Statutory Adjudication in New South Wales: Operational Problems and Potential Improvements

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Abstract:
The Australian state of New South Wales (NSW) was the second jurisdiction in the common law world and the first in Australia to introduce statutory adjudication. Although being modelled after the UK statutory adjudication regime, there are significant differences in the NSW regime that make it distinctive. The NSW regime is essentially a neutral certification process conducted by an adjudicator whose role is that of a certifier. However, due to its rapid nature and judicial interventions, there have been some serious problems with regard to the operation of the regime. This paper attempts to identify the operational problems of the NSW regime from neutral (adjudicator) and user (legal representatives in adjudication) viewpoints, allowing for the establishment of potential improvements to the current regime. The first stage involved a review of the relevant literature, parliamentary speeches and consultation documents, cases on statutory adjudication, and expert commentaries. It was followed by qualitative interviews with 11 leading adjudicators and construction lawyers who represent parties in adjudication proceedings. The main problems identified are court involvement, invariability in the quality of adjudicators, rubber stamp approach and the accessibility of the NSW Act. It is established that the introduction of a dual system of adjudication and an adjudication registry could solve most of the problems identified above.

Keywords: adjudication, cash-flow, construction contracts, disputes, payment.

1 Introduction

New South Wales was the first jurisdiction in Australia to introduce statutory adjudication when the Building and Construction Industry Security of Payment Act\textsuperscript{1} (the NSW Act) was on the statute books in 1999. Historically, statutory adjudication in the common-law world was first introduced three years earlier in the United Kingdom, when the Housing Grants Construction and Regeneration Act (the UK Act) was passed. Despite following the UK government’s footsteps in introducing statutory adjudication, the NSW State Government established a completely different scheme of adjudication in terms of procedure and application in its construction industry. The stark difference between the UK and the NSW adjudication schemes is that the latter imposes a reference to ‘rapid mandatory adjudication’ contingent on the crystallisation of progress payment disputes as prescribed by the NSW Act, whilst the former was designed for adjudication to be independent of payment. In other words, the UK adjudication model caters to all types of disputes as long as they arise under the contract, whereas the NSW model confines its application exclusively to progress payment disputes as established by the NSW Act. The UK adjudication model has been adopted

\textsuperscript{1} The NSW Act has been amended twice since its inception. The first once was in 2002 and the second was once in 2010.
(with modifications) in New Zealand,\(^1\) a few Australian states (Western Australia\(^2\) and the Northern Territory\(^3\)), and the Isle of Man,\(^4\) whereas the NSW adjudication model appears, to varying degrees, has been emulated by a number of Australian states (Victoria,\(^5\) Queensland,\(^6\) Tasmania,\(^7\) the Australian Capital Territory,\(^8\) and South Australia\(^9\)) and Singapore.\(^10\) The adjudication regimes in Western Australian and Northern Territory which are closely modelled after the UK regime are collectively referred to in industry parlance as the *west coast model* whereas those states and territories in Australian whose their adjudication regimes are largely based on the NSW regime are together known as the *east coast model*.

The difference in terms of adjudication operations in New South Wales and the UK is understandable, since the objectives of both Acts that underpin adjudication in these jurisdictions are fundamentally different. As stated by the then Construction Minister Nick Raynsford the objectives of the UK Act were:

First of all, it is necessary to address serious payment problems affecting many in the industry - particularly smaller firms. I receive a steady stream of mail from firms facing unnecessary hardship and even insolvency because they have not been paid for work carried out in good faith. This legislation will help to protect such firms from this sort of bad practice. Second, the legislation will address the problem of the costs and delays currently involved in settling even the most straightforward construction disputes. The legislation offers a quick means of resolving disputes so work can continue on site without delay and disruption.\(^11\)

Conversely, Morris Iemma the Minister for Public Works and Services of New South Wales had this to say:

The main thrust of this bill is to reform payment behaviour in the construction industry. The bill creates fair and balanced payment standards for construction contracts. The standards include use of progress payments, quick adjudication of disputes over progress payment amounts and provision of security for disputed payments while a dispute is being resolved. The bill will speed up payments by removing incentives to delay.\(^12\)

The objective of the NSW Act is thus clear, i.e., to improve payment practices in the construction industry. Adjudication under the NSW Act is merely a tool to achieve its policy objective. Conversely, the objective of the UK Act is two-fold. It first attempts to improve cash flow in the construction industry. Its other objective is to improve the efficiency of dispute resolution in the construction industry.

Since the objective of the NSW Act is different from its UK counterpart, its adjudication regime has been designed to be prescriptive, with strict and tight time frames for each step in the adjudication process, from the nomination of the adjudicator until the delivery of the decision. The scope of this regime’s application is also considerably narrower than that of the UK regime. Only disputes on progress payments as crystallised under the NSW Act can be referred to adjudication. The definition of progress payments as prescribed by the NSW Act is, however, wide enough to include final payments.\(^13\) Based on the take-up rates published by the NSW Department of Commerce, it may be

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2. Construction Contracts Act 2004, Western Australia, Australia.
11. ‘Laying Down the Law’; Building; 17 April 1998.
12. In the second reading of the Bill on 8 September 1999.
13. See the definitions of ‘Progress Payment’ under Section 4 of the NSW Act.
inferred that statutory adjudication has been effective in New South Wales (Coggins et al, 2010). This supports the notion that, if adjudication is not effective, industry participants will simply not use it.

The success of statutory adjudication in New South Wales, however, is not without its challenges. The adjudication system underpinned by the amended NSW Act seems to have drifted away from its original mission (Coggins, 2009). Adjudication was intended as a system to provide an impartial, neutral certification process, independent from the contract administration process, conducted by an adjudicator acting as a certifier (Davenport, 2007 & Uher and Brand, 2007). However, due to considerable judicial intervention, adjudication is now subject to the rules of natural justice, (which are applicable in litigation and arbitration),¹ and adjudication determinations are amenable to judicial review.² The courts have also allowed damages claims to be included in progress payment claims, which clearly was not the legislation’s intent (Davenport, 2007). This somewhat broad interpretation by the courts creates severe repercussions for the NSW adjudication regime, as it was not designed to assess such claims.

A proposal has since been made by a leading adjudicator in New South Wales to have a dual process of adjudication (Davenport, 2007 & Brand and Davenport, 2010). In essence, a dual process of adjudication combines both the strengths of the NSW and UK adjudication regimes. This process works on the idea that the UK adjudication regime is effective in dealing with damages claims, and that the NSW adjudication regime is effective in dealing with certification claims. There will be two different schemes in adjudication. The first scheme will be similar to the one currently provided under the amended NSW Act, except that its scope is restricted to certification claims (excluding damages claims) made by the claimant. The second scheme will deal exclusively with damages claims made by either the claimant or the respondent. Each scheme will have different time frames for responding to a claim and making an adjudication determination. This proposal should be distinguished from another proposal of harmonising Security of Payment (SOP) legislation in Australia, which is in essence the amalgamation of the east coast and west coast models (Coggins, et. al, 2010). This means that there will be a single scheme incorporating both the strengths of the two models.

The amended (2002) NSW Act was amended again on 29th November 2010 and came into force on 28th February 2011. The amendment deals only with the additional right given to the claimant subcontractor to ask the principal to freeze money due to the respondent contractor. The perceived problems with the NSW statutory adjudication regime were not addressed in the Building and Construction Industry Security of Payment Amendment Act 2010 (the new NSW Act). Accordingly, Accordingly, the aim of this paper is to identify the operational problems of the NSW regime from neutral (adjudicators) and user (legal representatives in adjudication) viewpoints. It also establishes potential improvements to the current regime. When the data for this research paper was collected in July 2010, the new NSW Act had not been passed, therefore, the interview questions were structured to ask the respondents about the operational problems of the Act and potential improvements to the NSW adjudication regime. Since the new NSW Act is now in force, the potential improvements to the NSW adjudication regime proposed in this paper may be regarded as missed opportunities instead.

2 Methods

A socio-legal approach was adopted for this study. The first stage involved the review of the relevant literature, parliamentary speeches and consultation documents, cases on statutory adjudication and expert commentaries. It was followed by qualitative interviews with five leading adjudicators and six construction lawyers who represent employers (n=3) and contractors (n=3) in adjudication. This study chose a purposive sampling method to identify interviewees in New South

Wales. Using this sampling method, individuals are selected because they have specific experiences central to the phenomenon or because they conform to the criteria set by the researcher. The interviewees in this study had to meet one of a set of strict criteria. They must be:

A senior adjudicator from one of various backgrounds (construction professionals, i.e., architects, engineers and surveyors and construction lawyers) who has been appointed as an adjudicator for at least five cases and must have made determinations on those cases;

A senior construction lawyer who has represented claimants or respondents in adjudications or court cases involving adjudication matters for at least five cases; or

A senior legal advisor to a contractor, consultant, subcontractor, supplier organisation or group, who has substantial knowledge in adjudication matters.

The reason why the number five (cases) was considered sufficient was that the interviewees would have substantial knowledge on the practice and procedure of adjudication particularly on the difficulties associated with it and potential improvements to the regime. Adjudicators are considered the neutrals in the adjudication process. The neutral signifies the third party appointed by the disputing parties to resolve a dispute (Sai-on Cheung et. al, 2002). To obtain holistic views on the issues investigated, this study also included the users of adjudication. Due to the complexity of this study, the users should have specialist knowledge on the scope, law, practice and procedure of adjudication. In this regard, the user category should exclude contractors, consultants, subcontractors and suppliers who have been involved in adjudications. Rather, users should include construction lawyers who have represented them in adjudications.

Whenever possible, face-to-face interviews were conducted with the interviewees. This was possible as the author was in Sydney from the 18th to the 24th of July 2010. However, out of 11 interviewees, three were interviewed by phone when the author was back in the UK. Each interview was taped with the consent of the interviewee and then transcribed. The transcripts of the interviews were sent to the interviewees for confirmation. The interview data were analysed using thematic analysis.

3 Operational Problems in the NSW Regime

3.1 Inconsistent Judicial Interpretations

The operation of statutory adjudication in New South Wales has been subject to a great deal of judicial interpretations since its inception in 1999. Unfortunately, there has been apparent inconsistency in judicial interpretations concerning a number of important issues. A leading construction lawyer in New South Wales revealed that:

[S]o far as challenging adjudication determinations well in New South Wales what we have noticed is a bit of an exploration of how that should be done for the first few years of the Act, then the law became fairly settled and just recently in New South Wales the Court of Appeal has actually said well, it’s got to all change again so we have gone back full circle. So it’s constantly evolving it’s not static, difficult to know where a person actually stands in so far as their rights, both under the contract and where the contract fits in, together with the Act.¹

These conflicting judicial interpretations have resulted in a flood of jurisdictional challenges in New South Wales. Parties who have lost their adjudications (mostly employers) may exploit these opportunities to challenge an adjudicator’s determination, with the hope to delay or avoid payment to the winning parties. It can be seen from the case law covered in a later part of this paper that the courts’ attitude toward enforcement of adjudication decisions in New South Wales differs considerably from its UK counterparts. Whilst the courts in the UK are more vigorous in enforcing adjudication decisions, the courts in New South Wales are more robust in setting aside adjudication determinations.

¹ Construction Lawyers/NSW/Contractors/9.
The crux of judicial inconsistency in New South Wales appears to be caused by the uncertainty of the legal nature of adjudication as interpreted by the courts (either it is intended to be a quasi-judicial dispute resolution method or a neutral certification process). Several judges in New South Wales seem to have perceived adjudication as a quasi-judicial dispute resolution method, rather than a neutral certification process. Notably, McDougall J, who is one of the Supreme Court Judges in New South Wales and has been responsible in many adjudication-related court cases, regards adjudication as a decision making tribunal (McDougall, 2009).

This is contrary to the statement made by Mr. Morris Iemma, the then Minister for Public Works and Services of New South Wales, in the second reading speech of the Building and Construction Industry Security of Payment Amendment Bill 2002 when he said:

Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure.

But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid.

As can be deduced from the above statement, statutory adjudication imposed by the NSW Act is merely a neutral certification scheme (Davenport, 2007 & Uher and Brand, 2007). Three interviewees (all of whom are adjudicators) affirmed that the Government intended adjudication to operate a neutral certification process. An adjudicator with considerable adjudication experience emphasised that adjudication is supposed to be a certification process in New South Wales at least, but that is not how it's panned out. It's a quasi judicial.¹

Five interviewees (four construction lawyers and one adjudicator) although did not specifically mention that adjudication is essentially a neutral certification process support the view that only progress payment disputes should be subject to adjudication and therefore imply that adjudication is a neutral certification process. A senior adjudicator explained:

[T]he preferable model is...a model that ensures that small contractors and subcontractors, have a mechanism for being paid, and the model would be that it looked only at progress payment claims and that is no claims for damages, no claims for time related costs or damages, and it simply meant that if somebody was not getting paid, they could get an assessment.²

The effect of the misconception of the intended nature of adjudication by the courts is three-fold. First, adjudicators' determinations (similar to court judgements or arbitrators' awards) are amenable to judicial review.³ Second, statutory adjudication is subject to the rules of natural justice (which are applicable in litigation and arbitration proceedings).⁴ Third, the scope of adjudication has been widened to include damages claims.⁵

The examination of caselaw discovers that the inconsistency in judicial analysis by the courts, had created a practice amongst dissatisfied claimants to refer a payment claim for the same work that is identical or nearly identical to the one that was earlier referred to adjudication for the second or even the third time, until a favourable determination is achieved. This practice is known in New South Wales as "two-hop" referencing.

¹ Adjudicator/NSW/Construction Management/3.
² Adjudicator/NSW/Legal/2.
³ The courts initially held that, in a string of cases (Abacus Funds Management v. Davenport [2003] NSWSC 1027; Brodyn Pty. Limited v. Davenport [2003] NSWSC 1019; Multiplex Constructions Pty. Limited v. Luikens [2003] NSWSC 1140; Transgrid v. Walter Construction Group [2004] NSWSC 21, John Holland v Cardno MBK [2004] NSWSC 258 and Emergency Services Superannuation Board v Davenport [2004] NSWSC 697), that adjudication determinations were subject to judicial review. That decision was overturned a year later by the Court of Appeal in Brodyn v Davenport, where the judges held that adjudication determinations were not amenable to judicial review. Brodyn was law for almost six years until the recent decision in the Chase Oyster Bar v Hamo Industries Pty Limited [2010] NSWCA 190 reverted back to the old position that adjudication determinations are subject to judicial review.
⁵ Walter Construction Group Ltd v. CPL (Surry Hills) Pty Ltd [2002] NSWSC 266.
South Wales industry parlance as adjudicator shopping. Three interviewees (two construction lawyers and one adjudicator) affirmed the existence of such a practice in the past. One of them stated: ‘Adjudicator shopping...has been a big issue...there are provisions in the Act that deal with that...but the court has made it very clear now that, once the adjudicator has dealt with the issue, then it would be an abuse of process to allow that issue to be re-agitated.’

The first case in New South Wales that gave rise to the practice of adjudicator shopping was *Rothnere v Quasar*. In that case, McDougall J held that the submission of a second claim identical to the first claim to another adjudicator did not offend the provisions of the NSW Act and was therefore acceptable. Later, in *John Goss v Leighton Contractors*, the same learned judge was asked to determine whether the subsequent adjudicator was bound by Section 22(4) of the NSW Act to follow the decision of the first adjudicator. In that case, the first adjudicator decided that the failure on the part of the claimant to comply with Clause 45 in the contract—concerned with the issue of notice of the claim in the prescribed time, manner, and form to the respondent for claims over and above the contract amount—barred its entitlement under the contract. In that case, the first adjudicator decided that the claimant was not entitled to payment for the delay and disruption claims. The second adjudicator was of the view that he was bound by Section 22(4) of the NSW Act and, therefore, followed the decision of the first adjudicator in deciding that the claimant was not entitled to additional money. He refused to follow the ruling in *Rothnere* because of its contradiction with the principle of issue estoppel. McDougall J later set aside the second adjudicator’s determination and reiterated that a claimant can make a further adjudication application for the same claims that have been decided and rejected in earlier adjudication decisions.

The effects of these two decisions led the flourishing practice of adjudicator shopping in New South Wales (Davenport, 2010). Claimants had more than one chance to submit a claim and would continue to do so until favourable determinations were achieved. This practice created a scope for potential injustice to respondents, who may be faced with one adjudication case after another, on the same work that had been previously decided in their favour. The NSW Court of Appeal found this practice unacceptable in *Dualcorp v Remo Constructions*, when it acknowledged that the principle of issue estoppel is applicable in adjudication determinations made under the NSW Act. Once an entitlement to a payment or a decision as to the value of construction work has been determined by one adjudicator, the decision is binding on any subsequent adjudicators.

### 3.2 Variability in the Quality of Adjudicators

There has been concern raised by the interviewees on the quality of the adjudicators in New South Wales. These interviewees are generally construction lawyers who predominantly represent employers or contractors. Generally, the construction lawyer interviewees are not satisfied with the quality of the adjudicators in New South Wales. An interviewee, who has done more than 120 adjudication cases as a legal representative to employers predominantly, discovered that there is variability in experience and expertise of adjudicators. Similarly another interviewee who has done more than 100 adjudications as a construction lawyer representing contractors predominantly stated that ‘we have got a lot of adjudicators in New South Wales...of different grades and qualities.’ These interviewees provide valuable insights on the quality of the adjudicators in New South Wales. They are in an ideal position to assess the quality of the adjudicators across the board since they have represented parties in a substantial number of adjudications as legal representatives.

The analysis of the interview data discovers two factors which may contribute to the variability in quality of the adjudicators in New South Wales. First, the variability in quality of the Authorised

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1 (Adjudicator/NSW/Construction Management/3).
2 [2006] NSWSC 798.
3 [2006] NSWSC 798.
5 Construction Lawyer/Employers/7.
6 Construction Lawyer/Contractors/9.
Nominating Authorities (ANAs). Second, the extension of the NSW adjudication regime to include damages claims.

3.2.1 Variability in Quality of the Authorised Nominating Authorities

At present, there are nine ANAs responsible for the nomination of adjudicators under the NSW Act. These ANAs are comprised of professional bodies, contractor organisations and private companies. In the absence of prescribed qualifications and experience applied to adjudicators in the NSW Act, the minimum qualifications and experience standards of adjudicators are set by these ANAs, which are responsible for recruiting adjudicators to serve on their panels. Three interviewees (one construction lawyer and two adjudicators) perceived that the quality of the ANAs in New South Wales is varied. One of them pointed out that ‘not all of the ANAs are the same, [and] not all of the ANAs have that same quality control over adjudicators.’

Some interviewees observed that the selection process undertaken by ANAs in recruiting prospective adjudicators is varied. Some ANAs specify high requirements for prospective adjudicators to serve on their panels, whilst others stipulate less extensive requirements. The amount of training provided to prospective adjudicators by ANAs is also varied. Some ANAs provide months of training while others provide mere days of training. The quality of monitoring of adjudicators on the panels also differs. Certain ANAs provide mentoring and reviewing systems, whilst others do not. Some ANAs are also perceived to have a reputation of being claimant-friendly.

The problem of variability in quality of adjudicators among ANAs could be caused by several factors. The absence of specific provisions in the NSW Act regarding qualifications and experience of adjudicators may be a contributing factor. Each ANA imposes a varying set of selection criteria for the recruitment of adjudicators, and some ANAs impose stricter requirements than others. The absence of an adjudication registry, similar to that established in Queensland, that nominates training organisations responsible for delivering courses in accordance to an approved syllabus may also be a factor contributing to varying quality of adjudicators across the ANAs. The registration of an adjudicator under the NSW Act should be standardised so that the exact requirements in terms of qualification and experience can be set at a higher standard across all the ANAs.

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1 As pointed out by one interviewee: ‘The quality of the adjudicators comes down to the quality of the ANA’, Adjudicator/Construction Management/3.
2 Institute of Arbitrators and Mediators Australia, LEADR – Association of Dispute Resolvers and Royal Institution of Chartered Surveyors Dispute Resolution Service (RICS DSR).
3 Air Conditioning and Mechanical Contractors Association of NSW Limited, Master Builders Association of NSW Pty Limited and Master Plumbers Association of NSW.
4 Able Adjudication Pty Limited, Adjudicate Today Pty Ltd and Australian Solutions Pty Limited.
5 Construction Lawyer/NSW/Employers/6.
6 For example one interviewee highlighted that ‘The ANAs are varied I guess in their approach to adjudication in a number of ways. One of those may be the emphasis their place on training for example. What kind of selection process they go through to, to put the people on to their panel.’ Adjudicator/NSW/Construction Management/3.
7 As highlighted by one interviewee who is an adjudicator ‘Our training is not two days, it’s three months.’ Adjudicator/NSW/Legal/5.
8 As highlighted by one construction lawyer interviewee: ‘[prospective adjudicators] merely have to go through a short course, that course is no longer available, so people who are already qualified are already in and nobody else is being admitted to be an adjudicator.’ Construction Lawyer/NSW/Contractors/8.
9 As highlighted by one interviewee: ‘[T]here is insufficient scrutiny of the adjudicators.’ Adjudicator/NSW/Legal/2.
10 One interviewee explained ‘[A]ll adjudicators are in groups, so that if they’re resting an issue, they don’t have to, they are not alone, they can go into the group, and say, I am resting with this issue, has any one encountered with this issue before? This is the way the courts work. That’s how the judges work.’ Adjudicator/NSW/Legal/5.
11 As highlighted by an interviewee who is also a senior adjudicator on an ANA’s panel: In the XXX [the name of a nominating body], there is a process whereby every adjudication determination is reviewed...to ensure that the standard is met. Adjudicator/Legal/2.
12 As pointed out by a construction lawyer who has done more than 100 adjudications; ‘Some ANAs are very claimant friendly, and so, people tend to go to the most friendly ANA.’. Construction Lawyer/NSW/Contractors/9.
3.2.2 The Extension of Adjudication to include Damages Claims

It may be argued that the extension of the scope of application of adjudication to include damages claims may have caused the varying quality of adjudicators in New South Wales. Damages claims, which usually involve complex analysis of the law, are arguably unsuitable for the NSW adjudication regime, which is designed as a certification process with a short time frame for the adjudicator to make a determination (Davenport, 2007). As some adjudicators have little or no legal knowledge, this could contribute to the lack of quality of the adjudicators specifically when dealing with damages claims. As pointed out by one interviewee, many of the current adjudicators are not legally qualified and they are producing very bizarre and terrible results. It is expected that adjudicators with little or no legal knowledge may find it difficult to assess damages claims, particularly on the parties’ entitlements of damages under the law. The entitlement of damages claims involves a complex analysis of culpability and is largely based on the examination of case law. Furthermore, the strict time frame of ten business days to make a determination may add considerable pressure to the adjudicator. These two factors may lead to adjudicators producing erroneous determinations.

3.3 Rubber Stamp Approach

One of the main criticisms of the NSW adjudication regime advanced in the literature is the fact that it allows the claimant to apply for summary judgment on the statutory debt created as a result of the respondent’s failure to issue a payment schedule. One respondent expressed this concern when he said: ‘It’s very harsh particularly during the learning cycle of how the Act works for respondents to be unfairly penalised because of ignorance. For example of they don’t put on a payment schedule, they might be hit with a payment claim or a judgement for $2million simply because they didn’t know. That is not fair.’ The case of Walter Construction Group v CPL (Surry Hills) provides a good illustration on the inherent difficulties caused by this so-called rubber-stamp mechanism. In that case, a multi-million dollar payment claim, which included damages claims to the respondent, was issued over Christmas. The respondent later failed to issue a payment schedule. The failure allowed the claimant to recover the claimed amount as a statutory debt in a court of competent jurisdiction by way of summary judgment. The claimant then went into liquidation and the respondent could not recover the overpaid amount. In that case, the claimant made a claim which exceeded the amount to which the claimant was entitled, and there was no option for the claimant to apply for adjudication.

3.4 Accessibility of the NSW Act

A majority of adjudicators and one construction lawyer indicated that the NSW Act is not being widely used by industry participants. They found that the NSW Act is used by big construction companies, but not small or medium-sized companies. One of the interviewees stated: ‘I guess the only difficulty with it is,...it is still not used by such small subcontractors. It is really only the big ones who can afford legal representation probably.’ The finding of the study confirms the study of Brand and Uher (2010), it must be stressed that, the sample size of this qualitative study is small, therefore this finding cannot be generalised to reflect the whole population. The adjudicators and construction lawyers who have been involved in many adjudications between them are in a good position to assess who has been using the NSW Act, as they are appointed by parties to become adjudicators or legal representatives. From their personal experience in adjudication, they found that the NSW Act is not used by all levels of the contractual payment chain, but rather at the top level, i.e., between the employer and the contractor.

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1 Construction Lawyer/NSW/Contractors/8.
2 Sections 15(2)(a) and 16(2)(a) of the NSW Act.
3 Construction Lawyer/NSW/Contractors/9.
4 [2003] NSWSC 266.
5 The construction lawyer used to be a legal advisor to a contractor organisation and now a member of a contractor organisation in New South Wales.
6 Construction Lawyer/NSW/Contractors/10.
This is divergent from the intention of Parliament, as the NSW Act was intended to assist small builders to recover payment for their errant paymasters. The fact that the NSW Act covers oral contracts as well as written contracts exemplifies Parliament's intention to provide cash flow protection to subcontractors, as they normally carry out work based on oral contracts. Therefore, if subcontractors are not using the NSW Act as Parliament intended, it brings the effectiveness of the NSW Act into question.

4 Potential Improvements

4.1 Administrative Improvements

4.1.1 The Variability in the Quality of Adjudicators in New South Wales

It is established from the analysis of the interviews that the quality of the adjudicators is effectively determined by the ANAs. From the interviews, it was discovered that some ANAs provide a review system in which adjudicators' determinations are reviewed by a senior adjudicator or a panel of senior adjudicators before being published.1 Some ANAs have a mentoring system in which a junior adjudicator may discuss the case he or she is currently working on with a senior adjudicator.2 Some ANAs have extensive databases that provide information on case law and past adjudicators' determinations.3 Certain ANAs are very efficient in 'picking the right sort of adjudicator for the right sort of dispute'.4 In some ANAs, the adjudicators are placed in groups to discuss their adjudication cases.5

4.1.2 Accessibility of the NSW Act

The issue of the accessibility of the NSW Act is fundamental, as one of the parameters to measure the effectiveness of Security of Payment legislation is by determining its level of use by industry players (Uher and Brand, 2008). The findings of the interviews reveal that the NSW Act is not widely used by subcontractors – the primary intended beneficiaries of the NSW Act. This is unfortunate, as the NSW Act has been in operation for more than a decade now, yet a large segment of the industry is not using it.

Despite having some of the highest numbers of adjudication applications in Australia (together with Queensland), there is reason to believe that the NSW Act is not widely used by the industry. Since 2005, the number of adjudication applications in New South Wales has levelled out at around 900 applications annually (Coggins, 2009). Queensland, which was the third jurisdiction in Australia to enact SOP legislation, had the highest number of adjudication applications (around 1000) in the period between 2008 and 2009. In the period between 2007 and 2008 the number of adjudication applications in Queensland was around 500. There was almost a 100 percent increase in terms of the number of appointments from the period of 2007-2008 to 2008-2009 in Queensland. The fact that Queensland has overtaken New South Wales in terms of having the highest number of adjudication applications in Australia offers some interesting observations.

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1 As highlighted by an interviewee who is also a senior adjudicator on an ANA’s panel: In the XXX [the name of an ANA], there is a process whereby every adjudication determination is reviewed...to ensure that the standard is met. Adjudicator/NSW/Legal/2.
2 As highlighted an interviewee: I’m involved in mentoring of adjudicators. Adjudicator/NSW/Legal/5.
3 As highlighted an interviewee: [The adjudicators] have access to enormous internal resources. Adjudicator/NSW/Legal/5.
4 Construction Lawyer/NSW/Employers/6.
5 As highlighted by an interviewee: [A]ll adjudicators are in groups, so that if they're resting an issue, they don't have to, they are not alone, they can go into the group, and say, I am resting with this issue, has any one encountered with this issue before? This is the way the courts work. That's how the judges work. Someone might say, yeah, I've dealt with that, when they talk about it, the adjudicator doesn't have to follow it, but the process, the fact that they are talking to people in their group who collectively is a massive amount of experience available. Adjudicator/NSW/Legal/5.
having a population of only 4.53 million compared to 7.25 million in New South Wales,\(^1\) and less volume of construction activity when compared with New South Wales, based on the recent number of adjudication applications it may be inferred that Queensland has been successful in terms of addressing the issue of accessibility of its SOP legislation. The Queensland version of the Security of Payment legislation closely resembles the NSW’s SOP legislation; therefore, the argument that the NSW Act is more complex than its Queensland counterpart in terms of operation, which may have the effect of deterring industry usage, is not attestable. The reason statutory adjudication is widely used in Queensland could be attributed to the measures taken by the government to promote the SOP legislation.

The Queensland government formed the Building and Construction industry agency, a branch of the Building Services Authority, _to provide the infrastructure to assist the Adjudication Registry, in its duties to give effect to the Building and Construction Industry Payments Act 2004._\(^2\) One of the roles of the Adjudication Registry is to _ensure that an effective educational and awareness strategy is in place with regard to the statutory obligations and entitlements established under the Act._\(^3\) No equivalent agency exists in New South Wales. The agency responsible for matters relating to Security of Payment in New South Wales, is NSW Procurement, a division of the NSW Department of Services, Technology and Administration. The roles of the NSW Procurement are varied and are not solely focused on Security of Payment matters.

It is proposed that an agency whose exclusive role is to look into Security of Payment matters should be established in New South Wales to actively promote accessibility to the NSW Act. Apart from the government, promotion of the NSW Act also falls upon the authorised nominating authorities, professional bodies and trade associations.

### 4.2 Potential Legislative Improvements to the NSW regime

#### 4.2.1 Dual Process of Adjudication

Four interviewees (three adjudicators and one construction lawyer) support the proposal of introducing a dual process of adjudication. As stated in one interview:

> [T]he ideal would be to have, a dual system, allowing the popularity obvious success of the New South Wales model in dealing with payment claims, to allow that to run, parallel to another adjudication system which ultimately connects in the end, that deals with other types of money claims that allows both parties to enter into the arena, and it looks more like an arbitration in a sense.\(^4\)

There are two opposing views expressed by the rest of the interviewees. Four interviewees (comprising of both three construction lawyers and one adjudicator) agreed that adjudication should only be used for progress payment claims. Three interviewees (two construction lawyers and one adjudicator) supported introducing adjudication to a wide spectrum of disputes, but one of them felt that the issue of quality of adjudicators must be first addressed. The introduction of a dual process of adjudication could fulfil the aspirations of these two diverging groups.

The dual process of adjudication is essentially a hybrid between the UK and New South Wales adjudication schemes. In essence, the dual process of adjudication combines the positive attributes of both the NSW and UK adjudication regimes (Davenport, 2007). This process is based on the idea that the UK adjudication regime is effective in dealing with damages claims but deficient in dealing with certification claims, while the NSW adjudication regime is effective in dealing with certification claims but deficient in dealing with damages claims. Interestingly, the limitations and the strengths of these two adjudication schemes do not overlap; hence, an integration of these

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\(^3\) http://www.bcipa.qld.gov.au/Pages/AboutUs.aspx.

\(^4\) Adjudicator/NSW/Construction Management/3.
schemes could offset the weaknesses inherent within one scheme by adopting the strengths of the other.

There are two different schemes for a dual process of adjudication. The first is similar to the system currently provided under the amended NSW Act, except that its scope would be restricted to certification claims made by the claimant. The second scheme, which mirrors the UK adjudication regime, would deal exclusively with damages claims made by either the claimant or the respondent. Each proposed system would have different time frames for responding to a claim and making an adjudication determination. For ease of reference, the term certification scheme will be used to refer to the adjudication regime that mirrors a certification process whereas the term dispute resolution scheme will be used to refer to the adjudication regime that is akin a quasi-judicial dispute resolution method.

Three interviewees, although they did not specifically mention the dual adjudication process, suggested that there should be different time frames for different disputes. One of them suggested; that there be perhaps slightly different time frames or different processes for different types of disputes. This suggestion appears to be consistent with the idea of the dual process of adjudication.

The proposal for a dual process of adjudication should be distinguished from another proposal of harmonising Security of Payment legislation in Australia, which is essentially the amalgamation of the east coast and west coast models (Coggins, et. al, 2010). This means that there would be a single scheme incorporating the strengths of both models. The SOP regimes in Western Australian and the Northern Territory, which are closely modelled after the UK regime, are collectively referred to in industry parlance as the west coast model, whereas those states and territories in Australia whose SOP regimes are largely based on the NSW regime are together known as the east coast model. Some of the interviewees applauded this idea, however, they felt that it may be difficult to realize. As one said: _Well I think that is admirable intent but the problem is that you have got two radically different models at the moment._

The dual process of adjudication could solve most of the problems identified earlier in this paper. The problems that have emerged as a result of inconsistent judicial analysis may be eliminated by the dual process of adjudication. The certification scheme should not be subject to judicial review and the rules of natural justice, as it is designed to be prescriptive as a result of limited time frames and the claimant's sole right to initiate adjudication. There should be an express provision in the NSW Act that gives effect to these exclusions. These may mean that grounds for jurisdictional challenges, which are usually y advanced by respondents to resist payment to claimants, would therefore be minimised; this works toward the policy objective of the NSW Act by improving cash flow in the construction industry.

The scope of the certification scheme should also exclude damages claims. In order to distinguish between certification and damages claims one interviewee proposed that: _Distinction between what is a damages claim, we're looking at similar types of words towards the Victorian legislation, which already pull out a lot of the damages claims._ However, the Victoria legislation excludes unapproved variations from being subject to adjudication. Arguably, unapproved variations are not damages claims and therefore should be part of the certification scheme. Conversely, delay and disruption claims arising from variations either approved or otherwise should be excluded from the certification scheme, as they are essentially damages claims. The inclusion of unapproved variations within the scope of the certification scheme may enliven the practice of ambush claims. Nonetheless, the severity of these ambush claims may be minimised if a time bar provision is introduced in the Security of Payment legislation.

An example of this time bar provision can be found in the Victorian Act. The Victorian Act provides that a period of 3 months after the reference date referred to in Section 9(2) is the minimum period for a claimant to make a claim (either a monthly, one-off or final payment claim). It also Act provides freedom to the parties to agree to a longer period for the claimant to make a claim, but to

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1 Construction Lawyer/NSW/Employers/7.
2 Adjudicator/NSW/Legal/4.
3 Adjudicator/NSW/Legal/5.
do so is to the detriment to the respondent, who may be faced with ambush claims if the claimant has a longer time to make a payment claim.

The exclusion of damages claims from the ambit of the certification scheme may eliminate the problems of ambush, limited time frame for the respondent to respond to a payment schedule and adjudication application, and limited time frame for the adjudicator to make a determination. Since ambush tactics are more common in damages claims, the distinction made by the dual process of adjudication may eliminate or at least diminish the risk ambush in the certification scheme. If the risk of ambush claims were minimised, the respondent and the adjudicator might no longer be faced with time pressure to perform their duties as prescribed in the SOP legislation. The dispute resolution scheme that the dual process introduces should be subject to judicial review and the rules of natural justice. There should be an express provision in the NSW Act to this effect. Since the dispute resolution scheme performs a quasi-judicial function, it is acceptable that adjudication determinations made under this scheme should be subject to judicial review and some of the rules of natural justice. The problem created by the courts in extending the application of the NSW adjudication regime to include damages claims may also be solved, as the dispute resolution scheme provides longer time frames for the respondent and the adjudicator to perform their duties under the SOP legislation, and allows both parties in the contract to initiate adjudication. The problem with ambush claims may also be minimised if the dispute resolution scheme adopts the time bar provision as proposed in the certification scheme.

4.2.2 Administration of Authorised Nominating Authorities and Adjudicators by the Adjudication Registry in the NSW Act.

As explained earlier, in New South Wales the quality of the Authorised Nominating Authorities is varied. This leads to a varying quality of adjudicators. The problem lies in a lack of monitoring on the part of the ANAs. For example, the absence of specific provisions in the NSW Act about qualifications and experience of adjudicators, means that ANAs are at liberty to specify any selection criteria; this may lead to the variability of quality among adjudicators. In Queensland there is a body that closely monitors the conduct of the ANAs and the adjudicators. The Adjudication Registry, a body created by the Queensland Act consisting of a Registrar and other staff, has functions of registering adjudicators and ANAs, publishing adjudicators’ determination and collecting statistical data. The administration of the ANAs and Adjudicators by the Adjudication Registry is spelled out in detail in the Queensland Act. The requirements imposed on the ANAs in recruiting adjudicators are consistent as prescribed in the Queensland Act. As a result, the ANAs all apply the same set of selection criteria in recruiting their adjudicators. This leads to consistency in terms of quality of adjudicators. It is proposed that in order to have consistency in the quality of adjudicators, the approach taken by the Queensland Government in spelling out the administrative matters of the ANAs and the qualifications of adjudicators in the body of SOP legislation should be introduced.

5 Conclusion

It is evident that the NSW Adjudication regime has been effective thus far in improving payment practices. However, there remain problems areas which need to be addressed. The guidance from courts so far has been inconsistent. Inconsistent courts’ interpretations lead to jurisdictional challenges. This is to contrary to the objective of Parliament that adjudication should be subject to minimum court involvement. It is apparent from this study that the quality of the adjudicators in New South Wales is varied amongst the ANAs. The rubber stamp approach is also perceived as one of the main deficiencies of the NSW regime. The fact that adjudication is not widely utilised by subcontractors is also a major issue of concern. The introduction of a dual process of adjudication could solve most of the problems identified above. As to the quality of adjudicators, the ANAs

1 Clause 38 of the Queensland Act.
should be more rigorous in recruiting their adjudicators by imposing stricter selection criteria. It is important that the quality of the adjudicators in these ANAs should be sustained and improved upon by having the mechanisms discussed earlier in this paper. The introduction of an adjudication registry that is entrusted with the task to actively promote adjudication should address the issue of accessibility of the NSW Act. This governing agency should also monitor the conduct of the ANAs.

6 References


