

Natural Justice and the Building and Construction Industry Security for Payments Act 1999 (NSW)

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Introduction

1. The objects of the *Building and Construction Industry Security for Payments Act 1999* (NSW) (*The Act*) are, broadly, twofold:
 - (i) to give an enforceable right to progress payments; and
 - (ii) to provide a swift but interim procedure for the resolution of disputes as to progress payments.
2. In most cases, the statutory entitlement to progress payments¹ will be sufficient to finalise matters. However, where disputes arise, the process of adjudication is available. Adjudication is intended to determine quickly the amount of a progress payment, on an interim basis. The intention is that payments will be made without further delay, and construction may continue. For this reason, the Act is often referred to as a ‘pay now, argue later’² scheme, intended to effect prompt payment, even where the right to payment may later be litigated or subject to another dispute resolution process.³

* Judge, Supreme Court of New South Wales. I acknowledge, with thanks, the contributions of my tipstaff for 2014, Miss Ashley Cameron BEcon LLB (Hons) to the preparation of this paper. The views expressed in this paper are my own, and not necessarily those of my colleagues or the Court.

¹ *Building and Construction Industry Security of Payments Act 1999* (NSW) ss 8, 14.

² *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [96], *John Holland Pty Ltd v Roads and Traffic Authority* [2007] NSWCA 140, [44].

³ *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83, [51].

3. It is now well established that the principles of natural justice will apply to adjudication determinations.⁴ The cardinal rules of natural justice involve primarily, the rule against bias and the right to be heard.⁵ The rule against bias, or the rule of impartiality, provides that parties should have their case determined by an unbiased decision maker.⁶ The hearing rule, on the other hand, requires that each of the parties be given a 'reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it'.⁷ Both of these rules apply to determinations made under the Act.
4. However, the cases also recognise that the requirements of natural justice must be fitted within the statutory scheme.⁸ In particular, the right to be heard is confined by the time restraints on adjudication determinations and the restrictions on what matters may be considered in reaching a determination. The common law rules of natural justice have therefore, to some extent, been circumscribed by the provisions of the Act and moulded to fit within the aims of the Statute.
5. An adjudication determination made contrary to the principles of natural justice is void. The affected party may apply to the Supreme Court to quash the determination. The grant of such relief may be seen to undermine the purpose of the legislation to ensure prompt payment for goods and services. Accordingly, adjudicators must be aware of and must comply with, their obligations under the Act and the principles of natural justice to ensure that their determinations are valid.

⁴ See, eg, *Musico v Davenport* [2003] NSWSC 977; *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, [57].

⁵ *Kioa v West* (1985) 159 CLR 550.

⁶ See, eg, *Hitachi Ltd v O'Donnell Griffin Pty Ltd* [2008] QSC 135.

⁷ *Musico v Davenport* [2003] NSWSC 977, [108].

⁸ *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879, [69]; *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168; *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172, [143].

The Relevant Provisions

6. I set out first the relevant provisions of the Act. Section 8 of the Act provides the entitlement to progress payments:

8 Rights to progress payments

- (1) On and from each reference date under a construction contract, a person:
 - (a) who has undertaken to carry out construction work under the contract, or
 - (b) who has undertaken to supply related goods and services under the contract is entitled to a progress payment.
- (2) In this section, reference date, in relation to a construction contract, means:
 - (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
 - (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

7. The amount of the progress payment is either calculated in accordance with the terms of the contract, or by way of a valuation determined by reference to the contract:

9 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

- (a) the amount calculated in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

10 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:

- (a) in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, having regard to:
 - (i) the contract price for the work, and
 - (ii) any other rates or prices set out in the contract, and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:

- (a) in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, having regard to:

- (i) the contract price for the goods and services, and
- (ii) any other rates or prices set out in the contract, and
- (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
- (iv) if any of the goods are defective, the estimated cost of rectifying the defect,

and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

8. Part 3 of the Act outlines the procedure for recovering progress payments. Of particular importance, s 14 creates the statutory entitlement to the payment of progress claims:

14 Payment schedules

- (1) A person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:
 - (a) must identify the payment claim to which it relates, and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount").
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If:

- (a) a claimant serves a payment claim on a respondent,
and
- (b) the respondent does not provide a payment schedule
to the claimant:
 - (i) within the time required by the relevant
construction contract, or
 - (ii) within 10 business days after the payment claim
is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

9. If the respondent disputes all or part of the payment claim made by a claimant, the claimant may refer the dispute to adjudication. That procedure is governed by Part 3, Division 2 of the Act. First, the respondent must provide a 'payment schedule' to the claimant indicating why it proposes to withhold payment. A claimant may either accept the amount offered, or make an adjudication application to an authorised nominating authority (ANA). The ANA will then appoint an adjudicator to determine the amount to be paid and the date on which it is to be paid.
10. Where the applicant seeks adjudication of the dispute, the respondent may lodge an 'adjudication response'. This response must be restricted to the issues raised by the respondent in its payment schedule. The relevant section is s 20(2B) of the Act:

The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant

11. In reaching a determination, the adjudicator must have regard to the requirements set out in s 22 of the Act:

22 Adjudicator's determination

- (1) An adjudicator is to determine:
 - (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the "adjudicated amount"), and
 - (b) the date on which any such amount became or becomes payable, and
 - (c) the rate of interest payable on any such amount.
- (2) In determining an adjudication application, the adjudicator is to consider the following matters only:
 - (a) the provisions of this Act,
 - (b) the provisions of the construction contract from which the application arose,
 - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
 - (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's determination must:
 - (a) be in writing, and
 - (b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).
- (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:
 - (a) the value of any construction work carried out under a construction contract, or
 - (b) the value of any related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of

that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

- (5) If the adjudicator's determination contains:
- (a) a clerical mistake, or
 - (b) an error arising from an accidental slip or omission, or
 - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or
 - (d) a defect of form,
- the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

12. Also relevant to the adjudicator's determination is s 21 of the Act, which outlines the 'adjudication procedures', including the power to seek further written submissions:

21 Adjudication Procedures

- (1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.
- (2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.
- (3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:
 - (a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or
 - (b) within such further time as the claimant and the respondent may agree.

- (4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
 - (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and
 - (b) may set deadlines for further submissions and comments by the parties, and
 - (c) may call a conference of the parties, and
 - (d) may carry out an inspection of any matter to which the claim relates.
- (4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.
- (5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

13. The above provisions summarise the legislation relating to adjudication determinations. The extracts are not intended to be exhaustive, however they highlight the areas which are of significance to the principles of natural justice under the Act.

The cardinal principles of natural justice

14. Natural justice has been described as a 'common law duty to act fairly'.⁹ It requires the decision maker to afford parties a minimum level of fairness in the decision-making process. The principle is analogous with the concept of 'procedural fairness', the difference between the two concepts being one of label rather than substance.¹⁰

⁹ *Kioa v West* (1985) 159 CLR 550, 584.

¹⁰ *Kioa v West* (1985) 159 CLR 550, 584-585.

15. Natural justice requires decision makers to adopt procedures that are fair to both parties in coming to a determination. The principles were explained by the High Court in *Kioa v West* (1985) 159 CLR 550. There, Mason J stated, at page 585, that:

the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.

16. In *Musico v Davenport* [2003] NSWSC 977 ('*Musico*'), I held that natural justice applied to adjudication determinations. Despite the legislature's intention to limit challenges to determinations,¹¹ an adjudicator's determination is nevertheless subject to judicial review where the rules of natural justice have been breached.¹² As I explained at [34]:

Statutes that seek to limit or exclude the right of judicial review of administrative decisions are to be construed by reference to a presumption that the legislature does not intend to deprive citizens of their right of access to the courts, other than to the extent expressly stated or necessarily implied.

17. The principles of natural justice are commonly divided into two main rules, namely, the hearing rule and the rule against bias. The hearing rule refers to the entitlement of a party to know the case against them and to have an opportunity of responding to it. In *Kioa v West* (1985) 159 CLR 550, at 582, Mason J stated:

Generally speaking, ... [a party] is entitled to know the case sought to be made against him and be given an opportunity of replying to it.

¹¹ See, eg, *Building and Construction Industry Security of Payments Act 1999* (NSW) ss 25(4), 30.

¹² See, also, *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, [57] and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190, [220].

18. McHugh J stated the entitlement in *Muin v Refugee Review Tribunal* (2002) 76 ADJR 966 at 989, at [123], (to which I referred in my judgment in *Musico*):

Natural justice requires that a person whose interests are likely to be affected by an exercise of power to be given an opportunity to deal with matters adverse to his or her interests that the repository of the power proposes to take into account in exercising the power.

19. Thus, the hearing rule consists of two main components. The first is that the person be made aware of the case which is made against him. The second is that the person be given an opportunity of replying to that case.

20. The other important aspect of natural justice is the rule against bias, that is, that 'justice should both be done and be seen to be done'.¹³ This rule requires that the decision maker is not actually biased in reaching their determination, and also that there is no basis for a reasonable perception of bias on the part of an outside observer.

21. Judicial review is more commonly sought on the ground of perceived bias, rather than actual bias. The test of perceived bias was outlined by the High Court in *Johnson v Johnson* (2000) 201 CLR 488 at [11] to be:

whether a fair-minded lay observer might reasonably apprehend that the [decision maker] might not bring an impartial and unprejudiced mind to the resolution of the question the [decision maker] is required to decide.¹⁴

¹³ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6].

¹⁴ Affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; applied in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427.

Natural justice and the s 21(4) discretion

22. The hearing rule is frequently invoked when an adjudicator decides not to seek further submissions. Section 21(4) of the Act, which I have set out in full above, grants adjudicators the power to seek further written submissions from the parties, call a conference of the parties or to carry out an inspection. In other words, the adjudicator may give parties a further opportunity to be heard.
23. It is clear from the language of s 21(4) that it creates a discretion, but does not impose an obligation, to proceed in one of the ways described. This is evident from the fact that each of the subsections granting powers to the adjudicator to seek further information is prefaced by the term 'may', creating an express discretionary power.¹⁵
24. As the power is discretionary, it will be up to the adjudicator, having regard to the circumstances of each adjudication application, whether to exercise the discretion. This principle was explained by Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [88]:
- Exercise of that discretion one way or another will depend upon the adjudicator's judgment as to whether or not he or she will be assisted in reaching a decision within the constraints, particularly the time constraints, imposed by the Act.
25. It follows from this, that an adjudicator who elects not to exercise their powers in accordance with s 21(4), to seek further information, will not necessarily be failing to act in good faith.¹⁶
26. The Queensland Supreme Court in *Abel Point Marina (Whitsundays) Pty Ltd v Uher* [2006] QSC 295 examined the discretion afforded under

¹⁵ *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [87]-[88]; *David Hurst Constructions Pty Ltd v Durham* [2008] NSWSC 318.

¹⁶ *David Hurst Constructions Pty Ltd v Durham* [2008] NSWSC 318, [62].

the equivalent Queensland legislation. In that case, the adjudicator needed to decide the date of practical completion in order to determine whether the principal, the plaintiff, was entitled to a set-off for liquidated damages. The date of practical completion was not evident from the written submissions of the parties. As a result, the adjudicator found against the principal in relation to the setting off of liquidated damages as he did not have sufficient information to determine the date of practical completion.

27. The principal argued that the adjudicator should have sought further submissions from the parties to determine the date of practical completion and therefore the entitlement to a set off. Wilson J held that the adjudicator 'was not obliged to seek further submissions', and was only obliged to 'make a decision on the material before him', even though it was clear that insufficient information had been provided.¹⁷
28. I reached a similar conclusion in the case of *David Hurst Constructions Pty Ltd v Durham* [2008] NSWSC 318. There, the claimant argued that once the adjudicator was unable to determine an issue that she had been asked to consider, it became incumbent upon her to seek further submissions from the parties in relation to that point.
29. In my opinion, as I said in that decision, the argument sought to transform a discretionary power into a mandatory obligation. Further, it would be contrary to s 21(5) of the Act, which allows a determination to be made by the adjudicator even though the parties may have failed to make submissions or comments, or to comply with the call for a conference.
30. I concluded in that case that the adjudicator was not in fact unable to decide the issues before her. I therefore was not required to determine whether the adjudicator would be obliged to seek further submissions.

¹⁷ *Abel Point Marina (Whitsundays) Pty Ltd v Uher* [2006] QSC 295, [20].

However, I doubt the existence of such an obligation. As I stated at [62]:

... it seems to me to be a very long bow to draw, to suggest that an adjudicator who might have exercised, but did not exercise, the s 21(4) powers thereby fails to act in good faith.

31. Accordingly, giving effect to the purposes of the legislation,¹⁸ it is a matter for the adjudicator to decide whether and to what extent the powers afforded by s 21(4) are to be exercised in any particular case.

32. As this decision is discretionary, judicial review is limited. Discretionary decisions may only be reviewed on the basis of ultra vires or a breach of the rules of natural justice. The limited grounds on which a decision may have been made ultra vires, or outside the powers of the decision maker, are where the decision maker took into account irrelevant considerations,¹⁹ ignored relevant considerations,²⁰ made the decision for an improper purpose,²¹ or where the decision was so unreasonable that no reasonable decision maker could have reached it.²² A discretionary decision will also be ultra vires where the decision maker refused to exercise their discretion by inflexibly applying a policy²³ or acting under dictation²⁴. Also, as I have explained earlier, discretionary decisions may be reviewed on the basis that there has been a breach of the rules of natural justice.

¹⁸ *Interpretation Act 1987* (NSW) s 33.

¹⁹ For an explanation of the principles, see, *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 39-43.

²⁰ For an explanation of the principles, see, *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 39-43.

²¹ *Thompson v The Council of the Municipality of Randwick* (1953) 90 CLR 449.

²² *Wednesbury Corporation v Ministry of Housing and Local Government* (1965) 3 All ER 571; as adopted by the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

²³ See, eg, *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

²⁴ See, eg, *Ansett Transport Industries Pty Ltd v Commonwealth* (1997) 52 ALJR 254.

When adjudicators *should* nevertheless exercise the discretion

33. Despite the discretionary nature of s 21(4), there will be circumstances in which an adjudicator should provide the parties with a further opportunity to make submissions or carry out further investigations. These situations arise where such further submissions or investigations would be necessary to ensure that the parties are afforded a minimum level of fairness in accordance with the hearing rule.²⁵
34. One situation where this may arise is where the adjudicator is considering determining a matter on a ground that has not been raised by the parties in their application, response or submissions. In such a case, the adjudicator should inform the parties of the ground and allow them the opportunity to address it.²⁶ As I said in *Musico*, at [107]:
- ... where an adjudicator is minded to decide a dispute on a basis for which neither party has contended, then natural justice requires the adjudicator to notify the parties of that intention, so that they could put submissions on it.
35. A similar situation arose recently in the South Australian case of *Built Environs v Tali Engineering Pty Ltd* [2013] SASC 84 (*'Built Environs'*). There, the respondent successfully argued that the adjudicator had denied the parties natural justice in failing to seek further written submissions or evidence before reaching his determination.
36. The adjudicator's determination in *Built Environs* relied on the "prevention principle" to defeat the respondent's claim for liquidated damages for delay. Under that principle, a party cannot rely on non-fulfilment of a condition of the contract where the non-fulfilment has

²⁵ See my earlier speech '*An examination of the role and content of natural justice in adjudications under construction industry payment legislation*'.

²⁶ *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208, [78]–[79] (Ipp JA, with whom Mason P agreed).

been caused by that party's own breach. However, the prevention principle was not expressly referred to in the adjudication application, nor the response. As explained by Blue J at [138]:

Tali's submissions were not inconsistent with its invoking the prevention principle, but they did not expressly do so, nor did they identify the issues and its contentions which it would necessarily air if it was invoking the prevention principle.

37. His Honour found that because the application of the prevention principle 'raises potentially complex issues of law as well as fact',²⁷ the adjudicator was required to call a conference or to seek the further written submissions of the parties. His Honour held that the adjudicator's failure to seek such further information rendered the determination void. Adjudicators should therefore consider the need for further submissions where they are minded to make a determination on an issue that has not been raised.

Additional submissions will not always be necessary

38. An adjudicator will not however be required to exercise the s 21(4) discretion in all circumstances. The principles of natural justice are flexible and can be adapted to each case. As explained in *Graham v Baptist Union of New South Wales* [2006] NSWSC 616, the content of the hearing rule is not determined 'by fixed rules but rather looks to see whether in any particular case in all the circumstances fairness has been done'.
39. I should also note at this point the words of Mahoney JA in the decision of *Super Pty Ltd (formerly known as Leda Constructions Pty Ltd) v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549. His Honour said, at 567, that '[t]he right to be heard does not involve the right to be heard twice'. The hearing rule only requires that parties have the opportunity

²⁷ *Built Environs v Tali Engineering Pty Ltd* [2013] SASC 84, [154].

to be heard. Whether the rule can be satisfied by a single opportunity, or whether the parties must be offered a second opportunity to be heard, is a question, the answer to which requires attention to the facts of the particular case.

Practical Considerations

40. The weight of authority in relation to natural justice reinforces the point that the requirements of natural justice must be determined in the context of the Statute. The purpose of the Act is to provide a 'quicker and cheaper means of enforcing payment'.²⁸ Accordingly, to provide further opportunities for the parties to make written submissions, beyond what was necessary, would undermine the intended efficiency of the Act's procedures.
41. One aspect of the Act which highlights this point is the requirement that the adjudicator's determination must be completed 'as expeditiously as possible'²⁹ and in any case, within 10 business days of the adjudicator's accepting the adjudication application, unless the parties otherwise agree.³⁰ Should the adjudicator fail to make a determination within that time frame, he or she will not be entitled to be paid any fees or expenses in relation to the determination.³¹ These provisions show the intended expediency with which determinations are to be made. Thus any application of the hearing rule must be examined within the context of the restrictive time limits applied by the Act.
42. This issue was explained by Vickery J in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172 at [143]:

²⁸ Second Reading Speech, the Hon M Iemma MP, New South Wales Hansard Articles, Legislative Assembly, 29 June 1999, No 16.

²⁹ *Building and Construction Industry Security of Payments Act 1999* (NSW) s 21(3); *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152, [15].

³⁰ *Building and Construction Industry Security of Payments Act 1999* (NSW) s 21(3).

³¹ *Building and Construction Industry Security of Payments Act 1999* (NSW) s 29(4).

... in approaching the question of procedural fairness in the decision-making of an adjudicator under the Act, not too fine a point should be taken in relation to what is done. The shortcomings of the statutory procedure provided for in the Act point to the need for a large measure of practicality, flexibility and common sense being observed to make it work. 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 ... and speedily ... and "on the papers" ... 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 ...

43. The more recent decision of *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879 (*'State Water Corporation'*) also explained the impact of practical considerations on the hearing rule.³² Sackar J held at [69]:

[T]he extent of natural justice must accommodate the scheme of the Act including the compressed timetable in which the determination is to be undertaken.

44. I also note that there is no requirement that the parties consent to an extension of the time in which the determination is to be made, nor that they make their submissions expeditiously or at all. This creates the practical difficulty where an adjudicator may be forced to make a determination within 10 days, without receiving submissions. The practical response may be that what is required to be given is the opportunity to make submissions. If the parties choose not to avail themselves of the opportunity, they cannot later complain that they were not heard.
45. In this situation, s 21(5) provides that an adjudicator's power to make a determination is 'not affected' by the parties' failure to respond to a

³² Which I also referred to my earlier decision of *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168.

request for further submissions or a conference made by an adjudicator. This is consistent with the aims of the Act.

46. I also note, however, that a delay in making a determination will not necessarily render the decision void. In *MPM Constructions Pty Ltd v Trepcha Constructions Pty Ltd* [2004] NSWSC 103, I held that a determination was nevertheless valid despite it having been made 6 days late. I came to that conclusion because, as I said at [17], ‘consequences of invalidity seem to me to be susceptible of undermining the purpose of the legislation’. Further, despite there being express provisions in relation to determinations made out of time, including that the adjudicator was not entitled to the payment of his fees, there is nothing in the Act to suggest ‘that a determination made outside the time limit for which s 21(3) provides is a nullity’. Thus, I held that the determination was valid, as the statutory remedy of not paying the adjudicator’s fees was a sufficient remedy for the breach.

47. I came to the same conclusion in *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430 (*‘Cranbrook’*). As I explained in *Cranbrook*, at [63]:

To my mind, it would be quite extraordinary if the legislature intended that a builder or subcontractor who had got through the various hurdles that the Act imposes, in the path of obtaining a successful determination, up until the point of receipt of the adjudicator’s reasons, should be disqualified from the benefit of a determination in its favour simply because the adjudicator did not comply with the statutory time limit.

48. I should also observe that in both *MPM* and *Cranbrook* the delay was minimal. In other situations the delay may be quite different. It is not appropriate to speculate in this context about the extent to which these decisions may be applied to other factual scenarios. However, it is

important to note that a small delay is unlikely to result in a determination being void.

Material or germane

49. In a similar vein, the opportunity to put further submissions will only be necessary where the interests of justice require that such an opportunity be given. This will mean that the issue about which further submissions are sought must be ‘material’ or ‘germane’ to the determination, before a failure to invoke s 21(4) could begin to amount to a failure to afford the parties natural justice.³³ In other words, the issue must be an important issue to the determination and there must be a real prospect that a party could have marshalled real arguments sufficient to influence the adjudicator in reaching a decision.

50. As I explained in *John Goss Projects v Leighton Contractors* [2006] NSWSC 789, at [42], ‘materiality’ is inextricably linked to the measure of natural justice, such that it:

could not ... require an adjudicator to give the parties an opportunity to put submissions on matters that were not germane to his or her decision.

51. The Queensland Supreme Court considered the issue of materiality at length in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205. Applegarth J concluded that it would only be necessary to seek further submissions from parties on issues not advanced by either party where the Adjudicator is ‘minded to decide a significant legal issue the basis for which neither party contended’.³⁴ His Honour also said that the interests of natural justice will not require the adjudicator to expose their provisional views about the legal issues, nor to seek submissions

³³ *John Goss Projects v Leighton Contractors* [2006] NSWSC 789, [42], *Musico v Davenport* [2003] NSWSC 977, [107], *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC941, [44], *Watpac Constructions v Auston Corp* [2010] NSWSC 186, [144] – [145].

³⁴ *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205, [61].

on every authority that the adjudicator may choose to rely upon, but only in relation to significant issues.³⁵

52. I considered the principle of materiality in *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168. After considering a number of authorities on the issue, I held, at [147]:

the court should not be too ready to find that a denial of natural justice was immaterial; that it had no real or practical effect; or that (in the present context) there was nothing that could have been put on the point in question. But it remains the case ... that the denial of natural justice must be material, and that submissions that could have been put might have had some prospect of changing the adjudicator's mind on the point.³⁶

53. It should however be noted that the 'materiality' of the issue is not only in relation to its financial or monetary impact. The question is whether the issue is relevant to the determination as a whole. This was discussed by Hammerschlag J in *St Hilliers Contracting Pty Ltd v Dualcorp Civil Pty Ltd* [2010] NSWSC 1468. There, his Honour rejected the claimant's submission that because the relevant issue would only lead to a \$4,000.00 variation in the \$1.3 million determination, it was not germane. Rather, in that case, his Honour found that the issue was 'clearly material' to the adjudicator's determination because it related to one of the questions which the adjudicator was specifically asked to determine, namely the date on which the progress payment became due and payable. Therefore, the issue was material to the determination as a whole.

54. Adjudicators must be conscious of these factors when deciding whether it is desirable to exercise their discretion in accordance with s 21(4) of the Act. In many circumstances further submissions will not be

³⁵ *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205, [61].

³⁶ Rothman J also adopted this approach in his subsequent decision of *Maxstra New South Wales Pty Ltd v Blacklabel Services Pty Ltd* [2013] NSWSC 406, [95].

appropriate or necessary. Nonetheless, adjudicators should turn their minds to whether, to afford the parties natural justice, it is desirable to exercise the s 21(4) discretions.

The hearing rule and ss 20(2B) and 22(2)

55. The application of the hearing rule to adjudication determinations will also be affected by the operation of ss 20(2B) and 22(2) of the Act, which I have set out above. These provisions indicate what matters an adjudicator can and cannot take into account when reaching their determination. Therefore, the provisions limit the matters in respect of which parties are entitled to be heard.
56. Adjudicators may only consider submissions that have been 'duly made' by the parties. Courts have consistently agreed that whether a submission has been 'duly made' is (at least, in general) 'not a matter for objective determination by the Court'.³⁷ Rather, this is (again, at least in general) an issue to be determined by the adjudicator. The principle was explained by Hodgson JA (with whom Beazley JA agreed) in *John Holland Pty Ltd v Roads and Traffic Authority (NSW)* [2007] NSWCA 19. At [63] his Honour said, 'the legislature plainly entrusts to the adjudicator the role of determining whether submissions are or are not duly made'.³⁸
57. However, a decision by an adjudicator that submissions were 'duly made' cannot be absolutely outside the purview of the Court. Such an interpretation would allow an adjudicator to deem any submission to have been 'duly made' and therefore able to be taken into account, irrespective of its breach of express provisions of the Act.

³⁷ *John Holland Pty Ltd v Roads and Traffic Authority (NSW)* [2007] NSWCA 19, [71]; *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWCA 49, [86].

³⁸ The same principle has been applied with approval in other decisions. See, eg, *Road Construction Services (NSW) Pty Ltd v Vadasz t/as Australasian Piling Co* [2008] NSWSC 1057, [37]; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190, [220]; *Clyde Bergemann v Varley Power* [2011] NSWSC 1039, [13].

58. Sackar J considered this situation in *State Water Corporation*. His Honour held that although it is for the adjudicator to determine whether the submissions have been ‘duly made’, this will ‘not necessarily place the adjudicator’s decision beyond review’. His Honour stated, at [65], that:

If the adjudicator formed his or her opinion by taking into account irrelevant considerations, or by misconstruing the terms of the Act, or the adjudicator’s opinion simply cannot be described as reasonable, or is without foundation, that may provide a basis for the intervention of the court.

59. It follows that, there will be situations where an adjudicator’s decision as to whether submissions have been ‘duly made’, is reviewable by the court. Particularly where the decision is unreasonable, without foundation, based on irrelevant considerations or misconstrues the Act, it may not withstand review.

When submissions are ‘duly made’

60. Submissions will not be ‘duly made’ if they breach s 20(2B) of the Act, which restricts the respondent’s submissions to matters outlined in their earlier payment schedule. This provision expressly circumscribes the application of the hearing rule by restricting what matters may be put in answer to an adjudication application. In effect, the subsection limits the matters in respect of which the respondent may be heard. Further, although there is no express legislative provision to this effect, a similar principle to s 20(2B) has been extended to the claimant’s submissions.
61. This extension of the rule was discussed in *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61, where it was alleged that the claimant had raised a new basis of claim pursuant to s 27(2A) of the Act for the first time in its adjudication application and the

submissions were therefore not 'duly made'.³⁹ On appeal to the Supreme Court, Brereton J found that the alleged 'new claim' under s 27(2A) was 'not outside the scope or ambit of the payment claim, but merely explained the statutory basis for the claim',⁴⁰ and as such the submissions were duly made. Nevertheless, his Honour stated in his judgment, at [22], that:

a claimant may not rely on, and an adjudicator may not consider, material that is included in an adjudication application which is outside the scope or ambit of the claim described in the payment claim.

62. I later agreed with his Honour in *Leighton v Arogen* [2012] NSWSC 1323 ('*Leighton*'). In that case the claim made in the payment claim was quite different from that advanced in the claimant's submissions, but was nevertheless used by the adjudicator in reaching his determination. The respondent argued that reliance on the new claim by the adjudicator denied the respondent natural justice due to the practical effect of s 20(2B). I upheld that argument.
63. It is clear that the effect of s 20(2B) is to prevent the respondent from raising any matters not already advanced in the payment schedule. Therefore, if an additional issue is first raised by the claimant in its adjudication application and submissions, this would effectively prevent the respondent from raising any reply to such issues unless they were already preemptively raised in the payment schedule. In my opinion, as I said in *Leighton* at [24], it would be a denial of natural justice to apply such an interpretation of the legislation.⁴¹ Further, submissions to which the respondent could not respond could not be considered to be 'duly made'.⁴² Therefore if an adjudicator took those submissions into account in making a determination, it would be outside the limits of the

³⁹ Section 27(2A) provides that a respondent will be liable for any loss or expenses incurred by a claimant as a result of the respondent removing any part of the work or supply from the contract.

⁴⁰ *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61, [29].

⁴¹ *Leighton v Arogen* [2012] NSWSC 1323, [84].

⁴² *Leighton v Arogen* [2012] NSWSC 1323, [86].

jurisdiction given by the Act.⁴³ As a result, I found that the determination made by the adjudicator was void.

64. Thus, for submissions to have been 'duly made' they cannot go beyond the ambit of the payment claim and payment schedule. This effectively restricts the matters the adjudicator will 'hear' on their application and thus expressly limits the operation of the hearing rule.

Further written submissions must also be 'duly made'

65. It is important to note that any further written submissions must also be 'duly made' if they are to be considered.⁴⁴ This means that the further submissions must not breach s 20(2B) of the Act. Presumably, an equivalent implied restriction should be placed upon the claimant's submissions.

66. It has been argued that s 21(4) may be used retrospectively to render submissions 'duly made'. However, this would be contrary to the express provisions of the Act. Einstein J dealt with this situation in *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & ors* [2004] NSWSC 258. There, the response to the adjudication application referred to a matter which was not raised in the payment schedule. This clearly breached s 20(2B) of the Act. It was argued that the adjudicator could seek further submissions from the claimant about the additional point which had been raised, which in turn would render the submissions 'duly made'. Einstein J held that the s 21(4) powers to seek additional submissions 'permi[t] no more than additional submissions which *clarify* earlier submissions: those earlier submissions being constrained' by the requirements that they must be

⁴³ *Leighton v Arogen* [2012] NSWSC 1323, [87].

⁴⁴ *Building and Construction Industry Security of Payments Act 1999* (NSW) ss 22(2)(c) and 22(2)(d).

'duly made'.⁴⁵ Thus, as his Honour found, s 21(4) cannot be used to undermine the intended operation of s 20(2B).

67. A related issue was recently discussed by Sackar J in *State Water Corporation*. State Water Corporation argued that although its submissions were made in breach of s 20(2B), they were nevertheless 'duly made' as they had been provided in response to specific requests for information made by the adjudicator under s 21(4)(a). However, to interpret the legislation in this manner would again allow the adjudicator to circumvent the operation of s 20(2B). Sackar J rejected State Water's submission, at [44], stating that the powers granted by s 21(4) could not be used to:

transform a party's submissions which were not duly made (by reason of s 20(2B)) to submissions duly made and capable of being considered by the adjudicator. That would empower adjudicators to defeat the underlying purpose of s 20(2B).

68. Accordingly, any further written submissions of the parties must also be 'duly made' and will be similarly restrained by the requirements set out in s 20(2B). Adjudicators must be aware of this restriction when making their determination and ensure that all submissions used in the making of their determination are 'duly made' in accordance with the Act.

The rule against bias

69. Similarly to the hearing rule, adjudicators must also observe the rule against bias. As I have outlined above, this requires that 'justice should both be done and be seen to be done'⁴⁶. Therefore, all decisions made under the Act should be made impartially and should be made in such a way that reasonable and appropriately informed observers would not perceive any bias on the part of the decision maker. Again, a

⁴⁵ *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & ors* [2004] NSWSC 258, [26].

⁴⁶ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6].

determination which breaches the rule against bias will make that determination 'void and not merely voidable',⁴⁷ and would undermine the purpose of the legislation.

70. One area where a reasonable perception of bias may arise would be where an adjudicator receives and considers submissions from one party without notifying the other party. I should first note that s 21(4)(a) of the Act expressly requires the adjudicator, where further written submissions are sought from one party, to provide an opportunity to the other party to also make further written submissions. Therefore, it is an express requirement, with regard to further written submissions, to give both parties a further opportunity to be heard.

71. The situation may be less obvious where the matters do not relate to further written submissions. Brereton J considered this point in the case of *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428. His Honour held that when the Adjudicator considered further materials from one party, whether evidence or submissions, which were not disclosed to the other party, there was a denial of natural justice.⁴⁸ This was because such direct communications could suggest actual or perceived bias, and also because they deny the other party the opportunity to respond. As a matter of prudential practice, the principle of notifying both parties of communications should be extended to all communications, in order to avoid any perception of bias.

72. The issue of impartiality has also arisen where adjudicators make comments about the parties themselves or their representatives. *Allpro Building Services Pty Ltd v Micos Architectural Division Pty Ltd* [2010] NSWSC 474 was one such case. In that case the respondent's representative sought the disqualification of the adjudicator because the respondent had had previous disputes with that adjudicator in

⁴⁷ *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394, [55].

⁴⁸ *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428, [52].

relation to the payment of the adjudicator's fees. The adjudicator, in a letter, chose not to disqualify himself, suggesting that the claim for recovery of the adjudicators fees was a 'recent invention' and that from his and other adjudicators' experience the respondent's representative had a 'history of requesting disqualification'. On the basis of those comments, Einstein J found that there was 'absolutely no doubt' that the Adjudicator had breached the rules of natural justice by exhibiting a reasonable apprehension of bias.⁴⁹

73. Another situation where the perception of bias may become an issue is in the appointment of adjudicators, particularly where ANAs have had some prior dealings with the parties in dispute. This issue was considered in *Built Environs*. The respondent in that case successfully argued that there was apprehended bias on the part of the adjudicator and the ANA as one of the parties had had prior dealings with the ANA in relation to the same dispute.
74. The claimant had engaged a consultancy firm to assist in the preparation of their progress claims. The CEO of that firm was also the manager of the ANA, to whom the adjudication application was made and who selected the adjudicator. The CEO had requested that one of his colleagues handle all communications with the claimant, independent of himself, once the adjudication application had been lodged, in order to remove any perception of bias.
75. Blue J found that the decision did nevertheless breach the rule against bias. The fact that the manager of the ANA had a prior affiliation with one of the parties was sufficient of itself to create an apprehension of bias. Further, the 'Chinese walls' measures were insufficient to remove the perception of bias. This is because of the differences between an ANA and a law firm, namely that the former is a decision maker, owes

⁴⁹ *Allpro Building Services Pty Ltd v Micos Architectural Division Pty Ltd* [2010] NSWSC 474, [16]-[18]; A similar finding on similar facts was made in the case of *Reiby Street Pty Ltd v Winterton* [2005] NSWSC 545.

no duty to either party and does not owe enforceable duties to the Court.⁵⁰ For these reasons his Honour held that there was a reasonable apprehension of bias in the selection of the adjudicator.

76. His Honour also stressed that the impartiality of the adjudicator is of the 'utmost importance',⁵¹ and accordingly the ANA must also be seen to be impartial. His Honour explained, at [190], that:

It is the evident purpose of the Act that the nominating authority must be independent of the parties to ensure both the reality and the appearance of fairness in selection of the adjudicator.

77. As a result there was a reasonable apprehension of bias in the appointment of an adjudicator and for that reasons the adjudicator's determination was void.
78. As far as I am aware this is the first decision to extend the rules of natural justice to the ANA. Nevertheless, it is likely that similar principles will apply with respect to the equivalent New South Wales legislation, which is almost identical to the South Australian Act. Thus, all parties involved in making decisions in relation to the adjudication process should be aware that their decision must not only be impartial but must also be seen to be impartial.
79. Given the close involvement of many claims consultants with ANAs and adjudicators, decision makers must be conscious of the implications that the decision in *Built Environs* will have in a practical sense. Adjudicators and ANAs must ensure that their procedures in relation to conflicts of interest, and the selection of adjudicators in particular, are impartial and can be seen to be impartial. Obviously, each case must be decided on its own facts, but it is clear that a similar

⁵⁰ *Built Environs v Tali Engineering Pty Ltd* [2013] SASC 84, [197] – [200].

⁵¹ *Built Environs v Tali Engineering Pty Ltd* [2013] SASC 84, [201].

level of impartiality will be expected of all decision makers under the Act, not just adjudicators in their determination.

Conclusion

80. Judicial review of adjudication determinations is limited. Nevertheless, for a determination to be valid, the adjudicator must operate within the confines of the Act and also (to the extent that the Act permits) within the relevant parameters of administrative law. This means that they must afford the parties natural justice as the circumstances of each case may require. In particular, decision makers must apply both the hearing rule and the rule against bias.
81. The rules of natural justice may also require adjudicators, in appropriate cases, to exercise their discretionary powers under s 21(4) by, for example, seeking further written submissions. However, the principles of natural justice are not applied in a vacuum. They are considered in light of the Act as a whole: in particular, the objects of the legislation and the express time constraints on determinations. Similarly, the Act expressly restricts what matters may be considered by an adjudicator in reaching a determination. It is therefore clear that other provisions of the legislation will mould the content of the rules of natural justice as they apply to adjudication determinations.
82. It has also been held that the principles of natural justice extend to ANAs, particularly with respect to the rule against bias. It is therefore important that ANAs are conscious of how they make their decisions and how those decision-making procedures may be viewed by an outside observer. ANAs and adjudicators should take warning from recent decisions to ensure that their procedures are, and can be seen to be, impartial.
83. In order to best satisfy the object of the legislation to provide an enforceable right to progress payments and to resolve disputes quickly

on an interim basis as to progress payments, adjudication determinations must be valid. Therefore, adjudicators should be conscious of their obligations, both under the Act and in relation to the principles of natural justice in making their determinations.