

An examination of the role and content of natural justice in adjudications under construction industry payment legislation

Robert McDougall¹

Introduction

1. The notion of natural justice has developed as a common law concept: an obligation to provide a minimum level of fairness when an individual's rights are affected in any of a broad range of factual scenarios including employment, club membership and migration. Brennan J noted in *Kioa v West*² that it was easy for judicial officers to uphold a right to natural justice where that right was obvious from the words of a statute. However, his Honour said, even absent any clear intention to the contrary in the words of the statute, legislation should still be construed "against a background of common law notions of justice and fairness"³. This, his Honour reasoned, was to make up for any 'omissions' of the legislature.
2. When addressing questions raised under the *Building and Construction Industry Security of Payment Act 1999* (NSW), which for present purposes I will refer to as the NSW Act, we can apply his Honour's analysis in *Kioa* to the framework provided by the NSW Legislature. (I will look principally at the NSW Act as it was the first of its type in Australia and because, being a judge of the NSW Supreme Court, it is the one with which I am most familiar.) I will compare the relevant parts of the NSW Act to the equivalent legislation in the other states and territories, which appear, to varying degrees, to have been based on the NSW Act.

¹ A Judge of the Supreme Court of New South Wales; Adjunct Professor, Faculty of Law, University of Technology, Sydney. The views expressed in this paper are my own, not necessarily those of my colleagues or of the Court. I gratefully acknowledge the very substantial contribution of my tipstaff, Grant Mason, LLB, BA Comms (University of Technology, Sydney), who undertook the original research and who prepared the draft on which this paper is based. The virtues of this paper are his; its defects are mine.

² (1985) 159 CLR 550

³ *Kioa* at 609

The requirement for natural justice in adjudications

3. The judgment of Hodgson JA (with whom Mason P and Giles JA agreed) in *Brodyn v Davenport*⁴ provides direction as to when adjudication determinations made under the NSW Act may be reviewed. His Honour referred from para [53] to an enumerated, though not necessarily exclusive, list of what his Honour called the 'basic and essential requirements' for the existence of a valid adjudicator's determination. At [57], his Honour said that:

[t]he circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions ...[which is] essential to validity

4. I note, for the sake of completeness, that in *Musico v Davenport*⁵ I had held that natural justice was relevant to the operation of the NSW Act. Hodgson JA noted my decision at [51] of *Brodyn* and P Lyons J referred to my decision in *Queensland Bulk Water Supply Authority v McDonald Group Pty Ltd*⁶.

Relevant provisions of the NSW Act

5. I set out first the sections mentioned by Hodgson JA.
6. Section 17 of the NSW Act is headed 'Adjudication Applications' and relevantly proceeds as follows:

(1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

⁴ *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* (2004) 61 NSWLR 421

⁵ [2003] NSWSC 977

⁶ [2009] QSC 165 at [95]

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

7. These provisions define essential preconditions to an adjudication application. By subs (1), there must be either a payment claim which has not been fully paid (para (a)) or a payment claim which, in essence, has been ignored (paragraph (b)). Subsection (2) restricts the availability of the adjudication process to those who have provided notice to the respondent within 20 business days of the payment due date and who give the respondent an opportunity to supply a payment schedule.
8. Section 20, headed 'Adjudication Responses', contains the following provisions:

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the "adjudication response") at any time within:

(a) 5 business days after receiving a copy of the application, or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

(2) The adjudication response:

(a) must be in writing, and

(b) must identify the adjudication application to which it relates, and

(c) may contain such submissions relevant to the response as the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14 (4) or 17 (2)(b).

(2B) 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.

(3) A copy of the adjudication response must be served on the claimant.

9. This section provides a respondent to an adjudication application an opportunity to respond if certain requirements are met. Firstly there is a time limit within which a response may be accepted, namely the latter of five business days from receiving a copy of the application or two business days from receiving an

adjudicator's acceptance of that application. Additionally, there are formal requirements: the response must be in writing; identify the relevant application; and provide submissions, if the respondent intends to do so at all. Further, by subs (2A) and (2B) the lodgement of a payment schedule, within the relevant time, becomes an essential pre-requisite to the right to lodge an adjudication response and the reasons for denying payment are limited to those which are provided in the payment schedule, respectively. Finally, subs (3), reflecting the notion of fairness that one must know the case to be met, requires any response to be served on the claimant.

10. Section 21 looks at 'Adjudication Procedures'. Most notable, from the perspective of an examination of natural justice, is subsection (1):

(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.

11. This subsection reinforces the proposition that adjudicators perform the role of a decision-making tribunal. Their actions, in performing that role, will affect the rights of one or other, or both, of the parties. It is accordingly required of adjudicators that they keep open minds to the issues which are in dispute until the opportunity to make submissions has been exhausted.

12. In addition, though not mentioned by Hodgson JA, subs (4) underlines the intention to provide natural justice by allowing adjudicators to request further submissions. It also requires that if such submissions are sought, the other party must be given an opportunity (within a timeframe allowed by paragraph (b)) to comment on those submissions:

(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.

13. The final section mentioned by Hodgson JA is s22(2)(d). The introductory words to the subsection acknowledge that the adjudicator will need to look at material to make a decision. The following paragraphs, coupled with the word 'only', restrict the materials to which an adjudicator may refer. Notably, paragraph (d) lists the payment schedule together with any submissions made in support thereof: highlighting the fact that the respondent has a right to make submissions on the case against him or her:

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

...

(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,

...

14. It has been noted that none of these sections alone or even in combination is an exhaustive statement of the extent of the right to natural justice intended to be

afforded by Parliament⁷. They have been used here to illustrate that some right to natural justice arises on the construction of the NSW Act.

Legislative regimes in other states

15. Other states and territories have adopted a similar framework in their respective statutes, and hence the content of the right to natural justice. In 2002, Victoria passed the *Building and Construction Industry Security of Payment Act*. Queensland followed with the *Building and Construction Industry Payments Act* in 2004. In the same year Western Australia produced the *Construction Contracts Act* and the Northern Territory produced the *Construction Contracts (Security of Payments) Act*. Currently before the South Australian Parliament is the *Building and Construction Industry Security of Payment Bill 2009*. There is a bill progressing through the Tasmanian parliament also. It is currently in the committee stage.

16. The speeches in the lower houses of the various Parliaments indicate that widespread problems existed within the construction industry and that there was a desire to streamline the activities for players in the construction industry who operate in several states. This aim has not been entirely successful to date.

Differences between the legislative regimes

17. Firstly, no equivalent legislation has yet been adopted, nor proposed, by the Parliaments in either Tasmania or the ACT. There are basically two models: those operating in Western Australia and the Northern Territory on the one hand (often called the “West coast model”); and those operating in New South Wales, Queensland, Victoria, South Australia and the ACT on the other (often called the “East coast model”). There are further, within each model, some differences in the wording of the various statutory regimes. For obvious reasons, the ACT legislation is virtually identical to the NSW Act, and what I say later should be understood as including, in reference to NSW or the NSW Act, a reference to the ACT or the ACT Act also.

⁷ See for example *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor* [2009] VSC 156 at [142]; *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399 at [42]

18. By reference to the sections identified by Hodgson JA, there is no material difference between the legislation in Qld⁸, the Bill as it currently stands in South Australia and the legislation discussed in NSW.
19. Nor does there seem to be any material difference in Victoria. However, the time frame to lodge an adjudication application for a payment claim to which no response has been received⁹, is ten business days,¹⁰ rather than twenty in the NSW Act,¹¹ and the time for the lodgement of an adjudication response to such an application is two business days¹² rather than five in NSW¹³. In addition, adjudication responses have a further formal requirement: that the names and addresses of anyone known to have a financial or contractual interest must be identified in the response; and any amount excluded from the payment claim must be identified.
20. Further, under the Victorian legislation, an adjudication response can contain reasons for not providing payment beyond those in any payment schedule if, notice is provided¹⁴; and, the adjudication response, including any reasons, is served on the applicant and they are provided with two days to respond¹⁵.

The need for context

21. It is appropriate now to return to *Kioa* and look at what Mason J said. His Honour identified the need to look at the requirements of natural justice in the ‘context’ of a dispute affecting the “rights, interests and expectations of the individual citizen in a direct and immediate way”¹⁶. His Honour continued by stating that “[w]hat is appropriate in terms of natural justice depends on the case and ... will include... the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting”. In comparing the terms natural justice and procedural fairness his Honour emphasised that the focus was on the need, regardless of

⁸ See ss21, 24, 25 and 26 of the *Building and Construction Industry Payments Act (Qld) 2004*

⁹ s17(1)(b) of the NSW Act

¹⁰ s18(2)(a) of the *Building and Construction Industry Security of Payments Act (Vict) 2002*

¹¹ s17(2)(a) of the NSW Act

¹² s18(3)(e) of the Victorian Act

¹³ s17(3)(e) of the NSW Act

¹⁴ s21(2B)(a) of the Victorian Act

¹⁵ s21(2B)(b) of the Victorian Act

¹⁶ *Kioa* at 584

the terminology used for a “flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case”¹⁷.

Aims of the legislation

22. It is important to understand the policy aims sought by the respective state and territory governments in introducing this legislation. This will assist in elucidating the context that Mason J suggested is necessary to appreciate the requirements or scope of natural justice in a particular case.
23. In the Second Reading speech before the NSW Legislative Assembly¹⁸ the Hon Mr Iemma, who was then Minister for Public Works and Services, stated that the “main thrust of the bill is to reform payment behaviour in the construction industry”. Mr Iemma drew on anecdotal evidence of parties to construction contracts completing work and not being paid “all too frequently”. He returned in particular to small subcontractors who did “not have the cash flow allowing them to keep on working while waiting for payment”. He stated that the aim was to provide a “quicker and cheaper means of enforcing payment” without adding “unnecessary cost to [the] industry”. In fulfilling this aim it must be noted that parliament specifically wished for the courts not to be too readily involved as this might provide an additional mechanism to delay payment.
24. These sentiments were echoed by the Victorian Minister for Planning, Ms Delahunty¹⁹, who said the Victorian Bill “represents a major initiative by the government to remove inequitable practices in the building and construction industry whereby small contractors are not paid on time, or at all” by ensuring that “a quick adjudication of disputes is provided for with an obligation to pay or provide security of payment”. The Explanatory Memorandum to the Construction Contracts Bill (WA) 2004 said that the aim was to “keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted

¹⁷ *Kioa* at 584-585

¹⁸ Second Reading Speech, the Hon M Iemma MP, New South Wales Hansard Articles, Legislative Assembly, 29 June 1999, No 16

¹⁹ *Hickory Developments* at [37]

disputes”²⁰. I will not refer to each second reading speech; it suffices to say the aims are uniform and support for each Bill appears to have been multi-partisan.

25. A good statement of the aims of the legislation is provided by the Queensland Court of Appeal²¹ which said that:

the Act is intended to provide a mechanism by which claims for payment under construction contracts can be decided quickly, on an interim basis and by which payment can be enforced even though a dispute in respect of the right to payment is being litigated or is subject to an alternative dispute resolution process²².

The courts’ role in determining the content of natural justice

26. In spite of the intention to keep the courts away from this interim payment process, which I acknowledged in *Musico*²³, the courts have often been called upon to intervene. Whilst the scope for judicial review is limited by Parliament, it is only limited to the extent expressed or necessarily implied by the words of the Act.

27. In *Musico* I was asked whether and on what grounds judicial review was available under the NSW Act. I decided that limited circumstances would give rise to judicial review including, relevantly, a denial of natural justice. That was because decisions of this nature are “to be construed by reference to a presumption that the legislature does not intend to deprive citizens of their right of access to courts, other than to the extent expressly stated or necessarily implied”.

28. To summarise the point, I said, at [108], that:

“where an adjudicator determines an adjudication upon a basis that neither party has notified to the other or contended for, and

²⁰ *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [122]

²¹ Muir JA with whom Holmes JA and Chesterman J agreed

²² *Intero Hospitality Projects P/L v Empire Interior (Australia) P/L and Anor* [2008] QCA 83 at [51]

²³ *Musico* at [35]

that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute [will] have ‘a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it’²⁴.

29. The last words of that paragraph draw on a passage from Lord Diplock²⁵ which in turn followed a line of English authority demonstrating that those who have legal authority to affect the rights of others must follow two key rules of natural justice, namely “a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of any personal bias against him”. I had noted, earlier in the *Musico* judgment²⁶ that McHugh J had said previously that:

“Natural justice requires that a person whose interests are likely to be affected by an exercise of power 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.”²⁷

30. The right to be heard is therefore a fundamental component of the content of natural justice in adjudications under the Act.

The concept of materiality in natural justice

31. I turn to an important qualification to the concept of natural justice. Gleeson CJ has said that it is important to look to the practical effect of any alleged denial of an opportunity to be heard because “[f]airness is not an abstract concept. It is

²⁴ It is worth noting briefly that a further aspect of the natural justice which is provided for under the legislative regime which will not be canvassed in this discussion is the right of parties to have their case heard by an unbiased adjudicator. For an illustration of this point see, for example, *Hitachi Ltd v O'Donnell Griffin Pty Ltd; O'Donnell Griffin Pty Ltd v Hitachi Ltd and Ors* [2008] QSC 135 at [104]

²⁵ *O'Reilly v Mackman* [1993] 2 AC 237 at 279

²⁶ *Musico* at [58]

²⁷ *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 989 [123]

essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.”²⁸

32. I agree with those comments, and applied the principle in *John Goss Projects Pty Ltd v Leighton Contractors*²⁹ and later in *Trysams v Club Constructions (NSW)*³⁰. In the context of the Act, I said that the use of “substantial” by Hodgson JA in *Brodyn*³¹, when his Honour described the type of denial of natural justice which might give rise to a void decision, indicated that only material denials of natural justice would authorise the court to intervene.
33. The best way to give effect to the concept propounded by Gleeson CJ in the context of adjudications under the Act is to determine whether the denial goes to an issue which is germane or material in the making of the adjudication. That is because the “concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case”³². In other words if the denial was not material or germane to the decision, there would be no denial of natural justice to the extent that it is required under the Act. That is the standard of fairness required is to be evaluated within the scope of what can be perceived to be the legislative intention. It does not exist as a stand-alone concept.
34. I picked up on this issue in the more recent decision of *Trysams* where I concluded that “[i]t does not follow... that any failure by an adjudicator to ask for submissions on a matter not raised by one of the parties will amount to denial of natural justice sufficient to justify” a declaration that the determination is void. The alleged denial claimed by *Trysams* was that it was not invited to put submissions on the application of s34 of the NSW Act. For clarity, this is the ‘no contracting out of the Act’ provision, for which there is an equivalent provision in each of the other jurisdictions. On the facts of the matter there was nothing that *Trysams* could have put on that issue which should have made a difference to

²⁸ *Re Minister For Immigration And Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1 at 14

²⁹ (2006) 66 NSWLR 707

³⁰ *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399

³¹ *Brodyn* at [53]

³² *John Goss* at [42]

the adjudicator's decision. Even though it was a 'germane' or material part of the reasoning, the fact that the ultimate decision, would, or more correctly should, have stayed the same meant there was no denial of natural justice.

35. To hold in such a case that the determination was void, as a denial of natural justice, where there should have been no difference to the outcome would not reflect the policy of the Act as it would lead to further, unnecessary delays in achieving an interim result.
36. It is, I think, this reasoning that was adopted by Einstein J in *Shorten v David Hurst Construction Pty Ltd*³³ and Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd*³⁴.
37. *John Holland v TAC Pacific*³⁵ provides a helpful discussion of authorities to date on where a denial of natural justice will be sufficiently material, or substantial, so as to warrant the conclusion the determination is void. Further, given that this case was decided in Queensland, it confirms that the statutory regime in Queensland (and therefore probably Victoria and South Australia if the South Australian Bill is passed in its current form) reflects that of NSW³⁶.
38. In *John Holland* the adjudicator chose, despite the fact that it was not his "practice to cite cases which have not been referred to by either party"³⁷ to refer to a case which neither party had referred. The adjudicator determined that the effect of the decision in *Plaza West*³⁸ was to overturn the decision in *John Goss*. When the case came before Applegarth J it was common ground that neither party had submitted that the matter should be decided that way, nor did they contend at trial that the adjudicator's opinion reflected the correct state of the law.

³³ [2008] NSWSC 546

³⁴ [2009] QSC 205

³⁵ *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* [2009] QSC 205

³⁶ Other examples of Queensland authority which has followed the NSW approach for example by accepting *Brodyn* includes *Hitachi Limited v O'Donnell Griffin Pty Ltd* [2008] QSC 135; *Walton Constructions (Qld) Pty Ltd v Salce* [2008] QSC 235; *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205 quoted in *John Holland* at [20]

³⁷ *John Holland* at [46]

³⁸ *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279

39. Applegarth J adopted³⁹ the summary of principles used by Einstein J in *Shorten v David Hurst Constructions*⁴⁰ which in turn drew on my decision in *Trysams*⁴¹. His Honour noted that two factors required analysis: firstly, the importance of the subject matter of the denial to the actual determination; and secondly, whether or not any submission could have been put which would have affected the determination. This second matter should be looked at realistically rather than as a matter of mere speculation. A judge faced with this question should ask whether there were substantive submissions which could have been put by the applicant which might have persuaded the adjudicator to change his mind. If there are no submissions of this nature which could have been put then relief should be denied⁴².
40. There were two competing positions in *John Holland* as to what constituted a denial of natural justice. TAC argued that despite the adjudicator's reliance on *Plaza West*, a denial of natural justice would only be material where it related to a refusal to hear a party on the "critical issue or factor on which the decision is likely to turn"⁴³. John Holland's position was that to focus merely on the 'critical issue or factor' would pay insufficient attention to the process of the adjudicator's decision. The latter approach was the one Applegarth J accepted, stating, at [39], that an application of the present kind required attention "to both 'the critical issue or factor' on which the decision turns and the way in which the adjudicator decided it."
41. This sentiment reflects the idea propounded by Macready AsJ that the ambit of the measure of natural justice required extends to the particular process during the adjudication and receipt and consideration of the submissions referred to in the Act⁴⁴. This idea is reflected in recent authority in Victoria. There, Vickery J, stated that:

³⁹ *John Holland* at [39]

⁴⁰ [2008] NSWSC 546

⁴¹ *Trysams* at [45]

⁴² *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; *Re Refugee Tribunal; Ex Parte Aala* (2000) 204 CLR 82 at 91 applied in *Shorten v David Hurst* at [23]-[24]

⁴³ *John Holland* at [30] quoting Mason J in *Kioa v West*

⁴⁴ *Tolfab Engineering Pty Ltd v Tie Fabrications Pty Ltd* [2005] NSWSC 326 at [42]-[43]

an adjudicator appointed under the Act is obliged to adopt procedures which are appropriately flexible, but which are fair to the parties in the light of the statutory requirements, the interests of the individual parties and the purposes which the Act seeks to advance.

When should additional submissions be sought?

42. It could be taken from the words of McHugh J, quoted at [30] above, that an adjudicator must, upon forming a conclusion adverse to one party, inform the party of the view and give them an opportunity to respond. Indeed, s 21(4), which I mentioned earlier, makes specific allowance for an adjudicator to seek further submissions and allow the party who has not provided those provisions with an opportunity to respond to them. However to interpret McHugh J's words this way would be to ignore the weight of authority on natural justice which reinforces the point that reference must be made to the context of an Act, which in the present case aims for a quick and informal resolution of the dispute on an interim, rather than a final basis.

43. *Abel Point Marina (Whitsundays) Pty Ltd v Uher*⁴⁵ addressed the Queensland equivalent of s 21(4). In that matter Abel Point claimed entitlement to set off a sum of liquidated damages against the amount in the payment claim which had been claimed by the defendant. The adjudicator denied the right to set off as he could not determine the Date of Practical Completion. Abel Point claimed before the Queensland Supreme Court that the adjudicator should have sought submissions from Abel Point to verify the Date of Practical Completion. Wilson J disagreed. She said that "the adjudicator's primary obligation was to make a decision on the material before him"⁴⁶ and critically "he was not **obliged** to seek further submissions" (emphasis added).

44. I respectfully agree with the point made by her Honour. Indeed, I had said as much in a case I had heard earlier, *Transgrid v Walter Construction Group*⁴⁷. In that case Transgrid approached the adjudication by merely criticising the

⁴⁵ [2006] QSC 295

⁴⁶ *Abel Point* at [20]

⁴⁷ [2004] NSWSC 21 at [68]-[69]

submissions put by Walter. It seemed to be under the mistaken impression that, once it had convinced the adjudicator of the error in the submissions made by Walter (which in any event it failed to do), the adjudicator would provide an opportunity for Transgrid to put its own substantive submissions. He did not, nor was he obliged to provide a second chance to Transgrid. There was no statutory provision stating this obligation. Additionally, it would be against the notion of a quick resolution of the dispute to create a window of delay through which a respondent party could put successive submissions.

45. The point for present purposes is that where sufficient material exists for an adjudicator to make a decision, and where that decision is to be made on material put forward by one or other of the parties and provided to the other parties, no obligation to seek additional submissions will be inferred.
46. There will, however be circumstances where an adjudicator is obliged to provide an additional opportunity to parties to provide submissions.
47. An example occurred in *John Goss*. This decision related to the treatment by an adjudicator of my earlier decision in *Rothnere v Quasar Construction*⁴⁸. John Goss relied on some comments I made in *Rothnere* to draw a distinction in its submissions between an entitlement to be paid and a valuation of the amount payable. Leighton in response claimed that the facts of *Rothnere* were distinguishable. The adjudicator acknowledged that neither party had argued that *Rothnere* was wrong. It was common ground that neither party had been notified that the adjudicator intended to decide the matter this way.
48. It was a scenario of this nature which I had in mind when making the comments extracted above in *Musico* at [107]-[108]. If John Goss had been heard on the validity of *Rothnere*, it may have convinced the adjudicator to change his view or to defer his view to an authority on point. Alternatively there may have been no change in the adjudicator's opinion. It was not necessary to pursue,

⁴⁸ *Rothnere Pty Ltd v Quasar Construction NSW Pty Ltd* [2004] NSWSC 1151

hypothetically, which of those would have been the result. The denial in that sense was enough to make the decision void.

49. Another example would arise where one party, at the request of an adjudicator, provides additional documents in support of a submission. Section 21(4) dictates that the other party must be given a chance to see and to comment on them. Brereton J faced this issue in *Fifty Property Investments Pty Ltd v Barry J O'Mara*⁴⁹ where the adjudicator did seek clarification of some points which were material to the decision to be made. The adjudicator's request for material to one party, Impero, was copied to the other party to the dispute, FPI. However, neither Impero nor the adjudicator sent Impero's response to FPI. This caused his Honour, in reviewing the decision of the adjudicator to conclude that "receipt and consideration from one party of material...which is not made known to the other, is a denial of natural justice".

Limitations to the obligation to seek submissions

50. Applegarth J drew a distinction between requiring an adjudicator to "expose their provisional views about the legal issues contended for by the parties, or to seek submissions on every authority on which the adjudicator [sought] to rely"⁵⁰. A similar point was made by Einstein J that "while the content of the rules of natural justice extends to requiring that notice be given of a basis for determination of the case outside the scope of the dispute as defined...it does not... extend to requiring that notice be given that one party's assessment might be preferred to another's."⁵¹
51. A further example of a limitation to the obligation on an adjudicator to seek further submissions exists where the parties have referred to cases in a line of authority and the adjudicator draws on an additional authority in that line. This is a different situation to that where an adjudicator decides a matter on an issue wholly not contested for by either party.

⁴⁹ [2006] NSWSC 428

⁵⁰ *John Holland* at [61]

⁵¹ *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd and Anor* [2005] NSWSC 1129 at [136]

52. Applegarth J adopted what I had said in *Musico* at [107]-[108] and concluded the issue by stating:

[t]he statutory scheme may permit an adjudicator to make unreviewable errors of law in quickly deciding complex legal issues in adjudications of the present kind after considering the parties' submissions. The statutory scheme does not permit an adjudicator to determine an adjudication on the basis of a view of the law for which neither party has contended. An adjudicator may be free, as it were, to make an unreviewable error of law based on the submissions of one of the parties. He should not be so free where the error is all his own work and might have been avoided by affording natural justice⁵².

The statutory discretion to seek additional submissions

53. I have noted that adjudicators should seek submissions when they are minded "to come to a particular determination on a particular ground for which neither party has contended"⁵³. Additionally, s21(4) of the NSW Act specifically provides that an adjudicator may seek submissions. Thus, one might ask, despite the fact that s21(4) is framed as a discretion rather than an obligation, are there circumstances, other than those mentioned, when an adjudicator *should* seek submissions? Section 21(4) of the NSW Act provides:

(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

⁵² *John Holland* at [57]

⁵³ *Musico* at [107]

(d) may carry out an inspection of any matter to which the claim relates.

54. In *John Holland v Cardno MBK*⁵⁴ Einstein J said that “it would seem unlikely that the legislature would have intended the provisions of s21(4)(a) and (b) to permit a radical departure from the statutory scheme...[they] are to be read as permitting no more than additional submissions which *clarify* earlier submissions” (his Honour’s emphasis). His Honour further noted that the initial submissions are constrained in additional ways by the Act and by analogy, therefore, so are the clarifying submissions. However, the discretion under s21(4) should not be used to create a conflict with other parts of the Act. This might occur where, for example, the adjudication process becomes protracted by allowing further time for submissions to the extent that they conflict with ss17 or 20, or by allowing submissions to provide reasons that were not offered in the payment schedule (which would conflict with s20(2B))⁵⁵. In other words, additional material may be allowed which is within the scope or ambit of the payment claim⁵⁶.

55. Submissions called for under s21(4)(a) are subject to the same rules of principle relating to natural justice. Therefore once adjudicators opt to make use of the discretion in s21(4)(a) they are bound, in the continuing exercise of their power, to provide natural justice to the other parties.

56. Although it has been argued at least once⁵⁷ (unsuccessfully, I might add), I see no basis for the assertion that s21(4)(a) creates not only a right but an obligation which in turn forms one of Hodgson JA’s ‘basic and essential requirements’. To read the legislation that way might encourage an adjudicator to seek submissions on each and every point on which he or she is not certain. This is clearly not in line with the scheme anticipated by the Act.

⁵⁴ *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors* [2004] NSWSC 258

⁵⁵ Note the difference already cited between s20(2B) in NSW and equivalent provision compared to s21(2B) in the Victorian Act

⁵⁶ *Holmwood* at [129]

⁵⁷ *David Hurst Constructions Pty Ltd v Durham* [2008] NSWSC 318 at [51]-[62]

Further practical considerations

57. The scope of natural justice to be afforded might also be affected by practical difficulties. Section 21(3) of the NSW Act, amongst other things, requires an adjudicator to complete the adjudication within 10 business days of providing notice of acceptance of the adjudication application. This is the upper limit (unless the parties agree to a longer period) as the general requirement of the adjudicator is to complete the determination “as expeditiously as possible”. Barrett J considered that this might “militate against the standards of thoroughness and detail that are expected where no externally imposed time pressure applies”⁵⁸. The ability to consider matters in detail would differ from, for example, the time available to a judge who has reserved judgment after trial. Indeed, his Honour said, that sort of detailed analysis cannot be presumed to be the intention of the legislature either.
58. A further example of a practical hurdle that may affect specific adjudications is the volume of material provided. Adjudicators are sometimes faced with a mass of material that would be difficult to read in the time allowed, not to mention a requirement to properly consider it and to write a reasoned determination in response to it. This is also increasingly a problem for courts⁵⁹.
59. The Full Court of the Federal Court has determined that the Administrative Appeals Tribunal (AAT) owed a similar obligation, which was necessarily to be considered “with due regard to the practical considerations related to the course of the hearing including... the receipt of a large volume of evidence during a hearing”⁶⁰. This acknowledges the conflict between an obligation to consider large volumes of material or difficult questions of law which must be balanced against a statutorily imposed deadlines. As Einstein J noted this will “necessarily give rise to many adjudication determinations which will simply be incorrect”⁶¹, keeping in mind that a decision will not be reviewable merely because it is wrong.

⁵⁸ *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152

⁵⁹ *Michael Wilson and Partners Ltd v Robert Colin Nicholls and Ors* [2009] NSWSC 669

⁶⁰ *Habib v Director-General of Security* (2009) 255 ALR 209 at 225 [63]-[64]

⁶¹ *Brodyn Pty Limited t/as Time Cost and Quality (ACN 011 998 830) v Phillip Davenport & Ors* [2003] NSWSC 1019 at [14]

The creation of an issue estoppel by adjudication determinations

60. The decision of the Full Federal Court relating to the AAT helps to reinforce the idea that the role of an adjudicator is analogous to a decision-making tribunal such as the AAT. This was reflected in the decision of *Dualcorp v Remo Constructions*⁶² where the NSW Court of Appeal⁶³ accepted the proposition that the principles of issue estoppel were applicable to adjudications under the Act.
61. The following propositions were relied upon:
1. The notion of finality, which underpins our legal system, dictates that “controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances”⁶⁴.
 2. The notion of finality is reflected in the principle of res judicata which is a substantive rule of law.
 3. Res judicata prevents parties re-agitating a decision on its merits “where a final judicial decision has been pronounced on the merits by.... [a] judicial tribunal with jurisdiction over the parties and the subject matter”⁶⁵.
 4. The requirements for an issue estoppel are threefold⁶⁶:
 - i. the same question has been decided;
 - ii. the decision said to create the estoppel was final; and
 - iii. the parties are the same as those in the decision said to create the estoppel.
 5. “It is well accepted that domestic tribunals are within the ambit of res judicata principles”⁶⁷.
 6. Therefore issue estoppel should attach to tribunals also⁶⁸. Notwithstanding the fact that they are abbreviated, adjudication determinations are still judicial in nature.

⁶² [2009] NSWCA 69

⁶³ Macfarlan JA, Handley AJA agreeing, Allsop P leaving the question open by deciding on other grounds

⁶⁴ *Dualcorp* at [44] quoting from *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34]

⁶⁵ *Dualcorp* at [46] Quoting Spencer-Bower, Turner and Handley *Res Judicata*, 3rd ed (1996) Butterworths

⁶⁶ *Dualcorp* at [47] referring to *Kuligowski v Metrobus* (2004) 220 CLR 363

⁶⁷ *Dualcorp* at [48]

⁶⁸ *Dualcorp* at [48]

62. With reference to the purpose of the Act, Macfarlan JA determined that it would be inconsistent to allow parties to re-agitate issues several times simply by serving another payment claim in identical terms, as occurred in this matter, to one which had been previously submitted. Noting what I had said in *Rothnere*, his Honour noted that the terms of s22(4) apply only where an adjudicator has actually decided a question of value of construction work. However, because s22(4) gives a level of finality the requirements of *Kuligowski* (outlined at point 5 above) are met. Section 22(4) states:

(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.

63. His Honour also noted that s22(4) probably did not indicate the extent of the issue estoppel, pointing out a number of other sections which gave an indication that Parliament intended determinations to have a level of finality⁶⁹.

⁶⁹ *Dualcorp* at [52]-[59] per Macfarlan JA

64. A similar point was made by Hammerschlag J in *University of Sydney v Cadence Australia*⁷⁰. His Honour doubted whether the discussion of issue estoppel in *Dualcorp* was obiter, though his Honour proceeded to decide the matter on other grounds. It is worth noting that his Honour, if he had been minded to decide the matter on the grounds of issue estoppel, would have accepted the High Court Authority of *Brewer v Brewer*⁷¹ which limited the estoppel to ultimate facts rather than evidentiary facts. This might therefore place a limitation on the issue estoppel as interpreted with regard to adjudications in *Dualcorp*.

65. Rein J in *Perform (NSW) v Mev-Aus t/as Novatec Construction Systems*⁷² agreed in general terms with the views propounded by the Court of Appeal in *Dualcorp* and adopted the approach of Allsop P⁷³. His Honour said that even though the court's power to restrain proceedings should be used sparingly it will be appropriate where there has been an abuse of process (the ground on which this case was ultimately decided). His Honour, noted that one should not lose sight of the fact that a determination under the Act is not a final statement of rights and liabilities between parties as it is a mechanism for interim payments only. This point is supported by s32.

Preservation of contractual rights

66. For completeness I set out s32 of the NSW Act:

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

⁷⁰ [2009] NSWSC 635

⁷¹ (1953) 88 CLR 1 at 15-16

⁷² [2009] NSWSC 416

⁷³ *Perform* at [42]

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

67. The section preserves parties' contractual rights which can be relied upon in a final hearing. However, in major construction disputes this is likely to be an expensive and possibly protracted process.

68. Nonetheless, determinations do have a bearing, even though interim in nature, on the rights and interests of the parties. This led Brereton J to observe in *Fifty Properties*, that where the question of a denial of natural justice is finely balanced, judicial intervention should err on the side of finding that there has been a denial to ensure that the legitimate rights of those affected can be protected⁷⁴.

⁷⁴ *Fifty Properties* at [54]

Relief available

69. What will be achieved if a party can demonstrate a denial of natural justice in the form discussed above? It is beyond the scope of this paper to look at all of the developments in this area since the inception of the Act and the competing arguments which have developed relating to whether certiorari should be available. It suffices to say that the current weight of authority stemming from the decision in *Brodyn*⁷⁵ is that a substantial denial of natural justice will render a decision void as there will not have been a valid determination. *Brodyn* also dictates, at least in New South Wales, that injunctions and declarations should be the remedies when such a denial is found⁷⁶. However, in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*, Vickery J concluded that certiorari was the appropriate remedy where the court concluded that a determination was void⁷⁷. His Honour said, in substance, that the power of the Supreme Court of Victoria to grant certiorari stemmed from the Victorian Constitution, and had not been ousted⁷⁸.

Conclusion

70. The right to natural justice is one which the courts will uphold except in the rare circumstances where Parliament clearly intends to deny it. It is a key principle in our society that one may be heard and have their views properly considered before their reasonable expectations of having their rights preserved can be affected. This is true also of the interim payment regime for the construction industry which has been set up to produce quick and cheap results, to maintain cash flow and to decide the rights of parties on an interim basis.

71. Review of adjudications is limited. One of the basic and essential requirements for a valid decision is that natural justice is afforded to the parties in the conduct of the adjudication. Whilst final contractual rights of parties are preserved, the enforcement of these rights is likely to take far longer and be more expensive

⁷⁵ *Brodyn* at [53]-[57] per Hodgson JA

⁷⁶ *Brodyn* at [52] per Hodgson JA

⁷⁷ *Hickory* at

⁷⁸ *Hickory* at [83]-[90] where his Honour made specific reference to the limited exclusions of s85 *Constitution Act (Vic) 1975* at ss28R, 46 of the Victorian Act. However, his Honour noted that this was the extent of the exclusion of s85 and therefore concluded that certiorari would be available in appropriate circumstances.

than the statutory adjudication process. As an adjudicator is a decision-making tribunal, and as an issue estoppel will attach to a determination, care must be taken in reaching and reviewing adjudication determinations.

72. Adjudicators should exercise their powers according to the statute but with a level of flexibility to ensure that a practical level of fairness is provided to the parties. An adjudicator should decide the issues and law according to the way it is submitted by the parties. If an adjudicator is minded to decide the matter on a basis not contended by the parties he or she should give the parties notice of this and a chance to make submissions. If further submissions are sought and obtained the adjudicator should ensure that the submissions are available to both parties.

73. When deciding whether there has been a relevant denial of natural justice in the adjudication process a judge will look at whether the denial is material to the rights of the party claiming there has been such a denial because materiality is 'inextricably interlinked with the concept of natural justice'. In order to make such an assessment the judge will assess whether the issue was germane to the decision of the adjudicator and whether any submissions could realistically have affected the outcome arrived at by the adjudicator to form a view about the decision reached and how that decision was reached in order to ensure practical unfairness is avoided.