

# THE VALIDITY OF ADJUDICATORS' DETERMINATIONS CONTAINING ERRORS OF LAW: THE NSW JUDICIAL APPROACH

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The Building and Construction Industry Security of Payment Act 1999 came into force in New South Wales (NSW) on 26 March 2000. However, the Act failed to have a significant impact on dispute resolution in the NSW construction industry until four years later. One of the reasons for the slow uptake of adjudication by the industry was the initial stance adopted by the NSW Supreme Court in allowing adjudicators' determinations to be quashed for containing errors of law on the face of the record. In taking this initial position, the NSW Supreme Court viewed the role of an adjudicator as similar to that of an expert by whose determination the parties had agreed to be bound. By allowing adjudicators' determinations to be overturned, the Supreme Court did not give statutory adjudication the support it needed in order to generate certainty within the NSW construction industry that an adjudicator's determination could be rapidly enforced. Conversely, in the UK, the English courts swiftly showed their support toward statutory adjudication after the enactment of The Housing Grants, Construction and Regeneration Act in 1996 by upholding adjudicators' determinations even though they contained errors of law. The English Court of Appeal also likened the role of an adjudicator to that of an expert. Eventually, in 2004, the NSW Court of Appeal gave statutory adjudication the support it needed in the case of *Brodyn Pty Limited T/as Time Cost and Quality v Davenport & Anor*<sup>2</sup>. This paper will consider the development of the NSW courts' view towards jurisdictional error of an adjudicator, and by comparison with key English authorities on the matter, seek to establish whether the analogy of adjudicator as expert is valid and appropriate in NSW.

Keywords: adjudication, adjudicators' determinations, judicial review, security of payment.

## INTRODUCTION

Over the past 12 years, several of the Commonwealth jurisdictions<sup>3</sup> have enacted legislation which allows parties to a construction contract the right to a statutory adjudication procedure in the event of a payment dispute. Under such legislation the adjudication process is intended to be quick, cheap and unencumbered by the heavy procedural requirements traditionally accompanying more formal dispute resolution methods such as arbitration and litigation; the object being to keep the cash flowing down, in as fair and practicable a way as possible, through the supply chain on construction contracts as they are carried out. The determination of the appointed

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<sup>2</sup> [2004] NSWCA 394.

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adjudicator is provisional in nature and intended to be enforceable in the interim until practical completion of the construction contract is reached, after which the parties may choose to refer the payment dispute to a more formal method of dispute resolution.

The first jurisdiction to introduce statutory adjudication<sup>4</sup> was the UK in the form of The Housing Grants, Construction and Regeneration Act (hereafter, referred to as the Construction Act) enacted in 1996. The second jurisdiction to introduce statutory adjudication was New South Wales in the form of the Building and Construction Industry Security of Payment Act 1999 (hereafter, referred to as the Act), which came into force on 26 March 2000. When adjudication was initiated in the UK, the courts were very supportive (Kennedy 2007), recognising the primary objective of the Act as a quick method of dispute resolution to keep cash flowing within the construction industry. As stated by Dyson J in *Macob v Morrison*:

*It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.*<sup>5</sup>

Accordingly, the English courts quickly recognised the importance to the success of adjudication of upholding the interim determinations made by adjudicators who were acting within their jurisdiction. As such the English courts did not consider, given the intent of statutory adjudication, that an error of law committed by the adjudicator was sufficient to quash or invalidate that adjudicator's decision as long as the adjudicator had answered the right questions put to him by the parties.

The NSW courts, however, have taken four years to provide a similar level of support to adjudicators' determinations with respect to errors of law. This is despite the clear legislative intent of the Act stated by the Minister in his Second Reading Speech on the amending Bill as follows:

*The Act was designed to ensure prompt payment and, for this purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment.*<sup>6</sup>

Interestingly, in reviewing adjudicators' determinations for errors of law both the English and NSW courts have likened the position of an adjudicator to that of a contractually appointed expert. Yet, this analogy has resulted in different approaches to the judicial review of adjudicators' determinations for errors of law on the face of the record. This article tracks the development of the NSW courts' approach towards review of adjudicators' determinations for error of law and, in doing so, seeks to determine why the NSW judiciary has adopted a different approach from its English counterpart despite their agreement as to the adjudicator as expert analogy.

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<sup>4</sup> The UK Act does not limit statutory adjudication to payment disputes only, but permits parties to initiate statutory adjudication for any dispute on a construction contract.

<sup>5</sup> BLR 93 at page 97.

<sup>6</sup> The Honourable Morris Iemma, NSW Legislative Assembly Hansard, 12 November 2002.

## JURISDICTIONAL ERROR – THE COURTS' INITIAL STANCE IN NSW

In the 2003 case of *Musico & Ors v Davenport & Ors*<sup>7</sup>, the NSW Supreme Court had to consider for the first time whether an adjudicator's determination under the security of payment legislation could be challenged by judicial review.

In *Musico*, the plaintiff employer applied to have the adjudicator's determination - that a progress payment of \$712,757 plus interest be paid to the contractor - quashed on, inter alia, the basis that the adjudicator's determination was vitiated by patent error of law in some nine respects including that the adjudicator had erred in valuing the payment claim as if the construction contract had been terminated at the time the payment claim was made when, in fact, the adjudicator expressly refrained from deciding whether termination had occurred or not.

In his judgment, McDougall J held that the legislative intent of the Act was inconsistent with allowing judicial review on the basis of non-jurisdictional error of law. However, his Honour did, in principle, believe that review of adjudications under the Act could be undertaken where jurisdictional error occurred and that, in some cases, an error of law on the face of the record may constitute jurisdictional error. In this respect, his Honour seems to have applied a standard applicable to administrative tribunals agreeing with Lord Reid's broad definition of jurisdictional error in *Anisminic Ltd v Foreign Compensation Commission*<sup>8</sup>, and with the High Court of Australia's approval of the *Anisminic* view in *Craig v The State of South Australia*<sup>9</sup>, that a jurisdictional error occurs where:

*... an administrative tribunal [i.e., one lacking judicial power] falls into an error of law which causes it [the tribunal or adjudicator] to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. (emphasis supplied)*<sup>10</sup>

McDougall J recognised that the position of an adjudicator is not completely analogous to that of an administrative tribunal, but rather is closely analogous to that of an expert by whose determination the parties have agreed to be bound. Nevertheless, his Honour still concluded that an adjudicator could commit jurisdictional error where his or her determination contained an error of law which had caused the adjudicator to make one (or more) of the jurisdictional errors which the court identified in *Craig* (as quoted above).

This approach led McDougall J to deem that the errors of law committed by the adjudicator in *Musico* constituted jurisdictional error, as these errors had caused the adjudicator to reach an erroneous finding or mistaken conclusion. For instance, in valuing the payment claim as if contract termination had occurred, the adjudicator did not apply the correct contractual provisions for valuation of payment claims. This

<sup>7</sup> [2003] NSWSC 977 (31 October 2003). Hereafter, referred to as *Musico*.

<sup>8</sup> [1969] 2 AC 147 at 171. Hereafter, referred to as *Anisminic*.

<sup>9</sup> (1995) 184 CLR 163. Hereafter, referred to as *Craig*.

<sup>10</sup> *Craig* at [14], as quoted in *Musico* at [50].

contravened s9(a) and s10(1)(a) of the Act which required valuation of the amount to be calculated in accordance with the terms of the contract. Hence, an error of law had occurred which resulted in an erroneous finding. Accordingly, the Court quashed the adjudicator's determination by granting an order in the nature of certiorari<sup>11</sup>.

Whilst Musico clarified the courts' position as to judicial review, it was not a position which provided the support needed to shore up the statutory adjudication process.

Interestingly, when noting the adjudicator's position as closely analogous to that of an expert the Supreme Court cited in support the English Court of Appeal's decision in Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd<sup>12</sup>. Yet, in contrast to Musico, Bouygues firmly reinforced the English courts' supportive stance towards the enforcement of adjudicators' determinations<sup>13</sup>.

## THE ENGLISH POSITION

In Bouygues, the adjudicator mistakenly included for full release of retention monies in his valuation of a payment claim when such release was not yet due. The adjudicator's error had a significant effect on the outcome of the determination, resulting in an award to the defendant subcontractor of £208,000 instead of an award to the plaintiff head contractor of £179,000. The Court of Appeal upheld the adjudicator's determination even though the award was wrong agreeing with the following approach, applied in the case of an expert valuer in Nikko Hotels (UK) Ltd v MERPC Plc, adopted by the court of first instance:

*...if he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.*<sup>14</sup>

This is a position which accords with the contractual nature of adjudication. As noted by Forbes (2001):

In legal terms the enforcement of an adjudication is based on the contractual proposition that, if the parties have agreed to leave a dispute to be resolved by a third party such as an adjudicator and be bound by that decision (which is, of course the position in adjudication), the court will then hold the parties to their mutual promises.

Thus, as long as the adjudicator answers the questions put before him by the parties in a particular dispute, he is within his contractual authority and, hence, is acting within his jurisdiction. As the adjudicator is not a government appointed arbiter, he is not obliged to interpret points of law correctly. He may err on a point of law, as long as such error was committed in the course of attempting to answer a question he was authorised to consider. As Forbes (2001) observes, the relevant principle is expressed by Lord Hoffman in Beaufort Developments (NI) Ltd v Gilbert-Nash NI Ltd the following terms:

*The powers of the architect or arbitrator [or adjudicator – Forbes' interpolation], whatever they may be, are conferred by the contract. It seems to me more accurate to say that the parties have agreed that their contractual*

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<sup>11</sup> An order in the nature of certiorari is an order a court issues so that it can review the decision and proceedings of an inferior tribunal and determine whether the decision ought to be quashed.

<sup>12</sup> [2000] BLR 522. Hereafter, referred to as Bouygues.

<sup>13</sup> See Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93.

<sup>14</sup> [1991] 2 EGLR at page 103.

*obligations are to be whatever the architect or arbitrator [or adjudicator] interprets them to be. In such a case, the opinion of the court or anyone else as to what the contract requires is simply irrelevant. To enforce such an interpretation of the contract would be something different from what the parties had agreed.*<sup>15</sup>

## A SHIFT IN THE NSW APPROACH

The NSW Supreme Court subsequently applied the decision in *Musico* to several cases<sup>16</sup> in order to grant relief from an adjudicator's determination in the nature of certiorari. However, in *Brodyn*, the NSW Court of Appeal took a much narrower view of the circumstances under which an adjudicator's determination could be challenged, thereby overruling the line of cases emanating from *Musico*.

In *Brodyn*, the plaintiff head contractor made an application to have the adjudicator's determination - that the claimant subcontractor should be awarded an amount of \$180,059 - quashed by way of certiorari on the basis of, inter alia, an error of law in that the relevant payment claim was invalid as it was one of several payment claims made after the termination of the construction contract, when only one such payment claim should be permitted under the contractual provisions.

The NSW Court of Appeal (leading judgment by Hodgson JA) did not agree with the previous approach taken by the NSW Supreme Court in attempting to categorise an adjudicator's error in satisfying the detailed requirements of the Act as being either a jurisdictional or non-jurisdictional error, deeming such an approach to be inappropriate and to "cast the net too widely"<sup>17</sup>.

Hodgson JA preferred an approach where the court ask whether a requirement being considered by an adjudicator was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination. In this respect, Hodgson J laid down five basic and essential requirements of the Act for the existence of a valid adjudicator's determination as follows<sup>18</sup>:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
2. The service by the claimant on the respondent of a payment claim (s.13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
5. The determination by the adjudicator of this application (ss.19(2) and 21(5), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (s.22(3)(a)).<sup>19</sup>

<sup>15</sup> [1999] 1 AC 266, HL, page 273.

<sup>16</sup> See *Abacus Funds Management v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, and *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116.

<sup>17</sup> *Brodyn* at [54].

<sup>18</sup> The relevant sections of the BCI Security of Payment Act 1999 (NSW) are shown in brackets after each requirement.

<sup>19</sup> *Brodyn* at [53].

Hodgson JA further considered that, where an adjudicator's determination does not satisfy the basic and essential requirements, it will not in truth be an adjudicator's determination within the meaning of the Act and, therefore, relief is available by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

Hodgson JA viewed the Act as disclosing "a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay". Accordingly, Hodgson JA agreed with McDougall J in *Musico* that such intention appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. In contrast to McDougall J, however, Hodgson JA believed the legislative intent justified "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". His Honour elaborated by stating that he did not consider compliance with the requirements of section 22(2) of the Act – which includes, inter alia, the provisions of the Act and provisions of the construction contract – as being requirements which have been made a pre-condition of the existence of any authority for the adjudicator to make his or her determination.

As such, Hodgson JA indicated that the alleged error of law in question in *Brodyn*, regarding the validity of the payment claim, concerned detailed requirements of the Act and, thus, was a matter for the adjudicator to decide without the correctness of his or her decision affecting the validity of the determination.

Although Hodgson JA's judgment appears, at first sight, to have gone a long way towards 'closing the door' on applications to review adjudicators' determinations based upon errors of law, his Honour has seemingly left some 'room for manoeuvre' by stating that the list of five basic and essential requirements may not be exhaustive. This poses the question as to whether the door has, in fact, been left ajar for challenge based upon one or several, as yet, unrecognised basic and essential requirements.

## **SIGNIFICANT DEVELOPMENTS SINCE BRODYN**

In *Holmwood Holdings v Halkat Electrical Contractors & Anor*<sup>20</sup>, the adjudicator made his determination within two days of having received Halkat's (the claimant's) adjudication application. Holmwood sought to have the determination declared void, inter alia, on the grounds that the adjudicator had failed to comply with the basic and essential requirements prescribed in the Act by having failed to consider relevant provisions of the construction contract, required by section 22(2)(b) of the Act, in the following respects:

- the adjudicator had not been provided with the specifications and plans which formed part of the contract;
- the adjudicator had determined the due date for payment to be 21 June 2005, but any reference to the construction contract would have lead to a different date being calculated; and
- the adjudicator had awarded a payment amount to Halkat which made no allowance for the deduction of retention monies required in the construction contract.

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<sup>20</sup> [2005] NSWSC 1129. Hereafter, referred to as *Holmwood*.

In order to address these submissions, Brereton J carried out a detailed and careful analysis of Brodyn, and subsequent cases which had referred to Brodyn, in order to consider what Brodyn decides in respect of failure to have regard to matters specified in s 22(2). His Honour viewed that<sup>21</sup>:

*The statement in Brodyn that “compliance with the requirements of s 22(2) is not a precondition to the existence of authority to make a decision, ... appears to proceed on the assumption that s 22(2) requires (though not as a condition of validity), not merely consideration of the matters (and only the matters) identified in that section, but also reaching a legally correct conclusion on those matters [Hargreaves, [74] (Basten JA)]”<sup>22</sup>*

However, whilst Brereton J did not consider that consideration by an adjudicator of the matters in s22(2) coupled with correct application of associated issues of law was an essential requirement to a valid determination, his Honour did view that, at least a consideration of the matters in s22(2) was required for the adjudicator to be acting within his or her jurisdiction. Accordingly, his Honour stated:

*Indeed, it would be a surprising result that, in the absence of a privative clause, a prescribed relevant consideration could be disregarded without affecting the validity of the decision. Accordingly, it is a condition of validity of a determination that an adjudicator consider the matters specified in s 22(2), although error in considering those matters, so long as they are in fact considered, will not result in invalidity.<sup>23</sup>*

Thus, Brereton J concluded that “mere error of law by an adjudicator in the consideration and application of the specified considerations does not invalidate a determination”<sup>24</sup>, but the entire disregarding of a relevant consideration may result in jurisdictional error which invalidates the determination. Additionally, his Honour concluded that section 22(2)(b) does not require the adjudicator to consider all contractual provisions, but only those provisions which are relevant to the adjudication application.

Thus, if an adjudicator at least considers whether a particular provision is, or is not, relevant to the payment claim, the adjudicator’s determination cannot be set aside for failing to satisfy section 22(2)(b)<sup>25</sup>. Rather, it is the complete failure to even consider a relevant provision which may render a determination void. Accordingly, Brereton J stated:

*If, having considered the relevant provisions of the contract, the adjudicator wrongly interpreted and applied them so as to err in fixing the due date, invalidity would not be established: an error of fact or law including an error in interpretation of the Act or of the contract, or as to what were valid and operative terms of the contract, would not prevent a determination from being*

<sup>21</sup> A view which Brereton J relied upon *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd [2005] NSWCA 142* per Hodgson JA at [49] for support.

<sup>22</sup> Holmwood at [46].

<sup>23</sup> Holmwood at [49].

<sup>24</sup> See Holmwood at [46].

<sup>25</sup> A conclusion which Brereton J stated was supported by *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd [2005] NSWCA 142* per Hodgson JA at [49] – see Holmwood at [48].

*an “adjudicator’s determination” within the meaning of the Act [Contrax Plumbing, [49]].*<sup>26</sup>

As such, in Holmwood the Court found that, as the specifications and plans did not concern the questions under adjudication, the failure of the adjudicator to consider them did not invalidate the determination. However, the adjudicator’s failure to refer to the relevant parts of the contract relating to due date for payment and deduction of retention monies were “not a mere inconsideration of the provisions of the contract, but a failure to consider relevant provisions at all”<sup>27</sup> and, therefore, did invalidate the determination.

Halkat appealed the NSW Supreme Court decision<sup>28</sup> on, inter alia, the bases that the trial judge was in error in holding that an adjudicator’s determination was void if the adjudicator failed to have regard to relevant contractual provisions, and in concluding that the adjudicator failed to have regard to relevant contractual provisions<sup>29</sup>. The NSW Court of Appeal disposed of the appeal, concurring with the trial judge’s finding that the adjudicator had failed to consider particular matters required by s.22 of the Act. Accordingly, Giles JA stated:

*The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters. But that is what the adjudicator did.*<sup>30</sup>

Interestingly, however, Giles JA viewed that it was more appropriate to class the adjudicator’s failure to pay regard to the relevant provisions of the contract as a non-compliance with a basic and essential requirement of the Act, and that in describing such failure as jurisdictional error, the trial judge appeared to have departed from the basis for invalidity of a determination adopted in Brodyn.

The NSW Supreme Court has subsequently affirmed its position with respect to consideration of particular relevant matters required by s.22 of the Act in several decisions<sup>31</sup>.

## CONCLUSIONS

In attempting to narrow the grounds for judicial review of adjudicators’ determinations both the NSW and English courts have likened the position of an adjudicator to that of a contractually appointed expert.

In England, such an analogy immediately resulted in a straightforward test for the validity of an adjudicator’s determination – namely, has the adjudicator answered the right question in the wrong way, or the wrong question?

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<sup>26</sup> Holmwood at [56].

<sup>27</sup> See Holmwood at [57] and [60].

<sup>28</sup> In the case of Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd [2007] NSWCA 32.

<sup>29</sup> See Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd [2007] NSWCA 32.

<sup>30</sup> Ibid at [26].

<sup>31</sup> See David Hurst Constructions Pty Ltd v Helen Durham [2008] NSWSC 318, Reiby Street Apartments v Winterton Constructions [2006] NSWSC 375, and Rta v John Holland [2006] NSWSC 567.



In NSW, however, despite the analogy, the Supreme Court in *Musico* initially seemed to apply a standard of jurisdictional error more akin to that of an administrative tribunal rather than a contractually appointed third party. Such an interpretation of jurisdictional error did not provide the statutory adjudication process with the support it needed to flourish in the construction industry.

Four years after the Act came into force in NSW, the NSW Court of Appeal in *Brodyn* eventually took a position which shored up adjudicators' determinations, providing much needed certainty to the statutory adjudication process. Whilst moving away from *Musico* as a basis to quash adjudicators' determinations, the NSW Court of Appeal did not expressly disagree with, or overrule, the Supreme Court's definition of jurisdictional error in relation to an adjudicator's error of law on the face of the record. Rather the Court deemed such an approach inappropriate, casting the net too widely. Accordingly, the Court of Appeal shifted the test for validity to that of a non-exhaustive list of basic and essential requirements which are, in accordance with legislative intent, a pre-condition to the existence of any authority for the adjudicator to make his determination.

As such, it is submitted that the NSW courts have had more difficulty than the English courts in perceiving the position of the adjudicator as a contractually appointed third party. This is perhaps due to the differences in the structure of the respective acts under which statutory adjudication is required in the two jurisdictions. This submission correlates with the warning given by the court in *Musico*, when citing *Bouygues* as support for the adjudicator as expert analogy, that care needs to be taken in seeking to apply decisions on a different legislative scheme.<sup>32</sup> The NSW Act brings far more regulation to the adjudication process in prescribing a detailed statutory scheme. The UK Construction Act, in contrast, allows the parties freedom to agree the detail of their own contractual adjudication scheme subject to satisfying certain key requirements set out in the legislation.

Thus the legislative structure of the UK Construction Act encourages the parties to contractually agree the detail of an adjudicator's authority whereas the NSW Act does not. Additionally, the UK Construction Act provides more freedom with respect to the choice of adjudicator, allowing the parties to mutually agree their own adjudicator. The NSW Act, however, only provides for adjudicator nomination by an Authorised Nominating Authority. It may be argued, therefore, that the selection of, and authority ascribed to, an adjudicator in NSW is far more influenced by legislation than contract. This may explain the NSW courts' reluctance to simply adopt the English courts' position with respect to definition of jurisdictional error.

Since the NSW Supreme Court's 2005 decision in *Holmwood*, it appears that adjudicators must at least consider all relevant contractual and statutory provisions if their determinations are to be valid. This expansion of the basic and essential requirements for an adjudicator's determination has broadened the scope for an adjudicator's determination to be declared void for error of law such that, arguably, NSW adjudicators have less scope for error than their counterparts in the UK who must only attempt to answer the right question put to them. Furthermore, with the list of basic and essential requirements being declared as non-exhaustive by the NSW Court of Appeal, there is always the possibility that the scope for adjudicator error will narrow even further.

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<sup>32</sup> See *Musico* at [51].

Both the NSW and English judicial positions with respect to judicial review of adjudicators' determinations for errors of law provide valuable guidance for the other jurisdictions which have more recently enacted statutory adjudication legislation. In this regard it should be noted that the structure of the New Zealand, Western Australian and Northern Territory legislation is more akin to that of the UK Construction Act and, therefore, the courts in these jurisdictions may be more inclined to adopt the English Court of Appeal's position in *Bouygues*. Whereas, the structure of the Victorian, Singaporean and Queensland legislation is more akin to that of the NSW Act and, therefore, the courts in these jurisdictions may be more inclined to adopt the NSW Court of Appeal's position in *Brodyn*.

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