INVESTIGATING THE FACTORS INFLUENCING THE QUALITY OF ADJUDICATION OF COMPLEX PAYMENT DISPUTES IN AUSTRALIA

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Statutory adjudication has been enacted throughout Australia on a state-by-state basis. The original enacting legislation may be broadly divided into two models which have become known as the East Coast and West Coast models. The East Coast model adjudication scheme – which is operational in NSW, Victoria, Queensland, Tasmania, ACT and South Australia – has in recent times come under much criticism for failing to facilitate determinations of sufficient quality with respect to large and/or complex payment claims. By carrying out a thorough desktop study approach whereby evidence is garnered from three primary sources – government commissioned consultation papers, academic publications and judicial decisions – this paper reviews this criticism and therefrom distils the key factors influencing the quality of adjudication of large and/or complex claims in Australia.

Keywords: adjudicators' determinations, complex payment disputes, security of payment, statutory adjudication.

INTRODUCTION

Statutory adjudication has been enacted progressively throughout Australia on a state-by-state basis over the past 15 years. The first Australian jurisdiction to introduce statutory adjudication was New South Wales (NSW) by virtue of the Building and Construction Industry Security of Payment Act 1999. Despite the many differences between all of the Acts in Australia, they can be broadly grouped on the basis of similarity into the East Coast model Acts (including New South Wales, Victoria, South Australia, Tasmania and Australian Capital Territory) and the West Coast model Acts (including Northern Territory and Western Australia). The East Coast model Acts were modelled after the original NSW Act and provide, in addition to an adjudication scheme, for a highly regulatory statutory payment scheme which runs alongside the contractual payment scheme. The West Coast model Acts are more akin to the UK Act, affording primacy to the contractual payment scheme. The common objective of all Acts is to facilitate timely cash flow in the construction contractual chains. The East Coast model's adjudication scheme was originally intended to assist, in particular, smaller contractors to get paid quickly (Iemma 1999: 1594) and, as such, to be a quick, informal and inexpensive process resulting in an adjudication decision provisionally binding in nature. Whilst adjudication usage rates under the East Coast model have generally been high for smaller payment claims, a significant number of large and technically and legally complex payment claims have also been the subject

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of adjudication applications. For example, in 2012/13 there were 71 adjudication determinations for payment claims ≥ $500,000 in Queensland (Qld), and 40 in NSW. For the same year, there were a further 85 adjudication determinations for payment claims between $100,000 and $499,999 in Qld, and 109 in NSW. This is because the eventuating scope of the legislation covered all parties carrying out construction work and/or supplying goods or services under construction contracts of all sizes. This has eventually resulted in inevitable formalisation of adjudication process, drifting away from the simple process envisaged by the Parliament. As to complexity, McDougall J has stated in Chase Oyster Bar v Hamo Industries [2010] NSWCA 190 at [207]-[209] that the NSW Act: *"provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents…"*

In Western Australia (WA), where parliament aimed the legislation at the construction industry broadly rather than focussing on smaller contractors, statutory adjudication is even more frequently used to determine large payment claims. In 2013/14, 36% of the 175 adjudication determinations concerned payment claims exceeding $500,000, with a further 35% concerning payment claims between $100,000 and $499,999. Indeed, the WA adjudication scheme has been so little used for smaller payment claims that this issue has been raised in the recent discussion paper for the review of the WA Act (Evans 2014: 41). Although, anecdotally, there is a general view that statutory adjudication has improved cash flow within the industry, the East Coast scheme has received a lot of criticism from practitioners for reasons relating to many procedural issues. These criticisms have, in particular, pointed at the unsuitability of the East Coast legislation in its current form to satisfactorily deal with the determination large or complex payment disputes. Notwithstanding the provisional, *"pay now, argue later"*, nature of statutory adjudication, the interim enforcement of adjudication determinations that are perceived as lacking in quality has many negative ramifications not least of which is a proliferation of judicial challenges to adjudicator's decision which results in extra costs to disputing parties and a general undermining of faith which the construction industry has in adjudication. By contrast, the West Coast model has received little, if any, criticism in this respect, and there are minimal judicial review applications, very few of which result in the adjudicator's decision being quashed on the basis of jurisdictional error (Marquet 2015: 8). This is not to say, however, that there is no room for improvement in the West Coast model's approach to large and/or complex payment claims. Indeed, the recently published discussion paper for review of the WA Act sought submissions for such improvement (Evans 2014). As with the East Coast model, there is a dearth of empirical research as to the performance of the West Coast model. As such, Yung *et al*. (2015: 70) note *"the lack of appropriate evaluations of the West Coast Model."*

This paper, written as a preliminary to inform the lead author's PhD research, aims to identify and review the key factors that affect the perceived and actual quality of adjudication determinations. This is achieved using a desktop study approach whereby evidence is garnered from three primary sources: government commissioned consultation papers, academic publications and judicial decisions. The key factors identified will be used as the basis for survey design in a subsequent research which aims to recommend an optimal process of adjudication of large and/or complex payment claims based upon stakeholders' views and experiences.

DEFINING LARGE AND/OR COMPLEX CLAIMS

As concluded by many authors (Australian Legislation Reform Sub-committee 2014; Wallace 2013), the *"one size fits all"* approach taken by the East Coast model legislation is no longer appropriate (if indeed it ever was) for producing quality determinations for larger and more complex payment claims. Most, if not all, of the research to date on the designing of an appropriate adjudication scheme to determine large and complex payment claims has been based on anecdotal evidence, usually in the form of submissions to government discussion papers (e.g. Wallace 2013). As such, there is a clear need for empirical research on the matter. The starting point for any such research is to determine the parameters for the large and complex payment claims to which such an adjudication scheme should apply, this section contemplates how such parameters can be defined and reviews the relevant literature to date to consider any such definitions already existing. In the search for existing definitions, the most obvious point of initial reference is the recent final report on the discussion paper into the Qld Act authored by Andrew Wallace QC (Wallace 2013), upon which the Qld Parliament based its key reform to the Act that came into effect on 15th December 2014. Based upon Wallace's recommendations, the Qld Parliament is the first and only jurisdiction to introduce a dual adjudication scheme which provides a modified scheme to deal with what it terms 'complex payment claims' whilst essentially retaining its original scheme to deal with 'standard payment claims'. For the purposes of its dual scheme, the amended Qld Act classifies all claims greater than $750,000 as complex payment claims. Regarding his basis for choosing this amount, Wallace (2013:183) comments: *"The value of this monetary limit is also likely to be a source of great debate. Whilst I am not particularly wedded to the sum, I have concluded that it is appropriate to tie the monetary limit to that of the civil jurisdiction of the District Court of Queensland, which is currently set at $750,000. Some will argue this figure is set too high, whilst others will argue it is too low. For claims in excess of this amount, i.e. $750,001 the parties are likely to be legally represented and I therefore assume well able to navigate the proposed legislative paradigm."*

Notably, however, Parliament adjusted the definition of complex claims recommended by Wallace, who originally classified complex claims as claims above $750,000 or any claims on the basis of time-related or latent condition cost. Upon further investigation, the Parliamentary Committee (2014) set up to examine and report on the reform Bill advised against accepting Wallace's inclusion of claims on the basis of time-related or latent condition cost. This advice was based upon concerns about the ambiguity and potential for confusion amongst contractors with respect to the meaning of latent condition and time-related costs, as well as the potential for these types of costs to have a broad scope of application meaning that even some simple claims (e.g., based on time sheet day work or discovery of hard rock during excavation) could be considered as complex claims (Queensland Parliamentary Committee 2014: 20). The Qld experience brings to light the question as to whether it is possible for the legislation to clearly define a claim with respect to its nature of complexity for the purposes of adjudication. This is a question that the proposed empirical research should seek to address by, it is suggested, diagnosing the nature of claims further and relating them to the required skills and powers of adjudicators as well as the timeframes governing proceedings. An alternative to define criteria for claim complexity could be to leave the decision as to claim complexity (and, thus, adjudication scheme) up to the body appointing the adjudicator. Again, the ramifications of this suggestion would need further empirical investigation. If the

nature of the claim is taken out of any definition (as happened in Qld), large and complex claims would be defined by a monetary amount alone. A large claim per se does not, of course, necessarily reflect complexity in the submission as some large claims are straight forward calculations of the quantity and amount of executed works. However, generally speaking, larger claims are more likely to involve complex legal issues and, even if they don't, will have more volume of submissions for the adjudicator to consider. As Yung *et al*. (2015: 61) found in their survey of 22 adjudicators in WA, while larger claims are not by virtue more complex, they have a greater potential to involve complex points of law. Thus, it may be valid to define complexity of claims for the purpose of a dual adjudication scheme according to solely amount. Notably, the English High Court in CIB Properties Limited v Birse Construction [2004] EWHC 2365 preferred that the suitability of a matter for adjudication not be assessed on whether it was too complicated, but whether the adjudicator was able to reach a fair decision within the timetable.

Looking elsewhere for indicators of claim complexity in relation to adjudication, the Victorian Act (s 10(b)) excludes many types of payment claims with likely complexity from being adjudicated including claims for certain disputed variations, damages under or in connection with the contract, time-related costs, latent conditions or changes in regulatory requirements. Such exclusions indicate that the Victorian Parliament did not regard the 'one size fits all' East Coast model adjudication scheme appropriate for complex claims. This raft of exclusions, however, has been blamed for adding to the complexity of the Victorian Act itself, resulting in a low adjudication usage rate (Shnookal 2009:9). The WA Act (s 31(ii)(iv))provides that an adjudicator must dismiss an adjudication application without making a determination of its merits if satisfied that it is not possible to fairly make a determination because of the complexity of the referred matter. Thus, in WA, Parliament is content to leave the decision about complexity of a payment claim up to the adjudicator, although the judiciary has required that an adjudicator must provide adequate reasons for dismissal due to complexity and has commented *"upon the need for adjudicators not to too readily form a view that a matter is too complex to be fairly determined."* (See Silent Vector Pty Ltd T/as Sizer Builders and Squarcini [2008] WASAT 39).

KEY FACTORS IMPACTING ADJUDICATION QUALITY

Before discussing the key factors affecting adjudication quality, it is necessary to briefly consider what is meant by adjudication quality. The ultimate yardstick by which adjudication quality can be measured is to be found in the legal accuracy – both in terms of procedural and substantive fairness – of adjudicators' determinations. However, recognising that there is a trade-off between fairness and efficiency in dispute resolution (Susskind and Cruikshank 1987: 21-33), this criterion needs to be calibrated in the light of the legislative objective, being to provide a rapid dispute resolution procedure in order to expedite cash flow on construction contracts. Thus, it would clearly be absurd to hold adjudication determinations up to as higher level of scrutiny as in arbitration or litigation. On the other hand, there surely must be a quality 'floor' below which determination quality must not fall otherwise the overemphasis on efficiency in lieu of justice would result in a process that the parties would perceive as unfair with the consequence that they are more likely to seek to undermine it (Susskind and Cruikshank 1987: 21-33; Gerber and Ong 2013: 332). In the context of adjudication, it is proposed that an adequate level of quality be defined in terms of adjudicators' determinations that meet the basic and substantial requirements of a satisfactory dispute resolution system, namely that: adjudicators act within their

legislative jurisdiction; the key elements of natural justice , or procedural justice, are afforded; adjudicators make a good faith attempt to exercise their powers under the legislation; and adjudicators' determinations are free from gross non-jurisdictional errors of law that materially and substantially affect the determination. A review of the relevant literature identifies the following five key factors that impact upon adjudication quality as defined above: adjudicator appointment, regulation of adjudicators, reviewability of adjudicators' determinations, timeframes in the adjudication process, and adjudicators' powers. These factors are discussed in more detail below.

Adjudicator Appointment

The way in which an adjudicator is appointed may have a direct bearing on the quality of the outcome. The appointment of adjudicators by authorised nominating authorities (ANAs) under the East Coast model has been much criticised for its leading to: perceptions that profit-driven ANAs are biased towards claimants (Wallace 2013: 131-145; Collins 2012: 72), allegations of adjudicator shopping whereby a claimant or its representative demands that an ANA either appoint or not appoint certain adjudicators, otherwise the claimant would refer its adjudication application to another ANA (Wallace 2013: 140), and accusations that some ANAs maintain an unhealthy relationship with claims preparers, whereby preparers are recommended to claimants by an ANA with the expectation that the preparer will direct the adjudication application to the ANA (Wallace 2013: 134, 148-150) or in expectation of receiving future appointments as an adjudicator from the ANA (Wallace 2013: 145). Such matters clearly contravene one of the fundamental tenets of natural justice, that the decision-maker conducts themselves in a manner free from actual or apprehended bias. Accordingly, the recent reform of the Qld Act abolished appointment by ANAs replacing it with appointment by a single government registry within the Queensland Building and Construction Commission.

Regulation of Adjudicators

Regulation of adjudicators may impact adjudication quality in terms of adjudicator eligibility, training and the ongoing monitoring of adjudicator performance. The importance of setting appropriate criteria for eligibility and training is clear, directly impacting upon the ability of an adjudicator to both run the adjudication process in a procedurally fair manner as well as having the requisite knowledge and experience to arrive at an appropriately just and accurate determination. Zhang (2009) noted that the risk of injustice in rapid adjudication requires a high standard of adjudicator's expertise. The regulation of adjudicators varies widely from State to State, with regulations being generally quite relaxed. With the exception of Qld (See Building and Construction Industry Payments Regulations 2004 (Qld, S2A), the regulations governing the eligibility, registration and performance of adjudicators under the East Coast model appear to be wanting. The NSW legislation, for instance, requires adjudicators to have such qualifications, expertise and experience to be eligible to perform adjudication but no relevant regulations listing such have ever been made. In practice, therefore, it is left to the ANAs to ensure adjudicators are suitably qualified, trained and experienced. In the absence of formal criteria regarding adjudicator appointment, it is also possible for ANAs to select an adjudicator based upon availability rather than experience and qualifications in order to meet the strict time limits. Accordingly, Wallace (2013:230) notes, *"adjudicators accept appointment by an ANA at a time when they have little or no knowledge of the issues in dispute…"* To

compound matters, the East Coast legislation provides no deterrent against adjudicators accepting adjudication appointments that they feel unqualified to properly determine with the exception of the Qld Act (s 35(6)) which deprives an adjudicator of his or her fees where a determination has been set aside for want of good faith. In his PhD thesis, Munaaim (2012) conducted interviews with highly experienced lawyers in NSW who expressed their dissatisfaction with the quality of adjudicators. Munaaim found that ANAs in NSW do not have similar quality control over adjudicators and their training courses significantly vary. He added that some ANAs provide training for months whilst other provide only a few days. South Australia is an anomaly amongst the East Coast legislation having set compulsory minimum requirements for an adjudicator to be eligible to practice[2]. However, these regulations do not mention any requirements for legal qualifications for adjudicators dealing with complex claims which may require application of complicated legal principles to complex facts. As Wallace (2013: 230) observes, *"adjudicators are often called upon to consider complex areas of building and contract law, yet they are not required to be legally qualified."* It is likely that one of the reasons for the recent high rate of adjudication determinations that have been quashed by the courts under the East Coast model is linked to shortcomings in the way adjudicators are regulated. As stated by the Australian Legislation Reform Sub-committee (2014: 38), *"the courts have seen more and more cases where the quality of the adjudication decision making process has been so poor that the courts have been increasingly willing to intervene."* In WA, although the regulations prescribe certain eligibility criteria, legal qualifications are not required. Noting this, Yung *et al*. (2015: 71) recommend that legal training should be required as *"73 per cent of adjudicators in Western Australia are not legally trained but quite a number of claims have been prepared by lawyers and included detailed legal submissions."*

Reviewability of adjudicators' determinations

Adjudication, with its abbreviated timeframes, has always been acknowledged as a somewhat *"rough and ready"* dispute resolution process. As such, Australian courts (as well as their English counterparts) have generally been happy to uphold adjudicator's decisions containing non-jurisdictional errors of law, only quashing those where adjudicators have strayed outside the boundaries of their jurisdiction. In its 2004 decision in Brodyn[3], the NSW Court of Appeal restricted the grounds to quash an adjudicator's determination even further to a failure to comply with five basic and essential requirements of the Act, where substantial breaches of natural justice have occurred and the adjudicator has failed to exercise their powers under the Act in good faith. Although jurisdictional error (with relief in the form of prerogative writs) has since been reinstated as the basis for judicial review in NSW[4] and Victoria[5], the courts have shown little appetite to broaden the opportunities for challenges to adjudication determinations beyond Brodyn. Consequently, as long as an adjudicator has been duly appointed in accordance with the Act's mechanisms and has addressed the correct issues in dispute, it will be very difficult for a disgruntled party to have the adjudicator's determination quashed in court even where the adjudicator has determined the issues in the wrong way. Thus, there are several instances where adjudicators' determinations containing errors of law on the face of the record that

[2] See s 6, Building and Construction Industry Security of Payment Regulations 2011 (SA).

[3] Brodyn Pty t/as Time Cost and Quality v Davenport and Anor [2004] NSWCA 394 at [52]-[53]

[4] Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

[5] Grocon Constructors v Planit Cocciardi Joint Venture [No 2] [2009] VSC 426

materially and substantially affect the adjudication outcome have been upheld by the courts[6]. In other words, in striking a balance between justice and efficiency, the courts for now appear to be prepared to allow errors of law on the face of the record in order to support the statutory adjudication process.

Whilst the courts do not view significant errors of law on the face of the record as sufficient to invalidate adjudicators' determinations, this doesn't mean they should be discounted as an indicator of adjudication quality. Indeed, it is argued that an optimal adjudication scheme should strive to encourage as much legal accuracy as is possible in determinations within the designated timeframes. The minimisation of errors of law has a direct bearing on stakeholders' confidence in the adjudication process. The more legally accurate an adjudicator's determination, the less likely it is for a losing party to either search for grounds upon which to challenge the determination, or to subsequently pursue the claim for a final binding decision in arbitration or litigation. The potential for adjudication to reduce overall disputing costs to the construction industry should not be understated, and the failure of parties to accept an adjudicator's determination as a final resolution should be seen as a lost opportunity to reduce disputing costs. Indeed it was in this context that statutory adjudication had its roots in the UK and subsequently appears to have precipitated a significant decrease in the amount of UK construction litigation (Davenport 2007: 13). Aside from judicial review, there are limited rights to adjudication review provided for in the Victorian, ACT and West Coast model Acts. In the Victorian Act (s 28(b)), adjudication determinations may be subject to review on the basis that the determination exceeds $100,000 and includes 'excluded amounts'. The review is carried out by a second adjudicator appointed by the ANA. Under the ACT Act (s 43(2)), an appeal may be made to the Supreme Court on any question of law arising out of an adjudication decision subject to certain conditions being satisfied. The WA (s 46) and NT (s 48) Acts allows a review of an adjudicator's decision by the WA State Administrative Tribunal (WASAT) or Local Court (NT) to dismiss an adjudication application without making a determination of its merits. Since the commencement of the WA Act to 30 June 2014, there have been 33 review applications to WASAT, 10 of which set aside the adjudicator's decision to dismiss.

Notwithstanding these limited avenues of review, it is argued that the general absence of any mechanism by which to review the merits of an adjudicator's determination made within jurisdiction directly impacts upon the quality of adjudication determinations. An optimal adjudication process should maximise, within the legislative objective of expediency, the opportunity that adjudicators' determinations are made in accordance with the correct and relevant law. In the immediate wake of Brodyn, Murray (2006) viewed that the challenge to uphold the integrity of the adjudication regime now fell to government and industry by implementing the necessary systems and procedures to ensure that adjudication determinations are of the highest possible standard. In order to achieve such quality control, it is proposed that a swift system of review provided for within the legislation is needed. Marquet (2015: 15) has suggested that the merits review avenues available under the West Coast model are likely to be more appropriate than judicial review proceedings, although adding that further investigation into the frequency, duration and cost of merit review applications under the West Coast legislation is necessary before it can be said with certainty that the merit review model produces better overall outcomes (Marquet

[6] See, for example, Clyde Bergemann v Varley Power [2011] NSWSC 1039; New South Wales Land and Housing v Clarendon Homes [2012] NSWSC 333; Uniting Church in Australia Property Trust (Qld) v Davenport and Anor [2009] QSC 134

2015: 16). Notably, the Singaporean Act (s 18) provides a wider merits review system which, it is proposed, could be considered for adoption into the Australian legislation.

Timeframes

As previously mentioned, in dispute resolution there is a trade-off between justice and efficiency. An optimal adjudication scheme for large and/or complex claims, therefore, needs to set a timetable which allows sufficient time to meet the basic and substantial requirements of a satisfactory dispute resolution system. There is no doubt that the 'one size fits all' timeframes prescribed by both the East and West Coast models are expeditious when compared with the international legislation. For example, whilst the East Coast model allows 10 business days, and the West Coast model 14 days, for an adjudicator to make his or her determination (with the exception of the recently amended Qld Act which now allows adjudicators up to 20 business days to issue decisions on complex claims), their counterpart has 45 working days to do so in Malaysia and 28 days to do so in Ireland and the UK. Jacobs (2014: xi) comments, *"[u]nfairness may arise, where large complex claims are submitted to the lay adjudicator for determination within the "pressure-cooker"* time limits set by the relevant [Australian] Acts". Accordingly, in the recent discussion paper for review of the WA Act, the issues of whether the timelines for respondents to serve their written adjudication response and for adjudicators to make their decisions should be extended have been raised (Evans 2014: 40-41).

Whilst the East Coast model timeframes may be appropriate for smaller straightforward payment claims, there is mounting evidence – in the form of adjudicators' determinations being quashed by the courts for substantial denial of natural justice[7] and/or failure to exercise their power in good faith[8] – to suggest they are inadequate to afford adjudicators enough time to meet the key requirements for a fair determination. Accordingly, Marquet (2015) states that, inter alia, the strict time bars have led to a substantial increase in the judicial review of adjudication determinations. The adjudicator's task has been made all the more difficult by the formalisation of the adjudication process that has occurred for large and complex payment claims with parties typically engage lawyers to prepare their adjudication applications and responses, and often submitting copious amounts of documentation – including statutory declarations, legal submissions, delay analyses, site inspections, photographs and technical expert reports – to support their cases. Given the East Coast model's requirement for an adjudicator to 'consider'[9] all duly made submissions and to make this apparent in his reasoning (See Laing O'Rourke Australia Construction v H&M Engineering and Construction [2010] NSWSC 818 at [73]), the adjudicator is faced with a very challenging task. This was acknowledged by the court in Laing O'Rourke as follows: *"I accept, too, that the adjudicator was required to assimilate a huge mass of material and to deal with it, to the extent of producing a reasoned conclusion, in a very short space of time. But even allowing for those matters, it is in my view clear, when this aspect of the determination is considered as a whole ..., that the adjudicator did not turn his mind to, and thus did not consider, those features of LORAC's defence that I have mentioned."*

[7] See Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd and Ors (No 2) [2010] VSC 255; St Hilliers Contracting Pty Limited v Dualcorp Civil Pty Ltd [2010] NSWSC 1468; Watpac Constructions v Austin Corp [2010] NSWSC 168.

[8] See Laing O'Rourke Australia Construction v H&M Engineering and Construction [2010] NSWSC 818; Lanskey v Noxequin [2005] NSWSC 963; Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd and Anor [2005] NSWSC 1129

[9] The word 'consider' interpreted by the courts in Tickner v Chapman [1995] FCA 1726 at [39] to mean an 'active process of intellectual engagement'

There is a limit to how much material a single adjudicator can intellectually engage with in just 10 business days, and the overwhelming of an adjudicator by sheer volume of paperwork may, it seems, be likely to leave the door ajar for a potential judicial challenge on the grounds of breach of natural justice and/or want of good faith. In addition to the formalisation of the adjudication process for large and/or complex claims, the long running practice of claimant's launching 'ambush' claims clearly poses a threat to quality of the adjudication determination (See, for example, Dorchester Hotel Ltd v Vivid Interiors Ltd [2009] EWHC 70). Ambush claims are facilitated by the East Coast model Acts allowing a claimant to spend several months preparing a comprehensive and lengthy payment claim for a substantial monetary amount, leaving the unsuspecting respondent only ten business days to respond in its payment schedule and five business days to prepare its adjudication response. Notably, in the recent reform of the Qld Act, these timeframes have been extended for complex claims based on when the adjudication application was made with regard to reference date. As well as being procedurally unfair, ambush claims typically will require an adjudicator to consider a huge amount of submissions in an insufficient timeframe, presenting a very real risk of the door being left ajar for a judicial challenge for breach of natural justice or want of good faith. Yung *et al*. (2015: 64) found in their survey of 22 WA adjudicators that ambush claims are not a concern under the West Coast model as there is a 28-day timeline for starting an adjudication.

Adjudicator's Powers

Whilst the West Coast model encourages adjudicators to be evaluative (WA Act, s 32(1)(b) and NT Act, s34(1)(b)), the East Coast model Acts impose many restrictions on the way in which adjudicators make their determinations. Under the East Coast model, adjudicators are limited to a consideration of the Act and documents submitted by the parties. Such a restrictive approach has the potential to negatively impact upon the quality of adjudicators' determinations. As Gerber and Ong (2013: [16.48] to [16.50]) state: *"An active, inquisitorial approach to adjudication therefore allows the merits of the dispute to be fully investigated, and is said to result in a more reasoned and accurate determination… it is clear that a passive, 'rubber stamp' approach [referring to the East Coast model] to adjudication is not conducive to the final and just determination of a dispute."* (Emphasis added). Both East and West Coast models give the adjudicator the authority to request further submissions from the parties, and to call informal conferences with the parties although they are silent on how such conferences should be conducted. Unlike the East Coast model, however, the West Coast model allows legal representation in conferences and allows the adjudicator to engage an expert or arrange for testing unless all parties object.

CONCLUSION AND FURTHER RESEARCH

Despite its high usage rate in NSW and Qld, and general agreement that it has helped to expedite cash flow in the construction industry, the Australian East Coast model statutory adjudication scheme has come under staunch criticism for not being able to deliver quality adjudication determinations for large and/or complex payment disputes. In order to stem the increasing rate of adjudicators' determinations quashed by the courts, sustain the construction industry's confidence in the adjudication scheme, and to benefit from the reduction in disputing costs that quality adjudication determinations have the potential to bring to the construction industry, a modified adjudication scheme is needed designed specifically to cater for the challenges of large and/or complex payment disputes. This has been recognised by the Qld

Parliament, which has been the first and only Parliament to reform its Act to provide for a dual scheme of adjudication. Notwithstanding the Qld reform, a review of the relevant literature reveals that there appears to be a dearth of empirical research informing the design of an appropriate adjudication scheme for large and/or complex payment claims in either the East or West Coast model legislation. As a preliminary to embarking upon this path of empirical research, this paper has identified and briefly discussed from the relevant law and literature five key factors that influence the quality of adjudicators' determinations, namely: adjudicator appointment, regulation of adjudicators, reviewability of adjudicators' determinations, timeframes in the adjudication process, and adjudicators' powers. Moving forward, it is now the intention of the lead author to design research surveys based upon these factors with the ultimate objective of formulating a roadmap with recommendations that may be applied to help optimise the various Australian adjudication schemes for the determination of large and/or complex payment disputes.

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