out in NSW. The adjudicator was eventually appointed. Before the receipt of adjudication response, the adjudicator advised the parties through the appointing authority on his findings that by referring to the unsolicited submission from the respondent, the payment claim was invalid due to non-existence of a construction contract requiring work in NSW. The claimant initiated proceedings seeking urgent relief claiming, inter alia, that the adjudicator had jurisdiction to hear the matter and the claimant is entitled to withdraw its application and serve a new adjudication application because the first adjudicator failed to determine the issue within the time limits. As a preliminary observation within the narratives of the judgement, Ball J mentioned, obiter dicta, at paragraph [11] that the NSW Act does not prevent respondents from raising grounds asserting that the adjudicator did not have jurisdiction to make a determination.⁶²⁷ Ball J further held at paragraph [21] that the claimant is entitled to make a new adjudication application, however, the court would not permit it to do so unless satisfied that an adjudicator had jurisdiction to determine the claim. The application was eventually dismissed upholding adjudicator’s decision that he has no jurisdiction.

The emerging uncertainties, leading to excessive judicial intervention, are likely to deter many claimants from going to adjudication, favouring other traditional avenues despite being more expensive and lengthy. As such, the SOP legislation become not only more inaccessible to many vulnerable firms, but also more inconvenient as

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⁶²⁷ This proposition was followed in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QCA 276 at [78] (Philippides J) and in *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 at [38] (McDougall J).
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engaging legal counsel, in order to advise on complex issues and increase the chances for success, becomes a necessity.

In light of the above analysis, it becomes apparent that the SOP legislation in each jurisdiction operating the SOP legislation do not provide sufficient directions for most of the following ten controversial matters (if not all) pending further legislative amendment, regulations or ultimate court authorities to finally decide upon:

1. The duty of an adjudicator to decide upon jurisdiction whether or not raised by the parties,628 and whether any resulting error in deciding jurisdiction is deemed an error within jurisdiction rather than an error going to jurisdiction.629

2. The adjudicator’s obligation to dismiss the application due to complexity of jurisdictional arguments.630

3. The adjudicator’s determination upon jurisdiction is an adjudicator’s determination within the purpose of the Act.631

4. The entitlement of respondents to raise new jurisdictional arguments in adjudication response.632

5. The limitations of respondents seeking judicial review if jurisdictional objections are not raised in adjudication.633

6. The claimant’s right to provide a reply if new jurisdictional objections are raised in adjudication response.634

628 Bezzina Developers P/L v Deemah Stone (Qld) P/L [2008] QCA 213 at [61] – [66], where the court found no obligation to enquire and similarly where the parties do not put a matter in issue, it does not have to be decided. See also, Kembra Coal and Coke v Select Civil [2004] NSWSC 628 at [37]; Lee Wee Lick Terence v Chua Say Eng [2012] SGCA 63 at [64].


630 See O’Donnell Griffin P/L v Davis [2007] WASC 215 at [31].


634 See, eg, the Qld Act, s 24B; the Vic Act, s 21 (2B).
7. The adjudicator’s right to extend time limits to determine an application if complex jurisdictional arguments are raised.  

8. The adjudicator’s entitlement of fees upon dismissal for lack of jurisdiction, and the adjudicator’s duty to avoid unnecessary expenses or costs in deciding upon jurisdiction. 

9. The Adjudicator’s obligation to consider whether new jurisdictional objections are raised by respondents in the apportionment of adjudication fees. 

10. The adjudicator’s entitlement of fees if the determination is quashed by court for adjudicator’s lack of jurisdiction. 

6.5 A proposed roadmap to regulate jurisdiction of adjudicators

The proposed roadmap demonstrated in the next paragraph stands as an alternative measure to another one detailed in a previous article which was led by the same author, in which it was suggested that:

1) jurisdictional challenges be separated from the merits of the dispute, so adjudicators can only deal with the real dispute as many adjudicators lack the legal training and knowledge to adequately deal with complex jurisdictional matters;

2) any jurisdictional challenges should be dealt with in parallel by establishing a legislative review mechanism via a quick, informal and cost effective process by competent tribunal who has the jurisdiction to consider questions of law.

The proposed roadmap seeks to address the observed difficulties and deficiencies in the operation of the SOP legislation with regard to the jurisdiction of adjudicators. The roadmap starts from a well-established need for a better designed adjudication scheme to reinstate the mission of the SOP legislation as originally intended. As such, the

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635 See, eg, the Qld Act, s. 25B.
637 See, eg, s. 16(3)(b), Building and construction Industry Security of Payment Act 2004 (Singapore).
638 See, eg, Qld Act, 35A(2)(g).
639 See PC Harrington Contractors Limited v Systech International Limited [2012] EWCA Civ 1371. In that case, fees were required to be repaid for a total want of consideration.
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roadmap identifies six key areas (or hold points) which address the ten controversial matters identified before. The roadmap collates and reconciles the best relevant practices from each jurisdiction. It, however, stands as a blunt instrument, where it is contended, that further empirical research is now needed. The six hold points are:

1. The obligation of respondents to raise jurisdictional objections in adjudication response;
2. Making the referral of the case after receipt of adjudication response;
3. Appointment of a legally qualified senior adjudicator if response includes jurisdictional objections;
4. Providing adjudicators with guidelines to deal with jurisdictional objections;
5. Empowering appointed adjudicators to extend time limits, allow for claimant’s reply and engage technical experts;
6. Adjudicator’s eligibility for fees upon dismissal of the case for lack of jurisdiction, and obligation to avoid unnecessary expenses.

The discussion below includes a brief rationale of each point:

6.5.1 Respondent’s obligation to raise jurisdictional objections in adjudication response

Since some respondents, who are statutorily entitled to lodge adjudication response, opt not to raise jurisdictional challenges before the adjudicator for tactical reasons as addressed above, it must be made clear in the legislation that when a respondent participates in adjudication process, it implies that it accepts that the adjudicator has jurisdiction to hear the matter and confers jurisdiction on the adjudicator to determine the dispute641 and no appeal for challenging enforcement, injunction, declaration or by way of certiorari would be entertained unless all known or likely to be known jurisdictional objections have been raised in adjudication response.642 Moreover, respondents must identify on the face of the response as to whether they include any jurisdictional objection to facilitate cost and time effective nomination process by the appointing authority.

642 This proposition was followed by McDougall in Oppedisano v Micos Aluminium Systems [2012] NSWSC 53 at [42]-[44].
6.5.2 Making the referral of the adjudication case after receipt of adjudication response

The appointing authority must hold the referral of the application to an adjudicator until the receipt of adjudication response to be better informed of the nature and complexity of raised arguments in order to marry each complex application with a suitably qualified adjudicator. Having said that, the appointing authority, whilst waiting for the lodgement of response, must start shortlisting and contacting potential adjudicators including legally trained adjudicators. The appointing authority must eventually refer the application to the most suitable adjudicator, with a copy to both parties. The appointment must be made within two business days after the end of the period within which the respondent may lodge a response. The adjudicator’s time limit to make a determination must start from the date of appointment, however, the adjudicator must notify the parties of the acceptance of the appointment. The adjudicator must have an express duty to decline the referral or resign by notifying all parties due to complexity of the referred matter so the appointing authority can make another referral. The impact of this hold point would only add a few days down the process but would ensure that the right horse is picked up for the right course.

6.5.3 Appointment of a legally qualified senior adjudicator if response includes jurisdictional objections

If the adjudication response includes jurisdictional objections, the appointing authority must only refer the adjudication application together with the response to a legally qualified adjudicator. This approach will increase the confidence of the parties with the adjudication outcome and diminish the need of judicial intervention. The adjudicator must have appropriate legal qualifications and relevant experience. Since that criteria may mean different things to different people, it is suggested that the appointing authority must establish a proper grading system to classify adjudicators based on their qualifications, expertise and successful track record in dealing with complex legal matters.

643 See Red Ink Homes Pty Limited v Court [2014] WASC 52 at [122] where it was implied that legal training can help achieve a better outcome.
6.5.4 Providing adjudicators with guidelines to deal with jurisdictional objections

Until the time of writing, there is no guidelines or handbooks whatsoever, save for the UK, that can assist adjudicators in dealing with jurisdictional objections in each jurisdiction. The need of such guidelines stems from the fact that many adjudicators, especially those practicing in more than one jurisdiction may err in determining their jurisdiction by wrongly applying the legislation of one jurisdiction into another one.645 Interestingly, an excellent guidance notes on jurisdiction has been made available to the UK construction adjudicators since May 2011 as an attempt to establish best practices to assist adjudicators in determining the threshold jurisdiction and maintaining jurisdiction.646

Such guidelines become more necessary for adjudicators in cases where no adjudication response was lodged as they must firstly decide whether or not they have jurisdiction before making a determination of the adjudication application. However, the guidelines, as proposed in this hold point, must cater for the dynamic nature of relevant case law, therefore, it must be regularly updated to include any legislative reform or further judicial interpretation of the legislation. The proposed guidelines may be developed or at least endorsed by the governing authority in each jurisdiction in order to stand as a reliable reference.

6.5.5 Empowering appointed adjudicators to extend time limits, allow for claimant's reply and engage technical experts

If jurisdictional objections are raised, adjudicators must be entitled to extend the time limits (say, up to additional five business days) by requesting approval with reasons from the appointing authority to limit abuse of process. The additional time will help adjudicators to properly consider detailed jurisdictional objections before proceeding with the determination of the merits of the payment dispute, notwithstanding the fact that these activities are generally undertaken concurrently.

The adjudicator must also be empowered to allow the claimant at least two business days to reply to adjudication response if new jurisdictional issues are raised to comply

645 See, eg, Department of Construction and Infrastructure v Urban and Rural Contracting Pty Limited [2012] NTSC 22.
with procedural fairness requirements. In complex cases, the adjudicator must be flexible enough to grant further reasonable extension of time to claimants to respond.647

On the other hand, technical issues may be very challenging to legal adjudicators such as using the correct formula in calculating due payments.648 Therefore, adjudicators who are mainly selected for their legal expertise must also be empowered to appoint technical experts such as quantity surveyors and engineers to assist in complex technical matters that might be raised in addition to legal arguments. In WA, however, a research involving interviews with 22 adjudicators found that the experts have a neutral position regarding the necessity of experts.649

### 6.5.6 Adjudicator’s eligibility for fees upon dismissal of the case for lack of jurisdiction and obligation to avoid unnecessary expenses or costs

To cater for some adjudicators’ practices assuming jurisdiction for commercial interest as addressed before, adjudicators must always be entitled for reasonable fees whether or not an application is eventually dismissed for lack of jurisdiction.650 Such entitlement must be made clear in the legislation; otherwise adjudicators may be disinclined to accept appointments if there is a threat that their fees could be waived. Having said that, during decision making process, an adjudicator must have an express duty to avoid unnecessary expenses and costs. This means that adjudicators who are satisfied that they have no jurisdiction must make a determination that they lack jurisdiction and dismiss the case immediately without analysing the case further. It is also suggested that if adjudicators think that the ground of jurisdictional objection are weak, they must proceed with the substance of adjudication in order not to undermine the object of the Act.651

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647 This approach was implemented recently in Queensland under section 24B of its Act, which gives the claimant the entitlement for 15 business days in which to lodge a reply to news reasons, which period can be extended up to an additional 15 business days because of complexity, or volume, of new reasons.

648 See, eg, *Uniting Church in Australia Property Trust (Qld) v Davenport* [2009] QSC 134. In that case, the adjudicator, after releasing his original decision and following a request from the claimant, attempted to correct the decision, using a completely different methodology of calculating prolongation cost.


By adopting the entire roadmap, it is arguably fair to deprive adjudicators of their fees if their determinations are quashed for lack of jurisdiction.\textsuperscript{652}

\textit{6.6 Concluding remarks}

Encouraging adjudicators, who are not required to be legally trained, to determine questions relating to their jurisdiction is only the tip of the iceberg. This article examined the problems, complexities and approaches in dealing with jurisdictional objections in statutory adjudication. The article further emphasised the problem of inconsistent case law and ambiguous legislative directions and their negative impact upon the operation of the SOP legislation. Accordingly, a roadmap was proposed with identified six hold points towards necessary reform in the SOP legislation. The impact of the proposed measures is anticipated to not only provide more transparency and efficiency in the operation of the SOP legislation but also improve the quality of determinations and eventually reduce judicial intervention.

\footnote{\textit{See PC Harrington Contractors Limited v Systech International Limited} [2012] EWCA Civ 1371, where it was held that fees were required to be repaid for a total want of consideration.}
ABSTRACT

Statutory adjudication was introduced into the security of payment legislation as a fast-track payment dispute resolution process with an express object to facilitate cash flow within the construction contractual chain. After more than a decade of the operation of the regime in Australia and Singapore, it becomes apparent that there are many operational problems that jeopardise the intended object of the legislation, particularly in adjudicating complex payment disputes. The aim of this paper is to explore views of the industry stakeholders regarding some operational problems of statutory adjudication of as well as possible solutions. To do so, “expert interviews” method is adopted to collect the empirical data, involving interviews with 23 practitioners from Australia and Singapore. The study uncovers many inherent operational problems and opportunities for law reform. The implication of this study is a better understanding of the most critical problems inherent in statutory adjudication that need serious consideration by the legislatures and policy makers. In addition, the study also provides some practical measures as suggested by the industry practitioners for each identified problem which may stand as a reliable reference for potential reform in the security of payment laws.

Keywords: adjudicators, complex claims, security of payment, statutory adjudication.
7.1 Introduction:

Statutory adjudication was introduced into the security of payment legislation as a fast-track payment dispute resolution process with an express object to facilitate cash flow within the construction contractual chain. After more than a decade of the operation of the regime in Australia and Singapore, it becomes apparent that there are many operational problems that jeopardise the intended object of the legislation, particularly in adjudicating complex payment disputes.

Courts have been more willing to intervene in the adjudication process due to poor quality of adjudication outcome. This situation has encouraged aggrieved parties to challenge adjudication determinations by way of judicial review resulting in numerous judicial review applications. This has eroded the original object of the security of payment legislation. The aim of this paper is to explore views of the industry stakeholders regarding some operational problems of statutory adjudication of complex payment disputes as well as possible solutions. The study adopts an empirical research involving 23 interviews with industry experts. The study is a continuation of a major research project where initial findings adopting the doctrinal legal research methods have already been published.653

7.2 Research Method

In social research, the use of “expert interviews” as a method of qualitative empirical research has long been popular as it offers an effective means of quickly obtaining good results.654 Conducting expert interviews can serve to shorten time-consuming data gathering processes, where experts can provide practical insider knowledge and avoid the necessity to interview a wider circle of players.655 “As a method, the expert interview appears to be “quick, easy, and safe” in its application, and it promises to be of good practical value.”656 This method helped explore various opinions and

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655 Ditto.

perceptions regarding the inherent problems in the SOP laws as well as opportunities for improvement.

A purposive sampling method was adopted to identify the potential experts who are experts in many jurisdictions operating security of payment regime including Singapore, Victoria, New South Wales (NSW), Queensland and Western Australia (WA). The experts were selected based on their specific experiences relevant to the research area under investigation.

52 invitations were sent out. Eventually, only 23 out of the 28 experts have participated in the research. That was a satisfactory sample size in accordance with the well-established guidance that the minimum number of interviews needs to be between twenty and thirty for an interview-based qualitative study to be published.657

The 23 interviews were conducted over a period of five months between 28 October 2015 and 23 March 2016. Most of the interviews were conducted by phone being the most convenient way in terms of time and cost. The interview durations varied between 30 minutes to two hours but the majority were completed in one hour. All interviews were recorded with the permission of experts.

The experts mainly belong to two main groups: adjudicators and construction lawyers. Half of the Experts have dual roles acting as adjudicators and construction lawyers. Many experts act as advisers for the parties during adjudication or enforcement proceedings. That is quite important as it ensures that the views of the parties are also considered in the research as conveyed by the interviewed experts. Most of the experts have more than 20 years of experience of dealing particularly with construction disputes and more than 10 years in dealing with statutory adjudication. This high level of experience increases the credibility of the participants’ views due to their broad knowledge and experience in construction disputes. It will also bring relevant, rich and concise views in terms of the research question being investigated. The vast majority of experts either possess legal qualifications or both legal and technical qualifications. This is understandable considering the fact that statutory adjudication is dominated by legally trained professionals.

7.3 Criteria of complex adjudications

Many experts observed a link between the amount in dispute referred to adjudication and complexity of the payment claim. A Victorian adjudicator observed that the larger the payment claim, the more complex is the case because the parties invest in appointing lawyers and provide volumes of detailed submissions including legal arguments and factual documents. He further said that in his experience, parties to adjudication start to engage lawyers when payment claims reach the level of AUS$100,000. A Singaporean adjudicator said the complexity can be identified by jurisdictional challenges, challenges that deal with interpretation of the act, where the quantum of dispute is large or where the legal issues are complex such as misinterpretation of contract terms. Another WA adjudicator said that the case becomes more complicated if it includes time related costs or expert technical reports.

Those views help shape the understanding of the nature of complex claims in order to assess whether or not the current legislative scheme deals with them effectively. Payment claims of any size could be complex if jurisdictional arguments are raised before adjudicators. However, the likelihood to have jurisdictional challenges may be very limited in the case of small payment claims where respondents find it unfeasible to invest in engaging legal advisors who rely heavily on jurisdictional argument in their defence. The importance of understanding the criteria of complex claims is manifest, specially, when dual adjudication schemes or review mechanisms are considered for introduction into the Security of Payment legislation.

7.4 Identified problems in statutory adjudication:

The interviewed experts shared interesting thoughts on many problems that are usually encountered when complex claims are being adjudicated. The main problems were identified and categorised into the following sub-headings following the analysis of all transcripts:

658 Senior adjudicator and construction lawyer based in Victoria.
659 Accredited adjudicator and independent arbitrator based in Singapore.
660 Adjudicator and Construction lawyer based in Western Australia.
7.4.1 Poor quality of adjudication outcome

All of the experts have similar views that there are quality concerns with adjudication determinations but have different views about the significance of those concerns. Many of them have mentioned the quick and dirty nature of adjudication which makes it almost impossible for an adjudicator to reach a well-reasoned determination in complex cases. That result can be reconciled with the observations of courts and scholars acknowledging the poor quality of determinations on complex claims. 661

Many experts also claimed that this issue has caused industry dissatisfaction with the adjudication process despite the fact that the process is interim. An official working in the Victorian Building Authority said that the legislative policy calls for ‘pay now argue later’ principle and anything else will be a shift which is unacceptable. 662

Another expert commented: “The question is whether you’re happy enough to say: Well I’ll accept it but move on with my life.” 663 This approach was endorsed by a third expert who raised an interesting argument:

“If the quality of adjudications is improved to the extent that parties know that it’s pretty much as good as they would get from a fully blown trial, and it’ll never be as good, but if parties are assured, commercial parties know that 80% is good then from a commercial point of view that I think would influence them to then say “Are we really going to roll the dice for the remaining 20%?”” 664

Another experienced lawyer said:

“We have had adjudications that we have lost where I think the adjudicators made a mistake, and we’ve had decisions where we’ve won and we think that we should not have won, but the parties then got on with the real dispute resolution process.” 665

Apparently, the industry, which is left with judicial review as the only remedy shows readiness to accept flawed determinations if it is not worth it to challenge them in

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662 Legislative Advisor at the Victorian Building Authority (VBA).
663 Senior academic with law background based in Victoria.
664 Barrister and solicitor based in Western Australia.
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court. This conforms to the underlying policy of the legislation as to offer rough justice supported by the main object of the legislation to keep cash flowing. This means that it may make sense that this commercial factor should be taken into consideration if alternative remedies are sought. In other words, monetary threshold may be introduced within any alternative remedy scheme such as dual scheme as implemented recently in Queensland or review mechanism as established in Singapore.

7.4.2 Bias of commercially driven ANAs

The majority of experts, in the Eastern Australian States, expressed similar views that adjudicators and authorised nominating authorities are commercially driven to produce an outcome that is ‘claimant friendly’ rather than an outcome that is efficient and fair, which negatively affects the outcome. This result is not surprising as many legislatures, acknowledging this problem, have started taking serious measures to counter that effect. Some experts said that the 2007 reform in Victoria has improved the quality of determinations where the parties can select three ANAs in the contract and the parties have to go to one of those three which have prevented ANAs from being claimant friendly. An adjudicator raised a concern that the approach taken in Victoria does not work because of the imbalance in bargaining powers. He reiterated that adjudicator’s appointment is flawed because of the conflict of interest and if it is fixed as in Queensland, a lot of problems that are undergoing with adjudication across the country can be fixed. Another expert mentioned that most of the respondents do not trust ANAs because they are ‘claimant friendly’. The owner of a major private ANA rejected the perception of ‘claimant friendly’ ANAs as it completely twisted the reality and was against the ANA’s commercial interests. He further said that if his ANA thinks there is a bad decision then the ANA will take action internally after the event. He went on to say that his ANA has no interest at all in defending the standing or reputation of an adjudicator who makes a poor decision.

The views of experts around this sensitive issue is quite enlightening in the sense that someone could argue that most of the adjudicators who do not get enough referrals may tend to be claimant friendly to help their appointing ANA get more business

667 Senior adjudicator and construction lawyer based in Queensland.
668 Construction lawyer based in South Australia.
669 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
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which would in turn mean better opportunities to get more referrals. This would be the case whether or not the ANA itself is for-profit ANA. This argument means that abolishing for-profit ANAs only may not be the best option to address the bias concerns. Rather, a single governmental appointment system similar to the system implemented in Queensland may stand as a better and more effective remedy. However, those perceptions would need further research which is beyond the scope of this study.

7.4.3 Short adjudication timeframes

Many experts addressed the short adjudication timeframes as a major factor contributing to poor quality determinations. One expert said that the high number of applications made for judicial review in NSW to challenge poor determinations is due to adjudicators being too time stressed to make appropriate decisions. Another one disagreed that the 10-day period is too tight and said that adjudicators should not accept appointments if they have not got the time to take on cases. The same expert also referred to the fees charged by adjudicators, which are in the range of AUS$3000-AUS$3500 per day, that make the adjudication too expensive for the parties if a longer time is granted. A Victorian adjudicator observed that the 10 business days are never enough for experienced adjudicators to consider all matters raised. Another adjudicator one mentioned that the current average timeframes to adjudicate complex claims in Queensland is 47 days. This duration seems too long for what is intended to be a quick and interim process.

There is a general consensus that the tight adjudication timeframes are the main cause for the poor quality. Some experts blamed adjudicators for accepting to adjudicate complex cases. However, it may be difficult for an adjudicator, who spent a considerable time on a case, to resign half way through the process in order not to lose his or her fees. However, other experts said that timeframes may not be an issue for senior adjudicators in most of the cases and suggested that if the parties opt to

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670 Senior adjudicator and construction lawyer based in Queensland.
671 Senior adjudicator with quantity surveying background based in Victoria.
672 Senior adjudicator and construction lawyer based in Victoria.
673 Senior adjudicator and construction lawyer based in Queensland.
675 See Wallace, A, Final report of the discussion paper – Payment dispute resolution in the Queensland building and construction industry, 2013, p 246.
adjudicate very complex and large payment claims, adjudicators may not accept appointment unless both parties agree to grant reasonable additional time as may be requested by the adjudicator.

7.4.4 Inadequate regulation of adjudicators

Many experts observed the poor selection of competent adjudicators and their inadequate training. A lawyer practicing in Queensland observed that electricians were appointed to determine very complex building disputes involving tens of millions of dollars and very complex legal issues.676 Another one said that most of the adjudicators do not have the skill sets to deal with jurisdictional challenges.677 A well experienced lawyer and adjudicator practicing in various jurisdictions had a strong view about the quality of adjudicators by saying that there are a lot of people who should not be adjudicators, but most of them are dealing with small matters and they never get to courts. The owner of a major ANA said that many adjudicators, despite having great experience and qualifications, cannot write good determinations that soundly tell the legal story in a way that parties can understand.678 Another practicing lawyer and adjudicator said that there are unhealthy practices in WA that many adjudicators come from other states and claimed that quality is being jeopardized as it is difficult for an adjudicator being an expert in six states.679 He went on to say that in his experience, CPD arrangement may not be an effective measure to improve the quality because it’s difficult to convince adjudicators to change how they operate. In contrast, another expert found that imposing mandatory and effective CPD schemes will definitely help improve the quality of adjudication outcome.680

Most of those views are informative and novel. They provide not only a better understanding of the impact of lack of regulations in the appointment and eligibility of adjudicators but also a proof that many adjudicators are under-performing for different reasons (as mentioned above) and they are not supposed to practice. This critical area would need further investigation which is beyond the scope of this study.

676 Senior adjudicator and construction lawyer based in Queensland.
677 Construction lawyer based in South Australia.
678 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
679 Adjudicator and Construction lawyer based in Western Australia.
680 Senior adjudicator practicing in NSW and Queensland.
7.4.5 Jurisdictional arguments

Most experts identified another problem with the operation of statutory adjudication as being that adjudicators are required to deal with jurisdictional arguments, a task for which they are not adequately trained. They further claimed that some jurisdictional arguments can be too complex to be dealt with by adjudicators with insufficient legal training. One expert said that many adjudicators with legal backgrounds find it too complex to deal with quantification, construction programme or quality standards of construction works.\textsuperscript{681} Another one said that “almost all cases that come before an adjudicator is, first of all, objection to jurisdiction, and in case that fails, that then goes on to deal with the merit.”\textsuperscript{682}

The owner of a major ANA said that his ANA only appoints legally qualified adjudicators if jurisdictional arguments are raised.\textsuperscript{683} He also said that if the jurisdictional arguments are only raised in the adjudication response where the adjudicator was appointed for his technical competences, then the ANA encourages that adjudicator to withdraw without charging a fee in order to appoint a qualified adjudicator. He further said that there is no regulation governing that issue and it is only a matter of good practice. He went on to say that some law firms and some preparers usually have a ready list of ten to twelve jurisdictional issues, and therefore, they usually raise the same jurisdictional objections. On the other hand, the same expert gave an interesting example as to the different approaches of adjudicators in dealing with jurisdictional issues by saying:

“The most common complaint by parties is not so much on jurisdiction but it is because they reckon that the adjudicator charged too much. The adjudicator wrote 140 numbered paragraphs on issues or jurisdiction which another adjudicator could have dismissed with 3 paragraphs. So, the first adjudicator was going out of his way to write a book in relation to the issues.”

Apparently, there are some real practical problems associated with the jurisdiction of adjudication where the legislation falls short to tackle them adequately, as mentioned above, even in Queensland where some amendments were introduced to encourage better practices in dealing with the jurisdiction of adjudicators. For instance, the

\textsuperscript{681} Senior adjudicator with quantity surveying background based in Victoria.
\textsuperscript{682} Barrister and solicitor based in Western Australia.
\textsuperscript{683} Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
amendments did not impose any duty on adjudicators to avoid unnecessary expenses in dealing with jurisdictional challenges.

### 7.4.6 Delaying tactics

A leading lawyer and adjudicator mentioned delaying tactics as another significant problem that undermines the object of the SOP legislation. He explained that if there is a large amount involved, the respondent will do anything to delay payment such as challenging the adjudication determination in the Supreme Court. He went on to say that the rate of interest is usually very small compared to what the respondent is making by using the money on other contracts or investing it in the short-term money market, so even if the respondent loses the application to Supreme Court, it will still make money, simply because it is holding the money longer. He also mentioned another advantage for respondents in taking the claimant to the Supreme Court is that a subcontractor who desperately needs money may become insolvent before any court ruling is made for the respondent to pay. A WA lawyer agreed with this and explained the sort of pressure that lawyers face when respondents challenging adjudications by quoting one of them saying: “If you win, my client will fold his company. If you lose, my client will keep his company going and get legal costs off you.”

Another practicing adjudicator in Victoria claimed that the number of challenged adjudications in court is not a good indicator of the quality of adjudication determinations because many respondents have got to do something to avoid paying while they are in the context of time to negotiate an overall settlement of much bigger disputes. He further added that whether or not a determination is appealed is not solely decided by lawyers thinking about whether or not they are going to win. A practicing lawyer explained the approach of respondents in playing that game by saying “the respondent might be saying: Well, if the decision comes back at $800,000 I might play my jurisdiction card but if it comes back less I’m very happy with the decision. I’ll just keep it in my top pocket.”

These views uncover many unacceptable practices exploiting the loop holes in the legal system which enable respondents to challenge any adjudication determination by way of judicial review without having to pay the adjudicated amount in court. Until

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684 Senior adjudicator and construction lawyer based in NSW.
685 Adjudicator and Construction lawyer based in Western Australia.
686 Senior adjudicator with quantity surveying background based in Victoria.
687 Arbitrator, adjudicator and mediator based in Victoria.
the time of writing of this thesis, no measures have been taken or proposed to address this major problem that frustrates the object of the SOP legislation.

7.4.7 Judicial intervention

One of the identified problems that was repetitively mentioned by the experts is the court involvement in adjudication process. Most of the experts believe that judicial intervention in statutory adjudication creates a significant barrier against securing smooth cash flow within the industry as intended by the SOP legislation. An adjudicator explained the nature of the emerging problems by saying:

“After Kirk, courts started to interfere with the conduct of adjudicators using judicial review to expand the notion of jurisdictional errors. I think it is a quite contrary to the intent of Parliament. This has inhibited companies using adjudication because they feel it will end up in court. It is an inhibiting factor and claimants start to say why not to litigate or arbitrate straight away and what is the point if adjudication is always prone to judicial review despite being an interim measure. A body of case law has been built up which is so complex that an average engineer or QS can’t understand.”

A construction lawyer in Queensland said that judicial intervention effectively frustrated the operation of the Act in Queensland as the court is too slow to hear and make judgments and subcontractors will need to wait for their money until then. Another expert said that only the big matters get to the court and most of them fairly involve senior adjudicators. That view was shared by another expert who said that a party will never invest money in engaging lawyers and experts to defend its case in the Supreme Court unless there is substance which should be a minimum of AUS$50,000. A lawyer clarified the losses incurred by winning claimants when they try to enforce the determination in court:

“A respondent will let a claimant commence legal proceedings, and then offer to pay the adjudication amount. Then, there would be a negotiation about what

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688 In Kirk v Industrial Relations Commission of New South Wales [2010] HCA 1, it was held at [100]: “Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.”

689 Senior adjudicator, arbitrator and construction lawyer based in Western Australia.

690 Construction lawyer based in Queensland.

691 Senior adjudicator and construction lawyer based in NSW.

692 Senior adjudicator and construction lawyer based in Queensland.
extra interest and what legal fees, but by that stage, the claimant is so desperate that it will probably forgo interest and legal fees to get its money." 693

Another expert claimed that judicial review is a major backwards step because it increases the cost forcing many adjudicators to put more protective materials in their determinations. 694 This observation reconciles with the comments made by Bergin J regarding the ‘catch-all’ statements used by some adjudicators to fend off an allegation that they have failed to consider a relevant matter. 695 Another lawyer explained how costly the involvement of courts in adjudication is by saying: “You can have two applications at different forums; one application to enforce the award and another application to quash the award or to set it aside”. 696 He further said that in WA, it is quite possible that you get two different judicial officers considering the same matter. Another one said: “the legal costs of running an application to set aside a decision would have to be five times more than the actual adjudication preparation.” 697 He added that normally, the losing party of a challenged case would be required to pay 70% of the other party’s costs and that percentage increases to 90% as indemnity costs if the conduct of the losing party was bad.

Experts have different opinions with regard to the effectiveness of judicial review avenues in preventing injustice in adjudication and improving the quality of adjudication outcome. Some experts mentioned that the object of the legislation has been undermined as judges, who have no construction experience, used to examine very fine legal and administrative issues in adjudication determinations. Another expert said that “different judges have different opinions on the same thing and they are always keen to push their own opinions.” 698 He further said that he prefers to keep any appeal within the local civil tribunal of three to four members rather than court. In contrast, some experts advocated that the availability of judicial review has clarified some ambiguities in the application of the legislation and provided directions for adjudicators to better deal with cases. A practicing lawyer found good benefits of having judicial review and argued that adjudicators, by reading the published court decisions, have learnt to improve their reasoning and there is no doubt that adjudicators

693 Adjudicator and Construction lawyer based in Western Australia.
694 Adjudicator and Construction lawyer based in Western Australia.
696 Barrister and solicitor based in Western Australia.
697 Senior Associate practicing in Queensland and Victoria.
698 Adjudicator and Construction lawyer based in Western Australia.
now are a lot better at not falling into a jurisdictional error because there have been many published decisions about what is jurisdictional error and what is not.699

The above results confirm that judicial intervention, being excessive, tends to be a problem rather than a necessity for the smooth operation of the SOP legislation. This shift requires some novel smart measures that maintain the supervisory powers of supreme courts over adjudication whilst keeping the majority of challenge applications away from judicial system by, for example, introducing an alternative arrangement that provides a more convenient remedy.700

7.4.8 Involvement of lawyers

The vast majority of experts believe that the whole lifecycle of the adjudication process becomes dominated by lawyers. A government official said that a lot of people retain counsel in Victoria and most of issues are legal.701 A Victorian adjudicator commented on the legislative amendments made in 2007, namely the raft of exclusions and introduction of the complex review mechanism within the legislation which eventually led to the fact that technical people get out of the process and lawyers become dominant hijacking the system.702 A WA lawyer explained the root of the problem by saying:

"one of the problems caused by judicial reviews is that it’s thrown up so much more case law that if you don’t – if you aren’t legally represented or you are legally represented by a lawyer that’s not a construction law specialist then whatever chance you have is going to be significantly diminished."703

The involvement of lawyers does not reconcile with the purpose of the SOP legislation704 that was primarily devised to help vulnerable class of subcontractors. Those subcontractors are faced with a piece of legislation that is not user-friendly. Also, those subcontractors will not be able to cope with the tremendous dynamic case law on adjudication when they prepare or defend their claims. They are left with no option but to engage lawyers to handle their claims where none of the legal costs will be recovered even if they get a favourable adjudication decision. Eventually, the cost

699 Construction lawyer based in Queensland.
701 Legislative Advisor at the Victorian Building Authority (VBA).
702 Senior adjudicator with quantity surveying background based in Victoria.
703 Adjudicator and Construction lawyer based in Western Australia.
704 In many jurisdictions, the SOP legislation prohibit legal representation.
incurred on being involved in the adjudication process may eat up a major portion of the adjudicated amount making the process less viable and attractive to many small players in the industry.

7.5 Mitigating measures:

In addition to the introduction of review mechanism within the legislation (which was fully analysed in a separate article),\textsuperscript{705} the analysis of industry stakeholders with regard to other necessary mitigation measures, to address the above problems, can be categorised under the following sub-headings.

7.5.1 Following Queensland Model as Amended

Many experts mentioned the recent reform in Queensland that aimed to improve the quality of adjudicators as an ultimately positive step towards improving the quality of adjudication decision-making and fairness. Accordingly, a construction lawyer in Queensland commented that a review mechanism may not be needed in Queensland.\textsuperscript{706} He also noted that removing the bias in the process in Queensland has effectively improved the quality of adjudication decisions. However, the owner of a major ANA addressed a significant drawback in the recent amendments and argued that the adjudication process of complex claims in Queensland now takes up to six months (if started before Christmas) which contradicts the interim and rapid nature of adjudication.\textsuperscript{707}

7.5.2 Improve the Regulation of Adjudicators & ANAs

A construction lawyer viewed that the best way to improve the adjudication outcome is to improve the quality of adjudicators rather than improving the process of adjudication.\textsuperscript{708} Another adjudicator suggested to increase the minimum standards for adjudicators, so only competent and well experienced adjudicators can practise.\textsuperscript{709} A senior adjudicator noted that the quality could be improved if the number of accredited adjudicators is reduced.\textsuperscript{710} He justified that by saying:

\textsuperscript{706} Construction lawyer based in Queensland.
\textsuperscript{707} Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
\textsuperscript{708} Construction lawyer based in South Australia.
\textsuperscript{709} Senior adjudicator based in Victoria.
\textsuperscript{710} Senior adjudicator practicing in NSW and Queensland.
“When I ran an authorised nominating authority I kept my panel reasonably small because it seemed to me you have an obligation to give people at least ten to fifteen adjudications a year. There is no reason for them to maintain their private reading, get their skills up and attend seminars or do whatever. So, there are adjudicators who do two or three adjudications a year, and that is very dangerous.”

On the other hand, the owner of a major ANA said that the better solution is to ensure that the ANA is required under the Code of Conduct to pay greater attention to the standard of quality of the work performed by adjudicators after the event (not during or before) and that if it is proven that the ANA is not performing those duties to the standard that can be reasonably expected then the appropriate processes can be followed in terms of the authorisation of the ANA. 711 He said that as part of the internal peer review process, where many flaws are found in the determination, it is likely that the errant adjudicator undergoes further training or engages in a mentoring arrangement when adjudicating further cases. He further said that if the adjudicator’s performance does not improve, he or she will be disqualified to receive further referrals.

7.5.3 Improving the drafting of legislation

Some experts criticised the current drafting of legislation and calls for better drafting of legislation and making the legislation more consistent in order to improve the quality of determinations. A construction lawyer and adjudicator said the poor quality of determinations is caused by the poor drafting of legislation and he gave an example of the improvement in the Queensland model which, he said, has reduced the number of Supreme Court challenges significantly. 712 A Victorian adjudicator criticised the complex drafting of the Victorian Act. 713 In addition, he proposed that reference dates should be up to the adjudicator to determine and should be by the end of each month. He went on to suggest that a legislative amendment is needed to ensure that all construction contracts be registered to use the Act.

An adjudicator said that there are 15 different timelines in the Act making it too complex and not user friendly to vulnerable subcontractors who are not sophisticated.

711 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
712 Senior adjudicator and construction lawyer based in Queensland.
713 Senior adjudicator with quantity surveying background based in Victoria.
enough to be able to work through the timelines. Another adjudicator agreed and viewed the lack of education as another barrier deterring small subcontractors from using adjudication by saying:

“I think that the system ought to be helping smaller contractors get paid because they’re often the ones that get done over. On the other hand, a lot of them don’t have the management skills. They aren’t terribly good with their invoices or their contracts and they don’t like having an argument with the boss because they might not get another job and they’re then left without money for six months. They’re the ones that need help but the help that they need is probably business training and management skills rather than this particular system.”

A senior adjudicator said that harmonising the legislation in Australia is worthwhile. Many experts favoured the West Coast model over the East Coast model for its simplicity. One practicing adjudicator in WA said:

“At least in WA, what you've got is fairly simple legislation that perhaps doesn't solve all of the problems that can arise, and the more you try and solve particular problems, the more complicated it gets, and there's a value in having a simple system... even if it doesn't work well always, there's a value in having a fairly simple system. It's a trade-off and it's hard to get that balance between simplicity and comprehensiveness.”

### 7.5.4 Legislative Review mechanism

Many experts suggested to introduce a legislative review mechanism of erroneous determinations. They look at the review mechanism as a quality assurance, quality control or a peer review process. One adjudicator said that there is always a need to offer another set of eyes to build confidence in the system. An academic noted that the experience in Singapore tells that the mere existence of a review mechanism and possibility seems to improve the chances that an adjudication will be done well. He meant that the fear of having a peer say that the determination was made incorrectly

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714 Accredited adjudicator and independent arbitrator based in Singapore.
715 Senior adjudicator, arbitrator, mediator and construction lawyer based in Western Australia.
716 Senior adjudicator practicing in NSW and Queensland.
717 Senior adjudicator, arbitrator, mediator and construction lawyer based in Western Australia.
718 Senior adjudicator based in Victoria.
719 Senior academic with law background based in Victoria.
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may of itself lead to greater quality. This statement was endorsed by a Singaporean adjudicator who acted as a review adjudicator on many occasions.\(^\text{720}\) Another one said that essentially there has to be some check on the adjudicators exercising jurisdiction and performing their process properly, because even adjudicators who are also practicing lawyers have been taken on judicial review and they have got it wrong.\(^\text{721}\)

Some experts supported the idea of introducing a review mechanism in other jurisdictions such as NSW but raised concerns regarding its disadvantages as it will add more delays and costs to adjudication process. A construction lawyer from Queensland suggested: “if you did have a review process it should be in the legislation and it’s a precondition to a court review”.\(^\text{722}\)

A construction lawyer said the review mechanism will be redundant if a court review is followed afterwards.\(^\text{723}\) Another one said it would be of no value if we could actually get to the point where adjudicators are producing better-quality decisions and making their decisions on proper basis that people objectively can understand. \(^\text{724}\)

7.5.5 Peer Review Scheme

A construction lawyer suggested to provide the adjudicator with the power to get his or her decision peer reviewed before releasing to the parties where both parties should share the cost of the peer review.\(^\text{725}\) He gave an example of the International Chamber of Commerce’s internal court that it reviews all arbitration awards before they are published but it cannot alter the tribunal’s decision and its main role is to make suggestions. Another adjudicator practicing in WA proposed that if parties want a merits review of the adjudicator’s decision; they should pay a fee in order to have a senior adjudicator nominated to have another look at the case.\(^\text{726}\) A construction lawyer agreed with the approach of independent peer review by saying:

“The idea of an independent body reviewing adjudication determinations and seeing whether adjudicators can maintain their ticket is also an idea that attracts me, because that does not add a review process for the parties, but it

\(^{720}\) Accredited adjudicator and independent arbitrator based in Singapore.

\(^{721}\) Construction lawyer based in WA.

\(^{722}\) Construction lawyer based in Queensland.

\(^{723}\) Construction lawyer based in Queensland.

\(^{724}\) Construction lawyer based in South Australia.

\(^{725}\) Construction lawyer based in Queensland.

\(^{726}\) Barrister and solicitor based in Western Australia.
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does tell the adjudicators that somebody is going to be looking over their shoulder and seeing whether or not they actually apply well-expressed logic and reasoning.”

The owner of a major ANA said that his ANA has very robust internal review systems. He explained that if the ANA has concerns about the quality of adjudication, then it is usually activated through a complaints system and internal peer review process following the release of determinations.727 He explained about the peer review mechanism, which usually takes 15 business days, by saying:

“Our reviews are being conducted and always done by at least two senior adjudicators and they do them separately, so we get two reports on the matter that's the subject of a complaint, and those reports are prepared with iron curtains so that neither adjudicator sees the report of the other senior adjudicator, so they're quite independently prepared and if they both agree then it makes my life easier. If they don't agree then that makes my life more difficult. It's a very robust system that we have and it's also very expensive and time consuming, but it's a system that we've had in operation for some time which all of our adjudicators are familiar with because they're required to sign up to it when they come on board our panel.”

7.5.6 Introduce a construction court

A construction lawyer practicing in Queensland claimed that there is often judges that are not suitable for construction law disputes, giving the decisions. He suggested that there should actually be a specific couple of judges, appointed to do construction law matters as it works in England. He went on to say that in England, there is a lot better construction law decisions coming out than its counterparts in Australia in terms of quality of reasoning.728 This view was supported by the owner of a major ANA who said that poor decisions of some judges (who have no construction background) significantly influence the judicial system where parties need to wait for months until a more experienced judge within the industry comes to correct it.729

727 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
728 Construction lawyer based in Queensland.
729 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
7.6 Concluding remarks:

Despite the general consensus that statutory adjudication has helped many vulnerable subcontractors and suppliers get timely payment, this empirical study demonstrated that the legislation is proving ineffective at delivering quality outcomes in the adjudication of complex payment disputes. The study found that the parties are usually investing in adjudication by appointing legal advisers and/or technical experts if considerable monetary amount is the subject of dispute which results in a more complex payment dispute. The parameters of complexity in adjudication were also identified which include the nature and size of the dispute, the amount in dispute, inclusion of expert reports, raising legal arguments regarding jurisdictional issues and contract interpretation.

The study identified many operational problems jeopardising the attainment of the object of the SOP legislation such as bias of ANAs, short adjudication timeframes, inadequate regulations of adjudicators, jurisdictional challenges, involvement of courts and lawyers, complex drafting of the legislation. The study also analysed the views of industry experts with regard to the opportunities for improvement in the operation of the SOP legislation such as following the Queensland model as amended and introducing peer review process. It also suggested specific amendments to make the legislation a more user-friendly. The implication of this study is a better understanding of the most critical problems inherent in statutory adjudication that need serious consideration by the legislatures and policy makers. In addition, the study also provides some practical measures as suggested by the industry practitioners for each identified problem which may stand as a reliable reference for potential reform in the security of payment laws.
8. CHAPTER 8: EFFECTIVENESS OF EXISTING ADJUDICATION REVIEW MECHANISMS: VIEWS OF INDUSTRY EXPERTS

*Journal Paper, Peer reviewed*


This thesis chapter is an exact copy of the journal paper in its final published form. (except for formatting, numbering and referencing that were varied to reconcile with the format of the thesis).

**ABSTRACT**

Some jurisdictions allow for an express limited right of aggrieved parties to apply for adjudication review as a way to remedy injustice caused by the speedy adjudication process. The aim of this paper is to examine the effectiveness of the existing review mechanisms and identify whether the notion of review mechanisms is a good idea. The paper adopts a combination of doctrinal legal research (black-letter law) and socio-legal research (empirical research) The empirical research involves interviews with 23 industry experts practicing in different jurisdictions in the area of statutory adjudication. The paper analyses the views of experts regarding the operation of review mechanisms in their jurisdictions and investigates the factors influencing their effectiveness. The paper concludes that if an effective review mechanism is devised to counter the barriers of cost and time, the arguments in support of the need of review mechanism would outweigh opposing arguments.

**Keywords:** judicial review, jurisdictional error, review mechanism, security of payment, statutory adjudication.
8.1 Introduction:

Courts, in recent years, have been more willing to intervene in adjudication process due to poor quality of adjudication outcome. This situation has encouraged aggrieved parties to challenge adjudication determinations by way of judicial review resulting in numerous judicial review applications. This has eroded the original object of the security of payment legislation. Some jurisdictions allow for an express limited right of aggrieved parties to apply for adjudication review as a way to remedy injustice caused by the speedy adjudication process. Notwithstanding the fact that some scholars have commented on the effectiveness of existing review mechanisms, there is very limited empirical research conducted to examine the need and viability of those mechanisms in statutory adjudication.

8.2 Research method

The paper adopts a combination of doctrinal legal research (research in law) and interdisciplinary research (research about law). The doctrinal legal research asks what the law is regarding a particular issue by analysing legal sources while the interdisciplinary research (non-doctrinal legal research) is about law and it usually engages empirical data. The combination of the two legal research methods is adopted to benefit from the strength and advantages of each method.

The doctrinal legal research is concerned with the analysis of the legal doctrine and how it has been developed and applied. In this method, the analysis is interpretive and qualitative in nature. The doctrinal method is characterised by the study of legal texts, therefore, it is informally described as “black-letter law”. The analysed legal sources include the relevant statutes, case law, parliamentary debates, discussion reports, governmental reports, legal journals and commentaries.

In social research, the use of “expert interviews” as a method of qualitative empirical research has long been popular as it offers an effective means of quickly obtaining


733 Chynoweth, above fn 732, pp.28-38.
good results. Conducting expert interviews can serve to shorten time-consuming data gathering processes, where experts can provide practical insider knowledge and avoid the necessity to interview a wider circle of players. "As a method, the expert interview appears to be “quick, easy, and safe” in its application, and it promises to be of good practical value." A purposive sampling method was adopted to identify the potential experts who are experts in the field in Singapore, Victoria, New South Wales, Queensland, Western Australia, South Australia and the Australian Capital Territory. The experts were selected based on their specific experiences relevant to the research area under investigation. The experts mainly belong to two main groups: adjudicators and construction lawyers.

52 invitations were sent out. Eventually, only 23 out of the 28 experts have participated in the research. That was a satisfactory sample size in accordance with the well-established guidance that the minimum number of interviews needs to be between twenty and thirty for an interview-based qualitative study to be published. The 23 interviews were conducted over a period of five months between 28 October 2015 and 23 March 2016. Most of the interviews were conducted by phone being the most convenient way in terms of time and cost. The interview durations varied between 30 minutes to two hours but the majority were completed in one hour. All interviews were recorded with the permission of experts.

The experts mainly belong to two main groups: adjudicators and construction lawyers. Half of the experts have dual roles acting as adjudicators and construction lawyers. Many experts act as advisers for the parties during adjudication or enforcement proceedings. That is quite important as it ensures that the views of the parties are also considered in the research as conveyed by the interviewed experts. Most of the experts have more than 20 years of experience of dealing particularly with construction disputes and more than 10 years in dealing with statutory adjudication. This high level

735 Bogner et al, above fn 734, p2.
of experience increases the credibility of the participants’ views due to their broad knowledge and experience in construction disputes. It will also bring relevant, rich and concise views in terms of the research question being investigated. The vast majority of experts either possess legal qualifications or both legal and technical qualifications. This is understandable because statutory adjudication is dominated by legally trained professionals.

8.3 Existing adjudication review mechanisms:

8.3.1 Victoria

8.3.1.1 How does it work?

The Victorian Building and Construction Industry Security of Payment Act 2002 was amended in 2006 to introduce, inter alia, a review mechanism for adjudication determinations valued in excess of AUS$100,000 (accounting also for any ‘excluded amounts’, which are defined under section 10B to encompass, inter alia, non-claimable variations, amounts relating to latent conditions, time-related cost and breach of contract).738 The respondent can only apply for review if he or she has identified that amount as an excluded amount in the payment schedule or the adjudication response, has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts and has paid the alleged excluded amounts into a designated trust account (s 28B (4 to 6)). The review is carried out by a second adjudicator appointed by the original appointing ANA.

Interestingly, the Victorian Supreme Court has accepted at least two applications by respondents for judicial review. In doing that, the court has bypassed the review mechanism which emphasises that parties have the discretion to use either the review mechanism or the readily available judicial review avenue.739 In one of these applications, the respondent sought judicial review instead of review under the available legislative mechanism, and the court quashed the adjudicator’s determination remitting it back to the same adjudicator for reconsideration.740 The position of the Victorian Supreme Court becomes another inhibiting factor for the effective use of the

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738 Building and Construction Industry Security of Payment Act 2002, s 28A (a) & 10B.
739 See Maxstra Constructions Pty Ltd v Gilbert t/as AJ Gilbert Concrete [2013] VSC 243; Seabay Properties Pty Ltd v Galvin Construction Pty Ltd [2011] VSC 183.
740 See Maxstra Constructions Pty Ltd v Gilbert t/as AJ Gilbert Concrete [2013] VSC 243.
review mechanism. Another possible strategic reason for a respondent's bypassing the legislative mechanism and seeking judicial review would be to avoid making payment to the claimant. In the context of judicial review, the respondent will only be required under the Act to pay the unpaid adjudicated amount (usually the full amount) in court as security (s 28R 5 (b)). This contrasts with the more demanding requirement under the legislative scheme to pay the claimant the adjudication award value, as well as to pay the alleged excluded amounts into a designated trust account.

8.3.1.2 Views of experts

All of the experts who are familiar with the review mechanism in Victoria were of the opinion that it is completely ineffective because of two main reasons. First, the drafting of sections related to excluded amounts, the subject of the review, is very complex. Secondly, its scope is too limited. An official from the Victorian Building Authority commented:

“In 2013-2014 no review applications were made in Victoria. In the 2015 financial year, we got one. It is already criticized as being barely used. ‘Excluded amounts’ is a problematic issue within the legislation. Too much interpretation by the court was also made which was not fun to read. The bigger players are very happy to use the regime as indicated from the statistics.”

An adjudicator linked the introduction of excluded amounts in 2007 amendments with the government intention to be well protected when it becomes a party to adjudication from determinations in large sums that could be made in the favour of claimants. Another adjudicator said that the way the amendments were drafted to explain the conditions for accessing the review mechanism resulted in a large portion of time being spent by Victorian adjudicators in dealing with what is a claimable variation and what is excluded.

A follow up question was raised before a third adjudicator as to why parties opt to bypass the internal review mechanism and challenge the determination in the Supreme

741 Legislative Advisor at the Victorian Building Authority (VBA).
742 Senior adjudicator with quantity surveying background based in Victoria.
743 Senior adjudicator based in Victoria.
744 Senior adjudicator, arbitrator and mediator based in Victoria.
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Court. He replied that there is no point to activate the review mechanism if the party is intending to take the case to the Supreme Court or even Court of Appeal following the review decision. He gave an example of a case relating to an excluded amount that he was involved in where the same judge of the Victorian Supreme Court has granted appeal of his decision to the Court of Appeal which, he said, indicates that the judge was not certain of his decision.

The views regarding the ineffectiveness of Victorian review mechanism are broadly not surprising as they confirm earlier findings. However, it was quite interesting to find out that even judges find difficulty in interpreting the Victorian legislation. Arguably, this could be reason as to why the Supreme Court judges in Victoria, despite the persuasive High Court authorities, usually accept to review challenge applications that should have been made before review adjudicators in the first place.

8.3.2. Singapore

8.3.2.1 How does it work?

The Singapore Building and Construction Industry Security of Payment Act 2004 (the SG Act) sought to establish a fast and low-cost adjudication system to resolve payment disputes. It substantially followed the NSW model with some key differences. The most significant difference is the introduction of an adjudication review mechanism allowing an aggrieved respondent to have the adjudicator’s determination reviewed by another adjudicator or a panel of adjudicators on its merits.

The Singaporean review mechanism is only accessible to respondents provided they have served a payment response and have paid the unpaid adjudicated amount to the claimant. The respondent must pay the adjudicated amount to the claimant in the first place to be entitled to apply for review (s 18(3)). This seeks to ‘fulfil the legislation mission and purpose of facilitating smooth and prompt cash flow.’ The review application must be lodged within seven days of obtaining the adjudication.

745 See, eg, Maxstra Constructions Pty Ltd v Gilbert t/as AJ Gilbert Concrete [2013] VSC 243; Seabay Properties Pty Ltd v Galvin Construction Pty Ltd [2011] VSC 183.
747 See The Queen v Cook; Ex parte Twigg [1980] HCA 36 [29], [30] and [34]. See also Re Baker; Martin CJ in Re Carey; Ex parte Exclude Holdings Pty Ltd [2006] WASCA 219 [128] - [140].
determination (s 18(2)) provided that there exists a disparity between the adjudicated amount and the relevant response of SG$100,000 or more.

The respondent must apply for the review to the same ANA with which the original application was served. The review application must include a proof of payment of the adjudicated amount to the claimant and a copy of adjudication determination (s 10(2)). Upon receipt of the review application, the ANA has seven days only (s 18(6)) to appoint one adjudicator or a panel of three adjudicators if the difference exceeds SG$1 Million. The review adjudicator must only have regard to the matters referred to in section 17 (3) and the adjudication determination that is the subject of the adjudication review (s 19 (6a)). This could mean that new reasons and fresh evidence from parties cannot be entertained in the review proceedings.

The review determination must be issued to the parties within 14 days (s 19(3)). It may replace the original determination or reject the review application. The cost of adjudication review will be proportionally borne by the parties to the extent each party was successful (s 19 (5d)).

The ambit of adjudication review was not clear until the Singaporean Court of Appeal handed down its decision in *Lee Wee Lick Terence v Chua Say Eng*. In that case, the court held that adjudicators do not have the competency to deal with jurisdictional issues apart from the basic function required by the legislation. The Court also held that any jurisdictional objection must be raised immediately with the court and not before the adjudicator.

8.3.2.2 Views of experts:

The two interviewed adjudicators practicing in Singapore noted that their review mechanism was successful to capture erroneous determinations and did not highlight any significant shortcomings from the existing review mechanism in their jurisdiction. They both mentioned that the Act is silent about some issues such as the right to raise new evidence in the review which was a bit confusing to review.
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adjudicators. One of them said because of the available review mechanism, Singaporean adjudicators take a more careful look at the merits of the case.\textsuperscript{754} He went on to say that where there is no review, some adjudicators, confined by time constraints, may take a very broad brush approach that may prejudice a party’s rights.

With regard to the scope of review mechanism, a follow up question was raised as to whether review adjudicators are expected to consider jurisdictional objections. The learned expert who sat as a review adjudicator on many occasions responded that sometimes, the merits are intertwined with the jurisdictional challenges. He explained this further by providing an example of a payment claim served out of time.\textsuperscript{755} He went on to say that the review adjudicator cannot proceed to look at the merits without determining whether or not the payment claim is valid. He clarified that the Court of Appeal has decided that challenges in jurisdiction has to be made in the court. Accordingly, he argued that many adjudicators proceed to say on the face of the payment claim, is it valid or not before examining the merits. He further proposed that adjudicators should have the power to determine their own jurisdiction to deal with these matters.

On a separate matter, the same expert clarified that a party in the review process is allowed to add a new reason but obviously the other side must be given the right of reply. He further explained the nature of appeal via the review mechanism in that:

“it is not entirely de novo in the sense that you disregard everything, because there are certain boundaries, the parties are still bound by the payment claim, they’re bound by the payment response, they can’t introduce anything that is not in the payment claim and the payment response, so that limitation is still there, but in the terms of submission they are not limited to what they had remitted in the first conference.”

Some Australian experts were provided a brief of the Singaporean review mechanism and they found it to be interesting and worthwhile of consideration. One expert found it very effective, especially with the feature that respondents must pay first in order to access the review mechanism.\textsuperscript{756} The owner of a major private ANA argued that the

\textsuperscript{754} Accredited adjudicator and independent arbitrator based in Singapore.

\textsuperscript{755} Accredited adjudicator and independent arbitrator based in Singapore.

\textsuperscript{756} Senior academic with law background based in Victoria.
advantages of Singapore are basically what his ANA has been trying to get into NSW for years.\textsuperscript{757} Another expert reasoned that the better quality of adjudication in Singapore as compared to Australia is due to Singapore’s cultural background in favouring arbitration and that many Singaporean adjudicators are practicing arbitrators.\textsuperscript{758}

It can then be broadly said that the features of the Singaporean review mechanism are well devised to protect the object of the SOP legislation. The main three controversial features are: 1) the respondents have to pay the adjudicated amount to be entitled to access the review mechanism and 2) the scheme is not available to claimants aggrieved by the adjudicator’s decision, 3) the scheme is not open for reviewing jurisdictional objections as decided by the Singaporean Court of Appeal.\textsuperscript{759} Those could be inhibiting factors which may respond to earlier observations as to why the Singaporean model is not widely used in Singapore.\textsuperscript{760}

\textbf{8.3.3 Western Australia (WA)}

\textbf{8.3.3.1 How does it work?}

Under the Western Australian \textit{Construction Contracts Act} 2004, 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. The 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 (section 31(2)(a). This review is carried out by the State Administrative Tribunal (WASAT). Similarly, the Northern Territory’s \textit{Construction Contracts (Security of Payments) Act} 2004 allows a review of an adjudicator’s decision by a Local Court to dismiss an adjudication application without making a determination of its merits (s 48). The grounds for dismissing applications are similar to those in WA (s 33 (1)(a)).

\textsuperscript{757} Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.

\textsuperscript{758} Construction lawyer based in South Australia.

\textsuperscript{759} \textit{Lee Wee Lick Terence v Chua Say Eng} [2012] SGCA 63.

\textsuperscript{760} Munaaim, M. E. (2012) Developing a framework for the effective operation of a security of payment regime in common law jurisdictions, Doctor of Philosophy, King’s College London.
The WASAT has jurisdiction to review the adjudicator’s decision to dismiss upon application by either party. 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.\textsuperscript{761} If the decision is reversed and remitted, the adjudicator is to make a determination within 14 days after the date on which the decision was reversed, or any extension of that time consented to by the parties (section 46 (2)).

A review by the WASAT involves a hearing \textit{de novo} on the merits in which material that was not before the decision-maker may be considered.\textsuperscript{762} Interestingly, section 46 (3) of the WA Act 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 \textit{Red Ink Homes Pty Ltd v Court}\textsuperscript{763} stating that the provision only limits the appealing before the Tribunal, while judicial review will still be open for the aggrieved party. Also, section 105 of the WASAT Act provides for an appeal to the Supreme Court from a decision of the WASAT provided the Court gives leave to appeal which is limited only on a question of law.

\textbf{8.3.3.2 Views of experts:}

The experts in WA had different views as to whether the current review mechanism by the State Administrative Tribunal (SAT) is effective. A practicing adjudicator in WA (who is also a member of SAT) said that in reviewing an adjudication ‘decision to dismiss’, one or two members may be appointed to hear the matter which is within the discretion of the President. \textsuperscript{764} He went on to say that the criteria of assigning one or more are not clear.

A WA practicing adjudicator said that if a party could have gone to the SAT, the WA Supreme Court normally would not take it on, because of the availability of a simple and cheap avenue where a party could have raised this.\textsuperscript{765} This view is consistent with

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{761} Under the \textit{State Administrative Tribunal Act 2004 (WA), section 29 (3).}
\item \textsuperscript{762} \textit{The State Administrative Tribunal Act 2004, s 27.}
\item \textsuperscript{763} [2014] WASC 52 at \{72\}–\{76\}.
\item \textsuperscript{764} Senior adjudicator, arbitrator, mediator and construction lawyer based in Western Australia.
\item \textsuperscript{765} Barrister and solicitor based in Western Australia.
\end{itemize}
\end{footnotesize}
the established WA case law in this regard. He added that judges, using their discretion, normally would not grant it in any case where the party should have gone to the SAT. He went on to say that it would be better if the SAT’s scope also includes review of adjudicators’ decisions ‘not to dismiss’ because the Supreme Court proceedings take much longer time to deal with similar cases.

In contrary, another WA practicing lawyer favoured to keep the review with the Supreme Court rather than the SAT because he thinks that decisions made by a member (as opposed to a judge) are perhaps not as reliable and understandable compared to Supreme Court decisions. This view was supported by another WA lawyer who made an observation that some people actually question the quality of the SAT’s decisions and they are not as clear as they should be. In answering a follow up question as to which avenue is faster (i.e. Supreme court or SAT), he answered: “both suffer from being slow and being a court style process where to get to the end, you know, like an urgent SAT review or a decision to dismiss will still take probably six months.”

There is no valid or convincing reason as to why the review mechanism is not open for aggrieved parties challenging the jurisdiction of adjudicators before the WASAT rather than the Supreme Court. This will, of course, require a better quality of members conducting the review in order to attract confidence in the system and attract aggrieved parties to this avenue for review over the Supreme Court. Apparently, the review mechanism seems successful in WA. However, there is a major scope for improving the operation of the review mechanism in WA in light of the above experts’ observations which should be taken into account when devising any effective review mechanism.

8.3.3 The Australian Capital Territory (ACT):

8.3.3.1 How does it work?

The Building and Construction Industry (Security of Payment) Act 2009 (the ACT Act) provides that an appeal may be made to the ACT Supreme Court on any question

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766 See, eg, Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd [2011] WASC 172 at [64]; Field Deployment Solutions Pty v Jones [2015] WASC 136 at [18].
767 Adjudicator and Construction lawyer based in Western Australia.
768 Adjudicator and Construction lawyer based in Western Australia.
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of law arising out of an adjudication decision subject to certain conditions being satisfied. Either party may appeal from an adjudication decision with either the consent of the other party or leave of the Supreme Court. According to Court procedural Rules (ACT) 2006, an application for leave to appeal should be filed not later than 28 days after the day on which the order appealed from is made, or any further time allowed by the Court.

The Supreme Court must not grant such leave unless it considers that having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the adjudication decision; and there is either a manifest error of law on the face of the adjudication decision, or strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law.

These restrictions on appeal are very similar to an appeal against an arbitral award pursuant to section 38(5) of the Commercial Arbitration Act 1986 (ACT).

The Supreme Court may confirm, amend or set aside the adjudication decision; or remit the adjudication decision, together with the Supreme Court’s opinion on the concerned question of law to either the original adjudicator for reconsideration; or a new adjudicator as may be appointed by the Supreme Court. If an adjudication decision is remitted, the adjudicator must make the new adjudication decision within 10 business days after the day the decision was remitted or within the time directed by the Supreme Court.

In addition, the ACT Act provides that the Supreme Court has jurisdiction to entertain any question of law if the adjudicator consents, or if the parties agree, provided that the determination of the question ‘might produce substantial savings in costs to the parties, and that the question of law is one in respect of which leave to appeal would be likely to be granted.’ This section is modelled closely on the appeal provisions under section 39 of the Commercial Arbitration Act 1986 (ACT). As such, it was argued that the right of appeal under the ACT legislation makes adjudication a judicial

769 Building and Construction Industry (Security of Payment) Act 2009 (ACT), s 43 (2).
770 Building and Construction Industry (Security of Payment) Act 2009 (ACT), s 43 (3).
771 Court Procedures Rules 2006 (ACT), rr 5072, Pt 5.2.
772 Building and Construction Industry (Security of Payment) Act 2009 (ACT), s 43 (4).
773 Building and Construction Industry (Security of Payment) Act 2009 (ACT), s 43 (6).
774 Building and Construction Industry (Security of Payment) Act 2009 (ACT), s 43 (7).
775 Building and Construction Industry (Security of Payment) Act 2009 (ACT), section 44.
process and, further, that the inherently substantial cost of defending Supreme Court proceedings will deter many small contractors from pursuing progress claims.\textsuperscript{776}

\textbf{8.3.3.2 Views of experts:}

The owner of a major ANA said that the review mechanism in ACT is a disaster to adjudication.\textsuperscript{777} He explained that many law firms advise clients in ACT not to go to adjudication but just go directly to court because respondents’ lawyers usually pick some legal issues, regardless of their soundness, and go to court, and in the meantime, the claimant is not being paid until that game is played in court. He also mentioned that the ACT Supreme Court has been allowing arguing in the court on matters that were never put to the adjudicator.

This observation conforms to the earlier findings that the right of appeal under the ACT legislation makes adjudication a judicial process and, further, that the inherently substantial cost of defending Supreme Court proceedings will deter many small contractors from pursuing progress claims.\textsuperscript{778} Surely, this scheme falls short in protecting the object of the SOP legislation. The researcher has already made similar observation about the excessive judicial intervention in his response to a relevant discussion paper in the ACT. That observation was quoted in the consultation report of the discussion paper entitled “\textit{Improving the ACT Building Regulatory system}” as provided below:

\begin{quote}
“Mr Samer Skaik considered the many problems that hinder the effective operation of the security of payments scheme. He provided a detailed submission on what he sees as two main and specific problems: the excessive court involvement (judicial review) in adjudication and the industry’s dissatisfaction with the quality of adjudicators’ determinations on the merits.”\textsuperscript{779}
\end{quote}


\textsuperscript{777} Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.


8.4 The need of an expanded review mechanism

8.4.1. Analysis of law

Notwithstanding the interim and rapid nature of statutory adjudication, it was judicially noted that there is “no proper basis to distinguish an adjudication for the purpose of maintaining cash flow from an adjudication to determine a party’s ultimate rights and entitlements.” They study found that an optimal adjudication process should maximise, within the legislative objective of expediency, the opportunity that adjudicators’ determinations are made in accordance with the correct and relevant law.

Typically, an aggrieved party in adjudication has no option but to initiate lengthy and expensive proceedings such as arbitration or litigation but the inherent cost of such proceedings may prevent the party from seeking justice. The remedy by way of judicial review is available in very limited situations. Therefore, many erroneous adjudication determinations have become final and binding decisions.

In addition, with the availability of the review mechanism, courts are likely to be more reluctant to exercise their discretionary powers to set aside adjudication decisions. In Singapore, Prakash J held in SEF Construction Pte Ltd v Skoy Connected Pte Ltd that the availability of a statutory merits review, with other factors, impliedly restricted judicial review in the High Court. In Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd, Kenneth Martin J also noted:

“As to discretion, the availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review. Circumstances where parties have been granted and hold alternative review options bear upon the availability of prerogative relief as a matter of discretion.”

Introducing review mechanism will improve the confidence and certainty in adjudication outcome, which is paramount in situations where claimants exercise their
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Statutory rights to suspend work if respondents do not pay the adjudicated amounts. However, the consequences of any work suspension may be devastating if the adjudication determination fails to resist challenges in courts. Vickery J observed this dilemma in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* and noted:785

“A contractor would be seriously inhibited in the exercise of its statutory right to suspend works if it suspected that its payment claim and the adjudicator’s determination made upon it could be vulnerable to attack on technical legal grounds. If the contractor made the wrong call, the consequences of suspending work could be prohibitive.”

On the other hand, improving the quality of adjudicators may not be a sufficient measure to avoid erroneous determinations. In Queensland, major amendments have been made to its SOP legislation in December 2014 to increase the quality of adjudication outcome such as allowing longer timeframes for complex claims and improving the selection and regulation of adjudicators. Interestingly, seven judicial review court applications were lodged after the amendment, (compared to 15 applications in the preceding year), in which the Queensland Supreme Court found that adjudicators committed jurisdictional errors in three cases.786 Moreover, adjudication of complex payment disputes received a lot of criticism as it became very lengthy and costly which makes the scheme more similar to curial proceedings.787

8.4.2 Views of experts:

Half of the experts liked the notion of introducing review mechanism within the legislation whilst the other half was completely against it. Many experts were not very familiar with the various legislative review mechanisms in other jurisdictions. Others did not have an actual experience in dealing with the review mechanism in their jurisdiction and were not very sure about how it works being rarely used as the case in Victoria. Some experts practicing in jurisdictions that do not have review mechanism found it more difficult to respond to questions relating to the purpose, need and likely features of effective review mechanisms. One of the initial experts approached the

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785 [2009] VSC 156; 26 VR 112 [47].
question whether or not a review mechanism is needed by asking a philosophical question:

“What are we trying to achieve here? Are we trying to achieve a perfect outcome, so we’re designing a Rolls Royce process so that we will get the best outcome to what at the end of the day is a progress payment, or are we trying to achieve a process where the focus is on the money flowing to enable the construction to continue to go?” 788

Many experts look at the notion of review mechanism as a quality assurance, quality control or a peer review process. One adjudicator said that there is always a need to offer another set of eyes to build confidence in the system. 789 Many experts mentioned the recent reform in Queensland that aimed to improve the quality of adjudicators as an ultimate positive step towards improving the quality of decision-making.

An academic 790 noted that the experience in Singapore tells that the mere existence of a review mechanism and possibility seems to improve the chances that an adjudication will be done well. He meant that the fear of having a peer say that the determination was made incorrectly may of itself lead to greater quality. This statement was endorsed by a Singaporean adjudicator who acted as a review adjudicator on many occasions. 791 Another one said that essentially there has to be some check on the adjudicators exercising jurisdiction and performing their process properly, because even adjudicators who are also practicing lawyers have been taken on judicial review and they have got it wrong. 792

Some experts supported the idea of introducing a review mechanism in other jurisdictions such as NSW but raised concerns regarding its disadvantages as it will add more delays and costs to adjudication process. A construction lawyer from Queensland suggested: “if you did have a review process it should be in the legislation and it’s a precondition to a court review”. 793 A leading practitioner in NSW said that the whole review mechanisms are bad things if they can serve to delay the

788 Construction lawyer based in South Australia.
789 Senior adjudicator based in Victoria.
790 Senior academic with law background based in Victoria.
791 Accredited adjudicator and independent arbitrator based in Singapore.
792 Construction lawyer based in WA.
793 Construction lawyer based in Queensland.
implementation of the interim decision. A Victorian adjudicator agreed by saying that the review mechanism would improve the industry confidence but it may be against the object of the Act. A practicing adjudicator and lawyer opposed the notion of review mechanisms by saying: “if a jurisdiction is looking to implement a review adjudication model that suggests to me that they misunderstand the concept of what adjudication is all about.” He went on to say that if there are concerns in the industry that it is too expensive to litigate in the Supreme Court to overturn a decision, the evidence is not there to support that argument. Interestingly, a practicing lawyer in Queensland criticised the court process of reviewing jurisdictional challenge applications as being too slow to match the demands of the industry. He gave an example of a court application made in November where the first court day for a hearing was in March of the next year.

One expert observed that big corporates in large cases will go to supreme courts anyway whether or not they believe the adjudicator made a right decision. He went on to say that judges do not think adjudicators should be deciding large amounts which should be matters for the court to decide. Another practicing adjudicator in WA said:

“The idea (and it doesn't always work this way) in WA is that in dealing with monthly progress claims, you would hope that in that context, the amounts of the claims would be smaller. It would be for a month work rather than a year work and it would be a month of disputes rather a year of dispute. In that sort of context, there is sort of hope that the amount would not be sufficient to warrant having another check.”

Experts were asked as to when any review mechanism becomes redundant. A construction lawyer said it will be redundant if a court review is followed afterwards. Another one said it would be of no value if we could actually get to the point where adjudicators are producing better-quality decisions and making their decisions on proper basis that people objectively can understand.
8.5 Concluding remarks:

The paper critically analysed and examined the operation of different adjudication review mechanisms in Australia and Singapore. The study revealed that there are many shortcomings as well as opportunities to improve the operation of the existing mechanisms. Many experts looked at the notion of review mechanism as a quality assurance, quality control or a peer review process. Some experts claimed there is always a need to offer another set of eyes to build confidence in the system and noted that the mere existence of a review mechanism seems to improve the chances that an adjudication will be done well.

Introducing an appropriate review mechanism may offer a pragmatic and practical solution that acknowledges the existing variety of adjudicators’ qualities and competencies and the difficulty of attaining quality adjudication outcome due to the hasty adjudication process. The review mechanism may act as an effective safety net to capture erroneous determinations away from curial proceedings to help control the overall cost and improve the finality and informality of statutory adjudication. The main concern of the experts was with regard to the inherent extra time and cost in conducting review mechanisms, delaying what is supposed to be an interim decision.

The paper revealed that if an effective review mechanism is devised to counter the barriers of cost and time, the arguments in support of the need of review mechanism would outweigh opposing arguments. Interestingly, the observations made by experts operating in jurisdictions with review mechanisms in place were positive favouring the existence of the review with some improvement. In contrary, experts in other jurisdictions, who are not familiar with the notion of review mechanism have much stronger views.
9. CHAPTER 9: AN EMPIRICAL STUDY: HOW TO INTRODUCE EFFECTIVE REVIEW MECHANISMS INTO STATUTORY ADJUDICATION?

Journal Paper, Peer reviewed


ABSTRACT

In recent years, courts have been more willing to intervene in adjudication process due to poor quality of adjudication outcome. This situation has encouraged aggrieved parties to challenge adjudication determinations by way of judicial review resulting in numerous judicial review applications. This has eroded the original object of the security of payment legislation. The aim of this paper is to review experts’ views about the need of introducing review mechanism, essential features and potential barriers. The paper adopts “expert interviews” as a method to collect empirical data where 23 experts, involved in adjudication, were interviewed from Australia and Singapore. The paper concludes with a set of proposed guidelines for introducing effective review mechanisms into statutory adjudication. The guidelines are devised to counter potential barriers addressed in the empirical study and they can be adopted in any jurisdiction operating the SOP legislation.

Keywords: complex claims, judicial review, jurisdictional error, review mechanism, security of payment, statutory adjudication.
9.1 Introduction:

Statutory adjudication was introduced into the security of payment legislation as a fast-track payment dispute resolution process aiming to facilitate cash flow within the construction contractual chain. However, in recent years, courts have been more willing to intervene in adjudication process due to poor quality of adjudication outcome, particularly in relation to large and/or complex payment claims. This situation has encouraged aggrieved parties to challenge adjudication determinations by way of judicial review resulting in numerous judicial review applications. This has eroded the original object of the security of payment legislation. The mission has been compromised particularly in ensuring that contractors are paid quickly for the work they do on an interim basis. With that, some jurisdictions allow for an express limited right of aggrieved parties to apply for review against erroneous determinations as a way to remedy injustice caused by the speedy adjudication process. The aim of this paper is to demonstrate experts’ views about the need of introducing review mechanism, essential features and potential impacts. The paper adopts an empirical research involving 23 interviews with industry experts. The paper is the second stage of a major research project examining review mechanisms in statutory adjudication where doctrinal legal methods were used and initial findings were published.  

9.2 Research Method

This study uses 'expert interviews' as a main method to collect empirical data which has long been an effective means of quickly obtaining good results. The data was then discussed in light of relevant literature review as applicable. A purposive sampling method was adopted to identify the potential experts who are familiar with the operation of statutory adjudication in Australia. 23 experts have eventually participated in the study. The experts broadly belong to two main groups: adjudicators and construction lawyers. Most of the experts have more than 20 years of experience of dealing particularly with construction disputes and more than 10 years in dealing with statutory adjudication. This high level of experience increases the credibility of

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the participants’ views. It also brings relevant, rich and concise views in terms of the research question being investigated.

9.3 Findings from of Experts’ views

9.3.1 The need for review mechanisms

The empirical study revealed that those interviewed experts who were not comfortable with the notion of review mechanism were not very familiar with the various legislative review mechanisms in other jurisdictions or have no actual experience in dealing with the review mechanism in their jurisdiction. Many experts looked at the notion of review mechanism as a quality assurance, quality control or a peer review process. Some experts claimed there is always a need to offer another set of eyes to build confidence in the system and noted that the mere existence of a review mechanism seems to improve the chances that an adjudication will be done well. The main concern of the experts was with regard to the inherent extra time and cost in review mechanism, delaying what is supposed to be an interim decision.

9.3.2 The ambit of the review

Experts have different opinions regarding the nature of errors that can be reviewable under any proposed expanded review mechanism. Some experts suggested not to provide any limitation on the type of reviewable errors. Some other experts preferred to limit the review on errors of law. One adjudicator, who has a technical background, preferred to limit the review onto jurisdictional errors and errors of law but not errors of fact. He justified that by saying that if errors of facts are included, it will basically allow whoever’s reviewing a determination to redo the whole thing which is not very effective in terms of time and cost. This view was supported by a construction lawyer who argued that the review should not include errors of fact because that will need a full rehearing of evidence and a full review of all the parties’ submissions.

In contrast, a construction law academic said that the scope should be about technical issues and should exclude jurisdictional challenges because it will make process less

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804 The need and effectiveness of review mechanisms was thoroughly examined in a previous article by the author. See Skaik S (2017), Effectiveness of existing adjudication review mechanisms: views of industry experts, Construction Law Journal, vol. 33, no. 3, pp 233-246.
805 Senior adjudicator based in Victoria.
806 Construction lawyer based in Queensland.
efficient and unless the review adjudicator is a judge or highly trained legal person, it will be waste of time.  

A construction lawyer viewed that the types of issues that parties wish to challenge should be limited to material defects or manifest errors including errors of reasoning which may be errors of fact or law. He further responded to a follow-up question as to whether it is easy for someone experienced in law to differentiate between questions of law and questions of fact by saying:

“I don’t think it’s every easy. I think a skilled lawyer is always able to take anything that looks like either a fact or law and skew it, which is why I worried that all you do if you have a threshold question of a merit and distinguish between fact and law is just create again more legal issues that the lawyers are interested in but takes us away from what the client wants to argue about.”

It is manifest that limiting the scope of the review may create further difficulties and vulnerable areas in the scheme that attract challenges. This implies there is no valid reason not to keep the scope of the review open to deal with all grounds for challenging adjudication determination including questions on jurisdiction as well as questions of law and fact. It follows that review adjudicators should be well experienced and legally qualified to deal with review applications involving legal arguments around jurisdiction.

### 9.3.3 Who can apply for review?

Most experts opined that either party should be able to access the review as a matter of equity and it should be seen as an expert review process rather than judicial process. A senior adjudicator, however, mentioned that respondents would be more interested in the review mechanism. He added that it is better for claimants losing the first opportunity to invest time in finally resolving their payment disputes via arbitration or litigation rather than adjudication review that does not resolve the real matters in dispute. Another expert said if the review is limited to jurisdictional challenges, then there may be no need to impose any condition on either party to access the review.

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807 Senior academic with law background based in Victoria.
808 Construction lawyer based in South Australia.
809 Construction lawyer based in South Australia.
810 Senior adjudicator based in Victoria.
811 Senior adjudicator based in Victoria.
Many claimants cannot afford going to court to challenge an adjudicator’s decision to dismiss the application without making a decision on the merits. Also, it is much more convenient for aggrieved claimants or respondents to seek further opinion about the disputed matters away from judicial system where statutory adjudication scheme has the promise to offer the review mechanism as an intermediate platform as long as it is devised in a way that it diminishes ‘abuse of process’. As such, there is no valid reason not to keep the review mechanism open for both parties.

9.3.4 Nature and size of adjudicated claims

One expert found the idea of providing a monetary threshold as raised by the interviewer as a good idea to diminish abuse of process by either party and commented: “you get claimants trying to force their rights under the Act and you get large, big deep pocket respondents that will just use every single thing they can to run the claimant out of money they have to pay”. 812 This view was contradicted by another expert who said that the focus should be on everyone equally as the amount of AUS$10,000 may be significant to a bricklayer as same as one million dollars for others.813 With that in mind, many experts believe that the review should not entrain small matters because the parties pay in most of these cases without seeking further appeal. This reconciles with the earlier findings that the threshold requirement helps prevent respondents from routinely exploiting the freely available review mechanism and thereby frustrating the object of the legislation by adding a tier of additional expense.814

A construction lawyer said “I think you look at the size of the error, not the size of the original claim. Because who cares, if it’s a million-dollar claim and we’re now talking about $5,000, it shouldn’t get a review just because it’s a million-dollar claim.” 815 This approach was also endorsed by another experienced adjudicator and lawyer who mentioned that the threshold, if any, should only consider the actual amount in dispute.816 To sum up, a considerable number of experts suggested to fix the amount

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812 Senior adjudicator based in Victoria.
813 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
815 Construction lawyer based in South Australia.
816 Senior adjudicator and construction lawyer based in NSW.
of AUS$100,000 for the disputed amount as the minimum threshold to access the review whilst a similar number of experts suggested not to provide any limit.

The monetary sum of AUS$100,000 seems appropriate considering the fact that disputants rarely go to court for amounts less than that to obtain a final decision for what is meant to be an interim decision. This threshold will achieve some sort of balance needed for the object of the SOP legislation to be maintained where adjudicating smaller disputes often involving simpler matters in dispute should be final as the comparatively small amounts at stake do not encourage the parties to seek further challenges. As well, this threshold has already been used for the Victorian\(^{817}\) and Singaporean\(^{818}\) review mechanisms. In this regard, Justice Prakash of the Singaporean High Court noted:

> “The drafters of the [SG Act] must have considered that it would not be convenient or economical to provide a review process for a dispute that did not have sufficient substance in economic terms. In those cases, the respondent’s arguments on principle or facts would have to be taken up subsequently in court or in arbitration proceedings.”\(^{819}\)

On the other hand, introducing the monetary sum, in a way that it is only based on the real amount in dispute as suggested by one of the experts\(^{820}\) rather than the claimed or adjudicated amount, is crucial for the success of the review mechanism to keep the cash flowing within the industry and avoid abuse of process.

9.3.5 \textit{Paying adjudicated amount as a pre-condition}

Many experts preferred to have the adjudicated amount paid into a trust account whilst a few experts suggested to have the money paid to the claimant as a precondition for respondents to access the review. A construction lawyer viewed that if the review process is dealt with as an appeal process, the parties normally have to perform their obligations until the dispute is successfully reviewed and the review should not act as a stay.\(^{821}\) An experienced adjudicator said that undisputed amounts should be paid to

\(^{817}\) See, Vic Act, s 28A.
\(^{818}\) See Building and Construction Industry Security of Payment Regulations 2005 (Singapore), s 10 (1).
\(^{819}\) SEF Construction Pte Ltd v Skoy Connected Pte Ltd [2009] SGHC 257 [24].
\(^{820}\) Senior adjudicator and construction lawyer based in NSW.
\(^{821}\) Construction lawyer based in South Australia.
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the claimant and the rest should be paid into a trust account. A Victorian adjudicator said that whilst asking respondents to pay claimants in order to access the review mechanism will help attain the object of the Act, the smarter and easier way is to get the money into a trust somewhere or pay against a bank guarantee, as sometimes, the claimant getting the money might take it and run away. He added that this situation becomes more dangerous and likely to happen in case of final payments. This approach was supported by a Singaporean adjudicator who said that there are current attempts to change the legislation to allow respondent seeking review to pay the adjudicated amount in trust account held by the authorised nominating body rather than paying directly to the claimant. One expert was very critical in allowing any private ANA operating trust accounts because of the significant amounts at stake and possibility of corruption.

On the other hand, some experts said if the review is fast enough, it may not be feasible to ask respondents to pay. A construction lawyer suggested that if the review process is short, (e.g. say 20 business days), it may not be necessary for respondent to pay because the risk of failure to repay is generally minimal. A Victorian adjudicator said: “If you do the review process quickly enough the money doesn’t matter. If it’s a six months process, yeah, fair enough but for a week doesn’t matter. It’s all about speed and simplicity.

The interpretation of the above results indicates that it may not be good enough to ask respondents to pay adjudicated amount into trust rather than paying claimants directly as this will delay payment and jeopardise the object of the SOP legislation. Equally, it is not also fair for the respondent to pay the claimant while there is possibility that the claimant may get bankrupt by the time the review determination is issued. The latter issues were raised by Singaporean interviews as one of the shortcomings of the review mechanism in Singapore. Also, a distinction should be made as to which amount should be paid to claimant or paid into a trust. Obviously, any adjudicated amount not in dispute must be paid to the claimant whilst the remaining amount reflecting the real

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822 Senior adjudicator practicing in NSW and Queensland.
823 Senior adjudicator based in Victoria.
824 Accredited adjudicator and independent arbitrator based in Singapore.
825 Senior adjudicator and construction lawyer based in NSW.
826 Construction lawyer based in Queensland.
827 Arbitrator, adjudicator and mediator based in Victoria.
amount in dispute that should be paid to the claimant as along as its financial standing is strong enough to repay the paid amount.

9.3.6 Reviewing party

The vast majority of experts viewed that the reviewing person should be a senior adjudicator with legal qualifications or a retired judge since the most critical problem is the quality of adjudicators across States and Territories. Some other experts preferred to have the appointment made by the State administrative tribunal. A well experienced lawyer and adjudicator practicing in various jurisdictions had very strong views about tribunals taking lead of the review. 828 He said that his experience with the administrative tribunals in Queensland, Victoria and NSW tells that the review process takes so long and therefore it is completely ineffective even for home buildings matters. The owner of a major private ANA criticised the NSW Civil and Administrative Tribunal for being ineffective. 829 He further asserted that once the whole thing goes into external tribunal, it can be subject to delays, legalisms, obstructions that barristers will invent. He went on to say that the only way to do it quickly and with confidence is to do it through peer review. A Queensland practicing adjudicator and lawyer said he would not be satisfied that the Tribunal members in Queensland and Victoria would have an appropriate grasp of the law as they should be reviewing adjudication determinations and he preferred to have the review done by a supreme court judge. 830 He further claimed that “it’s as complicated and as costly to litigate in VCAT and QCAT as it is for Supreme Court.”

Many experts were not in favour of increasing the number of review persons because of the resulting significant cost to the parties and the possibility of conflict within the review panel. An adjudicator who is also a practicing architect said that a tribunal of three members is a good idea for more complex and large cases. 831 He also suggested some powers to be granted to the tribunal by saying:

“The review tribunal should be allowed to hear expert evidence. If you have a lawyer as the tribunal member you might give the tribunal power to appoint its own expert, which I think would be excellent because you would have an

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828 Senior adjudicator and construction lawyer based in NSW.
829 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
830 Senior adjudicator and construction lawyer based in Queensland.
831 Arbitrator, adjudicator and mediator based in Victoria.
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independent, say, engineering expert considering these things with the benefit of having someone with legal knowledge, understanding of contracts, making the decision. I think that would be great.”

Apparently, the ideal proposition is that the reviewing party should be a well experienced and knowledgeable adjudicator who has the necessary legal qualifications and strong track record of successful determinations. That is necessary, especially in situations where the original adjudicator is appointed on the basis that he or she is deemed a senior adjudicator. In some larger and more complex cases, it is incumbent to have a panel of three adjudicators to make sure that the review determination is of the highest possible quality.

9.3.7 Appointing body

Many experts suggested to have review adjudicators appointed by an authorised nominating authority whilst the other half preferred to keep that power with the governmental authority. A Victorian adjudicator said the best way of appointing a review adjudicator is by the mutual agreements of the parties and in the absence of such agreement, the court should appoint the person. He went on to say that this mechanism will “have a lot more credibility and a lot less fights about their decisions if the parties could be involved in picking them”. Another Victorian adjudicator was critical about the available options by saying:

“I’m just thinking in terms of fairness. The original ANA is determined by the claimant. If you’re going to do a review typically the review isn’t the respondent, let him have a selection or alternatively, if you want to simplify it, it has to go back to the same ANA who has to appoint a different adjudicator. The problem with that is that some of the ANAs only have one or two adjudicators, it’s the guy himself.”

Upon weighing the reasoning of the above views, it seems that keeping the appointment of review adjudicators under the authority of the relevant governmental body may be the most effective option as long as measures are taken to avoid bureaucratic and slow process. One of the main shortcomings is that some

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832 Senior adjudicator with quantity surveying background based in Victoria.
833 Arbitrator, adjudicator and mediator based in Victoria.
governmental authorities are ill-equipped and under-resourced to cope with the requirements. Therefore, it may be best to give both parties the discretion to agree on the selection of the ANA or even the identity of the review adjudicator and in case of no agreement, the applicant for review has the discretion to select an ANA different to the one that appointed the original adjudicator to avoid any apprehension of bias or conflict of interest and to have an access to other pool of qualified adjudicators within that ANA.

9.3.8 Timeframes

The vast majority of experts suggested to have the same timeframes of adjudicating the review applications to that available for the original adjudication. A Singaporean adjudicator said that where the claim is considerably large or complex, review adjudicators should be granted a reasonable extension of time by having the consent of the applicant only. 834 He justified that by saying that the other party to the review adjudication may not agree to extend the time for tactical reasons. The approach of having the consent of the applicant only has already been implemented in the Victorian review mechanism which provides that the adjudicator has five business days to make a determination in addition to additional five days if granted by the applicant. 835 In Singapore, any additional timeframe to the review adjudicator must be granted by both parties, however, the original timeframe for reviewing applications is no different than the Victorian overall timeframe where adjudicators have to complete the review within 14 days. 836 The WA review mechanism has no express provision for timeframes, however many experts mentioned that it may take months until a review decision is made.

The purpose of the review mechanism is to add value and credibility to the adjudication avenue by releasing decisions with better quality that are capable of withstanding challenges. Therefore, it makes sense to give review adjudicators additional limited time in case of more complex and larger disputes. In addition, review adjudicators should have the right to request additional time from the applicant only as suggested

834 Accredited adjudicator and independent arbitrator based in Singapore.
835 See Vic Act, s 28I (10)(b).
836 See SG Act, s 19 (3).
by some experts and implemented in Victoria, however, the additional time should be limited to avoid any abuse of process.

9.3.9 New submissions

Most of the experts believe that the review process should not allow the parties to put new evidence and it should only consider the submissions made before the original adjudicator. A construction lawyer advocated new submissions in the review process but suggested to restrict them for the sake of review process in order to direct the reviewer into what needs to be reviewed.837 A senior adjudicator explained the practicality of this approach by saying “by this stage you’ve got the submissions to the first adjudicator and you’ve got the adjudicator’s decision. Now you need to make a submission about why the adjudicator got it wrong. You’ve got to allow them to have a say.”838 A WA lawyer explained the limitations imposed by SAT in considering new submissions by saying:

“If the employer didn’t include the relevant information before the adjudicator, well then, what SAT’s doing is reviewing that decision based on that incomplete material because the adjudicator wouldn’t know it’s incomplete, because it’s what he was given or she was given. So, that’s why SAT are very reluctant to allow any other material in.

The above observations infer that new evidence should not be entertained in the review. However, applicants should be obliged to make a submission that explains the grounds upon which it seeks review and identify alleged errors to limit unmeritorious appeals. The other party, as a matter of equity, should always have the right to make a submission in response to any submission made by the applicant. This right has already been granted under the Victorian review mechanism.839

9.3.10 Costs

The vast majority of the experts agree that if a review mechanism is to be introduced, the fees of review process should be paid by the parties as determined by the reviewing party. One expert said if the review process is limited on jurisdictional grounds, the

837 Construction lawyer based in Queensland.
838 Senior adjudicator with quantity surveying background based in Victoria.
839 Vic Act, s 28E.
review should be publicly funded but he raised a concern that the government may not be keen to implement that as it requires a separate budget line.\textsuperscript{840}

Many experts proposed to follow the guidelines of Queensland model as amended in deciding the review adjudicator’s fees. A senior Victorian adjudicator said it should be within the jurisdiction of the reviewer to deprive the first adjudicator from his/her fees if their decision was hopeless and unsupportable.\textsuperscript{841} An adjudicator said that the Singaporean Act is silent as to whether the review adjudicators are empowered to decide on the original adjudicator’s fees if the determination is reversed.\textsuperscript{842} He further said in practice review adjudicators assume that they have the power to do so.

A WA senior adjudicator said that it is unfair for the loser of the review process to pay as he could pay twice for what is supposed to be an interim process.\textsuperscript{843} Equally, another WA adjudicator found it unfair for the winner to pay for review by saying:

“If you’ve got a determination in your favour and someone wants you to review it then why should you pay twice because you’ve paid for the adjudication, why should you have to pay for the review of the adjudication? So then, you know, but equally, who is going to defend the decision? The adjudicator isn’t going to defend his or her decision. So, it seems unfair to me that a party that has an adjudication decision in its favour, which is then being reviewed, has to pay to defend that decision. So, perhaps, the party that is seeking any review should pay the defendants costs for doing so.”\textsuperscript{844}

Thus, experts have extremely controversial and different views regarding the costs. Accordingly, both doctrinal legal research and empirical findings suggest that the review mechanism should ensure that both parties must share the costs equally if the issues in disputes are genuine and the determination of adjudicator may go either way based on the submissions. However, if either party misconducts itself, the empirical findings revealed that reasonable measures for discipline or remedies should be in place to counter that effect including holding them liable for the review adjudication fees and possibly any legal costs. Also, original adjudicators, whose decisions are

\textsuperscript{840} Senior adjudicator, arbitrator, mediator and construction lawyer based in Western Australia.
\textsuperscript{841} Senior adjudicator with quantity surveying background based in Victoria.
\textsuperscript{842} Accredited adjudicator and independent arbitrator based in Singapore.
\textsuperscript{843} Barrister and solicitor based in Western Australia.
\textsuperscript{844} Adjudicator and Construction lawyer based in Western Australia.
overturned following the review should also be disciplined if their determinations are
too poor or unreasonable. This is because it is quite unfair to keep original erroneous
adjudicators (who do not perform their duties as required by the legislation) harmless
and in the same time grant them full fees for their poor determinations.

9.3.1 Abuse of process

The owner of a major ANA said that if the review is structured without thought to how
it would operate, and it allows parties to abuse that process considering that they will
not have to pay for a longer period of time until the review is completed. A WA
senior adjudicator advocated that it is important to stop spurious and unmeritorious
claims by respondents who exploit any small chance to just choke the process up and
never pay the money to the claimant. A construction lawyer argued that “virtually, everybody who lost a large claim would be saying that they want that looked at again based on the merits.”

In response to those observations, many measures are already considered to diminish
attempts to abuse the review process. Those measures include the introduction of
monetary threshold, duty of respondents to pay adjudicated amounts, disciplinary
arrangements for parties misconducting themselves and adjudicators releasing poor
decisions.

9.4 The potential impact of introducing an expanded review mechanism

9.4.1 Benefits

The vast majority of experts think that the main benefit of review mechanism is that it
helps rectify decisions that have been poorly made away from courts and increases
certainty in adjudication outcome. Most of the experts agree that the object of the Act
(to promote cash flow amongst vulnerable subcontractors) will be protected if a review
mechanism is introduced with a condition that respondents must pay the adjudicated
amount first before accessing the review, however, they have different views as to
whether the payment is to be made directly to the claimant or paid into a trust account.

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845 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
846 Construction lawyer based in South Australia.
847 Barrister and solicitor based in Western Australia.
A Singaporean adjudicator said that the review mechanism corrects any injustice occasioned by the “pay now, argue later” principle. Another construction lawyer said that a review mechanism has the potential to improve the quality of adjudication outcome because obvious errors that take place in the truncated timeframe can be fixed. A senior adjudicator advocated that review mechanism will not improve the quality unless the review decisions are published to give adjudicators the opportunity to see how sound determinations should be made. This view was supported by a government official who said that published determinations provide some sort of scrutiny. Another senior adjudicator summarised the benefits in three folds: 1) reduce traffic to Supreme Court; 2) cost effective; and 3) redress of incorrect determinations. Thus, publishing review determination sounds a very good idea which will be very effective in promoting best practices in adjudication.

9.4.2 Barriers

All experts agreed that time and cost are major barriers to the implementation of review mechanism. Interestingly, a NSW senior adjudicator warned of other barriers including poor ‘review adjudicators’, overly legalistic submissions, and the review acting as a stop point on the pathway of litigating the other party. A construction lawyer said “I am not convinced that the potential advantage is sufficient to outweigh the disadvantage of the extra time and the extra cost.”

A WA adjudicator said that having a review mechanism may make adjudication a two-stage process which would create less certainty regarding the finality of original determinations and lawyers will then become more involved in the process. He added that some parties may subsequently find it unfeasible to go to adjudication in the first place. He went on to say that these barriers could be countered if clever conditions are introduced to limit the ability to have a decision reviewed. The owner of a major ANA clarified that the review may be a good thing if the money is being paid and all quarantined in the trust so that the respondent does not get an unnecessary

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848 Adjudicator and barrister based in Singapore.
849 Construction lawyer based in South Australia.
850 Senior adjudicator with quantity surveying background based in Victoria.
851 Legislative Advisor at the Victorian Building Authority (VBA).
852 Senior adjudicator practicing in NSW and Queensland.
853 Senior adjudicator practicing in NSW and Queensland.
854 Construction lawyer based in South Australia.
855 Adjudicator and Construction lawyer based in Western Australia.
advantage by virtue of pursuing the review application. 856 A WA senior adjudicator said that if the review scheme is drafted in a complex manner, it will open the scope of legal arguments about the process. 857 A Victorian senior adjudicator said that imposing certain conditions or threshold questions on the parties to be eligible to access the review may also create room for further jurisdictional challenges by the parties. 858

A well experienced lawyer and adjudicator said that if the review mechanism is devised to take away the Supreme Court powers, they will not allow it because the judges are very jealous of their jurisdiction and they will be supported by big contractors. 859 Another practicing lawyer agreed by saying that the courts will always have a supervisory role over any review decision. 860 He went on to say that justice delayed is justice denied and the review mechanism will introduce delay. 861 A WA senior adjudicator said: “some people just view the adjudication process as a means of getting an extra five weeks or so within which to find the money. A review system would give them an extra ten weeks or so.” 862 A Singaporean adjudicator said the delays may be remedied by providing strict timeframe for the review and decision to be provided. 863 A construction lawyer said that respondents, who are resourced enough and angry enough, usually exhaust the appeal process to the end and any merit review will add another step down the appeal process which is against the purpose of the Act. 864

All identified barriers have been considered in developing guidelines for the features of any proposed review mechanism. Next section addresses the main three barriers identified above:

9.5 Addressing the barriers:

9.5.1 Additional time

The guidelines call for a fast track review mechanism with a total duration of 20-25 business days in normal cases and 25-30 business days in complex cases. That is a

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856 Senior adjudicator and owner of an authorised nominating authority in the Eastern Australian States.
857 Senior adjudicator, arbitrator, mediator and construction lawyer based in Western Australia.
858 Senior adjudicator with quantity surveying background based in Victoria.
859 Senior adjudicator and construction lawyer based in NSW.
860 Construction lawyer based in Queensland.
861 Construction lawyer based in Queensland.
862 Barrister and solicitor based in Western Australia.
863 Adjudicator and barrister based in Singapore.
864 Construction lawyer based in South Australia.
little price to pay for obtaining a reliable adjudication outcome. Also, the extra time will not have any negative effect on the object of the SOP legislation. In contrary, the review mechanism may help improve the flow of cash. This is because respondents will be required to release the undisputed portion of the adjudicated amount to the claimant. Also, the respondent will be required to pay the disputed portion to the claimant against a bank guarantee. If the claimant cannot provide a bank guarantee, the respondent must pay the disputed portion into a trust account.

9.5.2 Additional cost

The guidelines provide that review adjudicators can apportion their fees depending on many factors including the conduct of the parties. The guidelines also provide that the review adjudicators have jurisdiction to order legal costs to compensate a party for any expenses, loss or inconvenience as a result of the other party’s conduct. This would include situations when a party conducts itself unreasonably or where a case is obviously frivolous, vexatious or unmeritorious. Furthermore, where the original adjudicator’s determination is substantially varied as a result of the review; the original adjudicator’s fee may be reduced to a base fee rate as may be determined by the review adjudicator. The remaining fee amount should be refunded to the party who paid that amount.

9.5.3 Persistent availability of judicial review

In Victoria, the review mechanism is ill-equipped to stop respondents from bypassing the review mechanism and challenging original determinations by way of judicial review. In addition, the Victorian Supreme Court usually accepts applications that should have first been appealed before a review adjudicator. This policy seems inconsistent with the Australian High Court’s decision in *The Queen v Cook; Ex parte Twigg*, as to the use of the discretion to deny certiorari where there lies another review option. Accordingly, it was judicially noted that “availability of prerogative relief will be undermined by circumstances where parties could avail themselves of

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865 This approach seems fairer and more pragmatic than the one adopted in the UK. See *PC Harrington Contractors Limited v Systech International Limited* [2012] EWCA Civ 1371, where it was held that adjudication fees were required to be repaid for a total want of consideration.

866 See *Maxstra Constructions Pty Ltd v Gilbert t/as AJ Gilbert Concrete* [2013] VSC 243; *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183.

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alternative remedies by way of rehearing, appeal or review.” Therefore, the guidelines expressly provide that a party to an adjudication determination may not bring judicial proceedings to set aside an adjudicator’s determination without having first obtained a review determination with respect to the adjudicator’s determination.

Having said that, judicial intervention in adjudication remains as a problem. Respondents with deep pockets may exhaust the appeal process to the end whereas the review mechanism is another step down the appeal process. This barrier cannot be overcome following the High Court authorities in Kirk v Industrial Relations Commission of New South Wales [2010] HCA 1, which maintained the Supreme Court supervision over adjudication process. However, the guidelines provide many measures to discourage respondents from seeking judicial review after the review process. Those measures include the requirement to pay the disputed amount, appointment of experienced review adjudicators, apportionment of higher percentage of adjudication fees to respondents abusing the system and the award of legal costs.

9.6 Proposed guidelines for introducing review mechanism under the SOP Legislation

9.6.1 The purpose of the guidelines:

1. Provide a safety net to correct any injustice made during the hasty adjudication process.
2. Diminish judicial intervention in statutory adjudication.
3. Provide more certainty in the adjudication outcome.
4. Reinstate the object of the SOP legislation in facilitating cash flow.

9.6.2 Application of the guidelines:

The guidelines, whilst they are devised to assist the parliamentary counsels in drafting legislation for review mechanisms in jurisdictions based on the NSW SOP model, can also be used as a reference to draft legislative amendments within any other SOP

legislation in Australia or worldwide. The Victorian review mechanism within the security of payment legislation was used as a basis to devise these guidelines.

9.6.3 The guidelines

A. Threshold for review

(1) This review mechanism applies to a respondent in respect of an adjudication determination if the adjudicated amount exceeds the adjudication response amount by $100,000 or more.

(2) This review mechanism also applies to a claimant in respect of an adjudication determination if the payment claim exceeds the relevant adjudicated amount by $100,000 or more.

B. Application for review by respondent

(1) Subject to this section, a respondent may apply for a review of an adjudication determination (a review application).

(2) An application under this section may only be made on the ground that the first instance adjudicator (the adjudicator) made an error of fact or law that goes into or within the adjudicator’s jurisdiction that could substantially affect the right of one or more parties to the adjudication determination.

(3) An application under this section to challenge an adjudicator’s decision upon jurisdiction cannot be made unless:

   a) the grounds of that challenge have been duly raised before the adjudicator; and

   b) the adjudicator has released the determination.

(3) An application under this section may only be made if the respondent has paid to the claimant the undisputed portion of adjudicated amount.

(4) An application under this section may only be made if the respondent paid the claimant the disputed portion of the adjudicated amount against
a bank guarantee; or if the claimant is unable to provide a bank
guarantee, paid that portion into a designated trust account maintained
by an independent entity nominated by the governmental authority (the
Authority).

C. Application for review by claimant

(1) Subject to this section, a claimant may apply for a review of an
adjudication determination (a review application).

(2) An application under this section may only be made on the ground that
the adjudicator made an error of fact or law that goes into or within the
adjudicator’s jurisdiction that could substantially affect the right of one
or more parties to the adjudication determination.

(3) An application under this section to challenge the adjudicator’s
determination upon jurisdiction cannot be made unless the adjudicator
has released a determination dismissing the adjudication application
without addressing the merits for lack of jurisdiction.

D. Procedure for making application

(1) A review application must be made to an authorised nominating
authority (ANA) chosen by the mutual agreement of the parties. The
parties may also agree the identity of the review adjudicator to be
appointed. In the absence of agreement, the Authority, upon the request
of the applicant, shall nominate the ANA to which the review
application shall be made.

(2) The Authority shall note nominate the same ANA to which the
adjudication application was made.

(3) A review application must be made within five business days after the
respondent or claimant (as the case requires) receives a copy of the
adjudication determination.

(4) A review application—
(a) must be in writing in the prescribed form and contain prescribed information (if any); and

(b) must contain the reasons for applying for review and identify alleged errors in the determination; and

(c) must include a copy of the adjudication determination that is the subject of the adjudication review; and

(e) must include a copy of the payment claim, payment schedule and all submissions and information considered by the adjudicator in making the adjudication determination; and

(f) must be accompanied by the application fee (if any) determined by the ANA.

(5) The party applying for an adjudication review must give a copy of the review application to the other party within one business day after the application is made.

E. Right to respond to the review application

(1) A party who has received a copy of an adjudication review under subsection D(5) may make a submission to the ANA, appointed in accordance with subsections D(1) and D(2), in response to the review application within three business days after having been duly served with a copy of the review application.

F. Appointment of review adjudicator

(1) The ANA must, within five business days after receiving a review application, appoint a review adjudicator or a panel of three review adjudicators in accordance with this section (the review adjudicator) to conduct the review.

(2) The ANA shall not disclose the identity of the adjudicator to the review adjudicator.
(3) Notwithstanding the fact the parties may agree the identity of the review adjudicator under sub-section D(1), the review adjudicator shall be a person who is eligible to be an adjudicator pursuant to the Act.

(4) The ANA shall not appoint a review adjudicator who has been involved directly or indirectly with the adjudication determination that is the subject of the adjudication review.

(5) The ANA may select a review adjudicator with legal qualifications and experience relevant to the matter(s) in dispute.

(6) The ANA may appoint a panel of three review adjudicators if, in the opinion of the ANA, the review application is too complex and/or if the original adjudication determination was made by a senior adjudicator.

(7) Whether a review application is too complex for the purposes of subsection F(6) is a matter to be determined at the discretion of the ANA to which the review application has been made. In determining the complexity of the review application, the ANA may have regard to the amount in dispute, the volume of the review application documents, and the nature of the reasons for applying for review.

(8) The ANA must give each party to the review and the Authority written notice of the appointment of a review adjudicator.

(9) The notice under subsection F(8) must include the adjudicator’s name, contact details and date of appointment.

**G. Adjudication review procedures**

(1) The adjudication review commences upon acceptance by the review adjudicator of his or her appointment as the review adjudicator.

(2) The ANA must provide the following information to the review adjudicator as soon as practicable after the appointment of the review adjudicator—
(a) a copy of the review application together with all information submitted in accordance with section D; and

(b) a copy of any response to the review application made by a party pursuant to section E.

H. Adjudication review determination

(1) In determining a review application, the review adjudicator must consider the following matters only—

(a) the provisions of the Act and any regulations made under the Act; and

(b) the provisions of any construction contract to which the adjudication determination relates; and

(c) the information provided by the ANA under sub-section G(2).

(2) In determining a review application on the merits, the review adjudicator may consider reformulated arguments based on the facts submitted before the adjudicator but must not consider any new facts, reasons or evidence, save for any submission relating to errors of fact or law in the adjudication determination.

(3) The review adjudicator has the discretion to request further submissions, conduct inspections or call for conferences with the parties.

(4) The review adjudicator has the jurisdiction to determine questions of law or facts raised in the review application and/or in response to the review application.

(5) After conducting an adjudication review, a review adjudicator may—

(a) set aside the adjudication determination and substitute a new adjudication determination (the review determination) for the adjudicator’s determination that is the subject of the adjudication review; or
(c) release a review determination confirming the adjudicator’s determination that is the subject of the adjudication review.

(6) In determining a review application, the review adjudicator must—

(a) where the review determination varies the adjudication determination, identify how and why it differs;

(b) specify any amounts already paid to the claimant by the respondent in respect of the adjudication determination;

(c) determine any further amount that is to be paid by the respondent to the claimant pursuant to the review determination;

(d) determine any amount that is to be repaid by the claimant to the respondent;

(e) determine any interest payable on an amount referred to in subsection H(6) (c);

(f) specify the date on which any amount determined under subsections H(6) (c), (d) and (e) becomes payable.

(g) where the original adjudicator’s determination is varied due to error, specify whether or not the original adjudicator’s fee shall be reduced to a base fee rate as may be determined by the review adjudicator; and refund the remaining fee amount to the party who paid that amount.

(h) where the original adjudicator’s fee is reduced pursuant to subsection H(6)(g), specify the amount of the original adjudicator’s fees to be refunded to the party, or parties, who paid the fee.

(i) specify the date on which any amount under subsections H(6) (c), (d), (e), (g), and (h) becomes payable.

(7) The review adjudicator may make an order for legal costs to compensate a party for any expenses, loss or inconvenience as a result of the other
party’s conduct. This would include situations when a party conducts itself unreasonably or where a case is obviously frivolous, vexatious or unmeritorious.

(8) A review determination must be in writing and set out the reasons for the review determination in that determination.

(9) A review adjudicator may, as appropriate, include a statement in the review determination that, in his or her opinion, the review application was not made in good faith.

(10) The date for payment referred to in sub-section (6)(f) must be within five business days after the parties (as the case requires) are given a copy of the review determination.

(11) The review adjudicator must complete the adjudication review and provide a copy of the review determination to the ANA that appointed him or her—

(a) within 10 business days after his or her appointment; or

(b) where a panel has been appointed pursuant to subsection F(6), within 15 business days after the appointment of the panel; or

(c) within any further time, limited to additional five business days, to which the party who has applied for the adjudication review agrees.

(12) An applicant must not unreasonably withhold his or her agreement under sub-section (11)(c).

(13) Where a panel of review adjudicators is appointed to determine a review application, the determination shall be decided in accordance with the majority opinion of the review adjudicators on the panel.

I. ANA must notify persons of review determination

(1) The ANA must, as soon as practicable, provide a copy of the review determination to—
(a) each party to the adjudication review; and

(b) the adjudicator who made the adjudication determination that is the subject of the adjudication review; and

(c) the Authority.

J. Review adjudicator's fees

(1) A review adjudicator is entitled to be paid for reviewing the adjudication determination—

(a) the amount, by way of fees and expenses, that is agreed between the review adjudicator and the parties to the adjudication; or

(b) if no amount is agreed, the amount, by way of fees and expenses, that is reasonable having regard to the work done and expenses incurred by the review adjudicator.

(2) The claimant and respondent are jointly and severally liable to pay the review adjudicator's fees and expenses.

(3) As between themselves, the claimant and respondent are each liable to contribute to the review adjudicator's fees and expenses in equal proportions or, if the review adjudicator determines otherwise, in such proportions as the review adjudicator may determine.

(4) In deciding the apportionment of fees under subsection J(3), the review adjudicator may consider the following matters:

(a) the relative success of the claimant or respondent in the adjudication review;

(b) whether a party made an application for adjudication review for an improper purpose or without reasonable basis;

(c) whether a party conducted themselves unreasonably during the course of the adjudication review;
(d) whether the adjudication review application is withdrawn;

(e) the services provided by the review adjudicator in determining the review application, including the amount of time taken to consider discrete aspects of the amount claimed and reasons for review; and

(f) any other matters the review adjudicator considers relevant.

**K. Review determinations may be enforced as orders of court**

(1) A party entitled to be paid an amount under a review determination may enforce the review determination by filing in a court of competent jurisdiction:

(a) a copy of the review determination that the ANA has certified to be a true copy; and

(b) an affidavit as to the amount not paid under the review determination.

(2) Upon filing under subsection K(1), the review determination is taken to be an order of the court, and may be enforced accordingly.

**L. Judicial review of determinations**

(1) A party to an adjudication determination may not bring judicial proceedings to set aside an adjudicator’s determination without having first obtained a review determination with respect to the adjudicator’s determination.

**M. Publishing of review determinations**

(1) The ANA must provide a copy of the review determinations to the Authority.

(2) The Authority shall publish the review determinations in the public domain in a timely manner.
9.7 Concluding remarks

There is sufficient evidence that introducing effective review mechanism in statutory adjudication will help improve quality of adjudication outcome and reduce the involvement of court. However, introducing review mechanisms is confronted with some barriers including the additional time, additional cost and persistent availability of judicial review. The proposed guidelines in this paper, following an empirical study, provide novel measures for devising review mechanisms that are capable of countering the barriers and avoiding any abuse of process. It is hoped that the proposed guidelines stand as a good basis to assist legislatures aiming to introduce effective review mechanisms in their SOP legislation.
10. CHAPTER 10: CONCLUSION AND FURTHER RESEARCH

10.1 Introduction:

This chapter summarises the outcome of the study by summarising the findings in response to the research questions objectives that were set out to achieve the overall aim of the study being to examine whether the statutory adjudication in the Australian construction industry would benefit from a scheme of adjudication review and if so, what would be the features of an effective review scheme. The chapter also explores the limitation of the study and opportunities for further relevant research.

10.2 Research questions

10.2.1 To what extent do the available adjudication review mechanisms help attain the object of the SOP legislation and increase the industry confidence and satisfaction with the adjudication outcome?

The study identified many shortcomings associated with the use of existing review mechanisms in various jurisdictions as detailed in chapters 4 and 8. Relatively, the review mechanisms in Singapore and Western Australia were found to be the most effective schemes in attaining the object of the SOP legislation with great room for improvement including deliberate expansion of the scope of the review and addressing the loopholes identified in the study. The study re-affirmed the ineffectiveness of the Victorian review mechanism for being complex with very limited applications. The review mechanisms in the Australian Capital Territory (ACT) and Northern Territory were found to be ineffective as they not only encourage the parties to engage lawyers and seek court interference but also jeopardize the purpose of the SOP legislation being to provide a simple and inexpensive platform to resolve payment disputes.

10.2.2 If a review mechanism is found to be beneficial, what are the features of a review mechanism that help achieve the object of the SOP legislation?

The study found that introducing an appropriate review mechanism would offer a pragmatic and practical solution that acknowledges the existing variety of adjudicators’ qualities and competencies and the difficulty of attaining quality adjudication outcome due to the hasty adjudication process. The features of an
Introducing Review Mechanisms into Statutory Construction Adjudication

appropriate review mechanism are detailed within the guidelines proposed in chapter 9 which were deliberately devised to counter the identified barriers in the study.

10.3 Research objectives

10.3.1 Objective 1: To identify and investigate the causes of compromised quality of adjudication outcome.

Despite the general consensus that statutory adjudication has helped many vulnerable subcontractors and suppliers get timely payment, the study demonstrated that the legislation is proving ineffective at delivering quality outcomes in the adjudication of large payment claims. The study found that the parties are usually investing in adjudication by appointing legal advisers and/or technical experts if considerable monetary amount is the subject of dispute which results in a more complex payment dispute. The parameters of complexity in adjudication were also identified which include the nature and size of the dispute, the amount in dispute, inclusion of expert reports, raising legal arguments regarding jurisdictional issues and contract interpretation.

The evidence of the unsatisfactory outcome of complex adjudications was established, particularly, with regard to the increasing number of successful challenges of adjudication outcome in the Australian courts in recent years. The study identified seven key causes of such compromised quality, namely flawed adjudication appointment, relaxed regulations of adjudicators, intimidation of adjudicators, fuzzy jurisdictional boundaries, abbreviated adjudication timeframes, limited inquisitorial powers and want of review mechanism. A full analysis of each cause was conducted in chapters 3 and 7.

Each of the identified causes compromising the quality represents a potential avenue for a further major research with the overall objective being the optimisation of the adjudication process for complex payment disputes. Due to time constraints, it was not possible to address all the causes and the scope was narrowed down to fully investigate the whole notion of legislative review mechanism in terms of its need, features, barriers and impact upon the operation of statutory adjudication. Having said that, the study also touched base upon other possible measures to improve the operation of the
legislation which represents a “blunt instrument”, with the intention of proffering an “Aunt Sally” for feedback and further empirical research.

**10.3.2 Objective 2: To examine and appraise the features and effectiveness of available review mechanisms.**

The study critically examined a range of different legislative review mechanisms introduced within statutory adjudication around the world. The main purpose of having such review mechanisms is to provide aggrieved parties with a convenient remedy to appeal the decision of errant adjudicators in certain situations. Many jurisdictions expressly grant aggrieved parties the right to challenge adjudication decisions. Such right is typically limited, albeit to varying degrees. The limited right for review is expressly provided for in the SOP legislation in New Zealand, Malaysia, Ireland, the Australian Capital Territory, Western Australia, Northern Territory and Victoria. The Singaporean and the prospective Tasmanian review mechanisms are the only schemes that allow for a full legislative review of the merits of erroneous adjudication determinations.

The study revealed that the Singaporean and Western Australian review mechanisms are relatively the most effective schemes in terms of achieving the set purpose. The strength and weakness of each scheme was also considered in full detail (See chapter 4).

In WA, 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. The grounds include that: 1) the contract concerned is not a construction contract; 2) the application has not been prepared and served in accordance with the requirements of the Act; and 3) 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 (section 31(2)(a). This review is carried out by the State Administrative Tribunal (SAT). The study found that the review mechanism has reduced the caseload of Supreme Court by 50%. However, the study revealed that there is no valid reason not to expand the review mechanism in WA to review adjudicator’s decision “not to dismiss” the case where the adjudicator wrongly determined he or she has jurisdiction to hear the referred dispute and proceed with the determination on the merits.
Introducing Review Mechanisms into Statutory Construction Adjudication

In Singapore, the review mechanism allows an aggrieved respondent to have the adjudicator’s determination reviewed by another adjudicator or a panel of adjudicators on its merits. This review mechanism was introduced to remedy injustice inflicted by the hasty adjudication process. The study found that whilst the Singaporean review mechanism is an effective platform to achieve justice away from courts, it is infected with a number of restrictions as well as ambiguities in the procedures. For instance, aggrieved claimants are left with no alternative but to seek subsequent final proceedings in arbitration or litigation to have the case reviewed on the merits. The option of judicial review seems readily available for both parties on grounds relating to procedural injustice and adjudicator’s excess of jurisdiction. Thus, some respondents may exploit that option as a delaying tactic hoping that the claimant may become insolvent by the time the case is judicially decided.

On the other hand, the procedure of the review mechanism lacks clarity. For instance, there is no express provision giving the claimant the entitlement to serve a reply on the review application to conform to principles of procedural fairness. The scheme provides that the review application must contain such information or be accompanied by such documents as may be prescribed, however, no regulations were ever made to clarify whether new arguments or information can be raised in the review application.

10.3.3 Objective 3: To assess the need to propose a new scheme of adjudication review.

Notwithstanding the interim and rapid nature of statutory adjudication, it was judicially noted that there is “no proper basis to distinguish an adjudication for the purpose of maintaining cash flow from an adjudication to determine a party’s ultimate rights and entitlements.” The study found that an optimal adjudication process should maximise, within the legislative objective of expediency, the opportunity that adjudicators’ determinations are made in accordance with the correct and relevant law.

Typically, an aggrieved party in adjudication has no option but to initiate lengthy and expensive proceedings such as arbitration or litigation but the inherent cost of such proceedings may prevent the party from seeking justice. The remedy by way of judicial

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869 Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd (2014) 34 NTLR 17; NTSC 20 [45] (Barr J).
review is available in very limited situations. Therefore, many erroneous adjudication determinations have become final and binding decisions.870

In addition, with the availability of the review mechanism, courts are likely to be more reluctant to exercise their discretionary powers to set aside adjudication decisions.871

In Singapore, Prakash J held in SEF Construction Pte Ltd v Skoy Connected Pte Ltd872 that the availability of a statutory merits review, with other factors, impliedly restricted judicial review in the High Court. In Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd,873 Kenneth Martin J also noted that:

“As to discretion, the availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review. Circumstances where parties have been granted and hold alternative review options bear upon the availability of prerogative relief as a matter of discretion.”

Introducing review mechanism will improve the confidence and certainty in adjudication outcome, which is paramount in situations where claimants exercise their statutory rights to suspend work if respondents do not pay the adjudicated amounts. However, the consequences of any work suspension may be devastating if the adjudication determination fails to resist challenges in courts. Vickery J observed this dilemma in Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and noted:874

“A contractor would be seriously inhibited in the exercise of its statutory right to suspend works if it suspected that its payment claim and the adjudicator’s determination made upon it could be vulnerable to attack on technical legal grounds. If the contractor made the wrong call, the consequences of suspending work could be prohibitive.”

On the other hand, improving the quality of adjudicators may not be a sufficient measure to avoid erroneous determinations. In Queensland, major amendments have been made to its SOP legislation in December 2014 to increase the quality of

870 See, eg, Uniting Church in Australia Property Trust (Qld) v Davenport [2009] QSC 134 (Daubney J).
871 As to the use of the discretion to deny certiorari where there lies another review option, see for instance, the High Court's decision in The Queen v Cook; Ex parte Twigg [1980] HCA 36 [29], [30] and [34]; Re Baker; Martin CJ in Re Carey; Ex parte Exclude Holdings Pty Ltd [2006] WASCA 219 [128] - [140].
873 [2011] WASC 172; 42 WAR 35 [64].
874 [2009] VSC 156; 26 VR 112 [47].
adjudication outcome such as allowing longer timeframes for complex claims and improving the selection and regulation of adjudicators. Interestingly, seven judicial review court applications were lodged after the amendment, (compared to 15 applications in the preceding year), in which the Queensland Supreme Court found that adjudicators committed jurisdictional errors in three cases. Moreover, the study found that adjudication of complex payment disputes became very lengthy and costly which makes the scheme more similar to curial proceedings.

The study found that introducing an appropriate review mechanism would offer a pragmatic and practical solution that acknowledges the existing variety of adjudicators’ qualities and competencies and the difficulty of attaining quality adjudication outcome due to the hasty adjudication process. The review mechanism may act as an effective safety net to capture erroneous determinations away from curial proceedings to help control the overall cost and improve the finality and informality of statutory adjudication.

The empirical study revealed that those interviewed experts who were not comfortable with the notion of review mechanism were not very familiar with the various legislative review mechanisms in other jurisdictions or have no actual experience in dealing with the review mechanism in their jurisdiction. Many experts looked at the notion of review mechanism as a quality assurance, quality control or a peer review process. Some experts claimed there is always a need to offer another set of eyes to build confidence in the system and noted that the mere existence of a review mechanism seems to improve the chances that an adjudication will be done well. The main concern of the experts was with regard to the inherent extra time and cost in review mechanism, delaying what is supposed to be an interim decision.

10.3.4 Objective 4: To develop guidelines for devising an appropriate adjudication review mechanism.

Chapter 9 includes a set of proposed guidelines to inform the drafting of an appropriate review mechanism which is the core findings of this study. Also, Appendix (5) demonstrates the proposed process mapping for any review mechanism that may be devised with reference to the guidelines.

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10.3.5 Objective 5: To identify barriers of introducing a legislative review mechanism and examine solutions to counter the barriers.

The study identified some barriers resulting from introducing review mechanism into statutory adjudication. The identified barriers can be confined under three main categories: the additional time, additional cost and persistent availability of judicial review. The proposed guidelines provide solutions for each category as detailed below:

**Additional time**

The guidelines call for a fast track review mechanism with a total duration of 20-25 business days in normal cases and 25-30 business days in complex cases. That is a little price to pay for obtaining a reliable adjudication outcome. Also, the extra time will not have any negative effect on the object of the SOP legislation. In contrary, the review mechanism may help improve the flow of cash. This is because respondents will be required to release the undisputed portion of the adjudicated amount to the claimant. Also, the respondent will be required to pay the disputed portion to the claimant against a bank guarantee. If the claimant cannot provide a bank guarantee, the respondent must pay the disputed portion into a trust account.

**Additional cost**

The guidelines provide that review adjudicators can apportion their fees depending on many factors including the conduct of the parties. The guidelines also provide that the review adjudicators have jurisdiction to order legal costs to compensate a party for any expenses, loss or inconvenience as a result of the other party’s conduct. This would include situations when a party conducts itself unreasonably or where a case is obviously frivolous, vexatious or unmeritorious. Furthermore, where the original adjudicator’s determination is substantially varied as a result of the review; the original adjudicator’s fee may be reduced to a base fee rate as may be determined by the review adjudicator. The remaining fee amount should be refunded to the party who paid that amount.

**Persistent availability of judicial review**

As detailed in chapter 4, the availability of review mechanism in Victoria did not stop respondents from seeking judicial review by bypassing the review mechanism876 and

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876 See Maxis Constructions Pty Ltd v Gilbert t/as AJ Gilbert Concrete [2013] VSC 243; Seabay Properties Pty Ltd v Galvin Construction Pty Ltd [2011] VSC 183.
it seems that the Victorian Supreme Court has overlooked the Australian High Court’s decision in this regard. As to the use of the discretion to deny certiorari where there lies another review option, the WA Supreme Court in *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* referred to various authorities including the High Court's decision in *The Queen v Cook; Ex parte Twigg* and held that “availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review.”

Therefore, the guidelines expressly provide that a party to an adjudication determination may not bring judicial proceedings to set aside an adjudicator’s determination without having first obtained a review determination with respect to the adjudicator’s determination.

On the other hand, judicial intervention in adjudication remains as a problem. Respondents with deep pockets may exhaust the appeal process to the end whereas the review mechanism is seen as another step down the appeal process. This barrier cannot be overcome following the High Court authorities in *Kirk* which maintained the Supreme Court supervision over adjudication process. However, the guidelines provided many measures to discourage respondents from seeking judicial review after the review process. The measures include the requirement to pay the disputed amount, appointment of experienced review adjudicators, apportionment of higher percentage of adjudication fees to respondents abusing the system and the award of legal costs.

Nevertheless, the study provided another alternative to the notion of review mechanism to diminish judicial intervention, as detailed in chapter 6, whereas a roadmap of six hold points was proposed where a further empirical research will be needed to fully investigate it before any final recommendation is made in this regard. The roadmap aimed to not only diminish judicial intervention but also explore the best

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877 [2011] WASC 172 [64].
879 See also, *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172 at [64]; *Field Deployment Solutions Pty v Jones* [2015] WASC 136 at [18]; *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257.
880 In *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1, it was held at [100]: “Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.”
practices in dealing with jurisdictional issues in adjudication. The six hold points are as follows:

1. The obligation of respondents to raise jurisdictional objections in adjudication response;
2. Making the referral of the case after receipt of adjudication response;
3. Appointment of a legally qualified senior adjudicator if response includes jurisdictional objections;
4. Providing adjudicators with guidelines to deal with jurisdictional objections;
5. Empowering appointed adjudicators to extend time limits, allow for claimant’s reply and engage technical experts;
6. Adjudicator’s eligibility for fees upon dismissal of the case for lack of jurisdiction, and obligation to avoid unnecessary expenses.

10.4 Recommendations and further research

The study has identified many key problems jeopardising the effective operation of statutory adjudication. However, the scope of the study has only focused on investigating the need of review mechanisms, key features of appropriate review mechanisms and potential barriers. The findings of this study may apply to all jurisdictions operating SOP legislation. It is hoped that the findings will be considered by policy-makers and governmental agencies seeking to apply best practices to improve security of payment laws.

Nevertheless, further research is encouraged to cover many other worthwhile areas. The research areas can be divided into two categories: firstly; other identified problems and measures to improve the operation of statutory adjudication; and secondly, opportunities for researchers to continue investigating review mechanisms, with the findings of this study as start points. The potential research topics for each category are listed below:

10.4.1 Other operational problems and solutions

1. Best practices for the appointment and regulation of adjudicators as briefly addressed in chapter 3 and 7.
2. Best practices for dealing with jurisdictional issues in adjudication as briefly addressed in chapter 6 and 7.
3. Evaluating the drafting complexity of the SOP legislation and proposing measures to simplify as briefly addressed in chapter 7.

4. Investigating as to whether harmonising the SOP legislation in Australia would significantly improve its operation.

**10.4.2 Further research on review mechanisms**

1. Validating the emerging guidelines for review mechanism by further consulting a wide spectrum of industry stakeholders including judges and governmental agencies.

2. Examining the need of review mechanism in other jurisdictions such as the UK, New Zealand and Malaysia.

3. Investigate as to whether an errant adjudicator should be partially or fully deprived of fees following the review.

END
11. REFERENCE LIST


Director-General (2016) Improving the ACT Building Regulatory system:
Discussion paper, Environment and Planning Directorate, ACT Government, accessed:


Introducing Review Mechanisms into Statutory Construction Adjudication


Introducing Review Mechanisms into Statutory Construction Adjudication

January 2017,


Introducing Review Mechanisms into Statutory Construction Adjudication


APPENDIX 1: ETHICS APPLICATION

PLAIN LANGUAGE STATEMENT AND CONSENT FORM

TO: PARTICIPANT

Plain Language Statement

Date:

Full Project Title: EXAMINING THE NEED OF AN EXPANDED ADJUDICATION REVIEW MECHANISM UNDER SECURITY OF PAYMENT LEGISLATION IN AUSTRALIA

Principal Researchers: Prof. Anthony Mills, Dr Jeremy Coggins, Dr Roshani Palliyaguru

Student Researcher: Samer Skaik

You are kindly invited to take part in this research project which forms part of the requirements for a PhD degree. The purpose of this research is to examine the effectiveness of available legislative review mechanisms under statutory adjudication schemes and whether Australian legislation would benefit from an appropriately designed review scheme.

The possible benefits of the study include limiting the errors and flaws of adjudication process and avoid applications of judicial review which will eventually help minimize the bankruptcy rate of construction companies.

With your consent, your participation in the project will involve an interview of approximately 90 minutes. Indicative interview questions include:

- What are the nature of errors in adjudication and what is your opinion about efficacy of the existing adjudication review remedies?
- To what extent you would agree with the introduction of an expanded legislative adjudication Review mechanism and what should be the ambit and features of such system?
- What would be the expected benefits and barriers of introducing an adjudication review system?

Participation in any research project is voluntary. If you do not wish to take part you are not obliged to. Deciding not to participate will not affect your relationship to the researchers or to Deakin University. The collated views of participants will be published in academic journals and/or conference proceedings and no expert will be able to be identified in any publication. You have the option to stop the interview at any time. Also you may ask, up to the time of publication, that any information collected at your interview be destroyed and not used for the research by returning the withdrawal form.
All experts (estimated number of 30 persons) will be entered into a draw for the chance to win one of eight gift vouchers (worth around AU$3000 each) to attend upcoming international conferences relating to contract management and construction law organized by IBClegal in the UK (See the website for conferences details http://www.ibclegal.com/filter/Construction+%26+Property). The lottery will be conducted at Geelong Water Front Campus-Deakin University in presence of at least two members of the research committee. All experts will be invited to witness the lottery proceedings by giving them 1 week advance notice of the venue and timing of the lottery. The name of the eight winners and details of their won gift vouchers will be published by an email addressed to all experts. Also, participants will receive a summary of the research results.

We wish to voice record the interview. If you do not wish this to occur, we will take handwritten notes of the interview. To comply with government requirements all data will be stored securely for a period of a minimum of 6 years after final publication. It will then be destroyed. Withdrawal from this project will not be possible once the information has been de-identified. A website at www.deakin.edu.au will be created where summary information on the results will be published.

Approval to undertake this research project has been given by the Human Research Ethics Committee of Deakin University. If you have any complaints about any aspect of the project, the way it is being conducted or any questions about your rights as a research participant, then you may contact: The Manager, Office of Research Integrity, Deakin University, 221 Burwood Highway, Burwood Victoria 3125, Telephone: 9251 7129, Facsimile: 9244 6581; research-ethics@deakin.edu.au. Please quote project number: STEC-51-2015-SKAIK

Once you have read this form and agree to participate, I would appreciate you sign the attached consent form and send it back to the Student Researcher. You may keep a copy of the Plain Language Statement for your records.

If you require further information or if you have any problems concerning this project, you can contact any of the researchers responsible for this project as below:

**Student Researcher:**

Samer H. Skaik  
School of Architecture & Built Environment  
Deakin University Geelong Waterfront Campus  
Locked Bag 20001, Geelong, Victoria 3220 Australia  
Email: sskai@deakin.edu.au

**Principal Researchers:**

1. Prof. Anthony Mills Email: Anthony.Mills@deakin.edu.au  
2. Dr Jeremy Coggins Email: Jeremy.Coggins@unisa.edu.au  
3. Dr Roshani Palliyaguru Email: Roshani.Palliyaguru@deakin.edu.au
PLAIN LANGUAGE STATEMENT AND CONSENT FORM

TO: PARTICIPANT

Consent Form

Date:

Full Project Title: EXAMINING THE NEED OF AN EXPANDED ADJUDICATION REVIEW MECHANISM UNDER SECURITY OF PAYMENT LEGISLATION IN AUSTRALIA

Reference Number:

I have read and I understand the attached Plain Language Statement and have been given a copy of the Plain Language Statement and Consent Form to keep.

I freely agree to participate in this project according to the conditions in the Plain Language Statement.

(Please circle as appropriate) I agree / do not agree to have my voice recorded in the interview.

I understand that if I do not wish to be recorded at any time the researcher will take handwritten notes of the interview.

The researcher has agreed not to reveal my identity and personal details, including where information about this project is published, or presented in any public form.

On completing the interview, I will be entered into a draw for the chance to win a gift voucher to attend an international conference relating to contract management and construction law.

Participant’s Name (printed) ........................................................................................................................................

Signature ........................................... Date ...........................................
APPENDIX 2: EXPERT INTERVIEW QUESTIONS

SECTION 1: PARTICIPANT INFORMATION

1. What is your role with respect to statutory construction adjudication?

2. What are your professional qualifications (legal or technical)?

3. How familiar are you with the internal systems of review for adjudication that are expressly provided in the legislation where you practice, and with the grounds for judicial review of adjudicators’ determinations in courts?

SECTION 2: THE NEED OF AN EXPANDED REVIEW SYSTEM

1. What is your opinion about the effect of the available avenues for review of adjudication determinations, namely judicial review and the internal legislative review systems with respect to:
   - reducing the scope for judicial review of adjudicators’ determinations due to jurisdictional error;
   - improving the quality of adjudication determinations from a merits-based viewpoint;
   - the impact on the object of the legislation to provide an inexpensive and rapid process for the resolution of payment disputes to facilitate the timely flow of cash to contractors and suppliers.

2. Would you agree that the introduction of an expanded review system for adjudicators’ determinations into the legislation, which allows a merits-based review has the potential to improve the quality (i.e., reduce errors of law and fact, both jurisdictional and non-jurisdictional) of adjudicators’ determinations generally? Please expand on the rationale behind your answer.

SECTION 3: THE FEATURES OF AN APPROPRIATE REVIEW SCHEME

3. Assuming that an expanded internal legislative review system for adjudicators’ determinations was to be designed for introduction into the legislation, what would be your views as to the following key features of such a system?
a. The appropriate scope of the review (e.g. should the review seek to identify and amend determinations for jurisdictional errors, non-jurisdictional errors of law and/or fact?)
b. Who should be eligible to access the review?
c. What are the conditions that would need to be met in order for a party to access the review system?
d. Who should review an adjudicator’s determination?
e. What should the competencies/qualifications be of the reviewer?
f. Who should appoint the reviewer?
g. What would be the best procedures and timeframes for the review?
h. What should happen to the disputed payment monies whilst the review is in process?
i. Should the parties be allowed to provide new submissions in the review?
j. What would be appropriate powers of the reviewing adjudicator with respect to amending the original determination (e.g., setting aside, amending the determined amount, etc.)?
k. Should an application for internal legislative review be a prerequisite before application to the court for judicial review?
l. Who should pay for the review?

SECTION 4: THE IMPACT OF SUCH REVIEW SCHEME

4. What do you believe would be the benefits of introducing such a review system?
5. Would you agree that such expanded review mechanism would support the object of the Act?
6. What are the potential barriers or drawbacks of introducing such a review system?
7. Under what circumstances would a review mechanism be redundant?
8. Are there any other issues that are important? (Please comment).
APPENDIX 3: BRIEF PROFILES OF INTERVIEWED EXPERTS

Expert A
A construction law academic based in Melbourne. Before that he practices as a construction lawyer. He is the author of many publications in the field, and his scholarship and teaching has been recognised in several awards.

Expert B
A solicitor of the Supreme Court of NSW practising in the area of construction law and author of a number of books on construction law and adjudication, previously solicitor for the NSW Department of Public Works and a lecturer in the Faculty of the Built Environment, University of NSW.

Expert C
A Chartered Builder, Quantity Surveyor and Accredited Adjudicator in Victoria. Honorary Fellow, School of Architecture and Built Environment, Faculty Science Engineering and Built Environment, Deakin University.

Expert D
Senior Mediator and accredited adjudicator. He qualified and worked as an engineer in the oil industry and civil construction before training and commencing practice in the law. He now practices as Adjudicator, Arbitrator, Expert Determiner, Mediator and Facilitator across Australia. He has widely published and presented papers on Adjudication to National Conferences in Perth, Melbourne, and Canberra.

Expert E
Barrister and Advocate of the Supreme Court of Singapore. He has been in active legal practise over 20 years specialising in construction law, international commercial arbitration and construction adjudication. He is a practising Barrister, Arbitrator and Adjudicator [Malaysia].

Expert F
As a Senior Adjudicator and construction lawyer based in Queensland.

Expert G
An independent arbitrator and a Past President of the Singapore Institute of Arbitrators (SIArb), having served two terms as President from 2007 to 2011. He is a member of
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the panel of arbitrators of several international arbitration centres including SIAC, SIArb, KLRCA, HKIAC, DIAC, SCIA, LCIA, IIAM and SIA. He is also a member of the Advisory Council to the National Commercial Arbitration Centre, Cambodia. An accredited adjudicator with the Singapore Mediation Centre, Johnny also sits on the Construction Adjudicator Accreditation Committee

Expert H

A construction lawyer in Western Australia who has recently set up his own construction law practice in Fremantle, having previously worked for medium and large law firms since completing his articles in early 2003. He is passionate about construction law issues and has a wide experience of a variety of construction and infrastructure projects and has worked for a variety of clients at all levels of the construction and related industries. He is a Registered Adjudicator in WA who has determined around 50 payment disputes, a graded and practicing arbitrator and occasional university lecturer. He has published articles in Australia and the UK on construction law related issues and given industry talks. He is a UK trained quantity surveyor who had practiced in Northern Ireland and Australia until 2002.

Expert I

The Owner of an authorised nominating authority in the Eastern States, a Senior Adjudicator, Senior Mediator He has been influential in assisting governments develop policy for the continued success and enhancement of Security of Payments legislation.

Expert J

A Senior Associate in the Construction and Engineering team at Norton Rose Fulbright in Melbourne, Australia. He has practised in both the Brisbane and Melbourne offices of Norton Rose Fulbright, and has eight years’ experience in construction litigation, particularly in security of payment disputes. He has presented extensively in security of payment seminars, including for the Resolution Institute and Society of Construction Law, and has published a number of articles on this topic including for the Australian Construction Law Newsletter.

Expert K

He is a Fellow of the Institute of Arbitrators and Mediators Australia; Grade 1 arbitrator and accredited mediator. He has been a practicing solicitor for 10 years and independent barrister for 20 years, largely specialising in building, construction,
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He has 12 years active experience as an arbitrator and mediator and has acted as adjudicator on numerous applications, varying in size from small to very large, since the commencement of the Construction Contracts Act in 2005. His experience includes work on public enquiries as counsel assisting, special investigator and royal commissioner. He was deputy chairman of the Building Disputes Tribunal for two years.

Expert L

He is an experienced, practical dispute resolution lawyer and has acted in civil litigation and commercial arbitrations on behalf of both principals and contractors. He has conducted a number of adjudications under the Act, with sums in dispute ranging from $100,000 to $17,000,000. He was a partner at leading law Freehills for more than 12 years and now practices as a barrister. He is graded as an arbitrator by the Australian Institute of Arbitrators and Mediators, is a LEADR accredited mediator and a Fellow of the Chartered Institute of Arbitrators.

Expert M:

He practices as a barrister, adjudicator, arbitrator and mediator. He has represented clients in construction disputes in litigation and arbitration. He has conducted a number of adjudications under the Victorian Security of Payments Act with sums in dispute ranging from less than $100,000 to over $16 million between 2008 and the present. He has arbitrated construction disputes. He has mediated construction disputes.

Expert N:

Barrister and solicitor and chairman of partners of the law firm Kott Gunning. National senior vice president of the Institute of Arbitrators and Mediators Australia, Grade 1 arbitrator and accredited mediator and conciliator. Deputy Chairman (WA) of the Construction and Infrastructure Law Committee of the Law Council of Australia. He is expert in any construction dispute which can be determined on the basis of the evidence presented and which does not require the adjudicator to act on the basis of his own expertise in inspecting the works.

Expert O:

A tertiary-qualified business leader and general manager with over 25 years of commercial business experience in the field of contract, logistics, procurement and
project management in the private, corporate and government/defence sectors. He is a project manager with a strong background in establishment, administration, operation and management of contracts and has an established knowledge of contract law, building and construction law.

**Expert P:**

He has over 25 years of experience in the building and construction industry. He has extensive experience in contract administration, claims preparation and analysis, report writing, arbitration and litigation support, adjudication support, alternative dispute resolution and contract documentation. He has worked as a consultant for principals, contractors and subcontractors on major building, construction and infrastructure projects. He also practices as an arbitrator, expert determiner, mediator and adjudicator in building and construction disputes. He is a Grade 1 Arbitrator and an Accredited Mediator and Adjudicator with Institute of Arbitrators and Mediators Australia.

**Expert Q:**

He has his own legal practice, which is a law firm specialising in legal services for Major Projects. His firm services include drafting all project contracts and providing legal advice in all areas of law related to Major Projects. He usually advises on claims, disputes and back-charges on major projects.

**Expert R:**

He has acted in a substantial number of complex litigious matters in various State and Federal Courts and he has acted and advised clients across a wide range of industries and professions including building and construction, engineering, defence and professional practice. He is a founder and current Director of the Society of Construction Law Australia. He has advised on various aspects of construction contracts, both front end and back end, and advised on construction adjudication claims in several States. He is skilled in resolving disputes using alternative dispute resolution (ADR). He is qualified in mediation and arbitration (domestic and international), was a National Councillor and National Treasurer of the Institute of Arbitrator and Mediators and is the Treasurer of the South Australian Chapter. He is a Fellow of the Australian Centre for International Commercial Arbitration, the Institute of Arbitrator and Mediators Australia and the Chartered Institute of Arbitrators.
Expert S:
With degrees in engineering and law, he has been lead construction lawyer for principals on a number of large projects, lead lawyer to developers/bidders on several Melbourne Docklands projects, a construction contract adviser to road and water authorities in Victoria and other states. He has acted in major construction disputes, in litigation and arbitration, in Australia and in Hong Kong. He has substantial experience as adjudicator under the Victorian security of payments legislation and is a regular lecturer on construction law.

Expert T:
Forty years in many roles in the design and construction of many building types including extensive contract administration experience. More recently involved in building dispute resolution as an arbitrator, adjudicator and mediator. Accredited adjudicator in Victoria with IAMA for over 10 years determining claims up to $250,000.

Expert U:
A Legislative Advisor at the Victorian Building Authority (VBA) with responsibility for managing the VBA’s functions under the Building and Construction Industry Security of Payment Act 2002. The Advisor’s background is primarily in law and policy with a focus on law reform and the review and administration of legislative and regulatory regimes.

Expert V:
For over 25 years he has practised in the areas of contracting law relating to major projects and infrastructure, insurance, commercial litigation, Occupational Safety & Health and general legal services. He has assisted local and multi-national clients with all forms of contracts, including building contracts, project management contracts, consultancy contracts, contracts for the supply of goods and services, contracts for the purchase of goods and services, developing full suites of contracts for major contractors and assisting with the contracts relating to several power stations. He has advised a number of multinationals involved in the resource industry (supplying the mining industry with products and services), the energy (oil, gas and coal) sector and construction and engineering industries in connection with their Western Australian
operations including major contractors based in France, Italy, Japan, Malaysia, Norway, Singapore, the UK and the US.

**Expert W:**

He is an experienced Adjudicator who has completed in the order of 500 adjudications in total. They have been in relation to the legislation in its various forms in NSW, QLD, TAS, ACT, VIC and SA. His adjudication determinations/decisions have been rarely challenged. He is an active Adjudicator for four different ANA's, the longest relationship being with ASC.
APPENDIX 4: ANALYSIS OF EXPERTS’ BIOGRAPHIES

1. Introduction

This section provides an analysis of experts’ backgrounds and their experiences with statutory construction adjudication in their respective jurisdictions. The purpose of this section is to highlight the credibility of the experts for the purpose of the validity and reliability of the research.\textsuperscript{881}

2. Primary involvement in statutory adjudication

![Figure 1 Primary involvement of experts in statutory adjudication](image)

The experts who participated in the research mainly represent adjudicators and construction lawyers groups as demonstrated in figure 1 which is understandable given the specialised nature of the research topic that requires direct and heavy involvement of experts in statutory adjudication process so as to ensure collection of relevant and rich views. The interviewed construction lawyers often represent parties in adjudication proceedings or challenges to adjudication in supreme courts. That is quite important as it ensures that the views of the parties are also considered in the research as conveyed by the interviewed lawyers. In addition, around 43\% (n=10) of the experts

\textsuperscript{881} Refer to Appendix (1) - brief credentials and profiles of the experts who participated in the research.
have dual roles acting as adjudicators and construction lawyers. It was also planned that experts include an Australian leading academic in construction law, a well-known owner of an active authorised nominating authority and a representative of the Victorian Building Authority. Their views would fairly represent their user group. Such variety of roles helps gathering unique, holistic and diverse views in terms of the main research questions under investigation. It is worth noting that many participants have other secondary roles with regard to the statutory adjudication and they have been asked to solely mention their primary involvement. For instance, many experts, in addition to their primary roles, provide legal advice, claim consultancy and/or expert witness services to the adjudication parties.

3. Professional qualifications

Since the research question is of a legal nature, it was imperative to know the background of the experts for analysis purposes. As illustrated in figure 2, the large majority of the participants (87%, n=20) either possess legal qualifications or both legal and technical qualifications. This is understandable considering the fact that statutory adjudication is dominated by legally trained professionals. The rest of participants only possess technical qualifications. The technical qualifications of the experts include architecture, civil engineering, accounting and quantity surveying. Having said that, all of experts with technical backgrounds are also accredited adjudicators and have passed formal training in statutory adjudication. The multiple backgrounds held by some experts provide a holistic and diverse view in terms of the research question being investigated.
4. Years of experience in construction dispute resolution

![Bar chart showing years of experience in construction dispute resolution]

*Figure 3 Experts' years of experience in construction dispute resolution*

The construction industry is unique whereas the issues encountered are very specific to that industry such as the involvement of so many stakeholders, legislation, diversity, technological advancement and uniqueness of projects. As such, it was good to see that the large majority of experts (70%, n=16) have more than 20 years of experience of dealing particularly with construction disputes (See figure 3). This high level of experience increases the credibility of the participants’ views due to their broad knowledge and experience in construction disputes. It will also bring relevant, rich and concise views in terms of the research question being investigated.

5. Years of experience in statutory adjudication

![Bar chart showing years of experience in statutory adjudication]

*Figure 4 Experts' years of experience in statutory adjudication*
Statutory adjudication in Australia and Singapore has been introduced on a progressive basis between 1999 and 2009. The large majority of interviews (74%, n=17), as illustrated in figure 4, have more than 10 years of experience in statutory adjudication which broadly means that they have been involved since the inception of the regime. The experts’ wealth of experience in statutory adjudication provides holistic, unique and rich views in terms of the research question being investigated.

6. **Experts in all jurisdictions**

![Figure 5 Experts in all jurisdictions](image)

The participants are reasonably distributed among the Australian jurisdictions with the majority of participants operating in Victoria representing 52% (n=12) as illustrated in figure 5. This is understandable due to two factors. First, the researcher is based in Victoria and it is more convenient and easier to get access to prospective participants. Second, Victoria is the only Australian jurisdiction that has a legislative review mechanism for erroneous determinations (despite being very limited in terms of scope) for which the views of Victorian participants will enrich the relevant questions being

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investigated. Western Australia is the second jurisdiction in terms of the number of participants (n=8). This was deliberately planned for as it has a limited review mechanism on jurisdictional grounds by the State Administrative Tribunal rather than courts. Two participants have also been interviewed from the Singaporean jurisdiction. The reason behind that is that Singapore is the only international jurisdiction that allows for a full review mechanism on the merits and the views of the practitioners are anticipated to provide rich and unique views upon the questions being investigated.

7. **Number of adjudication cases**

The participants were also asked to confirm the number of adjudication cases that they have been directly involved in. It is important to note as in figure 6 that more than half of the participants (n=13, 57%) have dealt with more than 50 adjudication applications. The views of those participants who have intensively experienced so many different issues within the adjudication process will provide better and richer insights into the real issues being investigated around the research questions. It is also noted that there are only two participants (i.e. the academic and the government official) who have not been directly involved in adjudication cases which is understandable due to the nature of profession.
To have a better understanding of the nature of adjudication cases that the participants have been involved in, it is apparent that most of the experts have dealt with complex adjudication cases and almost half of the participants confirmed that they have dealt with 50 or more complex cases as illustrated in figure 7. That is quite important and relevant in light of the research questions being investigated.

8. The analysis approach of main data:

Most of the interviews were transcribed by professional service providers and the rest were transcribed by the researcher. The analysis started with skimming all transcripts and coding them using the qualitative research analysis software (nVivo 11). The main themes generated from the doctrinal legal research were used as a basis of coding the transcripts. The coding used the theme descriptions as keywords for categorising the data under headings and sub-headings. The process of generating headings and subheadings of the categories was progressively elaborated during the analysis. The process also identified some additional themes that were not picked up during the doctrinal legal research. Afterwards, each transcript was thoroughly examined and manually coded under its relevant heading. A chronological order was followed in examining the transcripts starting with the older interviews moving to the most recent ones. Interestingly, the data collected from the first eight interviews were significant and sufficient to be compared with doctrinal legal research and draw final discussion.
A substantial portion of the data collected from subsequent interviews were largely repetitive, although some new and important issues relevant to the study were raised by the experts and explored further. That is normal in qualitative studies adopting ‘grounded theory methodology’ which requires that all of the properties and the dimensions are saturated where saturation may indicate when it would be wise to stop conducting further interviews.882

APPENDIX 5: PROPOSED PROCESS MAPPING

The paying party may apply for review if:
1) Adjudicated amount exceeds adjudication response by min. $100,000.
2) The respondent paid the undisputed portion of adjudicated amount to the claimant.
3) The respondent paid the disputed portion of adjudicated amount to the claimant against bank guarantee, otherwise pay in trust account.

<table>
<thead>
<tr>
<th>Process Duration</th>
<th>Applicant</th>
<th>Respondent</th>
<th>ANA</th>
<th>Review Adjudicator</th>
<th>Reference Sections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business Days</td>
<td>Start</td>
<td>Release of adjudication determination</td>
<td>Yes</td>
<td>Accept</td>
<td>5 days</td>
</tr>
<tr>
<td></td>
<td>Copy respondent</td>
<td></td>
<td></td>
<td></td>
<td>1 day</td>
</tr>
<tr>
<td></td>
<td>Make submission</td>
<td></td>
<td></td>
<td></td>
<td>3 days</td>
</tr>
<tr>
<td></td>
<td>Appoint review adjudicator</td>
<td></td>
<td></td>
<td>Accept appointment</td>
<td>5 days</td>
</tr>
<tr>
<td></td>
<td>Complete Review</td>
<td></td>
<td></td>
<td></td>
<td>10 plus 5 days as granted by applicant</td>
</tr>
<tr>
<td></td>
<td>Complete Review</td>
<td></td>
<td></td>
<td></td>
<td>15 plus 20 days as granted by applicant</td>
</tr>
<tr>
<td></td>
<td>Finish</td>
<td></td>
<td></td>
<td>Accept</td>
<td></td>
</tr>
</tbody>
</table>

For enforcement, the review determination can be filed in the court. The filed determination is taken to an order of court and enforced.

Total review duration
20 to 25 days in normal cases
25 to 30 days in complex cases