

AUSTRALIAN SECURITY OF PAYMENT LEGISLATION: IMPACT OF INCONSISTENT CASE LAW

S. Skaik¹, J. Coggins², A. Mills³

¹Lecturer and PhD Researcher, School of Architecture and Built Environment, Deakin University

²Programme Director and Senior Lecturer, School of Nature & Built Environments, University of South Australia

³Head of School, School of Architecture and Built Environment, Deakin University

skaik@deakin.edu.au

Abstract

In Australia, a supreme court has a supervisory role over the statutory adjudication process that has been established within the security of payment legislation. In this role, the courts have quashed many adjudication determinations on the grounds of jurisdictional error in recent years. This is a problem as the courts' involvement in statutory adjudication is contrary to the object of the legislation. When reviewing adjudication determinations, the courts have adopted different approaches with respect to determining the role of adjudicators and the essential jurisdictional facts that must exist in order for an adjudicator to have jurisdiction to hear a referred disputed matter. This diversification of judicial interpretation with respect to jurisdictional error is confusing, not only to construction professionals, but also to many lawyers. Via a desktop study— where the evidence is mainly garnered from case law, governmental reports and commentaries – this paper reviews the legal complexities involved in diagnosing jurisdictional errors. In doing so, the paper aims to answer the question as to why the adjudication process has become bogged down in the quagmire of judicial review. The paper concludes that the evolving inconsistency of case law in relation to statutory adjudication is a crucial factor contributing to the erosion of the object of the security of payment legislation in Australia. Moving forward, the paper argues that establishing a legislative review mechanism of jurisdictional challenges may be sufficient to address this problem.

Keywords: judicial review, jurisdictional error, review mechanism, statutory adjudication, security of payment

1. INTRODUCTION

Statutory construction adjudication is a fast-track payment dispute resolution process that has been established within the Security of Payment (the SOP) legislation to keep the cash flowing down the hierarchical contractual chain on construction projects. Its rapid, highly regulatory and temporarily binding nature have led to it being often described as a 'quick and dirty' process (Wallace, 2013, P68:71) that delivers 'rough and ready' justice (See *Watpac Construction (NSW) Pty Limited v Austin Corp Pty Limited* [2010] NSWSC 168 at [127] per McDougall J). As such, adjudicators are always susceptible to make errors of law or fact. The supreme courts have a supervisory role over the statutory adjudication process. In this role, the courts have quashed many adjudication determinations on the grounds of jurisdictional error in recent years. This is a problem as the courts' involvement in statutory adjudication is contrary to the object of the SOP legislation. When reviewing adjudication determinations, the courts have adopted different approaches with respect to determining the essential jurisdictional facts that must exist in order for an adjudicator to have jurisdiction to hear a referred disputed matter. This diversification of judicial interpretation with respect to jurisdictional error is confusing, not only to construction professionals, but also many lawyers.

It is suggested that the court's inconsistent approach could be a result of lacunae within the SOP legislation. The drafters of the legislation may have not anticipated the risk of the court's involvement by way of judicial review where the court has no limitations in exercising its supervisory role. There is nothing in the legislation nor in case law that exhaustively defines jurisdictional facts that must exist in order for an adjudicator to have jurisdiction. This leaves the door always ajar for aggrieved parties to an adjudication determination to apply for judicial review on the basis that an adjudicator's error is jurisdictional in nature.

This paper initially reviews the real object of the legislation. The nature of errors in adjudication are then discussed, thereby revealing the legal complexities involved in diagnosing jurisdictional errors. In doing so, the paper aims to answer the question as to why the adjudication process has become bogged down in the quagmire of judicial review.

2. THE OBJECT OF SECURITY OF PAYMENT LEGISLATION

Understanding of the object of the SOP legislation will help justify the quick, rough and ready justice inherent in the adjudication process. Generally speaking, all Australian States have a consistent and express object of facilitating cash flow down the hierarchy of construction contractual chain through establishing a rapid and cost effective alternative scheme of resolving payment disputes compared to traditional

lengthy and expensive avenues such as litigation and arbitration¹. As such, any delay in releasing the due payment following an adjudication decision by challenging it in court will hinder the legislation attaining its object. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [46]-[47], the Victorian Supreme Court mentioned the deficiency of the NSW legislation in achieving its object due to the vast amount of judicial review in a very short period of time, and stated: “*If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.*”

In Western Australia and the Northern Territory, the SOP legislation has an additional express object of determining the dispute fairly and as rapidly, informally and inexpensively as possible². In *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTCA 1 at [48], the court criticised the use of the some ill-defined notion of ‘fairness’ in the legislation because the court may be led into reassessing the merits of the decision in a manner which fails to draw a firm distinction between procedural and substantive unfairness. The design and purpose of the rapid adjudication process was well explained as “*a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.*”³

There is no reason to believe that the WA legislative intention of ensuring an expeditious, inexpensive, informal and fair adjudication process should be different from its counterparts in the Eastern States. In *Brodyn*⁴, his Honour Hodgson JA at [31] explained the requirement of adjudicators to act fairly and noted at [51] that the intention of the SOP legislation is to resolve payment disputes with minimum of delay as well as minimum of opportunity for court involvement.

In Queensland, it was held that the Act “*emphasises speed and informality*”.⁵ Also, the requirements of natural justice under the SOP legislation were well discussed in *J Hutchinson Pty Ltd v Cada Formwork Pty Ltd* [2014] QSC 63 which held at [50] that: “*There is nothing in the BCIP Act which would exclude the requirements of natural justice*”. In Victoria, Vickery J considered procedural fairness and noted that:

¹ See *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture* [2009] VSC 426 at [33].

² See *Construction Contracts Act 2004* (WA) section 30; *Construction Contracts (Security of Payments) Act 2004* [NT] section 26.

³ See the Minister's Second Reading Speech (WA Hansard, 3 March 2004, 275).

⁴ *Brodyn Pty. Ltd. t/as Time Cost and Quality v Davenport* [2004] NSWCA 394.

⁵ *Minimax Fire Fighting Systems Pty Ltd v. Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [20].

*The procedures will call for adaptation in each case in the light of the clear legislative intention of the Act, namely that an adjudicator's determinations are to be carried out informally: s 22(5A); and speedily: s 22(4); and 'on the papers': ss 23 and 28I; and bearing in mind that there is always the facility for erroneous determinations to be corrected upon a final hearing of the issues in dispute between the parties: s 47(3). The legislative intention, in my opinion, points strongly to the position that, in approaching his or her task, an adjudicator's determination will only be brought into question if there has been a substantial denial of the measure of procedural fairness required under the Act.*⁶

3. JURISDICTIONAL ERRORS IN STATUTORY ADJUDICATION

Errors made by adjudicators, that may possibly give rise to legal challenge, can essentially be categorised into two types: jurisdictional errors and errors of law on the face of the record. There are two types of jurisdictional errors in adjudication. The first type relates to the existence of essential jurisdictional facts upon which the validity of the adjudicator's appointment is founded, including the existence of a construction contract and duly made payment claim. Any error by an adjudicator in finding such facts will automatically invalidate the adjudication process and any emerging determinations from that process. The second type relates to the adjudication making process where the adjudicator may exceed his or her jurisdiction by, for instance, failing to give both parties enough opportunity to respond to any issues or relying on evidence not advanced by either party. Although errors of fact may be jurisdictional in nature, most errors of fact made by adjudicators are regarded by the courts as being non-jurisdictional for the simple reason that a high level of precision cannot be expected from such a rough and ready process. As stated by Vickery J:

*"An adjudicator charged with the making of an adjudication determination under the Act is entitled to make an error of fact and not have that decision reviewed judicially. This is sometimes described as the power to make a wrong decision".*⁷

Having said this, it needs to be recognised that certain errors of fact may give rise to jurisdictional errors by dint of the existence of the fact being necessary to enliven an adjudicator's authority to make a determination under the SOP legislation. As stated by the Supreme Court of WA, *"ordinarily, an error of fact does not give rise to a jurisdictional error and thus is outside the scope of the court's review power. Not so when a fact is jurisdictional. The court must be satisfied that a jurisdictional fact actually (objectively) exists"*.⁸

⁶ *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 at [143]-[144].

⁷ See *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 at [9].

⁸ See *Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd* [2011] WASCA 217 at [11].

The law concerning the difference between jurisdictional errors and errors of law on the face of the record is notoriously confusing. As Vickery J states in the recent decision of *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd*,⁹ “the difficulty in drawing a bright line between jurisdictional error and error on the face of the record is well recognised”.¹⁰ Vickery J considered the question of what may amount to an absence of a jurisdictional fact by referring to *Chase Oyster Bar v Hamo Industries*,¹¹ where McDougall J observed that a ‘jurisdictional fact’ had previously been described by the courts as “a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question”.¹² Vickery J noted:

*If the exercise of power is challenged on the basis that the jurisdictional fact does not exist, the court must itself inquire into the existence of that fact. It may grant relief against the exercise of jurisdiction if it finds that the jurisdictional fact did not exist. If on the other hand the legislature confers on the decision-maker the power to authoritatively determine the existence of a jurisdictional fact, the court may inquire into the decision-maker’s decision that the jurisdictional fact exists, but it will not itself inquire into the existence of that jurisdictional fact.*¹³

The former approach (i.e. whether the jurisdictional fact actually existed) has been termed a ‘narrow’ judicial approach, whereas the latter approach (i.e. whether it was reasonable for the adjudicator to believe that the jurisdictional fact existed) has been termed a ‘broad’ judicial approach (Society of Construction Law Australia, 2014, p248). The courts in NSW and Victoria have considered that the “proper approach to construction, where some fact is specified as a pre-condition to the exercise of jurisdiction by a court, is to regard it as a matter for that court to decide whether or not the fact exists, unless the statute clearly precludes that approach”.¹⁴

An error of law on the face of the record is generally held to be understood as an error contained within the pleadings and certified order made at the conclusion of the matter.¹⁵ In the context of adjudication, this equates to the adjudication application, adjudication response, perhaps any further written submissions and comment thereto requested or permitted by the adjudicator and the determination itself.¹⁶ It is

⁹ [2015] VSC 233.

¹⁰ *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 at [74].

¹¹ (2010) 78 NSWLR 393 at [164] to [172].

¹² *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 at [83].

¹³ *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 at [86].

¹⁴ *Chase Oyster Bar v Hamo Industries* (2010) 78 NSWLR 393 per McDougall J at [172]; *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor* [2013] VSC 535.

¹⁵ *Kirk v Industrial Court (NSW)* [2010] 239 CLR 531 at [82]; *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 at [91] to [93].

¹⁶ *Musico v Davenport* [2003] NSWSC 977 at [66].

possible for an error of law on the face of the record to be jurisdictional or non-jurisdictional in nature depending on whether or not it leads to an erroneous decision. Under administrative law, it is possible for the courts to make an order in the nature of the prerogative writ of certiorari in order to quash the impugned decision for either jurisdictional error or error of law on the face of the record,¹⁷ which are considered separate and distinct bases for the making of such an order.¹⁸ With respect to statutory adjudication, the courts have from the beginning to the present day taken a consistent approach in ruling that non-jurisdictional errors of law on the face of the record are not sufficient to warrant judicial review.¹⁹ In other words, any errors of law made by an adjudicator acting within jurisdiction will not be amenable to judicial review. However, the court's approach to judicial review for jurisdictional error has not been so consistent.

4. THE EVOLVING INCONSISTENCY OF CASE LAW

In the first case to consider whether judicial review was available to challenge an adjudicator's determination – *Musico v Davenport* [2003] NSWSC 977 – the NSW Supreme Court applied the same scope of judicial review to adjudicators as that previously applied by the High Court of Australia to administrative tribunals. As such, it was held that where an adjudicator falls into an error of law that causes him or her to make an erroneous finding or to reach a mistaken conclusion, jurisdictional error could occur. As McDougall J stated at [46]: “*In some cases, an error of law may lead to jurisdictional error, although the distinction between jurisdictional and non-jurisdictional errors of law is easier to state than to apply*”. As such, in *Musico*, the Court held that patent errors of law made by the adjudicator, that led to him failing to value the payment claim in accordance with the relevant provisions of the contract as required by the SOP legislation did amount to jurisdictional error. *Musico* was subsequently followed in several decisions.²⁰

¹⁷ It has been held that whilst State Parliaments cannot legislate to take away from State Supreme Courts their power to grant relief for jurisdictional error, State Parliaments can deny State Supreme Courts relief for non-jurisdictional error appearing on the face of the record. This is due to the federal constitutional roots of judicial review for jurisdictional error. See *Kirk v Industrial Court (NSW)* [2010] 239 CLR 531 at [99] to [100]; *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 at [94](f).

¹⁸ *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 at [72].

¹⁹ *Musico v Davenport* [2003] NSWSC 977 at [54] (McDougall J); *Brodyn v Davenport* [2005] NSWCA 394 at [51] (Hodgson JA). In *Musico* at [54], McDougall J referred to section 25(4) of the NSW Act as evidence of Parliament's intent that review on the basis of non-jurisdictional error was not to be permitted. Section 25(4) prohibits a respondent from challenging an adjudicator's determination in any proceedings initiated by the respondent to set aside an adjudicator's determination which has been filed by the claimant as a judgment for a debt in court.

²⁰ See, eg, *Abacus Funds Management v Davenport* [2003] NSWSC 1027; *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140; *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116.

The tide turned, however, in the NSW Court of Appeal's 2004 decision in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394, in which the NSW Court of Appeal found that relief in the nature of the prerogative writ of certiorari was not available for adjudicators' determinations. Hodgson JA found at [54]-[55] that, given the legislative intent, the jurisdictional error approach "*has tended to cast the net too widely*", and that exact compliance with the more detailed requirements of the Act was not essential to the existence of a determination. Hodgson JA instead preferred the approach that an adjudicator's determination would be considered valid unless it had failed to meet one of the essential pre-conditions for the existence of an adjudicator's determination under the Act; a bona fide attempt by the adjudicator and no substantial denial of the measure of natural justice, in which case the determination would be void, and, therefore, relief would be available by way of declaration or injunction, without the need to quash the determination by way of an order in the nature of certiorari. Thus, in *Brodyn*, the Court held that relief was not available where an adjudicator had erroneously determined a payment claim (one of several made after contract termination) that should have been found invalid in accordance with the contractual provisions which permitted only one payment claim to be made after termination. This approach significantly curtailed the scope for an adjudicator's determination to be set aside.

Brodyn held as a good law for a period of around five years until the judicial approach once again changed tack, almost turning full circle, by the authority of *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, to a position where jurisdictional error with relief in the form of the prerogative writ of certiorari was re-established in NSW as the basis for judicial review. The catalyst for this reinstatement of jurisdictional error was the High Court's finding in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (*Kirk*). In that case, it was held at [100] that: "*Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power*".

In *Chase Oyster Bar v Hamo Industries*, the NSW Court of Appeal considered whether an adjudicator had power to determine an adjudication application not made in compliance with s 17(2)(a) of the SOP Act. In that case, Spigelman CJ observed at [5] that "*the process of adjudication... is a public, relevantly a statutory, dispute resolution process, and as a consequence is subject to the supervisory jurisdiction*". McDougall emphasised at [149] that: "*The decision in Brodyn appears to assume that there is a distinction between a basic and essential requirement for the existence of an adjudicator's determination and a jurisdictional condition, or jurisdictional fact*." His Honour went on to conclude that: "*the requirement of s 17(2)(a) are jurisdictional, in the sense that the giving of notice within the requisite period is a condition that must be satisfied for a valid application to be made pursuant to s 17(1)*". As such, it was held that an incorrect finding by the adjudicator

that an adjudication application had been given within the time limit prescribed by section 17(2)(a) of the *NSW Act* was vitiated with jurisdictional error. Post *Chase*, the courts, broadly speaking, have shown little appetite to broaden the opportunities to challenge adjudication determinations too far beyond *Brodyn* and *Chase*.²¹ In contrast to *Musico*, for example, the Court held in *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 that an adjudicator who had fallen into error by failing to correctly apply the relevant contractual provisions in order to calculate the amount of a progress payment had not fallen into jurisdictional error.

In 2015, the NSW Supreme Court of Appeal in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 (*Lewence*), overturned the trial judge's finding that the adjudicator's determination of a reference date was a finding of jurisdictional fact. The Court held that the question of whether a 'reference date' has occurred, which gives rise to an entitlement to a progress payment under the SOP Act, is not a matter that the court can quash an adjudication determination over if the adjudicator gets it wrong.²² This means that the existence of a reference date is not an essential pre-condition for having a valid payment claim, thus it is not considered as a jurisdictional fact. This decision not only overrules many previous authorities in the NSW,²³ but also completely inconsistent with the position of the Queensland courts²⁴. Two months after the decision in *Lewence*, the Victorian Supreme Court of Appeal in *Saville v Hallmarc Constructions Pty Ltd* [2015] VSCA 318 handed down its decision which was completely in contrary to *Lewence* authority. In that case, the court upheld the decision of the trial judge (Vickery J) who held that the reference date fixed by the adjudicator under the Act was wrong and that as a consequence the adjudicator ought not to have assumed jurisdiction and the adjudication determination is of no legal effect.

In Western Australia (WA), the Supreme Court has been consistent in adopting a broad approach when dealing with jurisdictional facts under s 31(2)(a), considering the adjudicator's role to be analogous to an inferior court.²⁵ However, in the recent judgment of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, Mitchell J, expressed his reservations about the broad sense approach which an adjudicator is empowered to authoritatively determine. The

²¹ See, eg, *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123 (Sackar J) where the court held that the adjudicator committed jurisdictional error for, inter alia, failure to consider compliance with s 13(4).

²² [2015] NSWCA 288 per Ward JA at [60], [93]; Emmett JA at [119]; Sackville AJA at [133].

²³ See, eg, *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413; *Omega House Pty Ltd v Khouzame* [2014] NSWSC 1837.

²⁴ See *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd* [2014] QSC 293.

²⁵ See, eg, *Wqube Port of Dampier v Philip Loots of Kahlia Nominees Ltd* [2014] WASC 331 at [78]; *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304 at [83].

judicial reviews in WA have often been contained to a consideration of an adjudicator's decision to dismiss or not to dismiss an adjudication application under sections 31(2) and 46 of *the Construction Contracts Act 2004* (WA). The proposition that the adjudicator in WA has an authority to decide questions of law authoritatively and wrongly²⁶ held as a good law until the Supreme Court handed its decision in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237. In that case, the scope for challenging adjudicator's determinations was broadened as the Court held that that the adjudicator committed a jurisdictional error when determining a payment dispute other than by reference to the terms of the construction contract which are before him.

5. THE CONSEQUENCES OF INCONSISTENT CASE LAW

As demonstrated above, the Supreme Court judges including those within the same jurisdiction have been inconsistent in their approaches to defining jurisdictional facts upon which the jurisdiction of adjudicator can be determined. As a result, the examination of the dynamic case law generated in connection with adjudication indicates that deciding upon jurisdiction becomes a more challenging task for adjudicators. Drawing a line to identify the boundaries of jurisdictional facts is not without difficulty. Indeed, the existing case law so far suggests that many adjudicators (whether legally trained or not) continue to make mistakes in deciding upon jurisdictional matters. To ensure that adjudicators maintain an up-to-date knowledge of the evolving case law may be an unattainable goal unless a strict and well-regulated continuous professional development (CPD) requirement is mandated.

It is submitted that even smart and well experienced lawyers advising parties on adjudication matters have become more uncertain nowadays than any time before regarding the likely approach that the court may take in dealing with any untested area of the SOP legislation. This unpredictability means that claimants relying upon a favourable adjudication determination may do so at their peril. A claimant who, for example, exercises their statutory rights to suspend works subsequent to the non-payment of an adjudication decision by a respondent, or a claimant who has to defend the soundness of an adjudication determination in their favour which has been challenged by way of lengthy judicial review, may end up in a serious trap potentially endangering the financial survival of their business.

This situation has indeed deterred many parties from using the statutory adjudication platform, instead preferring other traditional avenues although they be more expensive and lengthy. This is because the uncertainty and lack of finality of adjudication determinations, especially for large payment claims, has made the adjudication process and

²⁶ See *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [102].

subsequent enforcement proceedings more akin to curial proceedings in terms of time and cost concerns. Accordingly, the SOP legislation becomes not only more inaccessible to many vulnerable firms, but also more inconvenient as engaging legal counsel, in order to advise on complex issues and ensure the chances for success, becomes a necessity.

6. CONCLUSION AND FURTHER RESEARCH

This paper has examined the evolving tension between the object of the SOP legislation and the supervisory role of supreme courts. In doing so, the legal complexities and judicial inconsistencies in dealing with jurisdictional errors have been discussed. The paper concludes that the inconsistency of case law has increased the parties' uncertainty about the finality of adjudication determinations – this, it is proposed, is a key significant factor contributing to the erosion of the object of the SOP legislation in Australia.

Moving forward, reform is needed to address this serious problem. An example of one approach that could be taken to tackle the problem is to amend the SOP legislation such that essential jurisdictional facts that must exist in order for an adjudicator to assume jurisdiction are exhaustively listed with finer procedural matters being left for adjudicators to decide upon. Alternatively, another suggestion is that jurisdictional challenges be separated from the merits of the dispute, so adjudicators can only deal with the real dispute as many adjudicators lack the legal training and knowledge to adequately deal with complex jurisdictional matters. As such, any jurisdictional challenges should be dealt with in parallel by establishing a legislative review mechanism via a quick, informal and cost effective process by competent tribunal who has the jurisdiction to consider questions of law. Such an arrangement it is proposed would not only ensure a better certainty in adjudication outcome, but also discourage the parties from turning to the judicial system. As stated in *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172 at [64]:

*Availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review. Circumstances where parties have been granted and hold alternative review options bear upon the availability of prerogative relief as a matter of discretion.*²⁷

The lead author is currently examining the need and features of such review mechanism via an empirical research as part of his PhD study.

²⁷ See Also, the High Court's decision in *The Queen v Cook; Ex parte Twigg* [1980] HCA 36 [29], [30] and [34]; *Re Baker; Ex parte Johnston* (1981) 55 ALJR 191 and *Martin CJ in Re Carey; Ex parte Exclude Holdings Pty Ltd* [2006] WASC 219 at [128] - [140].

REFERENCES

Society of Construction Law Australia (2014), "Report on Security of Payment and Adjudication in the Australian Construction Industry", Australian Legislative Reform Subcommittee, Feb 2014.

Wallace, A (2013), Discussion Paper – Payment dispute resolution in the Queensland building and construction industry-Final Report.