SECURITY OF PAYMENT ADJUDICATION—A GOOD SOLUTION

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This is a consideration of the law surrounding the Building and Construction Industry Security of Payment Act 1999 (NSW) as amended[1] ('the Act') and in particular a consideration of what kind of process is 'adjudication' under the Act.

Adjudication is the means by which the Act ensures that a person is able to recover a progress payment consistent with the unusual 'pay now - argue later' nature of the Act.[2] The procedure established involves the referral of any disputed claim to an adjudicator for determination.[3]

The litigation that has ensued has been the cause of various tensions in judicial interpretation as judges attempt to come to terms with a statutory adjudication scheme that breaks many of the established rules.

The author reasons that a better appreciation as to what adjudication is and is not will assist in ensuring the Act achieves what is it intended to achieve. The emphasis is placed upon a prompt determination as opposed to a more considered and 'perfect' determination. In the words of General George S Patton

A good solution applied with vigour now is better than a perfect solution applied ten minutes later.

Prior to the introduction of the Act, the entitlement to a progress payment was a contractual right only although subcontractors could have recourse to making a quantum meruit claim for work carried out.[4]

The Act is an entitling or enabling Act. The Act's objective is to ensure a subcontractor is 'entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services'.[5] It does so by allowing for a subcontractor (the claimant under the Act) to make a 'payment claim' that a head contractor (called a respondent) can respond to by serving a 'payment schedule'.

The Act then provides a channel for any disputed progress payments to be determined by an independent 'adjudicator' - 'closely analogous to that of an expert by whose determination the parties have agreed to be bound'.[6]

In Brodyn Pty Limited t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors [2003] NSWSC 1019 at [14], Justice Einstein stated:

What the legislature has provided is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties rights per se.

The Act intended that subcontractors themselves could use an unsophisticated system of adjudication (specifically without the need for lawyers) by creating a piece of to ensure subcontractors 'got paid' without the usual documentation and procedures that accompanies the technicalities of arbitration or litigation.[7] The key consideration and overriding aim was the fast transfer of money (cash-flow). Provided a subcontractor did what the Act required (including stating that they were specifically making a claim under the Act), they would be given an additional entitlement to prompt payment for construction work and related goods and services carried out to date.

Whilst the legislation attempts to put in place a simple and straight forward system of obtaining progress payments, the very unique nature of that system has many traps for the uninitiated. Adjudication, as created by the Act, does not easily

fit within the previous forms of dispute resolution. Comparisons to statutory decisions makers, inferior tribunals or other forms of dispute resolution including arbitration, or judicial determination are usually unhelpful and dangerous.

The misinterpretation of the Act and its intended purpose by those who use it (often unsophisticated builders and labourers) has lead to a level of confusion never envisaged by the Act's proponents. The growing multitude of judicial pronouncements have added an unintended complexity to the adjudication process and the general understanding of how the Act should work that leave many in the industry to question its ability to achieve what it was intended to achieve.

All this has resulted in a substantial body of NSW Supreme Court judgments seeking to clarify the Act and take account of the difficulties in its practical application not contemplated by legislators. The Act has increasingly become the subject of judicial scrutiny and interpretation and sometimes re-interpretation. The irony is that one of the key intents of the Act was to avoid the trappings of litigation (principally cost and delay). The court was seen to only be required for the enforcement of payment – not the greater level of court intervention which has occurred.[8]

So a better understanding of the Act by those who use it and apply it will assist in it becoming more effective. This requires embracing the many unique features of the Act as discussed below. It is useful to firstly look at what the legislators intended adjudication to do.

WHAT ADJUDICATION WAS INTENDED TO DO

The Second Reading speeches, in particular in relation to the Amendment Act have be referred to in a number of decisions.[9] This is exemplified in the following Second Reading speech (at page 6541):

Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act. To reinforce this determination, the bill provides that after an adjudication the respondent must pay the claimant the adjudicated amount…

…The result is that cash flow to the claimant does not occur, and the claimant has achieved little through the adjudication process. Removing the security option will overcome this situation and ensure that a reasonable interim payment, assessed by an independent party, is made within a short time frame…

…The adjudicator has only 10 business days in which to make a decision. There will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined.

In Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd [2003] NSWSC 869, it was stated by Bergin J at[39] that:

The relevant Parliamentary debate from which there might be gleaned the underlying legislative intention of the Act, referred to by Nicholas J in Parist at par [19], referred to a 'prompt interim decision on a disputed payment' as a 'benefit' provided by adjudication. It is understandable that the term 'interim' was used because the adjudication process does not affect rights to bring civil proceedings and the Act contemplates that orders for restitution of the adjudicated amount may be made (s32). The whole process is one that has to be attended to expeditiously with quite tight timeframes fixed by the Act. It may well be that a payment claim might include amounts for services or other matters that do not fall within the definition of construction work or related goods and services. But that does not mean that a payment claim that also has within it claims for construction work is invalid. The adjudicator was validly appointed and it is the adjudicator who decides what is to be paid by having regard to the matters in s22, the first of which is the provisions of the Act.

A UNIQUE CREATURE OF STATUTE—SUI GENERIS

The original legislation was influenced by a system of adjudication created in the United Kingdom.

As with the UK legislative scheme under the Housing Grants, Construction and Regeneration Act 1996, the adjudication process created by the Act in New South Wales is a sui generis system of provisional dispute resolution.[10]

The Supreme Court in NSW has been careful in its consideration of UK decisions in respect of their Housing Grants, Construction and Regeneration Act 1996. Such care relates to the significant differences in the legislation as the NSW legislation takes hold of the adjudication scheme created in England and takes it to another

level. But, on a certain basic level (such as what is adjudication), the English authorities do provide some guidance. This can be seen in considering the following passages:

Whilst care needs to be taken in seeking to apply decisions on a different legislative scheme[11] …both the Act and the UK legislation share one fundamental feature – they both provide for interim payments following adjudications.[12]

The United Kingdom authorities have accepted that adjudication was meant to produce a 'rough-and-ready answer as a stop-gap solution'.[13] The view in the United Kingdom is that parliament has specifically provided other means of redress for intra vires errors namely the unaffected rights under the construction contract and any civil proceedings arising under a construction contract (analogous to s32 in the Act in NSW). In this respect such means for redress are exhaustive.[14]

It is important to recognise that the UK system has now matured whereas the NSW law is still experiencing growing pains. To illustrate this, one decision seems to show the UK's growing acceptance of their Act and a maturity in coming to terms with its uniqueness is the decision of Diamond v PJW Enterprises Limited [2003] ScotCS 343.

That decision provides a key to understanding any legislation of this kind – it is a sui generis system of provisional dispute resolution – a peculiar creature of its own kind or class. Once this is accepted and comparisons with arbitration, statutory decision makers, inferior tribunals or courts are removed, the sense of the Act and the adjudication process it creates is better understood.

Whilst understanding the sui generis nature of adjudication scheme in the UK is of some assistance, care must be taken not to place too much importance on such English decisions now that there is an increasing line of authority following Brodyn Pty Ltd T/as Time Cost and Quality v Davenport and Transgrid v Siemens Ltd.[15] The Court of Appeal is yet to clearly state what adjudication is or is not (in respect of comparisons to a inferior court or tribunal).

NOT AN 'INFERIOR TRIBUNAL' OR STATUTORY DECISION-MAKER

The important consideration is that an adjudicator should not be considered an inferior tribunal – an adjudicator is not a 'statutory decision maker' but rather the Act confers powers on an adjudicator appointed under the Act.[16]

Reliance on cases such as Craig v The State of South Australia (1995) 184 CLR 163 'went only to an inferior court or to certain tribunals exercising governmental powers' and equating an adjudicator to such tribunals is unnecessary and misleading, especially if it is accepted that:

...[t]he critical parameter of present significance in terms of the consideration of the extent to which an adjudication determination is amenable to judicial review is the fact that the determination does not finally determine the parties rights even where following the issue of an adjudication certificate, the determination in due course becomes enforceable as a judgment for a debt. All that such a judgment achieves and amounts to is an obligation for the judgment debtor to make a particular payment to the judgment creditor. That payment is regarded as a progress payment mandated by the Act when it has been regularly engaged and when each of the steps provided for have been carried out to the letter.

So read, none of the propositions put forward by Mr Davie is conclusive as to the extent to which, if at all, judicial review of the adjudicator's determination is available. And in determining the limited extent to which the procedures under the Act are open to judicial review, it is necessary to take into account the central mischief sought to be remedied as exposed by the second reading speech. Justice McDougall has relevantly set out that reading speech in Musico (see [2003] NSWSC 977 at [20]). It makes it very plain that the legislation was aimed at permitting contractors and subcontractors to obtain a prompt interim progress payment on account, pending final determination of all disputes. Were the Court to now hold that disappointed respondents may, following an adjudication determination, invoke general review by the courts of those determinations by way of orders in the nature of prerogative writs, the way would be open for a wholesale undermining of the mischief sought to be dealt with by the Act.[17]

The adjudicator does not exercise statutory power capable of affecting the rights of the parties: Subsection 32(1) of the Act expressly preserves any and all rights of the parties. Subsection 32(2) of the Act provides that '[n]othing done under or for the purposes of this Part [i.e. Part 3] affects any civil proceedings arising under a construction contract' except that '[i]n any civil proceedings before a court or tribunal in relation to any matters arising under a construction contract, the court or tribunal' must make allowance or give restitution for monies paid to a party to the contract under or for the purposes of Part 3 of the Act.

WHAT DOES AN ADJUDICATOR DO?

Accepting the uniqueness of adjudication is accepting that it is solely a creature of statute. Within the objective of the Act, it is specified that:

The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves…the referral of any disputed claim to an adjudicator for determination, and…the payment of the progress payment so determined.[18]

Recent Court of Appeal decisions have confirmed that:

... the task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable 52].[19]

In Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor [2005] NSWSC 362 at [13], Justice McDougall made the following observation:

…the legislature has made it quite clear that it is adjudicators under the Act who are the primary organs for the resolution of these disputes.

This follows what Hodgson JA said in Brodyn when he stated:

The Act discloses 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. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss3(3), 25(4).[20]

Whilst the author disagrees with any suggestion that an adjudicator is a 'statutory decision maker'(see above) ; Basten JA comments in all other respects about adjudicators in Coordinated Construction Co. Pty. Ltd. v. Climatech (Canberra) Pty. Ltd. & Ors [2005] NSWCA 229 are well expressed:

First, for the reasons set out above, it was for the adjudicator to determine the scope and nature of the payment claim. Furthermore, if the adjudicator had been inclined to determine the claim on the basis of a contractual entitlement other than that asserted by the claimant, he would have been required to make the relevant findings of fact and law to support his conclusion. If, in accordance with Brodyn and as suggested above, those matters are entrusted to the adjudicator by the Act, it is not open to the Court to form a view on those matters and act upon the view so formed, even to demonstrate that the adjudicated amount may be upheld on a different basis. The circumstances in which a court exercising a power of judicial review can reach a conclusion different from that reached by the repository of the power will be extremely rare: see Minister for Immigration and Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559 at 579. If the decision maker[21] has found all the necessary factual elements to justify a particular conclusion but has wrongly added a further element, which was not satisfied, a court may conclude that the proper result has constructively been reached: see Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at [41]-[43].

The scheme of the Act is to vest in an adjudicator the interim entitlement to construe construction contracts at a practical level.

SO WHAT ELSE ISN'T ADJUDICATION?

Adjudication is certainly not a form of arbitration and differs to arbitration in many key respects.[22]

Some have suggested that adjudication is 'ultimately about maintaining positive cash-flow, not dispute resolution'.[23] While ensuring cash-flow is the ultimate objective it is not easy to accept an adjudicator is a mere certifier – an adjudicator does need to make an determination – albeit a determination limited to the parameters he is allowed to consider and limited to the matters he must determine pursuant to s22 of the Act. Without a need for dispute resolution, the adjudicator has no role to play.

WHAT IS THE INTERACTION BETWEEN ADJUDICATION AND THE JUDICIAL PROCESS?

The scheme of the Act is to vest in an adjudicator the interim entitlement to construe construction contracts at a practical level. Niceties of interpretation to which a court may have regard, may be misplaced in an adjudication environment'; per Gzell J in Abacus Funds Management v Davenport [2003] NSWSC 935 (20 October 2003) at [30]-[32].

The Act was not intended to create a judicial process, that is spelt out in the Second Reading speeches. Adjudication does not seek to oust the jurisdiction of the court to make final and ultimate determinations. Indeed the Act contemplates the adjudication process acting in addition to any other rights in 'any proceedings before a court or tribunal in relation to any matter arising under a construction contract' and indeed contemplates the incorporation of any amount paid under the Act or restitution orders.[24]

So what involvement do court and the judicial process have in relation to the Act and the adjudication process it creates? In Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor [2005] NSWSC 362 at [13], Justice McDougall made the following observation:

The power of this Court comes in either to enforce the determination (a power shared with other courts) or, in the limited circumstances described in Brodyn, to restrain enforcement of the determination. The whole scheme of the Act including, as Palmer J said in Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140, is one of 'pay now, argue later'. It is clear from the provisions of s32 of the Act that the time for final adjustment of rights and remedies is later.

In circumstances where the legislature has enacted the legislation to provide, as s3 of the Act makes clear, a scheme to ensure that any person who undertakes to carry out construction work or supply related goods and services is entitled to recover, and is able to recover, progress payments, I think that this Court should think long and hard before interfering in the implementation, in a particular case, of that statutory scheme.

This is a theme that seems to be apparent in an earlier judgment of McDougall J when he emphasised:

The Act provides a quick, and it must be said somewhat rough and ready, mechanism for giving effect to that purpose. The whole scheme of the Act is to provide a quick and certain means of determination. The central importance of this was reinforced by the amendments made pursuant to the Building & Construction Industry Security of

Payment Amendment Act 2002. It was emphasised by the Ministers in the Second Reading Speeches both on the Bill for the 1999 Act and on the Bill for the 2002 Act.

Those considerations suggest very strongly that the Court should be slow to interfere in, by restraining enforcement action taken under, the legislative scheme.[25]

The Second Reading Speech referred to by McDougall J includes the following passage from 22 September 1999 when the Minister stated:

The adjudicator will then proceed to make a determination only on the information provided by the claimant. Clauses 21 and 22 detail the powers and functions of the adjudicator. After receiving the initial submission from the parties, the adjudicator can call for further submissions, view the site and hold a conference. The process is not judicial, the provisions of the Commercial Arbitration Act 1984 do not apply and there is no power to call for witnesses or for evidence under oath…

…Provided that the adjudicator actually decides the dispute evidenced by these documents, there is ample judicial authority to show that the courts will not interfere with or set aside a decision of an adjudicator…

…Therefore, if the dispute is not resolved to both parties' satisfaction by the adjudication process, it will result in an independently determined amount being securely set aside until final resolution is achieved.[26]

The bill does not specifically provide for an appeal from an adjudicator's decision. The adjudicator's decision is only an interim decision until the amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process. This is the appeal. Inserting by statute yet a further adjudication appeal process between the adjudicator's interim decision and the final decision would be unnecessarily burdensome and costly for parties to construction contracts'.

Again, these views on the New South Wales Act are consistent with those expressed by the English authorities in respect of their adjudication process.[27]

HOW DOES AN ACT SEEKING TO REDUCE LITIGATION CREATE SO MUCH LITIGATION?

Unfortunately the significant increase in litigation has been a paradox created, unintentionally, by legislative scheme that specifically seeks to reduce litigation on progress payments. Being such an innovative scheme, it is likely the Act's drafters never contemplated the potential confusion that has arisen in apply in the practical world of construction. It is unlikely that the legislators ever contemplated the extent of judicial intervention that has arisen. In attempting to strengthen the Act and give it greater power to effect a prompt payment by a head contractor, it has driven head contractors to have recourse to the courts even more so they can attempt to avoid the drastic measures provided for in the Act.

INHERENT IMPERFECTIONS

Adjudication is not intended to be a perfect system. As stated by Einstein in Brodyn Pty Limited T/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors [2003] NSWSC 1019 (6 November 2003 at [14]:

What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator by section 21, and in particular by section 21(4A) denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That clawback route expressly includes the making of restitution orders.

and further:

The scheme of the Act is to vest in an adjudicator the interim entitlement to construe construction contracts at a practical level. Niceties of interpretation to which a court may have regard, may be misplaced in an adjudication environment' [30]-[32].

Einstein dismissed the plaintiff's proceedings in Brodyn and in doing so stated:

Dealing with the matter

22 The short answer to each of these submissions is that:

… for the reasons given by McDougall J the rights of the plaintiff under section 32 are not affected in terms of civil proceedings later taken to establish the rights of parties under the construction contract. In particular restitution may be ordered under section 32(3)(b). It is at that stage and in those proceedings that no doubt submissions will be taken from both parties and every parameter of the subject rights will be extremely carefully traversed. The Court will not be tramelled by the stringent time constraints to which adjudicators are subjected by the Act. In truth all that will have occurred will be that the interim regime for payment of progress claims pending final resolution of disputes under construction contracts will have operated according to the terms provided for in the Act;

There are many who are critical of the Act and the way it is said to dispense 'justice'.[28] If any criticism is valid, it is more to do with the need to enhance the integrity of the system by ensuring that adjudicators are better skilled to deal with the task they are required to perform. As in England:

The risk of injustice that are inherent in the Scheme, not least those arising from the speed of the process, demand a high standard of expertise from adjudicators and their advisors.

THE FUTURE OF ADJUDICATION

From 3 March 2003 to 31 August 2004 there were 994 Adjudication Applications in New South Wales, ranging in value from approximately $39.5 million (determined at the full amount of the claim) to as little as $255. The total value of all Applications exceeds $338 million with Adjudication Determinations for at least $224 million.

The question is where does the legislation go from here? Legislation based on the Security of Payment legislation in NSW and the system of adjudication it created has spread to most Australian states.[29]

In NZ and UK, such adjudication legislation is used for all types of contractual disputes. As it is an additional right, there would seem no impediment to expanding the current adjudication system to take account of other contractual disputes. Some would say that the Act is already doing this by default.[30]

Regardless of whether the system is expanded, or is likely that it is here to stay. As such, there is a real need for all parties to appreciate the true nature of adjudication. Once it is understood what adjudication is and in not, the system will be better able to be utilised and achieve what it was intended to achieve.

It remains to be seen whether the Court of Appeal will reconsider the question of whether an Adjudication determination is susceptible to judicial review such as a writ of certiorari pursuant to s69 of the Supreme Court Act 1970 (NSW).

Overall the adjudication process created by the Act is the adoption of a good plan, 'violently' executed now. There is no doubt that a better understanding of the system coupled with legislative review and measured judicial consideration will result, in time, an adjudication process that moves closer to perfection.[31]

REFERENCES

1. Amended as a consequence of the Building and Construction Industry Security of Payment Amendment Act 2002 (NSW). The amendments came into effect on 3 March 2003.

2. See Palmer J in Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140

3. See s3(3)

4. In Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221 it was held that a right to recover on a quantum meruit rests not on implied contract but on a claim to restitution or one based on unjust enrichment

5. s3(1)

6. McDougall J in Musico & Ors v Davenport & Ors [2003] NSWSC 977 (31 October 2003) at [51]

7. The Act specifically excludes the right to legal representation at any conference called by an adjudicator – see s21(4A)

8. In Brodyn for instance, the matter was the subject of several applications in the Supreme Court together with District and Court of Appeal proceedings taking more than a year to finalise. The subcontractor never received the prompt interim payment on account promised by the Act that was to be paid in October 2003 according to the Act.

9. See for instance Trangrid v Siemens & Anor [2004] NSWSC 87 revised 1/03/2004 at [32]-[55]; Okaroo Pty Limited v Vos Construction and Joinery Pty Limited & Anor [2005] NSWSC 45

10. Diamond v PJW Enterprises Limited [2003] ScotCS 343 at [20]

11. McDougall J in Musico v Davenport [2003] NSWSC 977 at [51]

12. Grosvenor Constructions (NSW) Pty Limited (in administration) v Musico & Ors [2004] NSWSC 344 at [18]

13. Ballast PLC v The Burrell Company (Construction Management) Limited (2001) SLT 1309 at [24]

14. See analogy to UK Adjudication Scheme in Diamond v PJW Enterprises Limited [2003] ScotCS 343 at [40]

15. And more recently The Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd & Ors [2005] NSWCA 142

16. Lord Justice Clerk at [38] and Lord MacFadyin in Diamond v PJW Enterprises Limited [2003] ScotCS 343 at [47]

17. Einstein J in Brodyn Pty Limited t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors [2003] NSWSC 1019 (6 November 2003) at [17]-[18]

18. s3(3) of the Act

19. See Hodgson JA in Coordinated Construction Co. Pty Ltd v JM Hargreaves (NSW) Pty Ltd & Ors [2005] NSWCA 228

20. Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor [2004] NSWCA 394 at paragraph 51.

21. It is the author's view that an adjudicator is not a 'statutory decision maker' - consistent with Adjudication in the Building Industry 2nd Edition Phillip Davenport 2004 at pp256-7 and the referred judgment of Lord MacFadyen in Diamond v PJW Enterprises Limited [2003] ScotCS 343 at 47 (24 December 2003)

22. See original bill as referred to in the Second Reading Speech and in particular reference to the Commercial Arbitration Act 1984 and Schedule 1 of the Act (since repealed).

23. See NSW and ACT Chapters NECA News – June 2005 at p8

24. s34 and in particular subs3

25. Austrac v ACA; ACA v Sarlos & Anor [2004] NSWSC 131 at [102] – [104]

26. The subsequent amendment to the Act removed the required to set aside the adjudicated amount and sought to provide better means of immediate payment to the subcontractor of the amount determined.

27. See McDougall J in Musico & Ors v Davenport & Ors [2003] NSWSC 977 (31 October 2003) when he considered as stated by McDougall J when he considered earlier English and Scottish authorities and concluded that those decisions in general 'confirm that judicial review is in principle available. Secondly (and this is particularly relevant to the second issue), they suggest that the courts should not be quick to intervene' [41]

28. Particularly that the Act provides 'rough justice' see Brodyn Pty Ltd v Dasein Constructions Pty Ltd [2004] NSWSC 1230 at paragraph 13 where it is stated: 'The adjudicator is not a professional lawyer and it is now recognised that any such adjudication may well provide some rough justice, if it provides any justice'.

29. Currently Victoria, Western Australia, Queensland and Northern Territory.

30. Some consideration would be required to review the tight time-frames in this case as in the standard requirement of 28 days for adjudications determinations in UK.

31. Again in the words of General George S Patton ' A good plan, violently executed now, is better than a perfect plan next week'.