Construction Act Review

Towards Diminishing Judicial Intervention in Statutory Adjudication: A Pragmatic Proposal

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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"[1] 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 1 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.[2] Other paying parties seek to frustrate the adjudication process even before a determination

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[1] *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [96], per Palmer J, adopting the language of Ward LJ in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270; [2002] 1 W.L.R. 2344; [2002] C.L.C. 905.

[2] *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [46], per Vickery J.

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".[3]

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".[4]

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.[5] 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 is to have lost the right to use the statutory scheme because of the effluxion of time.[6]

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.

2. The evolving tension

Notwithstanding the fact that legislatures had attempted to insert privative clauses[7] 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*[8] that

[3] *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399 at [50].
[4] *Cardinal* [2011] NSWCA 399 at [99].
[5] The risk of such suspension was well noted in *Brodyn v Davenport* [2005] NSWCA 394 at [51], per Hodgson JA; *Hickory* [2009] VSC 156 [46]–[47], per Vickery J.
[6] This arises for example by the application of s.13(4) of the NSW Act and the decision of the court in *Cardinal* [2011] NSWCA 399.
[7] See, e.g., ss.90 and 91 of the Justice and Other Legislation Amendment Act 2007 (Qld) which amended Sch.1 Pt 2 of the Judicial Review Act (Qld) to exclude the operation of that Act to decisions made under Pt 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 at [68], per Vickery J.
[8] *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [100].

> "[l]egislation 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 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[9] 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.[10]

Table 1 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.[11] 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 1, disputed payment claims below AUD 25,000 do not reach the Supreme Court for judicial review; even claims between AUD 25,000 and AUD 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".[12]

That observation is well demonstrated in Table 1 which shows that the proportions of juridical review applications from the relevant adjudicated claims are much higher as the amount in dispute increases. For example, the average percentage of judicial review applications of disputed amounts between AUD 40,000 and AUD 99,999 is only three per cent and it steadily increases until it reaches 11 per cent for disputed amounts between AUD 500,000 and AUD 999,999. A brief analysis of these judgments discloses that the majority of the adjudications deal with

[9] 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 JM Hargreaves (NSW) Pty Ltd* [2006] HCATrans 9.

[10] See *John Goss Projects v Leighton Contractors* [2006] NSWSC 798.

[11] 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 and Services. Figures of Judicial review applications are derived from Supreme Court judgments 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.

[12] *Seabreeze Manly v Toposu* [2014] NSWSC 1097 at [51].

complex contractual entitlement issues and facts such as delay claims, liquidated damages and variations of high value.

The table 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.

Table 1 Proportion of judicial review from adjudicated applications in New South Wales

Claimed mount/ amount in dispute (AUD)	Determination released (financial year)				Judicial review challenges (calendar Year)				Judicial review applications			
	2012	2013	2014	Avg	2012	2013	2014	Avg	2012	2013	2014	Avg
0–24,999	341	357	234	311	0	0	0	0	0%	0%	0%	0%
25,000–39,999	102	69	53	75	2	2	2	2	2%	3%	4%	*3%*
40,000–99,999	130	97	98	108	3	3	3	3	2%	3%	3%	*3%*
100,000–249,999	106	83	70	86	4	5	2	4	4%	6%	3%	*4%*
250,000–499,999	46	26	46	39	1	2	4	2	2%	8%	9%	*6%*
500,000–999,999	25	13	18	19	2	2	2	2	8%	15%	11%	*11%*
≥ 1,000,000	29	27	37	31	2	0	3	2	7%	0%	8%	*5%*
Total	438	315	322	358	14	14	16	15	3%	4%	5%	4%

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".[13] As such, they present a significant problem for the efficacy of the Security of Payment (SOP) legislation. In his Second Reading Speech for the New South Wales (NSW) Building and Construction Industry Security of Payment Bill 1999, the Minister (the Right Honourable Morris Iemma) made it clear that the

> "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".[14]

This led the Honourable Justice Robert McDougall to comment that "'parliament specifically wished for the courts not to be too readily involved".[15] Furthermore, the Western Australian SOP legislation has an express object that the adjudication

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

[14] M. Iemma, *NSW Parliamentary Debates*, Legislative Assembly, 29 June 1999 at 1598.

[15] R. McDougall, "An examination of the role and content of natural justice in adjudications under construction industry payment legislation", 2009, p.9, retrieved on 4 Dec 2015, from *http://www.supremecourt.justice.nsw.gov.au /Documents/mcdougall110909.pdf* [Accessed 5 August 2016] .

process aims to resolve disputes fairly and as quickly, informally and inexpensively as possible.[16] 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 is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes."[17]

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 jurisdictional 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.

3.1 Broad approach to jurisdictional facts

The courts in the East Coast model jurisdictions have adopted a narrow approach when considering jurisdictional facts for the purpose of judicial review, which has led to the quashing of many determinations.[18] 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".[19]

Notwithstanding this, however, the Victorian Supreme Court has also highlighted the drawbacks if a broad approach is not required by the legislation to be adopted by the courts when considering essential jurisdictional facts, other than those established in *Brodyn*, stating

> "[i]f the Act does make the jurisdiction of an adjudicator contingent upon the actual existence of a state of facts, as distinguished from the adjudicator's determination that the facts do exist to confer jurisdiction, in my opinion the legislation would not work as it was intended to. Unnecessary challenges to

[16] Construction contract Act 2004 (WA) s.30.
[17] A.J. MacTiernan, *WA Parliamentary Debates*, Legislative Assembly, 3 March 2004 at 275.
[18] See, e.g., *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 at [66]; *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190.
[19] *See Sugar* [2013] VSC 535 at [107].

> 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".[20]

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."[21]

In Western Australia, the Supreme Court has been consistent in adopting a broad approach when dealing with jurisdictional facts under s.31(2)(a), considering the adjudicator's role to be analogous to an inferior court.[22] However, in the recent judgment of *Laing O'Rourke*,[23] Mitchell J expressed his reservations about the broad sense approach which an adjudicator is empowered to authoritatively to determine.

In its recent report, The Society of Construction Law Australia (SoCLA) 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 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".[24]

Whilst the SoCLA's 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.

3.2 Remitting jurisdictionally defective determinations

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

[20] *Grocon* [2009] VSC 426 at [115].
[21] *Grocon* [2009] VSC 426 at [116].
[22] See, e.g., *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].
[23] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237.
[24] 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.68.

(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.[25] 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 a time period directed by the Supreme Court.[26] The ACT Supreme court exercised its remittal authority for the first time in *Fulton Hogan*.[27] In that case, Mossop AsJ found that the adjudicator made a manifest error of law which could substantially affect the legal rights of the parties and held:

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

In Victoria, despite the fact the Victorian Act is silent regarding remittal, the Victorian Supreme Court has nevertheless remitted several cases to the relevant Authorised Nominating Authorities for further remittal to the original adjudicator.[28] In *Maxstra*,[29] 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*,[30] 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".[31]

`In NSW, the Act is also silent as to whether the court has power to remit erroneous determinations. However, an order under s.69 of the Supreme Court Act 1970 (NSW) in the nature of mandamus could be made, so that the court may order an adjudicator to reconsider an application and make a determination according to law. This possibility was discussed, obiter by McDougall J in *Trysams*.[32] 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)".[33]

[25] Building and Construction Industry (Security of Payment) Act 2009 (ACT) s.436(b).
[26] Building and Construction Industry (Security of Payment) Act 2009 (ACT) s.43(7).
[27] *Fulton Hogan Construction Pty Ltd v Brady Marine & Civil Pty Ltd* [2015] ACTSC 384 at [67], per Mossop AsJ.
[28] 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.
[29] *Maxstra* [2013] VSC 243 at [72].
[30] *Plenty Road v Construction Engineering (Aust) (No.2)* [2015] VSC 680.
[31] *Plenty Road* [2015] VSC 680 at [31].
[32] *Trysams Pty Limited v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399 at [80]–[89].
[33] *Trysams* [2008] NSWSC 399 [2008] NSWSC 399 at [90].

Eventually, the NSW Court of Appeal in *Cardinal Project*,[34] resisted the possibility of remittal. In that case, Macfarlan JA, with whom Tobias AJA agreed, pointed out that, by the time the adjudicator decided the matter after remittal, circumstances might have changed significantly from the time when the adjudicator was considering his original determination (e.g. the payment schedule may be outdated, other defects may have come to light and so on.). His Honour went on to say that the exemption of adjudicators' decisions under the Act from the scope of judicial review is a further indication of a legislative desire that the Act's mechanisms be quick, cheap and simple. Also, any remittal order would necessarily require the adjudicator to make a decision outside the time permitted by s.25(3), unless the parties agreed to an extension of time. Macfarlan JA further opined that

> "[i]f the legislature had adverted to the question of what should happen when a purported but void determination is issued pursuant to an adjudication application, it may have provided that that application should remain on foot but be remitted to the original adjudicator".[35]

In Queensland, the Court of Appeal, in *Heavy Plant*,[36] 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*,[37] 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.[38]

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".[39] However, in *Emergency Services*,[40] McDougall J, in an attempt to give indirect effect to an invalid determination, required the respondent to pay the amount unaffected by the error as a condition to set aside the adjudicator's determination. In *Cardinal*,[41] 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".[42]

[34] *Cardinal* [2011] NSWCA 399 at [100]–[103].
[35] *Cardinal* [2011] NSWCA 399 at [97].
[36] *Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2013] QCA 386 at [67].
[37] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394 at [87].
[38] A. Wallace, "Discussion Paper—'Payment dispute resolution in the Queensland building and construction industry-Final Report'", 2013, p.224.
[39] *Sunshine Coast Regional Council v Earthpro Pty Ltd* [2015] QSC 168 at [73], per Byrne SJA.
[40] *Emergency Services Superannuation Board v Sundercombe* [2004] NSWSC 405.
[41] *Cardinal* [2011] NSWCA 399 at [52].
[42] *Cardinal* [2011] NSWCA 399 at [52].

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.[43] 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".[44]

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".[45]

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.[46] Having said that, introducing such a provision within legislation, without sufficient guidance on how a court is to allow part of an adjudication decision, could bring many other difficult questions and valid concerns regarding its practicality and application. For instance, it was argued: "Is a breach of natural justice by an adjudicator a 'jurisdictional error' within the meaning of s 100(4)?"[47] However, it has been applied without issue.[48]

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.[49] 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.[50] That transitional training covers

[43] *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [115]–[116]; *Maxstra* [2013] VSC 243 at [77].

[44] Wallace, *Discussion Paper—Payment dispute resolution in the Queensland building and construction industry-Final Report*, 2013, p.224.

[45] Building and Construction Industry Payments Act 2004 (Queensland) s.100(4).

[46] See, e.g., *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 345 at [57–[59]; *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QSC 373 at [61]–[62]; e.g., *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No.2)* [2013] QSC 67 at [35]–[37]; *Multiplex* [2003] NSWSC 1140 at [90]–[92], per Palmer J; *Lanskey Constructions Pty Ltd v Noxequin Pty Ltd* [2005] NSWSC 963 at [21]–[22].

[47] P. Davenport, "An update on security of payment in the construction industry in Queensland", paper presented to RICS Cobra 2015, Sydney, p.8.

[48] See *Sunshine Coast* [2015] QSC 168, and previous excision prior to the Queensland Building and Construction Industry Payment Act being amended is evidenced in *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting* [2011] QSC 327.

[49] See Building and Construction Industry Payments Amendment Act (2014), Act No.50 of 2014 (Qld).

[50] See the Building and Construction Industry Payments Regulation 2004 Sch.1 Pt 2.

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 criticised for the Registrar's lack of probity.[51]

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.[52] 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 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.

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.[53] 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.[54]

Judicially, it was decided that all grounds upon which a review is sought are jurisdictional facts.[55] In *O'Donnell Griffin*,[56] 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

[51] Davenport, An update on security of payment in the construction industry in Queensland", paper presented to RICS Cobra 2015, Sydney, p.9.
[52] Queensland Building and Construction Commission, November 2015 monthly adjudication statistics, p.8.
[53] State Administrative Tribunal Act 2004 (WA) s.29.(3).
[54] See Construction Contracts Act 2004 (WA) s.46(2).
[55] See *Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd* [2011] WASCA 217 at [16].
[56] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 (Beech J).

review by the WASAT of an adjudicator's decision not to dismiss was "more expeditious"[57] and more consistent with the scheme of the WA Act than the "slower and more cumbersome prerogative relief".[58] That proposition was eventually overturned by the Court of Appeal in *Perrinepod*,[59] 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.[60] Apparently, there is an inconsistency between the WA Act and a hearing de novo. In *Marine & Civil Bauer*,[61] 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, s.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*,[62] stating that the provision only limits the appeal before the Tribunal, whilst judicial review will still be open for the aggrieved party. Furthermore, s.105 of the WASAT Act provides for an appeal to the Supreme Court from a decision of the WASAT, provided that the Court grants leave to appeal which is limited only on a question of law.

Since the commencement of the WA Act in 2005 until end of June 2015, the WASAT has reviewed 37 decisions of adjudicators dismissing applications without considering the merits. In 25 cases, the adjudicators' decisions were confirmed, whilst 12 cases (amounting to 37 per cent) were set aside or remitted to the original adjudicator to revisit the original decision to dismiss. Notably, the review applications before the WASAT have been constantly increasing over the years. Table 2 below demonstrates an extract from the relevant annual reports on the operation of the review mechanism from 2008 until 2015.

[57] *O'Donnell Griffin* [2009] WASC 19 at [122].
[58] *O'Donnell Griffin* [2009] WASC 19 at [131]. See also, *Thiess Pty Ltd v MCC Mining (WA) Pty Ltd* [2011] WASC 80 at [44], per Corboy J.
[59] *Perrinepod* [2011] WASCA 217 at [129].
[60] State Administrative Tribunal Act (2004) s 27.
[61] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [2005] WASAT 269 at [70]–[71].
[62] *Red Ink Homes Pty Ltd v Court* [2014] WASC 52 at [72]–[76].

Table 2 Operation of the review mechanism of adjudicators' decisions to dismiss in WA[63]

Description	Annual review applications by the WASAT						
Financial year	2008-9	2009-10	2010–11	2011–12	2012–13	2013–14	2014–15
No. of lodged applications	105	172	197	178	208	175	235
No. of dismissed application by adjudicators for no jurisdiction.	25	57	57	40	74	47	52
No. of review applications by the WASAT	4	4	3	5	5	7	8
No. of remittal/set aside cases by the WASAT	0	0	0	2	1	3	2

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:

1) separating jurisdictional issues from the merits in adjudication; and
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:

4.1 Separating jurisdictional objections from the merits in adjudication.

Since the majority of adjudicators possess no appropriate legal training,[64] 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.[65] 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"[66].

[63] Figures are extracted from the relevant annual reports on the WA Act as released by the Building Commissioner.
[64] P. Yung, K. Rafferty, R. McCaffer and D. Thomson, "Statutory Adjudication in Western Australia: Adjudicators' Views", Engineering (2015) 22(1) *Construction and Architectural Management* 71.
[65] *Lee Wee Lick Terence v Chua Say Eng* [2012] SGCA 63 at [64].
[66] *Lee Wee Lick Terence* [2012] SGCA 63 at [36].

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.[67] 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 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.[68]

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 were only four Supreme Court cases out of the 37 cases that were identified in which the WASAT's decisions were challenged unsuccessfully.[69] 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

[67] C. S. Keong, "Forword" in C. Fong, *Security of Payments and Construction Adjudication*, 2nd edn (LexisNexis, 2012).

[68] See *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 at [66].

[69] 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* [2011] WASCA 217; *Thiess* [2011] WASC 80.

erroneous adjudications through a legislative informal process. In *BM Alliance*,[70] Applegarth J referred to various authorities and noted 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*,[71] 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*,[72] referred to various authorities including the High Court's decision in *R. v Cook*[73] 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".

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.[74] 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, 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.

[70] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No 2)* [2013] QSC 67 at [8].
[71] *Field Deployment Solutions Pty v Jones* [2015] WASC 136 at [18].
[72] *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172 at [64].
[73] *R. v Cook Ex p. Twigg* [1980] HCA 36 at [29], [30], [34]. See also, *Re Baker Ex p. Johnston* (1981) 55 ALJR 191 and Martin CJ in *Re Carey Ex p. Exclude Holdings Pty Ltd* [2006] WASCA 219 at [128]–[140].
[74] The "no cost" approach was also adopted in the Building and Construction Industry Security of Payment Amendment Bill (2015) 55 (Tas).

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.[75] 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.[76]

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.[77] 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 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.

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

[75] See *Cant Contracting Pty Ltd v Casella* [2006] QCA 538.

[76] The entitlement to remuneration is now express in the Queensland Building and Construction Industry Payment Act at s.35.

[77] Adopted from *Rhodia Chirex Ltd v Laker Vent Engineering Ltd* [2003] EWCA Civ 1859; [2004] B.L.R. 75; (2004) 20 Const. L.J. 155 at [40].

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 AUD 100 per hour) to release the amended determination as a reasonable compensation to the parties affected by the consequences of the first erroneous determination.

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.

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.[78] 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.

5. Conclusion

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 represents something of a "blunt instrument" and further consultation with the building and construction industry will be required.

[78] See WA Act s.34(2).