Construction Act Review

The Tip of the Iceberg: Jurisdiction of Statutory Adjudicators

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Adjudicators' powers and duties; Australia; Jurisdiction; Statutory adjudication

1. Introduction

The intent of the SOP legislation in many jurisdictions[1] was to help vulnerable classes of subcontractors to 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[2] 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 party sufficient opportunity to respond to any issue raised by the other, 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 seems to be ill-equipped to appreciate this critical matter which could eventually erode

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[1] The legislation is based on two distinct models adopting either UK or NSW model. The legislation in Queensland, Australian Capital Territory, Victoria, Tasmania and South Australia are all largely based on the NSW Act, which is often called "the default model". The legislation on the Isle of Man, and inIreland is largely based on 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 follows the UK model but has 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".

[2] The main remedies in judicial review to set aside adjudication determinations are pregroative writ of certiorari, injunction or declaration.

the legislative intent. Adjudicators are usually appointed before being served the response to the adjudication application and neither the appointing authority[3] nor the adjudicator would have certainty as to 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 New South Wales (NSW) and Victoria, adjudicators have 10 business days to determine adjudication cases from the date of accepting the appointment, not the date of receiving the adjudication response.[4] The problem with this arrangement becomes manifest if the adjudicator appointment is made on the same day as the lodgement of the adjudication application. In that case, the adjudication response can be made within five business days from the appointment.[5] 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 from 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.[6] 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 the courts.[7]

The courts, by way of judicial review, have dealt with many latent problems related to jurisdictional issues and there have been an increasing number of court applications that have been successful in challenging adjudication determinations. For example, in NSW, Queensland and Victoria, there have been 197 cases challenging the adjudicator's determinations in courts to the end of 2013, 48 per cent of which have been successful.[8] In 2013 alone, there have been 22 challenge applications, 77 per cent of which have been successful and adjudication determinations were set aside. In Western Australia (WA) and Northern Territory

[3] 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.

[4] In NSW and Victoria, the 10-day period is calculated from the date of adjudicator's acceptance of appointment (see, e.g., NSW Act s 21(3)), while it is calculated in many other jurisdictions from the date of receipt of the adjudication response (see, e.g., Building and Construction Industry Security of Payment Act 2009 (ACT) (ACT Act) s.23(3); Construction Contracts Act 2004 (WA) (WA Act)) s.(31)).

[5] Under the NSW Act the respondent has the right to serve an "adjudication response" within 5 business days after receiving the adjudication application or 2 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 4 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 of 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 5 days of 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 of the date of the service of the response (s.31).

[6] Recently, the NSW Supreme Court of Appeal concluded that relief is not available to quash an adjudicator's determination on any ground other than jurisdictional error in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2016] NSWCA 379.

[7] *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* [2004] NSWCA 394 at [51].

[8] Society of Construction Law Australia, "Report on Security of Payment and Adjudication in the Australian Construction Industry", Australian Legislative Reform Subcommittee, February 2014, p.37.

(NT), to the end of June 2015, 18 out of the 47 of the matters referred to court (amounting to 38 per cent) have been considered and the adjudicator's determination was quashed.[9] 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[10] 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.[11] This view is widely supported with, for example, the duty of adjudicators to "intellectually engage" with the issues of the dispute.[12] In *De Neefe*,[13] 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*,[14] suggested that:

> "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."

Encouraging adjudicators to determine questions relating to their jurisdiction, as judicially suggested,[15] 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*.[16] However, this problem is only the tip of the iceberg. This article examines not only the problems emerging from the ambiguous SOP legislation

[9] See Building Commissioner, Annual Report (2014–2015), Construction Contracts Act 2004 (WA), p.10; Department of the Attorney-General and Justice, Annual Report (2014–2015), Construction Contracts (Security of Payments Act) 2004 (NT).

[10] 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–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.

[11] *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 at [13], per McDougall; *Energetech Aust Pty Ltd v Sides Engineering Pty Ltd* [2005] 226 ALR 362; and *Securcorp Ltd v Civil Mining & Construction P/L* [2009] QSC 249.

[12] *Laing O'Rourke Australia Construction v H and M Engineering and Construction* [2010] NSWSC 818 at [36].

[13] *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd* , [2010] QSC 279 at [11].

[14] *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 at [114], emphasis added. .

[15] 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 they were 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.

[16] *Lee Wee Lick Terence* [2012] SGCA 63 at [64].

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 by setting out a proposed roadmap to address the emerging problems.

2. The object of the SOP legislation

Understanding of the object of the SOP legislation helps justify the "pay now, argue later" policy[17] inherent in the adjudication process. The SOP legislation across jurisdictions has a similar object of facilitating cash flow down[18] 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[19]. 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 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 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".[20]

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.[21] 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."[22]

Judicially,[23] 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.[24] Vickery J mentioned the deficiency of the NSW Act in achieving

[17] 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.
[18] In some jurisdictions such as the UK, WA and NT, liability flows both up and down the contracting chain.
[19] See *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture* [2009] VSC 426 at [33].
[20] See *http://www.vba.vic.gov.au/practitioners/security-of-payment-sop* [Accessed 24 February 2017].
[21] See Construction Contracts Act 2004 (WA) s.30; Construction Contracts (Security of Payments) Act 2004 (NT) s.26.
[22] See the Minister's Second Reading Speech (WA *Hansard*, 3 March 2004, 275).
[23] *Brodyn* [2004] NSWCA 394 at [51].
[24] *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [20].

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."[25]

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."[26]

3. Jurisdiction of adjudicators

Adjudicators obtain their jurisdiction to look into the referred disputed matters by accepting the referral by the appointing authority.[27] 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.[28] 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.[29] In *Chase Oyster*,[30] McDougall J followed the High Court authorities,[31] 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; and
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.

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

[25] *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [46]–[47].
[26] *Grocon* [2009] VSC 426 at [115].
[27] In some jurisdictions, adjudicators can also be appointed by the mutual agreement of the parties.
[28] See *Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd* [2011] WASCA 217 at [11].
[29] See *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QCA 276 at [77]. See also *Sugar Australia* [2013] VSC 535 at [107].
[30] *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 at [158].
[31] See *Craig v South Australia* (1995) 184 CLR 163, 177–8; *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 573–4.

various statutory provisions[32] excluding new reasons.[33] The reasons why many respondents do not address 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[34] as well as the proposition that claimants may not be serious enough 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 a higher percentage upon respondents despite being successful in adjudication,[35] guided by the unique legislative guidelines regarding the apportionment of fees.[36] 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 an adjudication application probably could have prevented the claimant from withdrawing it upon its awareness of new issues raised in the adjudication response.[37]

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 equivalent of a fine tooth comb.[38] In Singapore, the Court of Appeal described the dilemma of adjudicators when faced with 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

[32] See e.g., NSW Act s.20(2B).

[33] See *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19 at [29] and *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53.

[34] 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 s.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 Corp of NSW v Nebax Constructions* [2012] NSWSC 6 at [38], perMcDougall J.

[35] See *JJB Builders Pty Ltd v Civil Contractors (Aust) Pty Ltd* , adjudication application no.00005417, 27 July 2015.

[36] The Building and Construction Industry Payments Act 2004 (Qld) (Qld Act) as amended in 2014 under (s. 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.

[37] See *JJB Builders Pty Ltd v Civil Contractors (Aust) Pty Ltd* , adjudication application no.00005417, 27 July 2015, p.11.

[38] *Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466 at [37]. See also, *Red Ink Homes Pty Ltd 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".

> 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."[39]

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[40] 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 an injunction in the Supreme Court to restrain the appointment of an 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.[41] However, it was judicially clarified that it would not be an easy or a quick matter for the Supreme Court to determine detailed jurisdictional arguments.[42]

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 *Brodyn*,[43] 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.[44] The court identified five basic and essential requirements[45] for the existence of an adjudicator's determination as follows[46]:

1) the existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8);
2) the service by the claimant on the respondent of a payment claim (s.13);
3) the making of and adjudication application by the claimant to an authorised nominating authority (s.17);

[39] *Lee Wee Lick Terence* [2012] SGCA 63 at [36].
[40] See *Allied P&L Ltd v Paradigm Housing Group Ltd* [2009] EWHC 2890 at [32].
[41] See *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362.
[42] *Australian Remediation* [2005] NSWSC 362 at [13] per McDougall J.
[43] *Brodyn* [2004] NSWCA 394.
[44] *Brodyn* [2004] NSWCA 394 at [55], per Hodgson JA.
[45] An additional requirement of providing that measure of natural justice required by the Act is in addition to these 5 (at [55]).
[46] *Brodyn* [2004] NSWCA 394 at [53], per Hodgson JA.

4) the reference of the application to and eligible adjudicator, who accepts the application (ss.18 and 19); and
5) the determination by the adjudicator of this application (ss.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 (s.22(1)) and the issue of determination in writing (s.22(3)(a)).

Brodyn held as 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*,[47] 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*, the NSW Court of Appeal considered whether an adjudicator had the 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 [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 [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 s.17(2)(a) of the NSW Act was vitiated with jurisdictional error.

Furthermore, the "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*,[48] 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.[49] This decision not only overrules many previous authorities in the NSW,[50] but also seems completely inconsistent with the position of the Queensland courts.[51]

[47] *Chase Oyster* [2010] NSWCA 190; applying the High Court decision in *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1.

[48] *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288.

[49] *Lewence* [2015] NSWCA 288 at [60], [93], per Ward JA; at [119], per Emmett JA; at [133], per Sackville AJA.

[50] See, e.g., *Patrick Stevedores Operations No.2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413; *Omega House Pty Ltd v Khouzame* [2014] NSWSC 1837.

[51] See *Lean Field Developments Pty Ltd v E and I Global Solutions (Aust) Pty Ltd* [2014] QSC 293.

Furthermore, two months after the decision in *Lewence*, the Victorian Supreme Court of Appeal in *Saville*[52] 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*.[53] The judgment is the first ever judgment 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*,[54] Ball J held that the adjudicator's decision on a 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*.[55] In that case, the court held that the adjudicator's statement that he had no jurisdiction was a decision within the purpose of the Act. The latter proposition was followed in *Alucity*[56] 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 to their fees. In the UK, fees were required to be repaid for a total want of consideration in *PC*.[57] In Australia, this issue has been tentatively raised in a number of matters, but does not appear to have been ultimately decided.[58] 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.

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

[52] *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318.
[53] *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2016] HCA 52.
[54] *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165 at [14].
[55] *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159 at [10]–[19], per Applegarth J.
[56] *Alucity Architectural Produce Supply Pty Ltd v Hick* [2016] NSWSC 608.
[57] *PC Harrington Contractors Ltd v Systech International Ltd* [2012] EWCA Civ 1371;[2013] 2 All E.R. 69; [2013] Bus. L.R. 970.
[58] See, e.g., *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No.2)* [2016] NSWSC 1229.

of jurisdiction and entitlement of adjudication fees upon dismissal, the legislation in WA and Queensland provide some directions[59] in this regard.

Table 1 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 years.[60] 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 $19,090 and $4,200 respectively, upon dismissal despite the fact that there is no provision in the legislation giving the adjudicator such an entitlement.[61] Interestingly, in the former case, the respondent was liable to pay 50 per cent of the adjudicator's fees.

Table 1 Comparison of dismissed adjudication applications in WA and Victoria

Description	**WA**		**Victoria**	
Financial year	**2013–2014**	**2014–2015**	**2013–2014**	**2014–2015**
Total adjudication applications	235	175	224	333
Adjudication applications dismissed by adjudicators	52	47	5	10
Percentage of dismissed applications (%)	22.1	26.9	2.23	3
Mean value of adjudicator's fees for claims dismissed ($)	6,316	4,561	3,818	420
Total value of adjudicator's fees for claims dismissed ($)	301,420	237,158	19,090	4200
Smallest Claim dismissed ($)	4,443	4,871	3,100	1,139
Largest claim dismissed ($)	82,995,300	18,583,363	1,255,431	365,086

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,[62] and made adjudicators entitled to fees where they find an application to be invalid.[63] 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.[64]

That adjudicator's duty to decide upon jurisdiction was criticized as it lacks clarity as to whether an adjudicator can

[59] See WA Act s.32(1)(a), s.44(2); Qld Act.

[60] See Victorian Building Authority, Security of Payment Adjudication Data, 2013–2014 and 2014–2015; Building Commissioner, Construction contracts Act 2004 (WA), Annual Reports.

[61] However, s.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 s.23 specifically recognises that an adjudicator may determine that no sum is payable to the claimant.

[62] See Qld Act s.25(3)(a).

[63] See Qld Act s.35(5)(b).

[64] See A. Wallace, "Final report of the discussion paper—Payment dispute resolution in the Queensland building and construction industry", 2013, p.245.

> "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)".[65]

In the recent case of *Camporeale*,[66] 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.[67] 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.[68]

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.[69]

Reactive adjudicators usually follow one of three basic approaches depending on the case. Firstly, an adjudicator may opt to resign and dismiss the case due to its complexity, by informing both parties and the appointing authority.[70] Secondly, an adjudicator may purposely wait until the statutory period for releasing the determination expires so the claimant may make a new adjudication application (often referred to as "allowing the matter to time out").[71] Similarly, some

[65] P. Davenport, "An update on security of payment in the construction industry in Queensland", RICS Cobra 2015, Sydney.

[66] *Camporeale Holdings Pty Ltd v Mortimer Construction Pty Ltd* [2015] QSC 211 at [36].

[67] Qld Act s.35(1)(b) states the fees must be reasonable. Apparently, that statement is inconsistent with the intention of the amendment as addressed by Andrew Wallace in his final report.

[68] See, e.g., *Steve Taylor Builder Pty Ltd v Innovation Design and Construct Pty Ltd* application no.00005515, 23 July 2015; *JJB* application no.00005417, 27 July 2015, accessible online: *http://xweb.bcipa.qld.gov.au/ars_xweb /Pages/Default.aspx*. [Accessed 24 February 2017].

[69] See comments of the court in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228 at [52]–[53].

[70] In *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".

[71] In WA, 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 that

adjudicators 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.[72] Thirdly, an adjudicator, driven by commercial factors[73] or directed by courts,[74] 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.[75]

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 jurisdictional arguments (with the assistance of lawyers) rather than arguing the merits of the underlying payment dispute.[76] In Victoria, the recent annual reports show that both claimants and respondents have retained solicitors in at least 30 per cent of the adjudication cases.[77] 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

there is no payment dispute to adjudicate. See Building Commissioner, *2014*–2015 Annual Report, Construction Contracts Act 2004 (WA), p.6.

[72] Wallace, A, Final report of the discussion paper — Payment dispute resolution in the Queensland building and construction industry, 2013, p 245.

[73] See Wallace, "Final report of the discussion paper—Payment dispute resolution in the Queensland building and construction industry", 2013, p.246.

[74] See *Lee Wee Lick Terence* [2012] SGCA 63.

[75] See *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans (Property) Pty Ltd* adjudication application no.1057877_1453, 14 May 2010, (adjudicator: Andrew Wallace)

[76] See Society of Construction Law Australia, Australian Legislative Reform Subcommittee, "Report on Security of Payment and Adjudication in the Australian Construction Industry", February 2014, p.67.

[77] See the Victorian Building Authority, Security of Payment Adjudication Data, 2013–2014 and 2014–2015.

trained to be eligible to practice. Thus, it is not surprising to see, for example, that 73 per cent of registered adjudicators in WA are not legally trained.[78]

It is submitted that even bright and experienced lawyers advising parties on adjudication matters have become more uncertain nowadays than at any time before regarding the likely approach that 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. Claimants 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.[79] 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.

The ambiguous SOP legislation has unnecessarily increased the traffic of challenge applications before Supreme Courts. The case of *Olympia*[80] 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 contact 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 was 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 judgment, Ball J mentioned, obiter dicta, at [11] that the NSW Act does not prevent respondents from raising grounds asserting that the adjudicator did not have jurisdiction to make a determination.[81] Ball J further held at [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 the adjudicator's decision that he had no jurisdiction.

The emerging uncertainties, leading to excessive judicial intervention, are likely to deter many claimants from going to adjudication, favouring other traditional

[78] See P. Yung, K. Rafferty, R.McCaffer and D. Thomson, "Statutory Adjudication in Western Australia: Adjudicators' Views", (2015) 22(1) *Engineering, Construction and Architectural Management* 71.

[79] This risk was well noted in *Brodyn* [2005] NSWCA 394 at [51], per Hodgson JA; *Hickory* [2009] VSC 156 [46]–[47], per Vickery J.

[80] *Olympia Group* [2011] NSWSC 165.

[81] This proposition was followed in *Thiess* [2012] QCA 276 at [78], per Philippides J and in *Rail Corp* [2012] NSWSC 6 at [38], per McDougall J.

avenues despite being more expensive and lengthy. As such, the SOP legislation becomes not only less accessible to many vulnerable firms, but also less convenient as engaging legal counsel, in order to advise on complex issues and increase the chances of success, becomes a necessity.

In light of the above analysis, it becomes apparent that the SOP legislation in each jurisdiction does not provide sufficient directions for most, if not all, of the following ten controversial matters pending further legislative amendment, regulations or ultimate court decisions.

1) The duty of an adjudicator to decide upon jurisdiction whether or not raised by the parties[82]; and whether any resulting error in deciding jurisdiction is deemed an error within jurisdiction rather than an error going to jurisdiction.[83]
2) The adjudicator's obligation to dismiss the application due to the complexity of jurisdictional arguments.[84]
3) The adjudicator's determination upon jurisdiction is an adjudicator's determination within the purpose of the Act.[85]
4) The entitlement of respondents to raise new jurisdictional arguments in adjudication response.[86]
5) The limitations of respondents seeking judicial review if jurisdictional objections are not raised in adjudication.[87]
6) The claimant's right to provide a reply if new jurisdictional objections are raised in the adjudication response.[88]
7) The adjudicator's right to extend time limits to determine an application if complex jurisdictional arguments are raised.[89]
8) The adjudicator's entitlement of fees upon dismissal for lack of jurisdiction,[90] and the adjudicator's duty to avoid unnecessary expenses or costs in deciding upon jurisdiction.[91]
9) The adjudicator's obligation to consider whether new jurisdictional objections are raised by respondents in the apportionment of adjudication fees.[92]
10) The adjudicator's entitlement to fees if the determination is quashed by court for the adjudicator's lack of jurisdiction.[93]

[82] *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, *Kembla Coal and Coke v Select Civil* [2004] NSWSC 628 at [37]; *Lee Wee Lick Terence* [2012] SGCA 63 at [64].

[83] *Camporeale* [2015] QSC 211 at [36], per Henry J.

[84] See *O'Donnell Griffin* [2007] WASC 215 at [31].

[85] See *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159, per Applegarth J at [10]–[19].

[86] See *John Holland v Road Traffic Authority* [2007] NSWCA 19 at [48]–[49], per Hodgson JA; *Thiess* [2012] QCA 276 at [78], per Philippides J; *Rail Corp* [2012] NSWSC 6 at [38], per McDougall J.

[87] See *Allied P&L* [2009] EWHC 2890 at [32]; *Project Consultancy Group v Trustees of The Gray Trust* [1999] HT/99/29 at [14].

[88] See, e.g., the Qld Act s.24B; the Vic Act s.21 (2B).

[89] See, e.g., the Qld Act s.25B.

[90] See *Alucity Architectural Product Supply Pty Ltd v Australian Solutions Centre*; *Alucity Architectural Product Supply Pty Ltd v Paul J Hick* [2016] NSWSC 608.

[91] See, e.g., Building and construction Industry Security of Payment Act 2004 (Singapore) s.16(3)(b).

[92] See, e.g., Qld Act s.35A(2)(g).

[93] See *PC Harrington* [2013] 2 All E.R. 69; [2013] Bus. L.R. 970. In that case, fees were required to be repaid for a total want of consideration.

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 led by the same author,[94] 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; and
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 a competent tribunal which 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 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 stands, however, as a blunt instrument where it is contended that further empirical research is now needed. The six hold points are:

1) obligation of respondents to raise jurisdictional objections in the adjudication response;
2) making the referral of the case after receipt of the adjudication response;
3) appointment of a legally qualified senior adjudicator if the 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 engaging technical experts; and
6) making adjudicator's eligible for fees upon dismissal of the case for lack of jurisdiction, and the obligation to avoid unnecessary expenses.

The discussion below includes a brief rationale of each point.

5.1 Respondent's obligation to raise jurisdictional objections in the adjudication response

Since some respondents, who are statutorily entitled to lodge an 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 the adjudication process, it implies that it accepts that

[94] See S. Skaik, J. Coggins, and A. Mills, "Towards Diminishing Judicial Intervention in Statutory Adjudication: A Pragmatic Proposal" (2016) 32 Const. L.J. 658–74.

the adjudicator has jurisdiction to hear the matter and confers jurisdiction on the adjudicator to determine the dispute[95] 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 the adjudication response.[96] Moreover, respondents must identify on the face of the response whether they have any jurisdictional objection to facilitate cost and time effective nomination process by the appointing authority.

5.2 Making the referral of the adjudication case after receipt of the adjudication response

The appointing authority must hold the referral of the application to an adjudicator until the receipt of the 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 the response, must start short-listing 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' time limit to make a determination must start from the date of appointment, however, the adjudicator must notify the parties of acceptance of the appointment. The adjudicator must have an express duty to decline the referral or resign by notifying all parties due to the complexity of the referred matter so the appointing authority can make another referral. The hold point would only add a few days to the process but would ensure that the right horse is picked up for the right course.

5.3 Appointment of a legally qualified senior adjudicator if the 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.[97] This approach will increase the confidence of the parties in the adjudication outcome and diminish the need of judicial intervention. The adjudicator must have appropriate legal qualifications and relevant experience. Since these criteria may mean different things to different people, it is suggested that the appointing authority must establish a proper grading system[98] to classify adjudicators based on their qualifications, expertise and track record in dealing with complex legal matters.

[95] See *Project Consultancy* [1999] HT/99/29 at [14].

[96] This proposition was followed by McDougall in *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53 at [42]–[44].

[97] See *Red Ink Homes* [2014] WASC 52 at [122] where it was implied that legal training can help achieve a better outcome.

[98] See, e.g., Queensland Building and Construction Commission, "Adjudicator Grading and Referral Policy", 2015.

5.4 Providing adjudicators with guidelines to deal with jurisdictional objections

Until the time of writing, there are no guidelines or handbooks whatsoever, save for the UK, that can assist adjudicators in dealing with jurisdictional objections in each jurisdiction. The need for 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.[99] Interestingly, excellent Guidance Notes on jurisdictions have been made available to the UK construction adjudicators since May 2011 in an attempt to establish best practices to assist adjudicators in determining the threshold jurisdiction and maintaining jurisdiction.[100]

Such guidelines become more necessary for adjudicators in cases where no adjudication response was lodged as they must first 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, 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.

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

If jurisdictional objections are raised, adjudicators must be entitled to extend the time limit (say, by 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 an adjudication response if new jurisdictional issues are raised to comply with procedural fairness requirements. In complex cases, the adjudicator must be flexible enough to grant a further reasonable extension of time to claimants to respond.[101]

On the other hand, technical issues may be very challenging to legal adjudicators, such as using the correct formula in calculating due payments.[102] 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

[99] See, e.g., *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd* [2012] NTSC 22.

[100] Adjudication Society and Chartered Institute of Arbitrators, "Construction Adjudication Practice Guidance: Jurisdiction of the UK construction adjudicator", 3rd edn, January 2016.

[101] This approach was implemented recently in Queensland under s.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.

[102] See, e.g., *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.

arguments. In WA, however, research involving interviews with 22 adjudicators found that the experts have a neutral position regarding the necessity of experts.[103]

5.6 making adjudicator's eligibility for fees upon dismissal of the case for lack of jurisdiction and the 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 to reasonable fees whether or not an application is eventually dismissed for lack of jurisdiction.[104] 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 the 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 it further. It is also suggested that if adjudicators think that the ground of jurisdictional objection is weak, they must proceed with the substance of the adjudication in order not to undermine the object of the Act.[105]

By adopting the entire roadmap, it is arguably fair to deprive adjudicators of their fees if their determinations are quashed for lack of jurisdiction.[106]

6. Conclusion

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 six identified 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.

[103] See Yung, Rafferty, McCaffer and Thomson, "Statutory Adjudication in Western Australia: Adjudicators' Views", (2015) 22(1) *Engineering, Construction and Architectural Management* 67.

[104] See *Alucity* [2016] NSWSC 608.

[105] See *ABB Power Construction Ltd v Norwest Holst Engineering Ltd* (2000) 2 T.C.L.R. 831; 77 Con. L.R. 20; (2001) 17 Const. L.J. 246 .

[106] See *PC Harrington* 2013] 2 All E.R. 69; [2013] Bus. L.R. 970 where it was held that fees were required to be repaid for a total want of consideration.