Adjudication Explained "Warts and All": the strengths and weaknesses of Adjudicating Disputes

Written by: Professor Kim Lovegrove, FAIB Conjoint Professor at the University of Newcastle and Partner of Lovegrove Solicitors.

Definition

Adjudication has been defined as: *"A form of Alternative Dispute Resolution. It is used widely in the construction industry and allows disputes to be determined by an adjudicator comparatively swiftly while work progresses. The adjudicator's decision is binding, unless and until the dispute is finally determined by legal proceedings, arbitration or the agreement of the parties. The parties may, however, accept the adjudicator's decision as finally determining the dispute"*.[1]

It has further been defined in the Butterworths Australian Legal Dictionary as *"The determination of the rights and liabilities in dispute between two or more parties by the final imposition of a decision or judgment of a court of law, tribunal, or as a result of a decision of a person otherwise sitting in judgment: Commissioner of Police v Brady"*.[2]

Adjudication is a system that seemed to have originated in the United Kingdom but has also been introduced in a number of southern hemisphere jurisdictions; New Zealand, Victoria and New South Wales being some of those jurisdictions. This chapter will provide a procedural synopsis of the later mentioned jurisdictions and regard will also be had to some of the British observations.

Under the various Security of Payment Acts, claimants lodge claims with the recipients and there are a limited number of days for the recipient to assess and formally reply to the written claim. There is a "sudden death" nuance to this system in that failure to formally respond to a claim within the specified time can culminate in judgement for the full amount.

If a matter is challenged then it is referred to an adjudicator and the adjudicator again has to operate within very tight time constraints with the view to formulating an adjudicated determination. The main patrons of the system are construction industry sub-contractors lodging claims against builders and to a lesser extent builders lodging claims against principals.

The Virtues

The system is swift and when the recipient or respondent receives a claim the respondent must give the claim immediate and time intensive attention. It is a system

[1] *Osborn's Concise Law Dictionary,* p.16
[2] *Butterworths Australian Legal Dictionary,* p. 27

©Kim Lovegrove 2012

that is weighted more in favour of the claimant from a logistical and preparation point of view; reason being a claimant may take many weeks to prepare the claim but the recipient may only have ten days (depending upon the Act of parliament) to generate the schedule and reply, be it a rebuttal in part or in full, or acceptance. So whereas the claimant has ample time to prepare the claim the respondent is corralled by statutory time bars.

There is little doubt however that the system (where there is strong patronage) has expedited the processing of claimants' payments in some jurisdictions like NSW.

Any party who is the beneficiary of swift decision making will be most enamoured of a system that provides that outcome. Cases that take years to resolve are highly prejudicial and place tremendous and sometimes terminal strain on financial resources. Adjudication in uncompromising jurisdictions like NSW has delivered a positive dividend to a great many claimants. Such euphoria however is often not shared by the respondents.

> *"As the Hon Morris Iemma, MP, stated in the second reading of the Bill on 8 September 1999: It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families"*[3]

In the chapter of this book dealing with instances where negotiation can be futile, mention is made of a developer who refused to pay a subcontractor a great deal of money that was owed to him simply on the basis that he knew if the man sued for his lawfully owed money it would take 2 years to get to trial. The contractor by all accounts went into voluntary administration.

If the contractor had been domiciled in NSW at the time that the security of payment legislation was in operation, the contractor may well have been paid quickly, for the simple reason that his entitlement to be paid was clear and irrefutable. Adjudication may have succeeded where the Courts failed. Conversely exploitation by the respondent of the court system served to assist the mala fide property developer as the time that it would have taken to get the matter to trial, made it untenable for the contractor to embark upon a lengthy case.

> *"The default nature of the legislation is indeed remarkable. It means, in effect, that a paying party must, every time he receives an interim payment claim, plead every defence in fact or in law of which he might want to avail himself. Many head contractors have found themselves unable to rise to the administrative challenge that this presents, and so the default provisions kick in and he finds himself obliged to pay, at any rate, on the same "pay now, argue later" basis that applies in the UK".*[4]

---

[3] Edited by Peter Sheridan and Dominic Helps, 'Construction Act Review', *Construction Law Journal* 2007 Vol 23 No 5 page 364.
[4] *Id*.

©Kim Lovegrove 2012

The Shortcomings

The speed by which claims are processed and adjudications determined is both the system's virtue and its vice. In this regard I use the analogy of a construction critical path, there is a balance between building too quickly and building too slowly. If one builds too quickly, quality can be compromised. If one builds too slowly, time related costs escalate. Likewise with adjudication: expedited adjudication can generate casualties in that the adjudicator may get it wrong. This is akin to the compromising of quality.

Whereas with the courts and the tribunals, one can by and large have a high level of confidence in the quality of the decision makers on account of their experience and the reverence by which they are held to get their judicial appointments in the first place, the quality of adjudicators may be more variable. It is not terribly difficult to become an adjudicator; a 1 day training course in adjudication will often suffice.

The quality of the adjudication will be very much dependant on the adjudicator, and the process that culminates in the appointment of an adjudicator may not be anywhere near as exacting as that which is conducive to a judicial appointment.

Having acted in a battery of major adjudications on the Commonwealth Games site for one of the developers/head contractors, we can vouch for the fact that when the respondent receives a claim or series of claims then he/she/it is required to respond within frequently prohibitive time constraints. There has to be a tremendous concentration of client, technical and legal expertise on the task of responding to the claim within the statutory time. The New Zealand report 'Construction Contracts Act 2002 Review: Summary of Submissions Report', released in January 2011, identified the concern *"That adjudication may be used to achieve technical wins by mounting surprise attacks or ambushes in order to take advantage of strict time limits for a respondent".*[5]

On larger matters, the system dictates that if one does not have the critical mass of human resources that can be deployed in a moment's notice, the respondent may be occasioned by misfortune. In the matter referred to we had to deploy three lawyers, full-time for three weeks to assess and prepare the responses.

Adjudication is a relatively mature institution in the United Kingdom and has attracted a great deal of comment, some good, some very controversial.

[5] Department of Building and Housing, Construction Contracts Act 2002 Review: Summary of Submission Report, January 2001 at page 15.

©Kim Lovegrove 2012

Sir Michael Latham was by all accounts one of the prime movers of this United Kingdom institution, and intended that the system be swift and effective with regards to the facilitation of payment of claims. A very good article titled 'The Future of Adjudication 'Is it all it is cracked up to be?'[6], written by barrister and accredited adjudicator, Ms Kim Franklin, suggests that these noble objectives may have been compromised.

Ms Franklin's paper suggests that what was fashioned as being an inexpensive form of dispute resolution is becoming increasingly expensive. Ms Franklin's observation that adjudication *"has turned into a form of hybrid, a cross between adjudication and arbitration or 'adjudibration'"*[7] may however hold sway. Both systems require the 'arbitors' to be remunerated by the disputants, so the issues relating to remuneration of dispute resolution circuit breakers that have been discussed elsewhere in the book are on point.

Ms Franklin goes on to add that: *"The disadvantages of this procedure include a protracted procedure with increasing number of written submissions. Some adjudicators let the parties go on as long as they like"* and - *"The process is not cheap. There is no mechanism for controlling costs"*[8]

Ms Franklin's following quote however is both bold and eloquent –

"21st Century Adjudication has been described by some as 'an expensive way to flip a coin'. Even if the coin comes up heads, it is not the last word. Challenges to enforcement need only raise a triable issue. That issue then has to be tried. Even an enforceable decision can be challenged in litigation or arbitration".[9]

The author would not characterise adjudication as an expensive way to flip a coin because this connotes a high risk punting dynamic, which does a disservice to some of the more venerable adjudicators. Nevertheless, the speed by which adjudication can evolve could indeed compromise the necessary level of rigour that is needed to generate a sound outcome.

A New Zealand report identified that court may not be an alternative for parties to an adjudication because: *"After payments of the dispute are made, it is too expensive to seek other appeal options for consumers and small contracting firms on limited budgets".*[10]

---

[6] *(Franklin, Kim (2005) "The Future of Adjudication is it all it is cracked up to be" page 6 at 19)*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Department of Building and Housing, Construction Contracts Act 2002 Review: Summary of Submission Report, January 2001 at page 9

©Kim Lovegrove 2012

In said paper, 'The Future of Adjudication' Ms Franklin does a synopsis of the case of *London Amsterdam Properties v Waterman* [2004][11] and Judge Wilcox held that -

"Mere ambush, however unattractive does not amount to procedural unfairness. There was clearly a deliberate evidential ambush. The adjudicator ought either to have excluded the late evidence in reply or to have given Waterman a reasonable opportunity of dealing with it. Instead he avoided a decision as to whether or not the evidence should be admitted and then based his decision on the late evidence without giving Waterman an opportunity to deal with it. That was a substantial and relevant breach of natural justice".[12]

An even more damming expose of the SOP schemes was evident in a very good paper written by Matthew Bell and Donna Vella - 'From Motley Patchwork to Security Blanket'.[13] The authors stated that *"it is this broad application which has brought to bear criticisms that the legislation represents an unjustified incursion into freedom of contract. For example, writing of the HGCR Act in the year the NSW Act was passed, Ian Duncan Wallace QC who has been described as [p]erhaps the most trenchant polemist of the legislation characterised the HGCR Act as "a monument of what legislation should not be – an inadequately considered surrender of customer/consumer interests to thinly disguised producer lobbies in an industry which has done little or nothing to deserve it".*[14] Ian Duncan Wallace QC makes further observations, the import of which being that the process negatively impacts upon procedural fairness on account of the "extraordinarily short time periods.[15]

Another poignant quote that the authors derive from Wallace QC on the shortcomings of adjudication is "it quite simply abrogates at a stroke the long established machinery of professional administrative regulation, which has evolved and been implemented by most commonly used forms of main contract in England and the Commonwealth for over a century".[16]

The same paper then quotes Judge Humphrey Lloyd who also makes certain observations about said Act.

> "It is hard to think of another comparable case of parliament singling out parts of a sector of the commercial life of the country and requiring them to alter their contracts……….on the basis that it knew better than its members how the commercial relationships should be regulated. It is a

[11] *London Amsterdam Properties v Waterman* [2004] BLR 179
[12] *(Franklin, Kim (2005) "The Future of Adjudication is it all it is cracked up to be" page 8/9 at 27).*
[13] Bell, Matthew; Vella, Donna --- "From Motley Patchwork to Security Blanket: The Challenge of National Uniformity in Australian "Security of Payment" Legislation", *Australian Law Journal*, Volume 84, Issue 8, 2010.
[14] *Ibid* pp. 3-4.
[15] *Id.*
[16] *Id.*

©Kim Lovegrove 2012

remarkable interference in the freedom of contracts enjoyed by people who are normally well able to look after themselves."[17]

Time Impacts

The time impacts equate with the cost impacts. Part of the raison d'etre of the adjudication process was to establish a system that fast tracked dispute resolution in order to substantially reduce costs. Adjudication is much faster than the typical court or tribunal process but if one has regards to Ms Kim Franklin's observations and if indeed they telegraph cross jurisdictional trends the time to resolve adjudications may be increasing.

In the case of the Victorian legislation, legislative amendments were introduced, the net effect of which made the legislation more benign, not as swift and less comprehensive in terms of its coverage. A further effect of this, when compared to NSW is that the legislation has virtually been boycotted or pushed to one side because the perceived virtues as perceived in NSW of expedited and decisive outcomes have been diluted.

Adjudication is probably the fastest of all the dispute determination systems explored in this book. When one considers that some of the critics of the system have described the system as being anything from extraordinarily short to tantamount to ambush, from a respondent's point of view the system is frighteningly swift.

From a timing point of view adjudication is heavily weighted in favour of the claimant save for the Victorian jurisdiction. Duncan Wallace is quoted as saying that *"claimants were free to prepare massive and detailed claims over whatever periods of time they may choose and launch them without warning"*.[18] Once the claim is visited upon the respondent, the respondent has to operate in surreal and compressed time constraints.

The respondent, to borrow terminology from Mathew Bell`s paper, has to engage in a "patch quilt" exercise in the generation of a "response on the run". Often a phenomenal amount of human resource has to be concentrated within a very short period of time to frantically analyse, rebut where necessary and validate where necessary. This surreal time compression chamber is the perfect environment for the generation of ill-considered responses and mistakes, mistakes that may prove to be dire in an industry where the actors often teeter on the edge of insolvency.

If a mistake is made in preparation of a respondent`s submission or a mistake is made in the assessment of a claim by an adjudicator then money that would not ordinarily considered to be owing at law can be ripped out of the respondent's pocket. The plight

[17] *Id.*
[18] Bell, Matthew; Vella, Donna --- "From Motley Patchwork to Security Blanket: The Challenge of National Uniformity in Australian "Security of Payment" Legislation", *Australian Law Journal*, Volume 84, Issue 8, 2010 pp 3-4.

©Kim Lovegrove 2012

of an aggrieved respondent may be of little consequence to a claimant but in circumstances where money exchanges hands in compromised circumstances the head contractor will not be able to visit the loss upon the principal and this could prove fatal.

Cost Impacts

When compared to the courts and the tribunals the real cost is measured in terms of time as adjudications can be wrapped up and claims processed in a matter of weeks. The swift application of justice, so to speak, translates into much lower dispute resolution service costs. To this extent, adjudication is more akin to expert determination.

Obviously, if the adjudicator gets it wrong then significant costs will be visited upon the victim of that wrong. Whereas the courts and the tribunals are very close to being free for the participant save for filing costs, adjudication is similar to both arbitration and expert determination in that the parties remunerate the decision maker. The cost of such a retainer would vary greatly but can be anywhere between $1,500 and $10,000 a day.

Commercial Impacts

In my experience, the processing of the payment claims where lodged in accordance with the legislation, proceeds with alacrity. I have not observed that commercial relations have been cruelled by the processing of the claims rather the destruction of the commercial relationship often occurs where one of the parties considers that an adjudicator's determination has gone awry.

Case Studies

1. Security for payment claims in New Zealand

The security for payment system is governed by the New Zealand Construction Contracts Act 2002 ("NZ Act").[19]

The NZ Act[20] was designed to expedite payments and to resolve construction law disputes quickly. The NZ Act[21] does not stop a party from initiating proceedings in another jurisdiction. One can have proceedings that operate concurrently as both adjudication and another form of dispute resolution such as a court.

[19] *New Zealand Construction Contracts Act 2002* (NZ).
[20] *Id.*
[21] *Id.*

©Kim Lovegrove 2012

Procedure

Section 28 of the NZ Act[22] provides that adjudication is commenced by a claimant referring a dispute to adjudication by way of the dispatch of a notice of adjudication. A copy of the same has to be given to any other party to the construction contract and or the owner.

The notice has to be dated, has to provide a synopsis of the dispute description, the location of where the dispute arose and what sort of relief is sought.

The notice depending on the circumstances may also seek a direction as regards the owner's liability. The notice will give details as regards the parties to the contract and the particulars of the contract. The claimant then has to select an adjudicator pursuant to section 33 and this has to be done within a specified period of time as determined by the NZ Act.

At first instance agreement between the parties should be sought regarding the choice and identity of the adjudicator. If agreement is not forthcoming an authorised nominating body can be approached to nominate an adjudicator. The authorised nominated body has to select a person as soon as possible.

An adjudicator is afforded a great deal of latitude in terms of the way he or she wishes to run an adjudication and this power is set out under section 42.[23] The adjudicator will require written submissions and has to give all concerned parties an opportunity to provide comment on such submissions.

The parties to the dispute have to provide documents that are germane to the adjudication. The adjudicator also has the power to appoint an expert advisor provided that the parties are apprised of this election before the appointment crystalizes.

The adjudicator can and often will convene a conference and will ordinarily conduct an inspection of the construction work that is subject to the adjudication. The NZ Act[24] provides that the adjudicator can request that any relevant material be provided that is germane to the adjudication and the adjudicator can issue directions from time to time whereupon the parties have to take heed of and comply with such direction.

Anyone who is party to a building contract has the ability to refer a dispute to adjudication and is allowed to invoke that right, regardless of whether there are concurrent proceedings in a court of law or another tribunal. Although a dispute cannot be referred to adjudication without the consent of the other parties, if the parties have chosen to refer a dispute that embraces the same dispute terrain to either a local arbitration or an international arbitration.

[22] *New Zealand Construction Contracts Act 2002* (NZ) s 28.
[23] *New Zealand Construction Contracts Act 2002* (NZ) s 42.
[24] *New Zealand Construction Contracts Act 2002* (NZ).

©Kim Lovegrove 2012

If a party is unhappy with the adjudicator's determination the matter can be appealed to the local District Court i.e. the District Court that is closest to the location of the adjudication.

Once a respondent receives an adjudication claim the respondent has to generate a written response within five (5) working days or within a period of time that is agreed by the parties or any extended period of time that has the imprimatur of the adjudicator. The respondent has to serve any relevant documentation germane to the response with the response.

The adjudicator has to issue a determination within twenty (20) working days of the expiration of the period of time that was afforded to the respondent to submit his, her or its response. Time can however be extended for the provision of the determination if the parties agree to an extension.

Section 57 of the NZ Act[25] provides that the adjudicator's fees will be agreed upon between the adjudicator and the parties to the adjudication. If no such agreement is forthcoming then the adjudicator is entitled to charge reasonable fees. The parties to the adjudication are jointly and severally liable for payment of the adjudicator's fees and expenses.

Virtues

The Building and Construction Minister Maurice Williamson released a discussion document on the New Zealand Construction Contracts Act 2002[26] in late 2010. Submissions were received from various sources such as construction firms, home owners, law firms, professional bodies and institutions, the Building Disputes Tribunal and the Arbitrators' and Mediators' Institute of New Zealand. The findings from the various submissions were published in the report: "Construction Contracts Act 2002 Review: Summary of Submissions Report"[27] ("the report"), released in January 2011. The report identified many strengths and weaknesses in the current adjudication system in New Zealand.

---

[25] *New Zealand Construction Contracts Act 2002* (NZ) s. 25.
[26] *New Zealand Construction Contracts Act 2002* (NZ).
[27] Ministry of Innovation and Employment New Zealand, *'Construction Contracts Act 2002 Review: Summary of Submissions Report'*, 2011.

©Kim Lovegrove 2012

The protagonists *"believed adjudication under the Act has been more successful than other forums used for alternative disputes, ie Tenancy Tribunal. This is due to the fact that orders are provided promptly by private adjudicators."*[28]

Adjudicators are also afforded a fair bit of latitude in terms of the way they conduct proceedings as adjudicators in New Zealand. As observed by the below quoted Australian lawyer they *"can conduct an adjudication in any manner that they think fit which could include conducting more extensive conferences, engaging experts and requesting the parties to comply with an adjudicator's directions."*[29]

Shortcomings

The NZ Act distinguishes and differentiates between residential and commercial contracts. Residential building contracts are excluded from the clauses that relate to progress payments and the enforcement powers pertaining to adjudication orders are also limited with respect to the provisions that govern residential building contracts. The New Zealand report proposed that residential construction contracts should be better captured by the legislation's application. Submissions received noted that the distinction between residential and commercial is *"Making dispute resolution and enforcement of resulting adjudication orders difficult, time consuming and costly for all parties involved".*[30]

Those that furnished submissions were of the opinion that having such distinction means that consumers find *"The adjudication process difficult and daunting"*.[31]

The report discusses the enforcement of adjudication orders; a view expressed was that *"The enforcement of adjudication orders can be ineffective"*.[32] Submissions made the following points: *"Without strong enforcement of orders, the credibility of the process is undermined"* and "*The concept of 'pay now, argue later' must be upheld to ensure it*

[28] Department of Building and Housing, '*Construction Contracts Act 2002 Review: Summary of Submission Report'*, January 2001 at page 12.
[29] Uher, Thomas E; Davenport, Philip "Adjudication in NSW and NZ" [2005] AUConstrLawNlr 51; 103 Australian Construction Law Newsletter 34 at 36
[30] Department of Building and Housing, '*Construction Contracts Act 2002 Review: Summary of Submission Report'*, January 2001 at page 5.
[31] *Id.*
[32] Department of Building and Housing, '*Construction Contracts Act 2002 Review: Summary of Submission Report'*, January 2001 at page 7.

©Kim Lovegrove 2012

remains in keeping with the spirit of the Act. Delays caused by Court proceedings, such as waiting for objections to be satisfied are counter- productive to this."[33]

The recommendation was that adjudication orders should be afforded the same level of potency as an order made by a court of superior jurisdiction.

A further weakness in the adjudication system in NZ was identified as being that *"After payments of the dispute are made, it is too expensive to seek other appeal options for consumers and small contracting firms on limited budgets".*[34]

The report discussed confidentiality of adjudication in NZ. Submissions identified a view that *"The confidentiality of adjudication orders protects bad builders and the public has the right to know if there is a problem with a building firm".*[35] However, this view does not consider the benefit of confidentiality when protecting one's commercial interests.

One of the sceptics opined that: *"adjudication may be used to achieve technical wins by mounting surprise attacks or ambushes in order to take advantage of strict time limits for a respondent."* [36] This inkling is consistent with the views of other sceptics who are ill-disposed to the fast track pathology of adjudications. As has been expressed elsewhere in this chapter the claimant has ample time to lodge a claim and may have the luxury of weeks to prepare a claim. The respondent on the other hand is deprived of such luxury and has to commit immediate and significant resources within a time challenged environment.

2. NSW – Building and Construction Industry Security of Payment Act 1999

Procedure

The NSW Building and Construction Industry Security of Payment Act 1999 (NSW Act)[37] like all of the other adjudication acts of parliament pertains to the construction industry and was promulgated as a way by which parties that contracted to do construction work would be able to seek quick relief and payment for work carried out and goods and services supplied. The NSW Act[38] embraces claims for payment, progress claims, entitlements, compliance with payment schedules and disputed claims.

---

[33] Department of Building and Housing, '*Construction Contracts Act 2002 Review: Summary of Submission Report'*, January 2001 at page 5
[34] *Ibid* at page 9.
[35] *Ibid* at page 11.
[36] *Ibid* at page 15.
[37] *Building and Construction Industry Security of Payment Act 1999* (NSW).
[38] *Id.*

The adjudication application procedure is governed by section 17 of the NSW Act[39] and a claimant whom is intent upon seeking the adjudication of a claim has to lodge an adjudication application.

An adjudication application cannot be lodged unless *"the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimants intention to apply for adjudication of the payment claim, and the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice"* - section 17(2) (a) (b) of the NSW Act.[40]

Applications have to be in writing and they have to be lodged with an authorised nominating authority ("ANA") and the applications have to be lodged within the periods of time pertaining to the category of claim that are specified within the NSW Act.

A copy of the application has to be served on the respondent and the ANA has to refer the application to an adjudicator as soon as possible. The adjudicator cannot make a determination until the period of time by which the respondent is permitted to reply has expired.

Adjudicators are required to issue a determination as quickly as possible but not later than ten (10) working days after the adjudicator advises the parties of the receipt of the application. However, if the claimant and the respondent agree the period of time to issue the determination can be extended.

The adjudicator can request submissions (and further written responses) but when the submissions are forthcoming the other party has to be afforded the opportunity to provide submissions in response, like the provisions of the NZ Act. The adjudicator can require the parties to attend a conference, impose deadlines and can carry out an inspection of the works pertaining to the application. Interestingly pursuant to section 21(4)(a) if a conference is called it has to be conducted informally (whatever that means) and the parties are not allowed to retain legal advocates to appear at the conference on their behalf.[41]

The adjudicator can issue a determination in circumstances where one or both of the parties fail to make a submission or comment within time, section 21(5) of the NSW Act.[42]

The adjudicator in issuing his or her determination can determine the amount to be paid by a set date, the interest on such amount, but in formulating the determination must

---

[39] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 17.
[40] *Id.*
[41] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 21.
[42] *Id.*

©Kim Lovegrove 2012

adhere to the Act, have regard to the building contract, and the submissions pertaining to the claim.

An adjudicator's determination predictably has to be in writing and save for circumstances where the parties expressly make a request that there be no written reasons, written reasons have to be provided.

The determination must in accordance with section 10 of the NSW Act[43], determining the value of building work and the value of goods and services caught within the curtilage of the building contract.

Assuming that the adjudicator finds in favour of the claimant and issues a determination requiring the respondent to pay, the respondent must indeed pay the set amount. The respondent has to pay the adjudicated amount within five (5) business days of the date of the determination or such other date that the adjudicator chooses to apply at his or her absolute discretion.

With respect to payment of the adjudicator's fees the provisions are virtually identical to the payment provisions of the NZ Act. Fees can be agreed upon, in the absence of agreement the value of work carried out is determined and the parties are liable to pay the fees in equal proportions or in proportionate amounts as determined by the adjudicator. Analogous to the NZ provisions, the parties are jointly and severally liable.

Virtues

Unlike the Victorian Act of Parliament, the New South Wales *Building and Construction Industry Security of Payment Act 1999* ("NSW Act") is clear and unambiguous. This was not always the case however. When the Act was promulgated in 1999 it was loosely modelled along the lines of the equivalent Act of Parliament in England i.e. *The English Housing Grants Construction and Regeneration Act 1996*. The NSW Act initially caused confusion and was misunderstood so the initial uptake of the Act was fairly anaemic.

The legislature recognised this and introduced an amending Act of Parliament, the Building and Construction Industry Security of Payment Amendment Act 2002 ("Amending Act").[44] The effect of this amendment was to bring to bear far more clarity about statutory time frames, their application and the consequences of not adhering to same.

Compare this legislation with the Victorian Amendment Act, the Building and Construction Industry Security of Payment Amendment Act 2007 ("Victorian Amending

[43] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 10.
[44] *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW).

©Kim Lovegrove 2012

Act").[45] The Victorian Amending Act if anything diluted and nullified the effectiveness of the originating laws. Unlike the NSW Act the Victorian amendments were confusing, labyrinthine, and the net effect was that the Act was very difficult to work with.

After the New South Wales amendments came through there was an extraordinary increase in the use of the Act. *"The NSW Act had a slow beginning with only 116 adjudication applications being made in the first three years of operation. However, after commencement of the amended Act on 3 March 2003, the number of adjudication applications increased sharply to 593 in the period between March 2003 and February 2004 and 401 in the first six months of the next period."*[46]

The increased patronage bears testimony to a given sector of the construction industry, i.e. the claimants, finding the "SOPA" a very potent instrument for rapid claims assessment. When compared to Victoria the uptake has been much, much greater: *"in the 2007-2008 financial year, the number of adjudication applications in Victoria was approximately one third of those in Western Australia, one fifth of Queensland and just over one tenth of New South Whales"*.[47]

Shortcomings

The NSW Act could be regarded as brutal in terms of its statutory machinery. The time limitations imposed upon the respondent for complying with a response to a claim are very much in the nature of a guillotine. If a response is not forthcoming by way of a payment schedule, then summary judgement can be enforced. This means that a respondent "can never be caught napping". A tremendous concentration of resources will need to be brought to bear within prohibited time constraints to prepare a plausible response through a payment schedule.

Whereas the claimant may have many weeks to prepare the payment claim and moreover may have sufficient time to deploy sufficient resources to generate a robust payment claim, the respondent is afforded no such accommodation. This means that the respondent's position could be compromised significantly. *"The process is one of 'pay now, argue later': the loser has to write a cheque but retains the right to have the dispute litigated or arbitrated in full in due course"*.[48]

---

[45] *Building and Construction Industry Security of Payment Amendment Act 2007* (VIC)

[46] Uher, Thomas E; Davenport, Philip, "Adjudication in NSW and NZ" [2005] AUConstrLawNlr 51; (2005) 103 Australian Construction Law Newsletter 34 at page 35.

[47] Bell, Matthew; Vella, Donna --- "From Motley Patchwork to Security Blanket: The Challenge of National Uniformity in Australian "Security of Payment" Legislation", *Australian Law Journal*, Volume 84, Issue 8, 2010 p.7.

[48] Robert Fenwick Elliot, Presentation for the Pickavance Consulting Masterclass in Sydney and Melbourne "Presenting Prolongation Claims in Adjudication", November 2005, page 2.

©Kim Lovegrove 2012

Ironically when viewed from "the other side of the fence" the above mentioned weakness when viewed through the eyes of the claimant will be considered the strength of the Act. It is that very factor that has led to an Act of Parliament that has attracted a lot of patronage.

An additional shortcoming is that the adjudicator is in somewhat of an invidious position because he or she has to consider and prepare a determination within a compressed time frame. In a later chapter on decision making the author makes the comment that it is very difficult to see how the quality of decision making in a compressed time frame environment could match the calibre of decision making of the Bench. Reason being adjudicators are starved of time and possibly starved of apposite information. *"Adjudication is intended to be – and is – a much faster process than litigation or arbitration, and there is obviously not time for the adjudicator to apply the same rigorous burdens of proof as apply in litigation and arbitration, particularly in a large or complex case"*.[49]

Robert Fenwick Elliot states: *"The NSW legislation now contains the extraordinary exclusion of "lawyers"*. He further goes on to say *"Extraordinary not only because it makes the adjudicator's job so much harder, but also because, absent the statutory provision, the exclusion of lawyers might well amount to a fundamental breach of natural justice."*[50]

Case Study 3 –The Victorian Building and Construction Industry Security of Payment Act 2002

Procedure

In Victoria the security for payment legislation is the *Building and Construction Industry Security of Payment Act 2002* ("the Victorian Act").[51] In circumstances where the claim for the adjudication of a claim has been made and the respondent either provides a payment schedule and the amount of money sanctioned in the schedule is less than that claimed or there is part payment or the respondent fails to provide a payment schedule to the claimant, the claimant may apply to an adjudicator for payment recovery.

The application has to be in writing and has to be dispatched to an authorised nominated authority ("ANA") and the application to the ANA has to be lodged within ten (10) working days of receipt of the schedule or within ten (10) working days of the due date for payment - or in circumstances where the respondent neglects to provide a

[49] *Ibid* page 3.
[50] *Ibid* page 11.
[51] *Building and Construction Industry Security of Payment Act 2002* (VIC).

©Kim Lovegrove 2012

payment schedule, within five (5) business days "after the end of the two (2) day period referred into subsection (2)(b)" (Section 18(3)(e) of the Victorian Act).[52]

The application also has to include the payment claim and schedule, if any, must be accompanied by the prescribed fee, and must include the relevant submissions. A copy of the application to the adjudicator has to be sent to the respondent.

Section 20 provides that the adjudicator must give notice of acceptance of his or her nomination to the claimant and respondent and a copy of the notice of acceptance has to be dispatched to the Building Commission within ten (10) working days of such acceptance.

Pursuant to section 21 (of the Victorian Act) the respondent can lodge a response to the application within five (5) working days of receipt of the application or within two (2) working days within receiving notice of the adjudicator's acceptance, whichever period is the later. The response has to be a written response, has to identify the application, identify a name and address of the principal along with any other party or concern that has a financial interest in the application.

The response also has to stipulate the amount of the claim along with any component of the claim that has been excluded. The respondent also has to provide written submissions on point to justify and articulate the rationale for the respondent's calculations.

The respondent has to comply with the strict time limits under the legislation and if the reasons for not paying the full amount of the payment schedule were not sufficiently amplified within the payment schedule any additional reasons that shed light on such reasons must find their way into the adjudication response.

The response also has to state that the claimant has two (2) business days to lodge a reply with reasons to the adjudicator, and a copy of the adjudication response has to be served on the claimant. Phil Davenport in his paper *Adjudication under the Amended Victorian SOP Act* states that *"there is no more cogent example of how unfair the Victorian Act is to claimants compared to the NSW Act"* when referring to the 2 day response time.[53]

The adjudicator is not allowed to issue a determination until the period within which the respondent can lodge the response has expired. Once the determination crystalizes a copy of it has to be given to both the parties and the Building Commission within five (5) days of the determination.

[52] *Building and Construction Industry Security of Payment Act 2002* (VIC) s13.
[53] Phil Davenport, *'Adjudication under the Amended Victorian SOP Act,'* 2007 p.18.

©Kim Lovegrove 2012

The adjudicator has to issue a determination as quickly as possible but not later than ten (10) business days after the date of acceptance or an extended period of time that does not exceed fifteen (15) business days after that date "to which the claimant agrees" (s22(4)(b) of the Victorian Act). A claimant is not permitted to unreasonably withhold such agreement.

The adjudicator is able to request further written submissions from the parties, set deadlines for further submissions, convene a conference, or carry out an inspection. Lawyers are not allowed to attend such conference unless the adjudicator sanctions their attendance and regardless of whether one of the parties generates a submission within the timelines the adjudicator can issue his or her determination.

The adjudicator, pursuant to section 23 of the Victorian Act[54], has to determine the amount of the claim payable along with the date on which it becomes payable and any interest has to be factored in. The adjudicator has to have regard to provisions of the Act, the construction contract, the submissions and the result of any inspection and the determination has to be in writing and must articulate the basis upon which a decision is made.

The determination also has to determine the value of construction work executed along with the value of goods and services pertaining to the contract.

The Virtues

Of all of the SOP Acts the Victorian Act appears to be the most maligned. Ironically that which is considered to be reprehensible about the Victorian Act may, in the minds of adjudication sceptics, be its greatest virtue i.e. its poor uptake. If one takes on board the bounty of criticisms about the very institution of adjudication such as it repudiates natural justice, repudiates procedural fairness, is trial by ambush, is overwhelmingly loaded in favour of the claimant, then in so far as the Act has been largely boycotted by the Building industry in Victoria it has enabled that jurisdiction to deploy dispute resolution theatres such as the courts that are more famous for adherence to the traditionally tried and true maxims of just application of the law.

Cynics may wonder whether the nullifying amendments that were introduced were designed to render the Act impotent, for there is little doubt that the amendments have generated an Act of Parliament that possesses very little appeal for claimants.

It does not look as if the "thinly disguised producer lobbies "as coined by Wallace QC were able to get access to the seats of power. Is it possible that the respondent classes such as developers, property owners, large commercial and civil contractors were able to "bend the ear" of the then government and press the arguments that this type of legislation is claimant friendly, respondent hostile? It may have even been possible that

---

[54] *Building and Construction Industry Security of Payment Act 2002* (VIC) s 23.

©Kim Lovegrove 2012

the Crown had been on the receiving end of aggressively swift adjudication applications. It would be ironic if the much maligned Victorian Act in so far as it has managed to quell the claimant appetite, is ahead of its time, because such is the swell of prominent antagonists of the SOP system that the system as we now know it may be on the eve of its twilight.

Shortcomings

The Victorian Act was reviewed in 2006 and amended by the Building and Construction Industry Security of Payment (Amendment) Act 2006 [55]. The writer interviewed Stephen Adorjan, a solicitor with 45 years' experience in and with the building and construction industry and a past manager of the Victorian MBA Legal Department; including 10 years as a construction lawyer. Mr Adorjan describes the amendments as being "difficult, complex and restricted in its scope, making the system less workable".

Mr Adorjan stated that "adjudication cannot be used in many situations". Originally orders were final, now one can appeal the adjudication process on certain limited grounds, and non - claimable items (including variations that do not fit within a complex formula) can be reviewed in a different forum such as a court.

Amendments made to the adjudication process make it harder to get to the start, harder to enforce at the end, and in the middle easier to defend. The orders must be lodged with the Magistrates Court to enforce; therefore one may ask why would this system be used as an alternative to the courts?

There are significant fees in incurring the costs of an adjudicator. To go through VCAT or the Courts the claim would not incur the same sorts of costs and neither the tribunal members nor the judges nor magistrates are retained or remunerated by the parties.

Stephen Adorjan sees no strengths in using adjudication in Victoria. He further explained that there are two categories under the Victorian Act where adjudication would be used:

(i) One party (respondent) defaults on payment and does not pay on time or does not pay in full. In this case the answer is black and white and requires adjudication. This was not part of the adjudication process in the original Act. It was introduced with the amendments.

(ii) Secondly, adjudication in Victoria may be used where there is a dispute to do with the quantum owed. The path to adjudication can be tortuous and as Mr Adorjan said - in most cases it is not worth the effort. The Victorian Act has a category of matters that are not claimable (eg excluded variations), making

[55] *Building and Construction Industry Security of Payment* (Amendment) Act 2006 (VIC).

©Kim Lovegrove 2012

the legislation so complicated that it contains a case study example within the Victorian Act that endeavours to explain what it means.

Mr Adorjan identified two alternative remedies that exist, apart from adjudication, that are quicker and more effective. He added that the original legislation allowed a Claimant to put in an application to the Adjudicator (in writing) which was then passed onto the Respondent and the Respondent was given a length of time to lodge a response. The Adjudicator was then bound to make a decision based only on contract and 2 written submissions.

The amendments introduced saw that the Respondent can add detail, which makes proceedings more drawn out and as Mr Adorjan stated "more like a court case." The legislation is complex and one needs a lawyer when using this forum for a payment dispute.

Mr Paul Fergusson, Manager of the legal department at the Housing Industry Association of Victoria describes the legislation as being cryptic, technical and administratively arduous.

Lawyer Phil Davenport in a paper titled "Adjudication Under the Amended Victorian SOP Act" echoed the views of Messrs Adorjan and Fergusson. In his conclusion Mr Davenport stated *"if the object of the Act as stated in section 3 and the purpose of the 2006 amendments as stated in his second reading speech are to be achieved, the Act requires drastic amendment".* [56] The stated ambitions with respect of the then Victorian Attorney General as expressed in the second reading speech were that the SOP Act would make it *"more effective in enabling any person who carries out building or construction work to promptly recover progress payments."*

Case Study 4: the Building and Construction Industry Payments Act 2004 Queensland

This Queensland Act of Parliament has been operational for some years and governs the adjudication of payment disputes under construction contracts in Queensland.

The object of the Act is to ensure that monies owing relating to the carrying out of building work and the supply of goods and services under building contracts are paid.

The Act gives the claimant the ability to be paid progress payments regardless of whether the apposite contractual instrument contains provisions for progress payments (section 8). The Act enunciates procedures that involve claim lodgement by the claimant and the provision of payment schedules by the recipient. It enables disputants to refer claims to adjudicators for determinations concerning sums of money that are in dispute.

[56] Phil Davenport, *'Adjudication under the Amended Victorian SOP Act,'* 2007.

©Kim Lovegrove 2012

Section 10 provides a very expansive definition of construction work. The definition is most comprehensive and embraces virtually any conceivable permutation or connotation of the term ‘construction work’. Section 11 provides a definition of related goods and services.

Part 2 of the Act governs the rights to progress payments. The amount of any progress payment that bestows an entitlement is an amount that is calculated under the contract or if the contract doesn’t specifically articulate the amount it will be the amount that is commensurate with a fair evaluation of works carried out and a fair value for goods and services supplied.

Interest is due with respect to any unpaid amount of any progress payment pursuant to the rates specified to the contract or the rate subscribed under the Supreme Court Act 1995 section 48(1).

Part 3 provides the procedures for recovering progress payments. A claimant is permitted to serve a payment claim on a recipient. The Act defines the intended recipient as being the party under the contract who is liable to make payment.

The claim has to identify the work and goods pertaining to the progress claim along with the amount, and it has to state that payment is sought under the Act. It must be served within the period prescribed under the building contract but this has to occur not later than 12 months after the completion of the building work pertaining to the claim. The claimant cannot serve more than “one payment claim in relation to each reference date under the construction contract” (section 15(5).

The recipient of the payment claim may reply by way of the dispatch of a payment schedule. The payment schedule has to identify the payment claim and has to stipulate the amount that respondent is prepared to pay, if indeed the respondent has decided to pay anything at all.

In circumstances where an amount is sanctioned that is less than the amount sought, a reason must be proffered in writing that sheds light on the rationale underpinning the part payment.

Section 5 applies in circumstances where a claim has been served on the respondent and the respondent neglects to serve a payment schedule upon the claimant, within either the time specified under the contract or within 10 working days after the payment claim is served. In such circumstances the respondent is compelled to pay the claimed amount.

Section 19 enunciates the consequences of not paying the claimant where there is no payment schedule. If a respondent becomes liable to pay an amount to a claimant under section 18 or because of the respondent’s failure to serve a payment schedule

©Kim Lovegrove 2012

within the prescribed period or in circumstances where there is only part payment of the progress payment, the claimant pursuant to section 19 (2) is entitled to claim any unpaid portion from a court of law. Alternatively the claimant can make an adjudication application under this Act.

Contractual Suspension Power

The claimant`s powers are bolstered by section 19(b) of the Act, by virtue of the claimant's ability to suspend the carrying out of further work or the supply of goods under the contract.

If a claimant initiates proceedings under this section (19) for recovery of a debt the court is entitled to enter judgment. This can occur as long as it is satisfied that the conditions of section 19 have been complied with. In such circumstances the respondent is precluded from raising any defence or generating any counterclaim with respect to the matter the subject of the claim.

When a claim is not paid pursuant to a payment schedule within the contractually stipulated period or within 10 business days after the claim has been served, the claimant is entitled to recover any unpaid amount of the scheduled amount from the respondent from a court. Alternatively the claimant can lodge an adjudication application.

Division 2 deals with adjudication disputes. A claimant can initiate adjudication after receiving a payment schedule for an amount that is less than the claimed amount that was manifest in the payment claim, or in circumstances where the respondent fails to pay any or part of the scheduled amount by the date for payment. Alternatively a claim can be lodged where the respondent fails to serve a payment schedule on the claimant.

Additional prerequisites for the filing of an adjudication application involve providing the respondent with notice within 20 days of the due date for payment of the claimant's wish to refer the matter to adjudication. Furthermore the notice must state that the respondent has to serve a payment schedule within 5 days of receipt of notice.

To state the obvious the application for adjudication has to be in writing, and must be made to an "ANA", in similar fashion to other Australian jurisdictions. The application also has to be made within the period enunciated under section 21 (c).

There has to be identification of the payment claim and payment schedule, provision of the prescribed fee and any accompanying submissions. Predictably the adjudication application has to be provided to the respondent.

Assuming everything is in order the ANA then has to refer the adjudication application to an adjudicator. If an adjudicator is intent on accepting the appointment he or she has to serve notice of his or her acceptance on both of the parties.

©Kim Lovegrove 2012

Section 24 provides that a respondent has to give the adjudicator a response to the application not later than 5 business days after receiving the application or 2 business days after receiving the adjudicator's acceptance of the application. The response has to be in writing, has to identify the particular application and can contain apposite submissions.

The respondent is not allowed to provide any additional reasons for withholding payment over and above those that have already been given in the payment schedule.

An adjudicator has to make a determination not later than 10 business days after he or she receives the adjudication response or the date upon which he or she "should have received the adjudication response" (section 25) or within any added period of time that has been sanctioned by the parties before the expiration of the 10 days. Section 25 (4) provides that the adjudicator is at liberty to seek further submissions, set deadlines, convene conferences or carry out inspections. In circumstances where a conference is convened legal representation is not permitted.

Section 26 provides that the adjudicator has to make a decision with respect to the amount that has to be paid and the date by which it becomes payable. The adjudicator is not allowed to go beyond the scope of the Act or the provisions of the building contract. Furthermore the adjudicator`s brief is quarantined to the payment claim, the payment schedule, any inspections pertaining to the same and submissions and documentation that come within the curtilage of the contract.

The adjudicator's decision has to be written and save for circumstances where the parties do not want written reasons, the decision has to provide reasons.

Section 29 provides that the respondent has to pay "the adjudicated amount". If the respondent neglects to pay the adjudicated amount the claimant can ask for an adjudication certificate and can also give notice of suspension of building work pursuant to section 33.

Section 31 of the Act specifies that an adjudication certificate can be filed in a court of law as a debt due and owing, provided that accompanying the adjudication certificate is an affidavit attesting to the fact that an amount of money should have been paid but has not been paid. In these circumstances the respondent is statutorily barred from raising any defence or counter claim in debt recovery proceedings relating to the adjudication certificate.

<u>Virtues</u>

This SOP Act unlike the Victorian counterpart appears to achieve what it set out to do i.e. to provide fast track determinations of payment claims. Phil Davenport quotes some statistics in his paper "Adjudication under the Amended Victorian SOP Act". The paper was published in 2007 so the statistics are not that up to date but they

©Kim Lovegrove 2012

nevertheless show a trend. *"There have been about 70 adjudications in the four years of operation of the Victorian Act. By contrast, there are more than 10 times the number of adjudications each year in NSW and there were 216 determinations last year in Queensland, an increase of 100% on the preceding year."* [57] The Queensland Act appears to be far more "claimant centric" than the Victorian Act, and these are probably the reasons for its much greater patronage.

Shortcomings

There is little to add with respect to the shortcomings that have not been said in the introductory discussion on SOP Acts of Parliament. In so far as the objective of the Act has been to expedite payment, this aim sits favourably when compared with Victoria and enjoys the level of success and claimant patronage that has been evident in NSW. From a respondent point of view however the system will not be as well received, because for fear of labouring the point, the respondent is disadvantaged in terms of time constraints with respect to the formulation of responding submissions. Nevertheless when reviewing expert comparative commentary on the respective benefits of the given jurisdictions, it is apparent that Queensland has not generated the level of ire that is characteristic of commentary on the Victorian Act.

As an aside, at the time of writing this manuscript the writer`s firm was considering whether to have a matter in Queensland adjudicated or referred to a court of law. We were acting for a claimant in a major matter. The decision was made to have the matter resolved in the Supreme Court. The reason for this was that such was the complexity of the issues pertaining to the claim we did not want the matter fast tracked. We wanted the case carefully considered and furthermore we wanted the guarantee of judicial consideration i.e. our wish was for judges rather than adjudicators to grapple with the nuances and complexities of the subject matter.

This was by no means an indictment on the Queensland adjudication system rather it was a wish on our part for a sufficient amount of time being afforded to the careful and measured review of the complex legal issues at hand. Adjudication does not provide this type of decision making setting.

[57] Phil Davenport, *'Adjudication under the Amended Victorian SOP Act,'* 2007, p.1.

©Kim Lovegrove 2012