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Construction Act Review: effectiveness of existing adjudication review mechanisms: views of industry experts

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Legislation:

Building and Construction Industry (Security of Payment) Act 2002 (Victoria)

Building and Construction Industry Security of Payment Act 2004 (Singapore) s.17, s.18, s.19

Construction Contracts Act 2004 (Western Australia)

Building and Construction Industry Security of Payment Act 2009 (Australian Capital Territory)

*Const. L.J. 235 1. Introduction

Courts, in recent years, have been more willing to intervene in adjudication process due to poor quality of adjudication outcome. This situation has encouraged aggrieved parties to challenge adjudication determinations by way of judicial review resulting in numerous judicial review applications. This has eroded the original object of the security of payment legislation. Some jurisdictions allow for an express limited right of aggrieved parties to apply for adjudication review as a way to remedy injustice caused by the speedy adjudication process. Notwithstanding the fact that some scholars have commented on the effectiveness of existing review mechanisms, there is very limited empirical research conducted to examine the need and viability of those mechanisms in statutory adjudication.

2. Research method

The paper adopts a combination of doctrinal legal research (research in law) and interdisciplinary research (research about law).[1] The doctrinal legal research asks what the law is regarding a particular issue by analysing legal sources while the interdisciplinary research (non-doctrinal legal research) is about law and it usually engages empirical data. The combination of the two legal research methods is adopted to benefit from the strength and advantages of each method.

The doctrinal legal research is concerned with the analysis of the legal doctrine and how it has been developed and applied.[2] In this method, the analysis is *Const. L.J. 236 interpretive and qualitative in nature.[3] The doctrinal method is characterised by the study of legal texts, therefore, it is informally described as "black-letter law".[4] The analysed legal sources include the relevant statutes, case law, parliamentary debates, discussion reports, governmental reports, legal journals and commentaries.

In the non-doctrinal legal research stage, the use of "expert interviews" as a method of qualitative empirical research has long been popular as it offers an effective means of quickly obtaining good results.[5] Conducting expert interviews can serve to shorten time-consuming data gathering processes, where experts can provide practical insider knowledge and avoid the necessity to interview a wider circle of players.[6]

"As a method, the expert interview appears to be ‘quick, easy, and safe’ in its application, and it promises to be of good practical value." [7]

A purposive sampling method was adopted to identify the potential experts who are experts in the field in Singapore, Victoria, New South Wales, Queensland, Western Australia, South Australia and

the Australian Capital Territory. The experts were selected based on their specific experiences relevant to the research area under investigation.

Fifty two invitations were sent out. Eventually, only 23 out of the 28 experts have participated in the research. That was a satisfactory sample size in accordance with the well-established guidance that the minimum number of interviews needs to be between 20 and 30 for an interview-based qualitative study to be published.[8] The 23 interviews were conducted over a period of five months between 28 October 2015 and 23 March 2016. Most of the interviews were conducted by phone being the most convenient way in terms of time and cost. The interview durations varied between 30 minutes to two hours but the majority were completed in one hour. All interviews were recorded with the permission of experts.

The experts mainly belong to two main groups: adjudicators and construction lawyers. Half of the experts have dual roles acting as adjudicators and construction lawyers. Many experts act as advisers for the parties during adjudication or enforcement proceedings. That is quite important as it ensures that the views of the parties are also considered in the research as conveyed by the interviewed experts. Most of the experts have more than 20 years of experience of dealing particularly with construction disputes and more than 10 years in dealing with statutory adjudication. This high level of experience increases the credibility of the participants' views due to their broad knowledge and experience in construction disputes. It will also bring relevant, rich and concise views in terms of the research question being investigated. The vast majority of experts either possess legal ***Const. L.J. 237*** qualifications or both legal and technical qualifications. This is understandable because statutory adjudication is dominated by legally trained professionals.

3. Existing adjudication review mechanisms

3.1 Victoria

3.1.1 How does it work?

The Victorian Building and Construction Industry Security of Payment Act 2002 was amended in 2006 to introduce, inter alia, a review mechanism for adjudication determinations valued in excess of AUS$100,000 (accounting also for any "excluded amounts", which are defined under s.10B to encompass, inter alia, non-claimable variations, amounts relating to latent conditions, time-related cost and breach of contract).[9] The respondent can only apply for review if he or she has identified that amount as an excluded amount in the payment schedule or the adjudication response, has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts and has paid the alleged excluded amounts into a designated trust account (s.28B (4–6)). The review is carried out by a second adjudicator appointed by the original appointing ANA.

Interestingly, the Victorian Supreme Court has accepted at least two applications by respondents for judicial review. In doing that, the court has bypassed the review mechanism which emphasises that parties have the discretion to use either the review mechanism or the readily available judicial review avenue.[10] In one of these applications, the respondent sought judicial review instead of review under the available legislative mechanism, and the court quashed the adjudicator's determination remitting it back to the same adjudicator for reconsideration.[11] The position of the Victorian Supreme Court becomes another inhibiting factor for the effective use of the review mechanism. Another possible strategic reason for a respondent's bypassing the legislative mechanism and seeking relief by way of judicial review would be to avoid making payment to the claimant. In the context of judicial review, the respondent will not be obliged to pay the adjudicated amount. However, if the respondent opts to set aside judgment made under s.28R3, he would be required under the Act to pay the unpaid adjudicated amount (usually the full amount) in court as security (s.28R5(b)). This contrasts with the more demanding requirement under the legislative scheme to pay the claimant the adjudication award value, as well as to pay the alleged excluded amounts into a designated trust account.

3.1.2 Views of experts

All of the experts who are familiar with the review mechanism in Victoria were of the opinion that it is

completely ineffective because of two main reasons. First, the drafting of sections related to excluded amounts, the subject of the review, is ***Const. L.J. 238*** very complex. Secondly, its scope is too limited. An official from the Victorian Building Authority commented:

"In 2013–2014 no review applications were made in Victoria. In the 2015 financial year, we got one. It is already criticized as being barely used. 'Excluded amounts' is a problematic issue within the legislation. Too much interpretation by the court was also made which was not fun to read. The bigger players are very happy to use the regime as indicated from the statistics." [12]

An adjudicator linked the introduction of excluded amounts in 2007 amendments with the government intention to be well protected when it becomes a party to adjudication from determinations in large sums that could be made in the favour of claimants. [13] Another adjudicator said that the way the amendments were drafted to explain the conditions for accessing the review mechanism resulted in a large portion of time being spent by Victorian adjudicators in dealing with what is a claimable variation and what is excluded.[14]

A follow up question was raised before a third adjudicator[15] as to why parties opt to bypass the internal review mechanism and challenge the determination in the Supreme Court.[16] He replied that there is no point to activate the review mechanism if the party is intending to take the case to the Supreme Court or even Court of Appeal following the review decision. He gave an example of a case relating to an excluded amount that he was involved in where the same judge of the Victorian Supreme Court has granted appeal of his decision to the Court of Appeal which, he said, indicates that the judge was not certain of his decision.

The views regarding the ineffectiveness of the Victorian review mechanism are broadly not surprising as they confirm earlier findings.[17] However, it was quite interesting to find out that even judges find difficultly in interpreting the Victorian legislation. Arguably, this could be a reason as to why the Supreme Court judges in Victoria, despite the persuasive High Court authorities,[18] usually accept to review challenge applications that should have been made before review adjudicators in the first place.

3.2. Singapore

3.2.1 How does it work?

The Singapore Building and Construction Industry Security of Payment Act 2004 (the SG Act) sought to establish a fast and low-cost adjudication system to resolve payment disputes. It substantially followed the NSW model with some key differences. The most significant difference is the introduction of an adjudication review mechanism allowing an aggrieved respondent to have the adjudicator's ***Const. L.J. 239*** determination reviewed by another adjudicator or a panel of adjudicators on its merits.

The Singaporean review mechanism is only accessible to respondents provided they have served a payment response and have paid the unpaid adjudicated amount to the claimant. The respondent must pay the adjudicated amount to the claimant in the first place to be entitled to apply for review (s.18(3)). This seeks to "fulfil the legislation mission and purpose of facilitating smooth and prompt cash flow".[19] The review application must be lodged within seven days of obtaining the adjudication determination (s.18(2)) provided that there exists a disparity between the adjudicated amount and the relevant response of SG$100,000 or more.

The respondent must apply for the review to the same ANA with which the original application was served. The review application must include a proof of payment of the adjudicated amount to the claimant and a copy of adjudication determination (s.10(2)). Upon receipt of the review application, the ANA has seven days only (s.18(6)) to appoint one adjudicator or a panel of three adjudicators if the difference exceeds SG$1 million.[20] The review adjudicator must only have regard to the matters referred to in s.17(3) and the adjudication determination that is the subject of the adjudication review (s.19(6a)). This could mean that new reasons and fresh evidence from parties cannot be entertained in the review proceedings.

The review determination must be issued to the parties within 14 days (s.19(3)). It may replace the original determination or reject the review application. The cost of adjudication review will be

proportionally borne by the parties to the extent each party was successful (s.19(5d)).

The ambit of adjudication review was not clear until the Singaporean Court of Appeal handed down its decision in *Lee Wee Lick*.[21] In that case, the court held that adjudicators do not have the competency to deal with jurisdictional issues apart from the basic function required by the legislation.[22] The court also held that any jurisdictional objection must be raised immediately with the court and not before the adjudicator.[23]

3.2.2 Views of experts

The two interviewed adjudicators practicing in Singapore noted that their review mechanism was successful to capture erroneous determinations and did not highlight any significant shortcomings from the existing review mechanism in their jurisdiction.[24] They both mentioned that the Act is silent about some issues such as the right to raise new evidence in the review which was a bit confusing to review adjudicators. One of them said because of the available review mechanism, Singaporean adjudicators take a more careful look at the merits of the case.[25] He ***Const. L.J. 240*** went on to say that where there is no review, some adjudicators, confined by time constraints, may take a very broad brush approach that may prejudice a party's rights.

With regard to the scope of review mechanism, a follow up question was raised as to whether review adjudicators are expected to consider jurisdictional objections. The learned expert who sat as a review adjudicator on many occasions responded that sometimes, the merits are intertwined with the jurisdictional challenges. He explained this further by providing an example of a payment claim served out of time. [26] He went on to say that the review adjudicator cannot proceed to look at the merits without determining whether or not the payment claim is valid. He clarified that the Court of Appeal has decided that challenges in jurisdiction have to be made in the court. Accordingly, he argued that many adjudicators proceed to say on the face of the payment claim, is it valid or not before examining the merits. He further proposed that adjudicators should have the power to determine their own jurisdiction to deal with these matters.

On a separate matter, the same expert clarified that a party in the review process is allowed to add a new reason, but obviously the other side must be given the right of reply. He further explained the nature of appeal via the review mechanism in that

"it is not entirely de novo in the sense that you disregard everything, because there are certain boundaries, the parties are still bound by the payment claim, they're bound by the payment response, they can't introduce anything that is not in the payment claim and the payment response, so that limitation is still there, but in the terms of submission they are not limited to what they had remitted in the first conference."

Some Australian experts were provided a brief of the Singaporean review mechanism and they found it to be interesting and worthwhile of consideration. One expert found it very effective, especially with the feature that respondents must pay first in order to access the review mechanism.[27] The owner of a major private ANA argued that the advantages of Singapore are basically what his ANA has been trying to get into New South Wales (NSW) for years.[28] Another expert reasoned that the better quality of adjudication in Singapore as compared to Australia is due to Singapore's cultural background in favouring arbitration and that many Singaporean adjudicators are practicing arbitrators.[29]

It can then be broadly said that the features of the Singaporean review mechanism are well devised to protect the object of the SOP legislation. The main three controversial features are:

1) the respondents have to pay the adjudicated amount to be entitled to access the review mechanism;

2)

the scheme is not available to claimants aggrieved by the adjudicator's decision; and ***Const. L.J. 241***

3)

the scheme is not open for reviewing jurisdictional objections as decided by the Singaporean Court of Appeal.[30]

Those could be inhibiting factors which may respond to earlier observations as to why the Singaporean model is not widely used in Singapore.[31]

3.3 Western Australia

3.3.1 How does it work?

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

The WASAT has jurisdiction to review the adjudicator's decision to dismiss upon application by either party. The reviewed decision can be affirmed, varied, set aside, or sent back to the adjudicator for reconsideration in accordance with any directions, or recommendations, which the WASAT considers appropriate.[32] If the decision is reversed and remitted, the adjudicator is to make a determination within 14 days after the date on which the decision was reversed, or any extension of that time consented to by the parties (s.46 (2)).

A review by the WASAT involves a hearing de novo on the merits in which material that was not before the decision-maker may be considered.[33] 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* [34] stating that the provision only limits the appealing before the Tribunal, while judicial review will still be open for the aggrieved party. Also, s.105 of the WASAT Act provides for an appeal to the Supreme Court from a decision of the WASAT provided the court gives leave to appeal which is limited only on a question of law. ***Const. L.J. 242***

3.3.2 Views of experts

The experts in WA had different views as to whether the current review mechanism by the WASAT is effective. A practicing adjudicator in WA (who is also a member of WASAT) said that in reviewing an adjudication "decision to dismiss", one or two members may be appointed to hear the matter which is within the discretion of the President.[35] He went on to say that the criteria of assigning one or more are not clear.

A WA practicing adjudicator said that if a party could have gone to the WASAT, the WA Supreme Court normally would not take it on, because of the availability of a simple and cheap avenue where a party could have raised this.[36] This view is consistent with the established WA case law in this regard. [37] He added that judges, using their discretion, normally would not grant it in any case where the party

should have gone to the WASAT. He went on to say that it would be better if the WASAT's scope also includes review of adjudicators' decisions "not to dismiss" because the Supreme Court proceedings take much longer time to deal with similar cases.

In contrast, another WA practicing lawyer favoured keeping the review with the Supreme Court rather than the WASAT because he thinks that decisions made by a member (as opposed to a judge) are perhaps not as reliable and understandable compared to Supreme Court decisions. This view was supported by another WA lawyer who made an observation that some people actually question the quality of the WASAT's decisions and they are not as clear as they should be.[38] In answering a follow up question as to which avenue is faster (i.e. Supreme Court or WASAT), he answered:

"Both suffer from being slow and being a court style process where to get to the end, you know, like an urgent WASAT review or a decision to dismiss will still take probably six months." [39]

There is no valid or convincing reason as to why the review mechanism is not open for aggrieved parties challenging the jurisdiction of adjudicators before the WASAT rather than the Supreme Court. This will, of course, require a better quality of member's review in order to attract confidence in the system and attract aggrieved parties to this avenue for review over the Supreme Court. Apparently, the review mechanism seems successful in WA. However, there is major scope for improving the operation of the review mechanism in WA in light of the above experts' observations which should be taken into account when devising any effective review mechanism. ***Const. L.J. 243**

3.4 The Australian Capital Territory (ACT)

3.4.1 How does it work?

The Building and Construction Industry (Security of Payment) Act 2009 (the ACT Act) provides that an appeal may be made to the ACT Supreme Court on any question of law arising out of an adjudication decision subject to certain conditions being satisfied.[40] Either party may appeal from an adjudication decision with either the consent of the other party or leave of the Supreme Court.[41] According to the Court Procedural Rules (ACT) 2006,[42] an application for leave to appeal should be filed not later than 28 days after the day on which the order appealed from is made, or any further time allowed by the Court.

The Supreme Court must not grant such leave unless it considers that having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the adjudication decision; and there is either a manifest error of law on the face of the adjudication decision, or strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law.[43] These restrictions on appeal are very similar to an appeal against an arbitral award pursuant to s.38(5) of the Commercial Arbitration Act 1986 (ACT).

The Supreme Court may confirm, amend or set aside the adjudication decision; or remit the adjudication decision, together with the Supreme Court's opinion on the concerned question of law to either the original adjudicator for reconsideration; or a new adjudicator as may be appointed by the Supreme Court.[44] If an adjudication decision is remitted, the adjudicator must make the new adjudication decision within 10 business days after the day the decision was remitted or within the time directed by the Supreme Court.[45]

In addition, the ACT Act provides that the Supreme Court has jurisdiction to entertain any question of law if the adjudicator consents, or if the parties agree, provided that the determination of the question

"might produce substantial savings in costs to the parties, and that the question of law is one in respect of which leave to appeal would be likely to be granted".[46]

This section is modelled closely on the appeal provisions under s.39 of the Commercial Arbitration Act 1986 (ACT). As such, it was argued that the right of appeal under the ACT legislation makes adjudication a judicial process and, further, that the inherently substantial cost of defending Supreme Court proceedings will deter many small contractors from pursuing progress claims. ***Const. L.J. 244**
[47]

3.4.2 Views of experts

The owner of a major ANA said that the review mechanism in ACT is a disaster to adjudication.[48] He explained that many law firms advise clients in ACT not to go to adjudication but just to go directly to court because respondents' lawyers usually pick some legal issues, regardless of their soundness, and go to court, and in the meantime the claimant is not being paid until that game is played in court. He also mentioned that the ACT Supreme Court has been allowing arguing in the court on matters that were never put to the adjudicator.

This observation conforms to the earlier findings that the right of appeal under the ACT legislation makes adjudication a judicial process and, further, that the inherently substantial cost of defending Supreme Court proceedings will deter many small contractors from pursuing progress claims.[49] Surely, this scheme falls short in protecting the object of the SOP legislation. The researcher has already made similar observations about the excessive judicial intervention in his response to a relevant discussion paper in the ACT. That observation was quoted in the consultation report of the discussion paper entitled "Improving the ACT Building Regulatory system" as provided below:

"Mr Samer Skaik considered there many problems that hinder the effective operation of the security of payments scheme. He provided a detailed submission on what he sees as two main and specific problems: the excessive court involvement (judicial review) in adjudication and the industry's dissatisfaction with the quality of adjudicators' determinations on the merits." [50]

4. The need for an expanded review mechanism

4.1. Analysis of law

Notwithstanding the interim and rapid nature of statutory adjudication, it was judicially noted that there is

"no proper basis to distinguish an adjudication for the purpose of maintaining cash flow from an adjudication to determine a party's ultimate rights and entitlements".[51]

The study found that an optimal adjudication process should maximise, within the legislative objective of expediency, the opportunity that adjudicators' determinations are made in accordance with the correct and relevant law.

Typically, an aggrieved party in adjudication has no option but to initiate lengthy and expensive proceedings such as arbitration or litigation but the inherent cost of such proceedings may prevent the party from seeking justice. The remedy by ***Const. L.J. 245*** way of judicial review is available in very limited situations. Therefore, many erroneous adjudication determinations have become final and binding decisions.[52]

In addition, with the availability of the review mechanism, courts are likely to be more reluctant to exercise their discretionary powers to set aside adjudication decisions.[53] In Singapore, Prakash J held in *SEF Construction* [54] that the availability of a statutory merits review, with other factors, impliedly restricted judicial review in the High Court. In *Re Graham Anstee-Brook*,[55] Kenneth Martin J also noted that:

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

Introducing a review mechanism will improve the confidence and certainty in adjudication outcome, which is paramount in situations where claimants exercise their statutory rights to suspend work if respondents do not pay the adjudicated amounts. However, the consequences of any work suspension may be devastating if the adjudication determination fails to resist challenges in courts. Vickery J observed this dilemma in *Hickory Developments* and noted[56]:

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

consequences of suspending work could be prohibitive."

On the other hand, improving the quality of adjudicators may not be a sufficient measure to avoid erroneous determinations. In Queensland, major amendments have been made to its SOP legislation in December 2014 to increase the quality of adjudication outcome such as allowing longer timeframes for complex claims and improving the selection and regulation of adjudicators. Interestingly, seven judicial review court applications were lodged after the amendment, (compared to 15 applications in the preceding year), in which the Queensland Supreme Court found that adjudicators committed jurisdictional errors in three cases.[57] Moreover, adjudication of complex payment disputes received a lot of criticism as it became very lengthy and costly which makes the scheme more similar to curial proceedings. ***Const. L.J. 246*** [58]

4.2 Views of experts

Half of the experts liked the notion of introducing a review mechanism within the legislation whilst the other half was completely against it. Many experts were not very familiar with the various legislative review mechanisms in other jurisdictions. Others did not have actual experience in dealing with the review mechanism in their jurisdiction and were not very sure about how it works, being rarely used as is the case in Victoria. Some experts practicing in jurisdictions that do not have a review mechanism found it more difficult to respond to questions relating to the purpose, need and likely features of effective review mechanisms. One of the initial experts approached the question of whether or not a review mechanism is needed by asking a philosophical question:

"What are we trying to achieve here? Are we trying to achieve a perfect outcome, so we're designing a Rolls Royce process so that we will get the best outcome to what at the end of the day is a progress payment, or are we trying to achieve a process where the focus is on the money flowing to enable the construction to continue to go?" [59]

Many experts look at the notion of a review mechanism as a quality assurance, quality control or a peer review process. One adjudicator said that there is always a need to offer another set of eyes to build confidence in the system.[60] Many experts mentioned the recent reform in Queensland that aimed to improve the quality of adjudicators as an ultimate positive step towards improving the quality of decision-making.

An academic[61] noted that the experience in Singapore tells that the mere existence of a review mechanism and possibility seems to improve the chances that an adjudication will be done well. He meant that the fear of having a peer say that the determination was made incorrectly may of itself lead to greater quality. This statement was endorsed by a Singaporean adjudicator who acted as a review adjudicator on many occasions.[62] Another one said that essentially there has to be some check on the adjudicators exercising jurisdiction and performing their process properly, because even adjudicators who are also practicing lawyers have been taken on judicial review and have got it wrong.[63]

Some experts supported the idea of introducing a review mechanism in other jurisdictions such as NSW but raised concerns regarding its disadvantages as it will add more delays and costs to adjudication process. A construction lawyer from Queensland suggested

"if you did have a review process it should be in the legislation and it's a precondition to a court review".[64]

A leading practitioner in NSW said that the whole review mechanisms are bad things if they can serve to delay the implementation of the interim decision.[65] A ***Const. L.J. 247*** Victorian adjudicator agreed by saying that the review mechanism would improve the industry confidence but it may be against the object of the Act.[66] A practicing adjudicator and lawyer opposed the notion of review mechanisms by saying

"if a jurisdiction is looking to implement a review adjudication model that suggests to me that they misunderstand the concept of what adjudication is all about." [67]

He went on to say that if there are concerns in the industry that it is too expensive to litigate in the Supreme Court to overturn a decision, the evidence is not there to support that argument. Interestingly, a practicing lawyer in Queensland criticised the court process of reviewing jurisdictional challenge applications as being too slow to match the demands of the industry. He gave an example

of a court application made in November where the first court day for a hearing was in March of the next year.[68]

One expert observed that big corporates in large cases will go to Supreme Courts anyway, whether or not they believe the adjudicator made a right decision.[69] He went on to say that judges do not think adjudicators should be deciding large amounts which should be matters for the court to decide. Another practicing adjudicator in WA said:

"The idea (and it doesn't always work this way) in WA is that in dealing with monthly progress claims, you would hope that in that context, the amounts of the claims would be smaller. It would be for a month's work rather than a year's work and it would be a month of disputes rather a year of dispute. In that sort of context, there is sort of hope that the amount would not be sufficient to warrant having another check." [70]

Experts were asked as to when any review mechanism becomes redundant. A construction lawyer said it will be redundant if a court review is followed afterwards.[71] Another one said it would be of no value if we could actually get to the point where adjudicators are producing better quality decisions and making their decisions on a proper basis that people objectively can understand.[72]

Conclusion

This paper critically analysed and examined the operation of different adjudication review mechanisms in Australia and Singapore. The study revealed that there are many shortcomings as well as opportunities to improve the operation of the existing mechanisms. Many experts looked at the notion of a review mechanism as a quality assurance, quality control or a peer review process. Some experts claimed there is always a need to offer another set of eyes to build confidence in the system and noted that the mere existence of a review mechanism seems to improve the chances that an adjudication will be done well. ***Const. L.J. 248***

Introducing an appropriate review mechanism may offer a pragmatic and practical solution that acknowledges the existing variety of adjudicators' qualities and competencies and the difficulty of attaining quality adjudication outcome due to the hasty adjudication process. The review mechanism may act as an effective safety net to capture erroneous determinations away from curial proceedings to help control the overall cost and improve the finality and informality of statutory adjudication. The main concern of the experts was with regard to the inherent extra time and cost in conducting review mechanisms, delaying what is supposed to be an interim decision.

The paper revealed that if an effective review mechanism is devised to counter the barriers of cost and time, the arguments in support of the need for review mechanism would outweigh opposing arguments. Interestingly, the observations made by experts operating in jurisdictions with review mechanisms in place were positive, favouring the existence of the review with some improvement. In contrary, experts in other jurisdictions, who are not familiar with the notion of review mechanisms have much stronger views.

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9. Building and Construction Industry Security of Payment Act 2002 ss.28A(a) and 10B.

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11. See *Maxstra Constructions [2013] VSC 243*.

12. Legislative Advisor at the Victorian Building Authority (VBA).

13. Senior adjudicator with quantity surveying background based in Victoria.

14. Senior adjudicator based in Victoria.

15. Senior adjudicator, arbitrator and mediator based in Victoria.

16. See e.g., *Maxstra Constructions [2013] VSC 243*; *Seabay Properties [2011] VSC 183*.

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21. *Lee Wee Lick Terence v Chua Say Eng [2012] SGCA 63* (Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA).

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

23. *Lee Wee Lick [2012] SGCA 63* at [36].

24. Adjudicator and barrister based in Singapore; Accredited adjudicator and independent arbitrator based in Singapore.

25. Accredited adjudicator and independent arbitrator based in Singapore.

26. Accredited adjudicator and independent arbitrator based in Singapore.

27. Senior academic with law background based in Victoria.

28. Senior adjudicator and owner of a major authorised nominating authority in the Eastern Australian States.

29. Construction lawyer based in south Australia.

30. *Lee Wee Lick [2012] SGCA 63*.

31. *M.E. Munaaim, "Developing a framework for the effective operation of a security of payment regime in common law jurisdictions", 2012, PhD, King's College London*.

32. Under the State Administrative Tribunal Act 2004 (WA) s.29(3).

33. The State Administrative Tribunal Act 2004 s.27.

34. *Red Ink Homes Pty Ltd v Court [2014] WASC 52* at [72]–[76].

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

36. Barrister and solicitor based in Western Australia.

37. See, e.g., *Re Graham Anstee-Brook Ex p. Mount Gibson Mining Ltd [2011] WASC 172* at [64]; *Field Deployment Solutions Pty v Jones [2015] WASC 136* at [18].

38. Adjudicator and construction lawyer based in Western Australia.

39. Adjudicator and construction lawyer based in Western Australia.

40. Building and Construction Industry (Security of Payment) Act 2009 (ACT) s.43(2).

41. Building and Construction Industry (Security of Payment) Act 2009 (ACT) s.43(3).

42. Court Procedures Rules 2006 (ACT) rr.5072, Pt 5.2.

43. Building and Construction Industry (Security of Payment) Act 2009 (ACT) s.43(4).

44. Building and Construction Industry (Security of Payment) Act 2009 (ACT) s.43(6).

45. Building and Construction Industry (Security of Payment) Act 2009 (ACT) s.43(7).

46. Building and Construction Industry (Security of Payment) Act 2009 (ACT) s.44.

47. *P. Davenport, Adjudication in the building industry, 3rd edn (Federation Press, 2010), p.24*.

48. Senior adjudicator and owner of a major authorised nominating authority in the Eastern Australian States.

49. See *Davenport, Adjudication in the building industry, (2010), p.24*.

50. Director-General, Environment and Planning Directorate, "Improving the ACT Building Regulatory system: Consultation Report, 2016", ACT Government, p.55, available at: http://www.planning.act.gov.au/__data/assets/pdf_file/0005/898682/Improving_the_ACT_Building_Regulatory_System_-_Consultation_repor [Accessed 27 March 2017].

51. *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd (2014) 34 NTLR 17; NTSC 20* at [45], per Barr J.

52. See, e.g., *Uniting Church in Australia Property Trust (Qld) v Davenport [2009] QSC 134* (Daubney J).

53. As to the use of the discretion to deny certiorari where there lies another review option, see for instance, the High Court's decision in *R. v Cook; Ex parte Twigg [1980] HCA 36* at [29], [30] and [34]; *Re Baker ;* Martin CJ in *Re Carey; Ex parte Exclude Holdings Pty Ltd [2006] WASCA 219* at [128]–[140].

54. *SEF Construction Pte Ltd v Skoy Connected Pte Ltd [2009] SGHC 257*.

55. *Re Graham Anstee-Brook Ex p. Mount Gibson Mining Ltd [2011] WASC 172; 42 WAR 35* at [64].

56. *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd [2009] VSC 156; 26 VR 112* at [47].

57. Queensland Building and Construction Commission, monthly adjudication statistics, December 2015, p.8.

58. See, e.g., *P. Davenport, "An update on security of payment in the construction industry in Queensland", RICS Cobra 2015, Sydney, p.3*; RICS DRS submission to the SA SOP discussion paper, available at: http://www.sasbc.sa.gov.au/files/666_consultation_paper_submission_rics_drs_2016_08_19.pdf [Accessed 27 March 2017].

59. Construction lawyer based in South Australia.

60. Senior adjudicator based in Victoria.

61. Senior academic with law background based in Victoria.

62. Accredited adjudicator and independent arbitrator based in Singapore.

63. Construction lawyer based in WA.

64. Construction lawyer based in Queensland.

65. Senior adjudicator and owner of a major authorised nominating authority in the Eastern Australian States.

66. Senior adjudicator based in Victoria.

67. Senior adjudicator and construction lawyer based in Queensland.

68. Construction lawyer based in Queensland.

69. Senior adjudicator and construction lawyer based in NSW.

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

71. Construction lawyer based in Queensland.

72. Construction lawyer based in South Australia.