



ADJUDICATION IN AUSTRALIA: AN OVERVIEW

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Introduction

- 1 The purpose of this paper is to review the impact of adjudication in Australia and to highlight the differences between the Australian process and adjudication in the UK.¹
- 2 The first and most obvious difference between Australia and the UK is the nature of their judicial systems. Australia is made up of a number of States and Territories each of which must be considered separately. Not every State has adopted adjudication legislation. Currently those States and Territories which have adopted adjudication are as follows:
 - (i) New South Wales Building and Construction Industry Security of Payment Act 1999, as amended in 2002 and 2007;
 - (ii) Victoria Building and Construction Industry Security of Payment Act 2002, as amended in 2006;
 - (iii) Queensland Building and Construction Industry Payments Act 2004;
 - (iv) Western Australia Construction Contracts Act 2004;
 - (v) Northern Territory Construction Contracts (Security of Payments) Act 2004.
- 3 There is no adjudication legislation in South Australia, Tasmania or the ACT - yet.
- 4 In addition, the various adjudication legislations are not the same. Thus, adjudication stands in contrast to arbitration, Australia having adopted a uniform arbitration law the Commercial Arbitration Act 1986 throughout all the States and Territories.
- 5 The NSW and Victoria legislation was amended because, as originally drafted, the legislation had turned out to be practically ineffective. The reason for this was because a party ordered to pay under the adjudication process could avoid doing so

¹ For those of you interested in further reading, the Adjudication Society website provides transcripts of Australian adjudication enforcement cases from NSW, Victoria, Queensland and Western Australia. The website also has in its "Papers and Talks" section, an article on statutory adjudication in Australia based upon a talk given by Professor Jones to the London Branch of the Adjudication Society on 21 November 2006.

by providing security and then commencing either litigation or arbitration. The 2002 NSW amendment made it clear that payment had to be made to a successful party in an adjudication.

- 6 The effect of this can be seen by the fact that by mid 2006 there had been over 2,500 adjudications in NSW whereas in Victoria, where the problem was only fixed at the end of March 2007, there had only been approximately 100 adjudications.²
- 7 Apparently also about half the number of adjudications that have taken place are for claims of less than AU\$40,000, and about 10% are for less than AU\$5,000. As a consequence, the average adjudication fees are some 10% of the amounts claimed. That said, perhaps as a consequence of familiarity and a realisation that the process has teeth, the amounts claimed are going up.³ In the first half of 2006, the average size of adjudication claim brought in NSW rose to some AU\$1,168,000 (mean of AU\$48,000), compared with an average before 2006 of some AU\$679,000 (mean of AU\$40,000). The largest claim brought to date is one for some AU\$94 million.⁴
- 8 The adjudication provisions of Queensland and NSW are similar. This is what happens in Queensland.

Adjudication in Queensland

- 9 As noted above, the relevant legislation is the Building and Construction Industry Payments Act 2004 ("BCIPA").
- 10 Sections 7 and 8 of the BCIPA state as follows:

"7 Object of Act

The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person

- (a) undertakes to carry out construction work under a construction contract; or
- (b) undertakes to supply related goods and services under a construction contract.

8 How object is to be achieved

The object is to be achieved by

- (a) granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and
- (b) establishing a procedure that involves
 - (i) the making of a payment claim by the person claiming payment; and
 - (ii) the provision of a payment schedule by the person by whom the payment is payable; and
 - (iii) the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and

² See "Construction Act Review" by Robert Fenwick Elliott and Jeremy Coggins *Construction Law Journal* 2007 Vol. 23 No. 5

³ In NSW at least

⁴ Again, the figures are from "Construction Act Review" by Robert Fenwick Elliott and Jeremy Coggins *Construction Law Journal* 2007 Vol. 23 No. 5

(iv) the payment of the progress payment decided by the adjudicator.”

- 11 The relevant construction contract must have come into effect on, or after, 1 October 2004. Adjudications in Australia seem to be almost exclusively about payment. A contractor makes an interim application for payment in the form of a “payment claim”. If the paying party wants to challenge this, he must respond within the given timescale with what is known as a “payment schedule”. These are very important documents.
- 12 A payment claim must identify the construction work or related goods and services to which the progress payment relates, indicate the claimed amount, and state that it is made under the Act. It must be served on the party that actually has to pay any monies that are due.
- 13 It is important to put the “payment schedule” in promptly. The time for response will be that defined in the contract or 10 business days whichever is the earlier. Like a withholding notice, if it is intended to pay less than the amount claimed, the schedule must explain what the amount is and why the claim has been reduced. All the reasons for withholding payment must be set out. The paying party can only rely on defences in any subsequent adjudication if those reasons were set out in the payment schedule.⁵
- 14 If the paying party does not put in a payment schedule or does not pay, the applicant can commence an adjudication. However, if you simply do not pay, it seems that there is little or no defence. A debt is due, so summary judgment proceedings could be brought at court. Therefore it is most likely that an adjudication will take place when the amount paid is less than the amount claimed.
- 15 Accordingly, a claimant (or “referring party”) may submit an application for adjudication to an Authorised Nominating Authority under one of three conditions:
- (i) The respondent has served a payment schedule and the payment schedule states an amount owing that is less than the claimed amount stated in the payment claim application under section 21(1)(a)(i);
 - (ii) The respondent has failed to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount application under section 21(1)(a)(ii);
 - (iii) The respondent has failed to serve a payment schedule on the claimant and failed to pay the whole or any part of the claimed amount by the due date for payment application under section 21(1)(b).⁶
- 16 By sections 10 and 11 of the BCIPA, a claimant must have an eligible contract related to construction work or the supply of related goods and services. The definition of construction work is very broad. One particular exception (as in the UK), given by

⁵ There is no similar statutory restriction on what the claimant can rely on, although case law suggests that a restriction might be imposed for reasons of fairness and natural justice *John Holland Pty Ltd v Cardno MBK* [2004] NSWSC 258

⁶ An application under section 21(1)(b) of the Act is subject to a further condition. The claimant must give the respondent notice, within 20 business days immediately following the due date for payment, of their intention to apply for adjudication of the payment claim. The notice must state that the respondent may serve a payment schedule on the claimant within five (5) business days after receiving this notice.

section 10(3), is in respect of “the drilling for, or extraction of, oil or natural gas” and the “extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose”.⁷

- 17 In Western Australia, that exclusion is significantly wider, including the construction of plant for the purposes of the extraction of oil, natural gas or minerals a testament to the importance of the mining industry in WA, be it gold or otherwise.
- 18 The definition of goods, materials and services includes materials and components forming part of any building or for use in connection with the carrying out of construction work, the provision of labour to carry out construction work, architectural, design, surveying or quantity surveying, building, engineering, interior or exterior decoration or landscape advisory services relating to construction work and soil testing services relating to construction work.
- 19 The provision of legal advice is construction work. In the case of *Doyles Construction Lawyers v Ulysses (Qld) Pty Ltd*,⁸ the adjudicator, Mr Philip Davenport, was asked to consider whether the provision of legal advice was “construction work” for the purposes of the BCIPA. Whilst he did not consider that the provision of legal advice fell within the definition of either “construction work” or “related goods and services”, he noted that section 12 gives a right of a progress payment to a person who “has undertaken to carry out construction work”. The term “carry out construction work” is given a wide meaning in Schedule 2 of the Act, which defines the term to include the provision of advisory services for carrying out construction work.
- 20 Thus, in Queensland (though not NSW and probably not the UK) a person who provides advisory services for carrying out construction work actually carries out construction work within the meaning of the Act.⁹
- 21 By section 3, the contract can be written, oral, part-written or part-oral. This is a matter of some significance to the UK, given the Government’s apparent intention to introduce similar legislation here. It is of note that there seems to be a lack of distinct cases that revolve around this point, which suggests that the proposed change to the HGCRA will not be as problematical as some have suggested.
- 22 The BCIPA also allows for the concept of an arrangement, which has wider connotations than a contract or agreement. This “arrangement” encompasses transactions or relationships that are not legally enforceable agreements. For example, arrangement may be similar to the following scenario: a principal forwarding payment to a subcontractor of a head contractor in order to keep a job going, despite having no formal agreement with the subcontractor. The subcontractor may be able to lodge payment claims on the principal that still come under the jurisdiction of the BCIPA.

⁷ There are other exclusions, namely work outside Queensland, a claim for work or services which are the subject of a subcontractor’s charge, a contract which forms part of a loan agreement, guarantee or contract of insurance, a domestic building contract where the owner is a resident owner (where the owner intends to reside in the building) and a contract where the amount to be paid is not calculated based on the value of work done.

⁸ Adjudication reference 1057877

⁹ “Legal Advice is ‘construction work’ for the purpose of security of payment legislation.” Bede Lipman, 22 November 2006, Minter Ellison website

- 23 There is something similar in NSW, where the case of *Okaroo Pty Ltd v Voc Construction and Joinery Pty Ltd*,¹⁰ shows the breadth of contractual (and other) arrangements caught by the legislation. Nicholas J said this:

In deciding whether a contract or other arrangement is within the definition of construction contract the only matter for consideration is whether it is one under which one party undertakes to carry out construction work, or to supply related goods and services, for another party. There is no other requirement or qualification which is expressly or by implication included in the definition which must be satisfied.

- 24 The application for adjudication must be in writing and must be made to an Authorised Nominating Authority chosen by the claimant. It must also identify the payment claim and the payment schedule (if any) to which it relates. The application may contain submissions relevant to the application the claimant chooses to include and must be served on the respondent.

- 25 There are strict time limits as to when the application can be made.

- (i) for an application under condition 21(1)(a)(i) 10 business days after the claimant receives the payment schedule;
- (ii) for an application under condition 21(1)(a)(ii) 20 business days after the due date for payment; and
- (iii) for an application under condition 21(1)(b) 10 business days after the end of the five day period referred to in section 21(2)(b)

- 26 This application is the combined equivalent of the UK Notice and Referral.

- 27 If the claimant chooses, it is possible for certain adjudications to be carried out for a fixed fee. The Queensland RICS operates a scheme offering fixed fees for adjudications with a value of less than AUS\$40,000. The fixed fee includes the nomination fee and the adjudicator's costs:

Payment Claim Range (inc. GST) (AU\$)	Total Adjudication Fees (AU\$)	Total Adjudication Fees (inc. GST) (AU\$)
0-6500	650	715
6501-15,000	1000	1100
15,001-25,000	2000	2200
25,001-40,000	3100	3410

- 28 The respondent produces an Adjudication Response, in response to the adjudication application. The response must be served either within the later of:

- (i) five business days after receiving a copy of the application; or
- (ii) two business days after receiving notice of an adjudicator's acceptance of the application.

¹⁰ [2005] NSWSC 45

- 29 The key part of the response is that a respondent, constrained by sections 24(3) and (4) of the BICPA,¹¹ may only give the adjudication response to an adjudicator if the respondent has served a payment schedule on the claimant within the time period specified. The response can only include reasons for withholding payment that have been included in the payment schedule. The adjudicator is not allowed to consider reasons that have not been included on the payment schedule.
- 30 The adjudicator¹² can only begin the adjudication process once the time period for submission of the adjudication response has elapsed. The adjudicator then has 10 business days to reach his decision. That is 10 days after the earlier of:
- (i) the date on which the adjudicator receives the adjudication response or
 - (ii) the date on which the adjudicator should have received the adjudication response.
- 31 There is, however, scope for the claimant and the respondent to agree to allow further time.
- 32 During the adjudication period, in accordance with section 25, the adjudicator may:
- (i) ask for further written submissions from either party. The other party must have the opportunity to comment on the submissions. The adjudicator may also set deadlines for these further submissions and comments on these further submissions;
 - (ii) call a conference with the parties. These are to be informal, and the parties are not entitled to any legal representation; or
 - (iii) carry out an inspection of any matter to which the claim relates.
- 33 There are limits on what the adjudicator can decide. Essentially, he is limited to the payment claim to which the application relates (including all submissions, relevant documents that have been properly made in support of the claim) and the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made in support of the schedule.
- 34 In addition, there are limits on what he can consider, namely the BCIPA, the contract, the payment claim and schedules, and any other valid submissions
- 35 Under section 26, the adjudicator is required to decide:
- (i) the amount of the progress payment (the *adjudicated amount*);
 - (ii) the due date for payment; and
 - (iii) the applicable rate of interest.

¹¹ Section 24(3) of the BCIPA states, "*the respondent may give the adjudication response to the adjudicator only if the respondent has served a payment schedule on the claimant within the time specified.*" Section 24(4) of the Act states, "*The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.*"

¹² In Queensland, though not NSW, an adjudicator must be registered and as part of the registration process, the Registrar must be satisfied that the applicant is suitable. Registration lasts for three years.

- 36 An adjudicator has no right to insist upon security for their fees. Under section 32 of the BCIPA, a claimant can withdraw an application for adjudication if the adjudicator does not make a decision within time, and by section 35 an adjudicator is not entitled to a fee if the decision is late.
- 37 If an adjudicator decides that a respondent is required to pay an adjudicated amount, the respondent must pay this amount to the claimant on or before the following dates:
- (i) The date that is five business days after the date on which the adjudicator's decision is served on the respondent; or
 - (ii) A later date, as per the adjudicator's decision.
- 38 The BCIPA allows for two methods of enforcement:
- (i) asking the Authorised Nominating Authority for an Adjudication Certificate; and/or
 - (ii) suspending future work or the supply of related goods and services
- 39 The Adjudication Certificate is a document which sets out the adjudicator's decision, and may be filed at court as a judgment for debt. Once the adjudication certificate is registered as a judgment, it becomes an enforceable money order of that court.
- 40 Under section 33, the claimant also gains the statutory right to suspend work if a valid payment schedule has not been provided, or a scheduled amount has not been paid. Any expense or loss in relation to the suspension can be claimed by the claimant. Finally, a claimant who suspends work or the supply of related goods and services is not liable for any loss or damage suffered by the respondent.
- 41 By section 101 of the BCIPA, an adjudicator must, as soon as practicable, give a copy of his decision to the authorised nominating authority that referred the adjudication application to the adjudicator. The authority must pass the decision on to the Registrar, who, by section 38(2)(d), must publish the decisions. All of which means that each and every adjudication decision in Queensland can be found on the internet at www.bcipa.qld.gov.au/ars_xweb/Pages/default.aspx

Adjudication in the Northern Territory and Western Australia

- 42 The main difference with adjudication in WA and NT is that the adjudicator has 28 days instead of 10 business days to reach his decision. In addition, either party (i.e. the payer and payee) may initiate adjudication proceedings.
- 43 The parties are also free to agree an adjudicator of their choice and they even go so far as to allow lawyers to attend any meeting requested by the adjudicator.
- 44 The question as to whether or not submissions and arguments made during the adjudication process can be used during any subsequent court proceedings as evidence is always an interesting one. In WA, under section 45(3), the legislation provides that evidence of anything said or done in an adjudication is not admissible before a court or arbitrator unless there is an application to have the adjudicator disqualified or there is an attempt to seek a review of the actual decision.

- 45 The situation is less clear in Queensland and NSW where the fall-back position is the fact that the court rules enable parties to rely on evidence filed in other proceedings, which suggests that reference can be made to what is said in an adjudication. Of course, just as in the UK, the adjudication decision is of no interest to a court that has been asked to consider the dispute afresh.

Enforcement Issues

The basic position in NSW

- 46 The key case in NSW is the Court of Appeal decision in *Brodyn v Davenport*.¹³ Prior to *Brodyn*, there had been a line of cases which indicated that a jurisdictional error on the part of the adjudicator would render the decisions unenforceable. When it came to enforcement, Hodgson JA said this:

55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. *R v. Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination.

- 47 This is in keeping with the UK leading decisions such as *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*.¹⁴ In other words, adjudication should not be thwarted by relatively modest complaints about procedure. Following *Brodyn*, a decision may be void if:

- (i) the basic and essential requirements of the legislation have not been complied with;
- (ii) there has been a denial of natural justice;
- (iii) the adjudicator has not acted on a bona fides basis; or
- (iv) the adjudicator has acted fraudulently.

- 48 There must be a *substantial* denial of natural justice. Thus in *Brodyn*, the failure to consider the submissions of one of the parties would be a breach of natural justice.¹⁵

- 49 The *Brodyn* case will be familiar in the UK as a consequence of the comments of HHJ Coulson QC in the case of *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd*.¹⁶

¹³ [2004] NSWCA 394

¹⁴ [2005] EWCH (Civ)

¹⁵ In the UK, following *Carillion v Devonport*, that may well be considered to be an error and so the decision would be enforceable.

¹⁶ [2007] EWHC 1360 (TCC)

Here the Judge rejected an attempt to rely on *Brodyn* as a means to escape the consequences of a decision potentially having been given late. Judge Coulson said this:

Fourthly, Mr. Leabeater relied on a decision of the Court of Appeal of New South Wales in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* (2004) 61 NSWLR 421. That was a case concerned with the New South Wales adjudication provisions, which are of more limited scope than those that apply in the UK. In that case, the court relied on Lord Steyn's words in *R v. Soneji* in holding that failures to meet statutory deadlines governing various aspects of adjudication were not necessarily fatal to the process. However, it appears that the adjudication provisions with which the court were there concerned were very different to those provided by the Scheme for Construction Contracts. There is, for example, no obligation that the adjudicator "shall" conclude his decision within a certain time. It therefore seems to me that the case is of limited assistance on this particular topic.

50 Thus in NSW, the position is that the courts will adopt a robust approach to challenges to an adjudicator's decision. In *Brodyn*, the courts made it clear that they would enforce an adjudicator's decision (or determination, to use NSW terminology) provided that it complies with the basic and essential requirements of the relevant legislation, namely:

- (i) There is a construction contract between the claimant and the respondent, to which the legislation applies;
- (ii) A payment claim has been served;
- (iii) An adjudication application has been made by the claimant to an authorised nominating authority;
- (iv) The application has been referred to an eligible adjudicator, who accepts the application; and
- (v) The adjudicator has made a decision in writing on the amount owing, the date on which it became due and the rate of interest payable.

51 An interesting application of the *Brodyn* principles came in *Energy Australia v Downer Construction & ors*,¹⁷ before Nicholas J, who gave an indication of the number of enforcement cases that have ended up before the NSW courts when, having quoted from the relevant extracts of the legislation, he set out his:

"Analysis of these provisions, which have been considered in the tsunami of litigation which has engulfed the court since the Act came into force."

52 On 19 September 2001, the parties entered into contract whereby Downer agreed to carry out the design and construction of a cable tunnel for some AU\$13.5 million. On 3 June 2005, Energy certified completion of the works. Downer was paid AU\$14,590,944.55 but on 12 July 2005, submitted a payment claim seeking AU\$9,115,780.20, including claims for delay, disruption, and other costs incurred in relation to water ingress as a consequence of certain ground conditions. On 26 July 2005, Energy responded to the payment claim by its payment schedule, disputing

¹⁷ [2006] NSWSC 52

that any amount was payable, largely because of arguments relating to the ground conditions. Proper reasons were provided according to statute.

- 53 On 9 August 2005, Downer served its adjudication application on Energy. On 15 September 2005, Energy served its adjudication response, and on 4 October 2005, the adjudicator delivered the adjudication determination, finding that Downer was entitled to be paid the sum of AU\$5,468,502.05. On 6 October 2005 the adjudicator amended this amount to AU\$6,040,579.05 on the basis that there had been an accidental slip or omission.¹⁸
- 54 On 14 October 2005, the court refused an interlocutory application by Energy who sought to restrain Downer from obtaining an adjudication certificate to be filed as a judgment debt. On 17 October 2005, an adjudication certificate was issued and, on 18 October 2005, Downer filed it as a judgment in court.
- 55 Nicholas J had to consider two key issues in this case:
- (i) Was the adjudication application properly made? and
 - (ii) Was the adjudication determination a proper and valid one?
- 56 In respect of the validity of the adjudication application, the Judge held that the adjudication application was properly made. Energy had submitted that the differences between the payment claim and the adjudication application were so substantial as to render the adjudication application invalid. These differences included the adjudication application which stated the payment claim amount as AU\$9,131,998.31, whereas the amount claimed in the payment claim was lower by AU\$16,218.29; and that the submissions accompanying the adjudication application specified bedding plane shears at different locations to those specified in the payment claim.
- 57 Nicholas J disagreed and said that taking Downer's adjudication application and supporting documentation as a whole, the payment claim and payment schedule were clearly identified irrespective of the differences upon which Energy relied.
- 58 Looking at the validity of the adjudication determination, Nicholas J held that the adjudication determination was null and void on three grounds:
- (i) there was a failure to comply with the basic and essential requirement of the legislation. The adjudicator had wrongly determined the basis of the claim by considering issues which were not the issues raised in the payment claim and payment schedule;¹⁹
 - (ii) the determination was not bona fide, in that although the adjudicator had addressed the parties' submissions as to the existence of latent conditions, he failed to deal with those directed to bedding plane shears, which went to the core of the claim. Accordingly, he did not give due regard to Energy's submissions on that issue and his reasons indicated a fundamental failure on his part to attempt to understand the basis of the claim with the

¹⁸ The elongated timetable is interesting given the very tight deadlines (in UK terms) of the statutory timetabling.

¹⁹ Namely whether the excess water ingress was a latent condition under the contract, not whether the bedding plane shears were latent conditions, and if so whether the water ingress arose from them.

consequence that the determination was void as it was not the product of a bona fide exercise of power; and

(iii) Energy was denied natural justice, as the adjudicator had made his determination on a basis which was markedly different from that specified in the payment claim and addressed in the payment schedule. Energy was afforded no opportunity to put its case in response to the approach taken by the adjudicator in the course of the determination process.

59 So it can be seen that in Australia, not every application of Brodyn results in every adjudication determination being enforced (just as in the UK). Of course (again just as in the UK), most are.

60 One of the issues in *Brodyn* was whether or not successive payment claims had to be for additional work. This was recently relied on in the case of *Doolan v Rubickon*.²⁰ Rubickon was building a set of 11 townhouses for the Doolans. Towards the end of the development, Rubickon made a “final claim” for payment, which was not paid. The adjudicator held that the money should not be paid because the adjudication application was not made within time.

61 Rubickon simply resubmitted the payment claim in the same form as the earlier claim, save that they changed the invoice date and included the words “Reissued 16 February 2006”. This claim was not paid but this round the time limits were adhered to and the second adjudicator accepted that the payment claim was valid. Rubickon therefore made an application to the court for a judgment debt so that the adjudicator’s certificate could be enforced.

62 In Queensland, a contractor cannot issue two payment claims in relation to the same reference date (the date under which a contractor can issue a payment claim).

63 Rubickon relied on the *Brodyn* decision that successive payment claims did not necessarily have to be for additional work. Doolan said that there had been an error of law and a breach of the rule of natural justice. However, unlike in *Brodyn*, here, the second claim was identical to the first and so the determination was not enforced. The second claim was really a second claim in respect of the original reference date and any other decision would result in Rubickon getting round the time bar in commencing the adjudication for the original claim.

64 Practically, it seems that what Rubickon should have done was to include in their second application, additional work or a claim for loss and expense, or perhaps work previously omitted.

65 Also of interest is the recent case of *John Holland Pty Ltd v the Roads and Traffic Authority of NSW*.²¹ Here, Holland contracted with the RTA for the construction of a roadway and associated bridgeworks. The terms of the contract provided for security:

“for the purposes of ensuring the due and proper performance of the Contract and of satisfying the obligations of the Contractor under the Contract.”

²⁰ [2007] QSC 168

²¹ [2007] NSWCA 140

- 66 While carrying out works, disputes arose over payment and Holland made three separate adjudication applications arising from payment claims. All were successful. Indeed, the amounts paid by RTA were well in excess of the amount of the security.
- 67 Upon practical completion, RTA refused to release half of the security on the basis that Holland had no entitlement as a result of the substantial disputes raised by RTA in its payment schedules. Holland brought proceedings and the case reached the Court of Appeal, who agreed with RTA.
- 68 The NSW payment legislation allowed for interim payments. This was in the interests of progressing the works. The superintendent (a form of contract administrator) was able to come to different decisions from those of the adjudicator.
- 69 So in NSW, the Court of Appeal said that the position decided upon by the adjudicator remains but it is interim (as would be the case in the UK).
- 70 However, the decision of the adjudicator was *“subject to a different position being established contractually or in proceedings”*. The adjudicator’s determination remains, and requires payment of the adjudicated amount, but as it is interim, it is potentially subject to a different position being established in relation to payment for the relevant work or related goods and services, contractually or in proceedings. In other words, the superintendent could take into account when issuing a final certificate, amounts the employer claimed to be entitled to, including recovery of previous adjudication amounts, and this, according to the court, would not offend the adjudicator’s determination (something which would not necessarily be the case in the UK).
- 71 The purpose of the NSW legislation was only to ensure prompt interim progress payment on account, pending final determination of all disputes.

Differences between the NSW/Queensland adjudication legislation and the UK model

- 72 The first key difference relates to the extent of the construction contracts covered by the Australian legislation. As noted above, in Australia all construction contracts are covered whether they are evidenced in writing, oral or partly oral.
- 73 In addition, Australian legislation covers the supply of goods and services, in contrast to sections 105 (2)(c) and (d) of the HGCRA.
- 74 Another key difference is speed. An adjudicator has just 10 days to make his decision.²² To assist the adjudicator, the pleadings in the Australian form of adjudication are limited. The claimant puts in an application notice and the responding party puts in an adjudication response. The responding party is limited in that response to raising matters which he identified in the payment schedule. And that should be that.
- 75 Indeed, it is difficult to underestimate the importance of the payment schedule. It has far more significance than the UK withholding notice, and the failure to serve a timely payment schedule seems to have a much wider significance than the failure to

²² However, as we have seen, the parties can agree to extend the process. The time limits in WA are longer, an adjudicator having a more familiar 28 days. Indeed, the WA and NT approaches are far closer to the UK model.

serve a valid withholding notice. In Australia, the game would be up, whilst in the UK there might be some valuation or other points that could perhaps be raised.

- 76 The scope of adjudication in Australia is much narrower. It seems to be almost exclusively about payment; this includes payments of a professional's fees. Claims are restricted to payment claims made under the contract. Employers cannot bring claims against contractors, seeking an adjudication decision on the sums due under the contract. There is thus no scope for the "reverse ambush".
- 77 This is perhaps the third and most important difference between the UK and Australian models. In Australia, adjudication seems heavily to favour the contractor over the employer and sub-contractor over the contractor. Compared with the Australian model, there is a certain air of neutrality about the UK approach.
- 78 Thus, the adjudicator must limit his deliberations to contents of the payment claim and payment schedule, together with the adjudication notice and response. Of course, in the UK an adjudicator would be well advised to limit his deliberations to the material provided to him and certainly if he has any intention of introducing anything which might be considered new, he should let the parties know.
- 79 In the UK adjudication meetings are held regularly. In Australia, the legislation seems actually to discourage the adjudicator from holding hearings. Of course, adjudicators in the UK might be relieved that lawyers are banned from attending any meetings that take place under most of the legislation. In the UK, there is also a relative freedom to choose the adjudication procedure, an opportunity not afforded by the Australian approach.
- 80 The role of the adjudicator in Australia seems to be subject to more regulation than in the UK. It is not possible in every jurisdiction for parties to agree themselves on the identity of an adjudicator. An adjudicator must be nominated by an authorised adjudicator nominating authority and these bodies have to be licensed by the respective state governments. ANBs in the UK can seemingly be set up by anyone, although, of course, certain key ANBs quickly established themselves in the UK and have now embarked upon various processes to ensure that the adjudicators on their lists are properly qualified.
- 81 But overall, just as in the UK, adjudication has been widely taken up in Australia and has clearly received the same support from the courts as it has in the UK.

Adjudication in Australia the future

- 82 There seems to be little doubt that, in time, South Australia will follow suit and introduce adjudication legislation. Draft legislation is being prepared. Whether it will follow the NSW/Queensland route or the Western Australia model remains to be seen.
- 83 The route it chooses to go down might be influenced by the tightening up of the adjudication procedures at least in Queensland. Following the case of *JJ McDonald & Sons Engineering Pty Ltd v Gall*,²³ decisions of an adjudicator there were subject to

²³ [2005] QSC 305

judicial review. This meant that parties could apply to have an adjudicator's decision overturned on the basis that there was an error of law or a breach of natural justice.

- 84 However, on 29 August 2007, the Queensland parliament passed a bill amending the Judicial Review Act to exclude an adjudicator's decision from judicial review. The explanatory notes to the new legislation referred to the objectives of the BCIPA as being:

to create a dispute resolution process whereby adjudicators can quickly resolve payment disputes between parties to a construction contract on an interim basis.

- 85 Although the new legislation has not yet come into effect, it seems certain that the effect of the amendment will be to significantly reduce the extent to which parties in Queensland will be able to challenge an adjudicator's decision.

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