

MY RESPONSE TO FIOCCO AND MURRAY REPORTS ON SECURITY OF PAYMENT REFORMS IN AUSTRALIA

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1. BRIEF BIOGRAPHY OF THE SUBMITTER

I am a Senior Lecturer at CQUniversity and currently leading the research team within the Master of Project Management programme. My main research interest is security of payment laws and statutory adjudication. Some of my research is published in the collaborative book - International Contractual and Statutory Adjudication by Routledge, where I contributed the four Australian chapters. I also serve as a Panel Adjudicator in NSW and as a Principal Supervisor of Higher Research Degree students.

In 2017, I completed my PhD entitled "introducing review mechanisms into statutory adjudication" at Deakin University. The quality of my research was recognized on a national level being selected as a Finalist for the Research Achievement Award by PMI Australia 2018 and receiving three Brooking Prize Commendations Awards in the last three consecutive years.

The impact of my research was manifest following the Australian Government release of the final report of the Review of Security of Payment Laws by Mr John Murray. The report recommended adopting my proposal to introduce adjudication review across Australia.

In addition to academia, I have 16 years of industry experience serving in various project management roles. In one of those roles, I served as senior projects manager to deliver DAMAC Heights, one of the tallest residential building in the world.

I hold Master in Construction Project Management (Distinction), Bachelor in Civil Engineering and international certificates in Arbitration, Adjudication and Project Management. I am a certified Project Management Professional and a full member at Chartered Institute of Arbitrators (UK).

1.1 LIST OF RELEVANT PUBLICATIONS

I list below my recent publications relating to the security of payment legislation and reform opportunities:

Thesis:

1. Skaik S (2017), Introducing Review Mechanisms into Statutory construction adjudication, Doctoral Thesis, Deakin University, February 2017.

Book Chapters:

2. Skaik S (2017), Australia: The East Coast Model with New South Wales as the Principal Legislation. In: Burr, A. ed. International Contractual and Statutory Adjudication, Informa Law from Routledge.
3. Skaik S (2017), Australia: The East Coast Model: Victoria, Tasmania, The Australian Capital Territory and South Australia. In: Burr, A. ed. International Contractual and Statutory Adjudication, Informa Law from Routledge.
4. Skaik S (2017), Australia: The East Coast Model: Queensland. In: Burr, A. ed. International Contractual and Statutory Adjudication, Informa Law from Routledge.

5. Skaik S (2017), Australia: The West Coast model: Western Australia and Northern Territory. In: Burr, A. ed. *International Contractual and Statutory Adjudication*, Informa Law from Routledge.

Journal articles

6. Kerr, M and Skaik S (2018), Towards Statutory Adjudication in South Africa: Learning from the UK and Australia, *Construction Law journal*, vol. 33, no. 4
7. Skaik, S (2017), Operational problems and solutions of statutory complex adjudication: stakeholders' perspectives. *International Journal of Law in the Built Environment*, 9(2), 162-175.
8. Skaik S (2017), An empirical study: How to introduce effective review mechanisms into statutory adjudication? *Construction Law Journal*, vol. 33, no. 5, pp 102-120.
9. Skaik S (2017), Effectiveness of existing adjudication review mechanisms: Views of industry experts, *Construction Law Journal*, vol. 33, no. 3, pp 233-245.
10. Skaik S (2017), The tip of the iceberg, jurisdiction of statutory adjudicators, *Construction Law Journal*, vol. 33, no. 2, pp 102-120.
11. Skaik S, Coggins J, Mills, A (2016), Towards diminishing judicial intervention in Australia: A pragmatic proposal, *Construction Law Journal*, *Construction law journal*, vol. 32, no. 6, pp. 659-675.
12. Skaik S (2016), Taking Statutory Adjudication to the next level: A proposal for Legislative Review Mechanism of Erroneous Determinations, *International Construction Law Review*, *International Construction Law Review*, vol. 33, no. Part 3, pp. 287-311.
13. Skaik S, Coggins J, Mills, A (2016), The big picture: causes of compromised outcome of complex statutory adjudication in Australia, *International Construction Law Review*, vol. 33, no. Part 2, pp. 123-147.

Conference papers

14. Skaik S, Coggins J, Mills, A (2016), Australian Security of Payment Legislation: Impact of inconsistent case law, in *AUBEA 2016: Proceedings of the 40th Australasian Universities Building Education Association Annual Conference*, Central Queensland University, Rockhampton, Qld, pp. 671-681.
15. Skaik S, Coggins J, Mills, A (2016), Examining the approach to diminish judicial intervention in statutory adjudication in Australia, in *AUBEA 2016: Proceedings of the 40th Australasian Universities Building Education Association Annual Conference*, Central Queensland University, Rockhampton, Qld, pp. 660-670.
16. Skaik S, Coggins J, Mills, A (2015), A proposed roadmap to optimise the adjudication of complex payment disputes in Australia, in *ARCOM 2015: Proceedings of the 31st annual conference for the Association of Researchers in Construction Management*, ARCOM, Reading, Eng., pp. 93-102.
17. Skaik S, Coggins J, Mills, A (2015), Investigating the factors influencing adjudication of complex payment disputes in Australia, in *ARCOM 2015: Proceedings of the 31st annual conference for the Association of Researchers in Construction Management*, ARCOM, Reading, Eng., pp. 83-92.
18. Skaik S, Coggins J, Mills, A (2015), How should Adjudicators deal with expert reports in Australia? in *RICS COBRA AUBEA 2015: Proceedings of the 2015 Annual RICS International Research Conference*, Royal Institution of Chartered Surveyors (RICS), London, Eng., pp. 1-9.

Submissions:

19. Skaik, S, (2017), Written Submission, National review of the security of payment laws in the building and construction industry, Minister of Employment, Australia.
20. Skaik, S, (2017), Written Submission to the Queensland Building Plan discussion paper, QBCC, Queensland. Government.
21. Skaik S (2016), Taking Statutory Adjudication to the next level: Legislative Review Mechanism of Erroneous Determinations, Brooking Prize, online resources, Society of Construction law Australia.
22. Skaik, S, (2016), Written Submission to the SOP consultation paper, Small Business commissioner, South Australia Government, June 2016. Available at:
23. Skaik, S, (2016), Written Submission to the discussion paper "Improving the ACT Building Regulatory System, ACT Government, February 2016. See the relevant government report citing my submission here:
24. Skaik, S, (2015), Written Submission to the BCISP discussion paper NSW Fair Trading, December 2015.
25. Skaik, S, (2015), Written Submission to the Queensland SOP consultation paper, QBCC, Queensland Government, December 2015.

2. THE PURPOSE OF THIS SUBMISSION

I came to know that Hon Bill Johnston recently invited many key stakeholders to comment on the recommendations of Fiocco's report with regard to necessary reform in security of payment laws in Western Australia following the release of Murray Report. I also got an invitation a few months ago from Hon John Chapman, the Small Business Commissioner of South Australia to provide my response to Murray Report. This general submission provides my response and commentary on many recommendations made in Fiocco and Murray reports, particularly with regard to adjudication review.

Whilst I commend both reports for taking many significant steps in the right direction, I have identified the following problems if Fiocco and/or Murray recommendations are followed as they currently stand:

1. **Delaying tactics by seeking juridical review:** Many claimants will still be deprived from prompt payment following favourable adjudication determination since respondents (with deep pockets) usually seek judicial review as a delaying tactic. Respondents will continue challenging adjudicator's jurisdiction and seek judicial intervention to avoid payment or disciplinary action.
2. **Lack of industry confidence:** Adjudicators have variety of competencies and qualities and the right horse may not be picked for the right course. Industry will continue to have no confidence in adjudication decisions and adjudication process will continue to be a dirty unreliable process which open gates for further disputes and judicial intervention.
3. **No alternative convenient remedy:** Aggrieved parties of adjudication process will be left with no option but to pursue expensive and lengthy curial proceedings such as arbitration and litigation.
4. **Uncertainty:** Claimants who suspend work following successful adjudication determination will be liable for consequences if the determination is set aside by way of judicial review.
5. **Flawed appointment process:** The appointer will only appoint adjudicators based on adjudication application. However, adjudication response is still allowed to be served after adjudicator's appointment (as recommended in Murray's Report) which usually include complex legal submissions on jurisdiction that would need legally trained adjudicator to be appointed in the first place.
6. **Jurisdiction of adjudicators:** Adjudicators do not have clear guidelines or settled case law on how to deal with jurisdictional challenges. The reports did not adequately explain what are the adjudicator's obligations and rights whether or not jurisdictional objections are raised.

2.1 THE AMBIT AND RATIONALE OF THIS SUBMISSION

This submission focuses on providing detailed response to the recommendations made with regard to adjudication review mechanism in both Reports, it also states my position and addresses my concerns

regarding all the 86 recommendations in Murray Report. The reason whilst more attention is given to adjudication review is that the whole notion of adjudication review and its feature was proposed by myself in many submissions, one of which was sent to Mr Murray who in turn fully endorsed my proposal in his comprehensive report with some alterations. However, Fiocco's Report, which also referred to my submission to Mr Murray, recommended NOT to introduce adjudication review. In both reports as well as this submission, the following key policy considerations have guided the recommendations, namely:

1. Any reform should ensure that claimants receive payment when due, and have an effective means for enforcing their contractual rights.
2. Any reform should, as far as practicable, promote prompt payment to ensure cash flow through the contractual chain.
3. Any reform should be capable of proper enforcement.
4. Any reform should ensure minimal court and lawyer involvement in resolving most if not all disputes by the means of swift and informal adjudication process.¹

The recommendations made in both reports have not addressed the overwhelming judicial intervention in statutory adjudication that frustrate the very object of the security of payment legislation of promoting prompt payment. The reports did not provide effective remedies for claimants who received favourable adjudication determinations but could not enforce it as a result of the respondents (with deep pockets) opting to challenge determinations by way of judicial review. In fact, none of the above policy considerations would be achieved if the recommendations are adopted as they are. On the contrary, Recommendation 1 in chapter 4 of Fiocco's Report impliedly seems to encourage all respondents (who are unwilling to make payment for any reason) to seek judicial review in order to be exempted from the disciplinary action under the proposed reform. The recommendation 1 states:

The amendment to the BSR Act should make it clear that a disciplinary matter does not arise where the building service provider has –

a. commenced proceedings to suspend or set aside the unsatisfied judgment debt, adjudicator's determination, arbitrator's award or finding made by another person or body; or

b. commenced proceedings in relation to an amount determined by an adjudicator under the SOPA as payable by the building service provider.

The overwhelming involvement of lawyers in adjudication does not reconcile with the purpose of the SOP legislation that was primarily devised to help vulnerable class of subcontractors. Those subcontractors are faced with a piece of legislation that is not user-friendly. Also, those subcontractors will not be able to cope with the tremendous dynamic case law on adjudication when they prepare or

¹ Brodyn Pty. Ltd. t/as Time Cost and Quality v Davenport [2004] NSWCA 394 at [51]; Minimax Fire Fighting Systems Pty Ltd v. Bremore Engineering (WA Pty Ltd) [2007] QSC 333 at [20].

defend their claims before adjudication or Supreme Court. They are left with no option but to engage lawyers to handle their claims where none of the legal costs will be recovered even if they get a favourable adjudication decision. Eventually, the cost incurred on being involved in the adjudication process and/or a later judicial review proceedings may eat up a major portion of the adjudicated amount making the process less viable and attractive to many small players in the industry.

Indeed, the available evidence from my research revealed that an appropriately devised review mechanism of adjudication determinations could be a solution to all the above problems. The whole notion of introducing review mechanisms is to facilitate swift cash flow down the construction contractual chain and deter respondents from seeking judicial review as a delaying tactic. It is a safety net that can capture erroneous determinations away from court system which will improve industry confidence and certainty in adjudication outcome. In order to limit judicial intervention and meet the above policy considerations, any review mechanisms model must include the following provisions:

1. Aggrieved respondents must pay the undisputed adjudicated amounts to claimants in order to access the review. In addition, disputed amounts must be paid into a trust account pending review if claimants may not be able to repay.
2. Complex adjudication cases (including legal arguments) must always be referred to senior adjudicators who are legally trained.
3. Judicial review applications to set aside adjudication determinations must not be entertained unless the parties have first engaged in the review mechanism.

Such review mechanism as detailed in this submission can, on its own right, achieve multiple policy objectives including the following:

- 1- It offer a pragmatic and practical solution that acknowledges the existing variety of adjudicators' qualities and competencies and the difficulty of attaining quality adjudication outcome due to the hasty adjudication process.
- 2- It acts as an effective safety net to capture erroneous determinations away from curial proceedings to help control the overall cost and improve the finality and informality of statutory adjudication.
- 3- Reinstate industry confidence in adjudication process and determinations.
- 4- Enhance the certainty in adjudication process and outcome which ultimately helps increase the use of the regime and inform claimants' decision of suspending works for non-payment.
- 5- Improve the quality of first instance determinations where adjudicators become more vigilant in making their determinations fearing the review.
- 6- Deter respondents from delaying the release of adjudicated payment by seeking judicial review.
- 7- Decrease Supreme Court case load, where most of cases can be captured by the review avenue.

3. MY RESPONSE TO FIOCCO REASONING FOR NOT INTRODUCING REVIEW MECHANISM:

It was disappointing that Fiocco’s Report did not take up any of Murray’s recommendations regarding the need to introduce adjudication review and the features of such model which substantially endorse my proposed model. Whilst I thank Mr Fiocco for citing my relevant work in his report, I think his report did not substantiate any of the arguments made against my proposed review mechanism which emerged as a key finding of an extensive PhD study. The table below includes my response to Fiocco’s argument against introducing the adjudication review:

Fiocco’s argument	My response
stakeholders were concerned that it would add another layer of appeal, thereby delaying cash flow	The proposed model (see below section) requires the adjudicated payment to be made as a pre-condition to access the review. Indeed, it would expedite and promote cash flow. It has been used effectively for more than a decade in Singapore and proven to be a great success. Please refer to my paper, Skaik S (2017), Effectiveness of existing adjudication review mechanisms: Views of industry experts, Construction Law Journal, vol. 33, no. 3, pp 233-245
Reasonable minds may differ on whether review of jurisdictional matters should be the function of a court or tribunal, rather than an adjudicator. The legislation will need to be carefully crafted to ensure that senior adjudicators are suitably qualified to carry out such a function.	As per my proposed model, review adjudicators must have jurisdiction to look into questions of law. A review adjudicator must be a senior adjudicator with legal training (i.e. retired judge) or a panel of adjudicators depending on size and complexity of the case subject to review. Please see my paper; Skaik S (2017), An empirical study: How to introduce effective review mechanisms into statutory adjudication? Construction Law Journal, vol. 33, no. 5, pp 102-120, Skaik S (2017), <u>The tip of the iceberg: Jurisdiction of statutory adjudicators</u> , Construction Law Journal, vol. 33, no. 2, pp 102-119.
Equally, the underlying proposition of providing a more cost-effective path to appeal erroneous determinations is somewhat attractive. Supreme Court litigation is a costly and uncertain prospect for any claimant or respondent, but undoubtedly more so for smaller parties.	Agreed, but since the report did not endorse the review mechanism, I am wondering of the measures that the report put in place in address this concern. Please see further details on this issue in my paper; Skaik, S (2017), Operational problems and solutions of statutory complex adjudication: stakeholders’ perspectives. International Journal of Law in the Built Environment, 9(2), 162-175.
In considering Mr Murray’s recommendations, I have reviewed the submission made by Mr Samer Skaik, an academic in this field. Mr Skaik quotes Kenneth Martin J in <i>Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd</i> ⁵⁵⁷ that “the availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal, or review”. ⁵⁵⁸ I agree with Mr	Whilst, I thank Mr Fiocco of taking the initiative in considering my earlier submission to Mr Murray, I am not sure of the basis of making the claim that the Judge in the referred case was referring to traditional forms of arbitration or litigation. I think the two avenues would go without saying being the only available remedies in dispute resolution. Apparently, the Judge would have meant other binding

<p>Skaik that this confirms a willingness of the courts to deny prerogative relief where other review options are available. In this case His Honour was referring to the availability of more traditional paths of arbitration and litigation to resolve the parties' contractual rights, but the comments align with views expressed in other contexts.</p>	<p>alternative convenient remedies. The statutory review mechanism is of course one of those alternatives. Please see my paper; Skaik S (2017), An empirical study: How to introduce effective review mechanisms into statutory adjudication? Construction Law Journal, vol. 33, no. 5, pp 102-120.</p>
<p>The decision in <i>Kirk</i> means that the Supreme Court will maintain a supervisory function of the adjudication process. Mr Skaik concedes in his submission that: <i>judicial intervention in adjudication remains as a problem. Respondents with deep pockets may exhaust the appeal process to the end whereas the review mechanism is seen as another step down the appeal process. This barrier cannot be overcome following the High Court authorities in Kirk which maintained the Supreme Court supervision over adjudication process.</i> For this reason, I consider that the Government should not adopt the adjudication review process recommended in the Murray Report at this stage.</p>	<p>My proposed model addressed this issue in full by firstly forcing respondents to pay to access the review and prevent them from seeking judicial review without first obtaining a review determination. Imposing a condition on the parties to use review mechanism first is a fundamental difference between my model and Murray model. Having said that, the Supreme Court as confirmed in <i>Kirk</i> will continue to supervise adjudication after the parties had exhausted the review mechanism and remain dissatisfied. That would ensure that payment has been made ASAP as per the policy and respondent can argue later by way of judicial review. Surprisingly, despite the fact that Fiocco report acknowledged the problem of judicial intervention, it did not provide any measure to address it. Rather, it declines adopting the only effective and pragmatic measure being the review mechanism. Indeed, the proposed review is seen as a much more effective and efficient approach than any measures taken by court to protect the object of the legislation such as severance or remittance of erroneous determinations.</p>
<p>There is an inherent risk that a review process will take the adjudication scheme further away from the original intent of 'pay now, argue later'.</p>	<p>My proposed model call for payment to be made first in order to access the review. This is an obvious feature that promotes "pay now, argue later" policy. Judicial intervention seems the only avenue for aggrieved parties in case they are dissatisfied with adjudication process or outcome which promotes argue now, pay later. Currently, respondents are allowed to argue the determinations by way of judicial review, then they can pay months later if were unsuccessful in challenging the case. In fact, we have recently seen adjudication cases that reached High Court and the claimants had not received their adjudicated amounts.</p>
<p>While I appreciate the process may (emphasis added) in theory provide certainty for parties to larger disputes of avoiding the costs of Supreme Court litigation, in reality it will be viewed as little more than another step in the process for a well-resourced party.</p>	<p>Arguably, that is absolutely the case with existing legislation that encourage respondent to seek judicial intervention to avoid or delay making the payment. We have seen respondent with deep pocket investing in judicial review to keep the money due to others in their custody in order to run their own businesses hoping that claimants would get into insolvency by the time the Court had its say, then they will not be bound to pay at all.</p>
<p>Indeed, the limited use of the current review process under the Victorian Act is indicative of the likely</p>	<p>With due respect, this argument is irrelevant since</p>

<p>utility, or lack thereof, of an adjudication review process.</p>	<p>the Victorian review model is not a well-devised review mechanism and it was setup to serve a specific purpose that suites the unique Victorian legislation only. It is proven to be totally ineffective and not a user friendly. All of the experts who are familiar with the review mechanism in Victoria that I interviewed during my PhD were of the opinion that it is completely ineffective because of two main reasons. First, the drafting of sections related to excluded amounts, the subject of the review, is very complex. Secondly, its scope is too limited. My proposed review mechanism model or even Murray model are totally different and much more comprehensive, user-friendly and rigorous. Please refer to my paper, Skaik S (2017), Effectiveness of existing adjudication review mechanisms: Views of industry experts, Construction Law Journal, vol. 33, no. 3, pp 233-245</p>
<p>I consider the SAT to be the most appropriate body to continue to review decisions to dismiss adjudication applications.</p>	<p>It would have helped if Fiocco Report at least expended the scope of WASAT to review erroneous determination on ground of jurisdictional errors of law by either party as advocated by many SC judges in WA before. For example, in <i>O'Donnell Griffin Pty Ltd v John Holland Pty Ltd</i>,² Beech J held that the WASAT also has jurisdiction to review the adjudicator's 'decision not to dismiss'. To reach this proposition, Beech J examined the object of the WA Act and found that the review by the WASAT of an adjudicator's decision not to dismiss was '<i>more expeditious</i>'³ and more consistent with the scheme of the WA Act than the '<i>slower and more cumbersome prerogative relief</i>'.⁴ That proposition, however, was eventually overturned by the Court of Appeal in <i>Perrinepod Pty Ltd v Georgiou Group Building Pty Ltd</i>.⁵</p> <p>There is no valid or convincing reason as to why the SAT review mechanism is not open for aggrieved parties challenging the jurisdiction of adjudicators before the WASAT rather than the Supreme Court. This will, of course, require a better quality of members conducting the review in order to attract confidence in the system and attract aggrieved parties to this avenue for review over the Supreme Court. In addition, Fiocco's Report appears to accept that erroneous determinations on merits are ok to continue being immune from any scrutiny or review. That is not helpful if we really want to improve certainty, usage and confidence in the entire regime.</p> <p>For full review and analysis of SAT review, please refer to my paper, Skaik S (2017), Effectiveness of existing adjudication review mechanisms: Views of industry experts, Construction Law Journal, vol. 33,</p>

² [2009] WASC 19 (Beech J).

³ [2009] WASC 19 [122].

⁴ [2009] WASC 19 [131]. See Also, *Thiess Pty Ltd v MCC Mining (WA) Pty Ltd* [2011] WASC 80 [44] (Corboy J).

⁵ [2011] WASCA 217 [129].

	no. 3, pp 233-245.
The Government may wish to re-visit the recommendations pending discussions with other states and territories on the details and role a senior adjudicator.	Agreed. I hope my submission has provided enough evidence and clarifications to move towards revisiting Fiocco’s recommendations about review mechanisms.

4. SKAIK’S REVIEW MECHANISM MODEL

In My PhD, I examined whether the Australian statutory adjudication would benefit from introducing a review mechanism, and if so, what would be the guidelines for devising an effective review mechanism. The study adopted a combination of doctrinal legal research and socio-legal research (empirical research) involving 23 interviews with industry experts. The study revealed that the lack of full review mechanisms within the security of payment legislation is one of the identified factors leading to poor adjudication outcome and/or excessive judicial intervention. The study drew upon this analysis and evaluates the operation of review mechanisms in various jurisdictions to examine whether or not a legislative review mechanism, should be an essential characteristic of any effective statutory adjudication scheme. The study concluded that an appropriately designed full review mechanism is a pragmatic and effective measure to improve certainty, reinstate disputants’ confidence and diminish judicial intervention. The study identified some barriers resulting from introducing review mechanisms, namely, additional time and cost, and persistent availability of judicial review. Thus, a set of detailed guidelines for devising an appropriate review mechanism was eventually proposed to counter those barriers and avoid any abuse of process in order to meet policy considerations.

Notwithstanding the interim and rapid nature of statutory adjudication, it was judicially noted that there is “*no proper basis to distinguish an adjudication for the purpose of maintaining cash flow from an adjudication to determine a party’s ultimate rights and entitlements.*”⁶ An optimal adjudication process should maximise, within the legislative objective of expediency, the opportunity that adjudicators’ determinations are made in accordance with the correct and relevant law. Judicially,⁷ it was noted that the intention of the SOP legislation is to resolve payment disputes with minimum of delay as well as minimum of opportunity for court involvement. Also, it was observed that the SOP legislation emphasises speed and informality.⁸

Typically, an aggrieved party in adjudication has no option but to initiate lengthy and expensive proceedings such as arbitration or litigation but the inherent cost of such proceedings may prevent the

⁶ *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd* (2014) 34 NTLR 17; NTSC 20 [45] (Barr J).

⁷ *Brodyn Pty. Ltd. t/as Time Cost and Quality v Davenport* [2004] NSWCA 394 at [51].

⁸ *Minimax Fire Fighting Systems Pty Ltd v. Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [20].

party from seeking justice. The remedy by way of judicial review is available in very limited situations. Therefore, many erroneous adjudication determinations have become final and binding decisions.⁹

In addition, with the availability of the review mechanism, courts are likely to be more reluctant to exercise their discretionary powers to set aside adjudication decisions.¹⁰ In Singapore, Prakash J held in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd*¹¹ that the availability of a statutory merits review, with other factors, impliedly restricted judicial review in the High Court. In *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd*,¹² Kenneth Martin J also noted that:

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

Introducing review mechanism will improve the confidence and certainly in adjudication outcome, which is paramount in situations where claimants exercise their statutory rights to suspend work if respondents do not pay the adjudicated amounts. However, the consequences of any work suspension may be devastating if the adjudication determination fails to resist challenges in courts. Vickery J observed this dilemma in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* and noted:¹³

“A contractor would be seriously inhibited in the exercise of its statutory right to suspend works if it suspected that its payment claim and the adjudicator’s determination made upon it could be vulnerable to attack on technical legal grounds. If the contractor made the wrong call, the consequences of suspending work could be prohibitive.”

On the other hand, improving the quality of adjudicators may not be a sufficient measure to avoid erroneous determinations. In Queensland, major amendments have been made to its SOP legislation in December 2014 to increase the quality of adjudication outcome such as allowing longer timeframes for complex claims and improving the selection and regulation of adjudicators. Interestingly, seven judicial review court applications were lodged after the amendment, (compared to 15 applications in the preceding year), in which the Queensland Supreme Court found that adjudicators committed

⁹ See, eg, *Uniting Church in Australia Property Trust (Qld) v Davenport* [2009] QSC 134 (Daubney J).

¹⁰ As to the use of the discretion to deny certiorari where there lies another review option, see for instance, the High Court's decision in *The Queen v Cook; Ex parte Twigg* [1980] HCA 36 [29], [30] and [34]; *Re Baker; Martin CJ in Re Carey; Ex parte Exclude Holdings Pty Ltd* [2006] WASCA 219 [128] - [140].

¹¹ [2009] SGHC 257.

¹² [2011] WASC 172; 42 WAR 35 [64].

¹³ [2009] VSC 156; 26 VR 112 [47].

jurisdictional errors in three cases.¹⁴ Moreover, adjudication of complex payment disputes became very lengthy and costly which makes the scheme more similar to curial proceedings.

Introducing an appropriate review mechanism would offer a pragmatic and practical solution that acknowledges the existing variety of adjudicators' qualities and competencies and the difficulty of attaining quality adjudication outcome due to the hasty adjudication process. The review mechanism may act as an effective safety net to capture erroneous determinations away from curial proceedings to help control the overall cost and improve the finality and informality of statutory adjudication.

4.1 My Guidelines to introduce review mechanism into statutory adjudication:

This section includes a set of guidelines that explain how to introduce my proposed model into any legislation. The guidelines, whilst they are devised to Assist the parliamentary counsels in drafting legislation for review mechanisms in jurisdictions based on the NSW SOP model, can also be used as a reference to draft legislative amendment within any other SOP legislation in Australia or worldwide.

A. Threshold for review

- (1) This review mechanism applies to a respondent in respect of an adjudication determination if the adjudicated amount exceeds the adjudication response amount by \$100,000 or more.
- (2) This review mechanism also applies to a claimant in respect of an adjudication determination if the payment claim exceeds the relevant adjudicated amount by \$100,000 or more.

B. Application for review by respondent

- (1) Subject to this section, a respondent may apply for a review of an adjudication determination (a *review application*).
- (2) An application under this section may only be made on the ground that the first instance adjudicator (*the adjudicator*) made an error of fact or law that goes into or within the adjudicator's jurisdiction that could substantially affect the right of one or more parties to the adjudication determination.
- (3) An application under this section to challenge adjudicator's decision upon jurisdiction cannot be made unless:

¹⁴ Queensland Building and Construction Commission, monthly adjudication statistics, December 2015, p. 8.

- a) the grounds of that challenge have been duly raised before the adjudicator; and
 - b) the adjudicator has released the determination.
- (4) An application under this section may only be made if the respondent has paid to the claimant the undisputed portion of adjudicated amount.
- (5) An application under this section may only be made if the respondent has either provided a bank guarantee for the disputed portion of the adjudicated amount or has paid the disputed portion of the adjudicated amount into a designated trust account maintained by an independent entity nominated by the governmental authority.

C. Application for review by claimant

- (1) Subject to this section, a claimant may apply for a review of an adjudication determination (a *review application*).
- (2) An application under this section may only be made on the ground that the adjudicator made an error of fact or law that goes into or within the adjudicator's jurisdiction that could substantially affect the right of one or more parties to the adjudication determination.
- (3) An application under this section to challenge the adjudicator's determination upon jurisdiction cannot be made unless the adjudicator has released a determination dismissing the adjudication application without addressing the merits for lack of jurisdiction.
- (4) An adjudicator's determination made under sub-section C(3) is an adjudicator's determination for the purpose of the Act.

D. Procedure for making application

- (1) A review application must be made to an authorised nominating authority chosen by the mutual agreement of the parties. The parties may also agree the identity of the review adjudicator to be appointed. In the absence of agreement, the Authority, upon the request of the applicant, shall nominate the authorised nominating authority to which the review application shall be made.
- (2) A review application shall not be made to the same authorised nominating authority to which the adjudication application was made.

- (3) A review application must be made within 5 business days after the respondent or claimant (as the case requires) receives a copy of the adjudication determination.
- (4) A review application—
 - (a) must be in writing in the prescribed form and contain prescribed information (if any); and
 - (b) must contain the reasons for applying for review and identify alleged errors in the determination; and
 - (c) must include a copy of the adjudication determination that is the subject of the adjudication review; and
 - (e) must include a copy of the payment claim, payment schedule and all submissions and information considered by the adjudicator in making adjudication determination; and
 - (f) must be accompanied by the application fee (if any) determined by the authorised nominating authority.
- (5) The party applying for an adjudication review must give a copy of the review application to the other party within one business day after the application is made.

E. Right to respond to the review application

- (1) A party who has received a copy of an adjudication review under subsection D(5) may make a submission to the authorised nominating authority, appointed in accordance with subsections D(1) and D(2), in response to the review application within 3 business days after having been duly served with a copy of the review application.

F. Appointment of review adjudicator

- (1) The authorised nominating authority must, within 5 business days after receiving a review application, appoint a review adjudicator or a panel of 3 review adjudicators in accordance with this section (the *review adjudicator*) to conduct the review.
- (2) The authorised nominating authority shall not disclose the identity of the original adjudicator to the review adjudicator.

- (3) Notwithstanding the fact the parties may agree the identity of the adjudicator under subsection D(1), a review adjudicator shall be a person who is eligible to be an adjudicator pursuant to the Act.
- (4) The authorised nominating authority shall not appoint an adjudicator who has been involved directly or indirectly with the adjudication determination that is the subject of the adjudication review.
- (5) The authorised nominating authority may select a senior adjudicator with legal qualifications and construction experience relevant to the matter(s) in dispute.
- (6) The authorised nominating authority may appoint a panel of 3 review adjudicators if, in the opinion of the authorised nominating authority, the review application is too complex and/or if the original adjudication determination was made by a senior adjudicator.
- (7) Whether a review application is too complex for the purposes of subsection F(6) is a matter to be determined at the discretion of the authorised nominating authority to which the review application has been made. In determining the complexity of the review application, the authorised nominating authority may have regard to the amount in dispute, the volume of the review application submissions, and the nature of the reasons for applying for review.
- (8) The authorised nominating authority must give each party to the review and the Authority written notice of the appointment of a review adjudicator.
- (9) The notice under subsection F(8) must include the adjudicator's name, contact details and date of appointment.

G. Adjudication review procedures

- (1) The adjudication review commences upon acceptance by the review adjudicator of his or her appointment as the review adjudicator.
- (2) The authorised nominating authority must provide the following information to the review adjudicator as soon as practicable after the appointment of the review adjudicator—
 - (a) a copy of the review application together with all information submitted in accordance with section D; and

- (b) a copy of any response to the review application made by a party pursuant to section E.

H. Adjudication review determination

- (1) In determining a review application, the review adjudicator must consider the following matters only—
 - (a) the provisions of the Act and any regulations made under the Act; and
 - (b) the provisions of any construction contract to which the adjudication determination relates; and
 - (c) the information provided by the authorised nominating authority under subsection G(2).
- (2) In determining a review application on the merits, the review adjudicator may consider reformulated arguments based on the facts submitted before the adjudicator but must not consider any new facts, reasons or evidence, save for any submission relating to errors of fact or law in the adjudication determination.
- (3) The review adjudicator has the discretion to request further submissions, conduct inspections or call for conferences with the parties.
- (4) The review adjudicator has the jurisdiction to determine questions of law or facts raised in the review application and/or in response to the review application.
- (5) After conducting an adjudication review, a review adjudicator may—
 - (a) set aside the adjudication determination and substitute a new adjudication determination (*the review determination*) for the adjudicator's determination that is the subject of the adjudication review; or
 - (c) release a review determination confirming the adjudicator's determination that is the subject of the adjudication review.
- (6) In determining a review application, the review adjudicator must—
 - (a) where the review determination varies the adjudication determination, identify how and why it differs;

- (b) specify any amounts already paid to the claimant by the respondent in respect of the adjudication determination;
 - (c) determine any further amount that is to be paid by the respondent to the claimant pursuant to the review determination;
 - (d) determine any amount that is to be repaid by the claimant to the respondent;
 - (e) determine any interest payable on an amount referred to in subsection H(6) (c);
 - (f) specify the date on which any amount determined under subsections H(6) (c), (d) and (e) becomes payable.
 - (g) where the original adjudicator's determination is varied due to error, specify whether or not the original adjudicator's fee shall be reduced to a base fee rate as may be determined by the review adjudicator; and refund the remaining fee amount to the party who paid that amount.
 - (h) where the original adjudicator's fee is reduced pursuant to subsection H(6)(g), specify the amount of the original adjudicator's to be refunded to the party, or parties, who paid the fee.
 - (i) specify the date on which any amount under subsections H(6) (c), (d), (e),(g), and (h) becomes payable.
- (7) The review adjudicator may make an order for legal costs to compensate a party for any expenses, loss or inconvenience as a result of the other party's conduct. This would include situations when a party conducts itself unreasonably or where a case is obviously frivolous, vexatious or unmeritorious.
- (8) A review determination must be in writing and set out the reasons for the review determination in that determination.
- (9) A review adjudicator may, if he or she thinks it appropriate, include a statement in the review determination that, in his or her opinion, the application for the adjudication review was not made in good faith.
- (10) The date for payment referred to in sub-section (6)(f) must be within 5 business days after the parties (as the case requires) are given a copy of the review determination.

- (11) The review adjudicator must complete the adjudication review and provide a copy of the review determination to the authorised nominating authority that appointed him or her—
- (a) within 10 business days after his or her appointment; or
 - (b) where a panel has been appointed pursuant to subsection F(6), within 15 business days after the appointment of the panel; or
 - (c) within any further time, limited to additional 5 business days, to which the party who has applied for the adjudication review agrees.
- (12) An applicant must not unreasonably withhold their agreement under sub-section (11)(c).
- (13) Where a panel of review adjudicators is appointed to determine a review application, the determination shall be decided in accordance with the majority opinion of the review adjudicators on the panel.

I. Authorised nominating authority must notify persons of review determination

- (1) The authorised nominating authority must, as soon as practicable, provide a copy of the review determination to—
- (a) each party to the adjudication review; and
 - (b) the adjudicator who made the adjudication determination that is the subject of the adjudication review; and
 - (c) the Authority.

J. Review adjudicator's fees

- (1) A review adjudicator is entitled to be paid for reviewing the adjudication determination—
- (a) the amount, by way of fees and expenses, that is agreed between the review adjudicator and the parties to the adjudication; or
 - (b) if no amount is agreed, the amount, by way of fees and expenses, that is reasonable having regard to the work done and expenses incurred by the review adjudicator.

- (2) The claimant and respondent are jointly and severally liable to pay the review adjudicator's fees and expenses.
- (3) As between themselves, the claimant and respondent are each liable to contribute to the review adjudicator's fees and expenses in equal proportions or, if the review adjudicator determines otherwise, in such proportions as the review adjudicator may determine.
- (4) In deciding the apportionment of fees under subsection J(3), the review adjudicator may consider the following matters:
 - (a) the relative success of the claimant or respondent in the adjudication review;
 - (b) whether respondent party made an application for adjudication review for an improper purpose or without reasonable basis;
 - (c) whether respondent party conducted themselves unreasonably during the course of the adjudication review;
 - (d) whether the adjudication review application is withdrawn;
 - (e) the services provided by the review adjudicator in determining the review application, including the amount of time taken to consider discrete aspects of the amount claimed and reasons for review; and
 - (f) any other matters the review adjudicator considers relevant.

K. Review determinations may be enforced as orders of court

- (1) A party entitled to be paid an amount under a review determination may enforce the review determination by filing in a court of competent jurisdiction:
 - (a) a copy of the review determination that the authorised nominating authority has certified to be a true copy; and
 - (b) an affidavit as to the amount not paid under the review determination.
- (2) Upon filing under subsection K(1), the review determination is taken to be an order of the court, and may be enforced accordingly.

L. Judicial review of determinations

- (1) A party to an adjudication determination may not bring judicial proceedings to set aside an adjudicator's determination without having first obtained a review determination with respect to the adjudicator's determination.

M. Publishing of review determinations

- (1) The authorised nominating authority must provide a copy of the review determinations to the Authority.
- (2) The Authority shall publish the review determinations in the public domain in a timely manner.

5. MURRAY'S REVIEW MECHANISM MODEL:

Murray's report provided a detailed analysis and rigorous reasoning on why the review mechanism is the way forward in Australia. He also cited my relevant work in his reasoning. In his analysis, I cite the following propositions that Mr Murray made to support the need of a well-devised review mechanism which I fully agree with.

If, however, the nature of the rapid adjudication process, particularly where it involves disputed payments claims for large amounts, results in adjudication decisions which are perceived to be clearly wrong, then considerable injustice may be inflicted. An aggrieved claimant may be deprived of receiving payment for the construction work it claimed it had carried out. Similarly, an aggrieved respondent may be required to make a payment for an amount it considers it is not liable to the claimant and this may cause it, absent adjudication review, to apply to the courts to have the adjudicator's decision set aside.

To a large degree, the current legislative regime that does not provide for adjudication review has forced a dissatisfied party, particularly respondents, to look to the courts for providing the requisite relief. Where the courts have set aside an adjudicator's decision because of jurisdictional error or denial of natural justice (and there have been many), the costs to the parties has been significant.

The long list of successful court cases that have set aside many adjudication decisions has been an unfortunate feature of the current legislative regime and strongly suggests that perhaps a more cost-effective alternative may be worth examining. The higher the incidence of judicial intervention, the greater the uncertainty associated with the adjudication process, and the greater the uncertainty the less likely its usage by industry.

The review adjudication procedure should have appropriate restraints so as to cause a dissatisfied party to carefully consider whether it wishes to pursue such option. It should be available to both parties, but only in respect to disputes involving larger payment claims.

The legislation should clearly state that if a party is aggrieved by an adjudication decision it should take the step of adjudication review before applying to the courts to set aside the adjudication decision.

In devising his own model, Mr Murray followed the same structure of the Victorian review mechanism model which I have also based my proposed model on. Mr Murray, however, introduced some features that are different to their counterparts in my model that I tend to disagree with. The main areas of differences that the Murray model has are: 1) the lack of appropriate process to deal with jurisdictional issues in the review, 2) the suggested appointment of review adjudicators and 3) the absence of provisions preventing parties to bypass adjudication review by way of judicial review. The table below demonstrates the key differences between Mr Murray and my model with a commentary on why I think my proposed model would be more effective in meeting policy considerations:

Procedures	Skaik's model	Murray's model	Justification for my disagreement with the changes in Murray model
Adjudication cases subject to review	Adjudicated amount is 100,000 or more Dismissal by adjudicator for no jurisdiction	Adjudicated amount 100,000 or more Dismissal by adjudicator for no jurisdiction	This will ensure that cases subject to review have sufficient substance in economic terms This will provide claimants with an alternative convenient and affordable remedy than judicial review.
Eligibility	Either parties	Either party	This is for equity considerations.
Scope	Merits and jurisdiction	Merits and jurisdiction	Mr Murray did not propose any measures to deal with cases where jurisdiction of adjudicator is challenged whether during adjudication or after the release of a determination. It is quite necessary that the

			legislation provides clear procedures to avoid further challenges of the entire review process. Please refer to my model for the proposed procedures if a review is sought based on jurisdictional issues.
Conditions to access review	<p>Payment schedule is a precondition.</p> <p>Respondents must pay undisputed adjudicated amounts to claimant and the rest into a trust account.</p>	<p>Payment schedule is a precondition.</p> <p>Respondent must pay the adjudicated amount into a trust account.</p>	<p>This would provide an additional incentive to respondents to ensure that payment schedule is served on time in order not lose their right for review.</p> <p>Requiring the disputed payment to be made will promote “pay now argue later and strike the balance between accuracy of adjudication outcome and longer adjudication. There is no reason not to release unaffected payments to claimants directly before accessing the review.</p>
New reasons	<p>Not allowed.</p> <p>Respondents must raise jurisdictional challenges before the first instance adjudicator.</p>	<p>Not allowed.</p>	<p>Whilst respondents are required to mention the reasons for withholding payment in their response to the payment claim, it is quite possible that jurisdictional objections are only raised in the adjudication response after the adjudicator has been appointed. That approach has multiple risks, including having a potentially valid ground rejected for want of prosecution or excluded by</p>

			operation of the various statutory provisions ¹⁵ excluding new reasons. ¹⁶ The reasons why many respondents do not address jurisdictional issues in their response to the payment claim may basically be attributed to practical aspects including the high expenses and efforts in establishing jurisdictional arguments in responding to each payment claim ¹⁷ as well as the proposition that claimants may not be serious to take their claim further to adjudication.
Adjudication review of determinations by adjudicators agreed by parties.	Allowed	Not allowed	This must be allowed for the simple reasons that mutually agreed adjudicator may also get it wrong and he/she should be vigilant in making determination by the mere availability of the review.
Appointment of review adjudicator	A review application must be made to an authorised nominating authority chosen by the mutual agreement of the parties. The parties may also agree the identity of the review adjudicator to be appointed. In the absence of agreement, the Authority, upon the request of the applicant, shall nominate the	The regulator appoints the most senior available adjudicator	Mutual agreement on appointment will increase the parties' confidence of the outcome. Regulators will have less workload if they are only required to nominate an ANA rather than a competent adjudicator. The regulator, then, would not be involved in the review process which is left to ANAs that are more experienced and well

¹⁵ See eg, NSW Act, section 20(2B).

¹⁶ See *John Holland Pty. Limited v. Roads & Traffic Authority of New South Wales* [2007] NSWCA 19 at [29] and *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53.

¹⁷ In NSW, the Act no longer requires a payment claim to include a statement that it is a payment claim made pursuant to the Act. This means that any invoice or claim for payment that complies with section 13(1) of the Act is a payment claim within the meaning of the Act even though the claimant may not intend it to be a payment claim under the Act. See also, *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 at [38] (McDougall J).

	<p>authorised nominating authority to which the review application shall be made. A review application shall not be made to the same authorised nominating authority to which the adjudication application was made.</p>		<p>resourced.</p>
<p>Jurisdiction of review adjudicator to determine questions of law or fact</p>	<p>The review adjudicator has the jurisdiction to determine questions of law or facts raised in the review application and/or in response to the review application.</p>	<p>Not stated</p>	<p>This provision will close the gate for challenging jurisdiction of review adjudicators to review questions of law relating to jurisdiction of first instance adjudicators.</p>
<p>Jurisdiction of review adjudicator to determine first instance adjudication fee or order legal cost</p>	<p>The review adjudicator has jurisdiction to reduce the rate of first instance adjudicator and order legal costs if a party did not act in good faith.</p> <p>The review adjudicator may make an order for legal costs to compensate a party for any expenses, loss or inconvenience as a result of the other party's conduct. This would include situations when a party conducts itself unreasonably or where a case is obviously frivolous, vexatious or unmeritorious.</p>	<p>No jurisdiction to order fees or costs</p>	<p>Errant Adjudicators will still be paid their base rate costs but it is unfair to charge a full fee rate for erroneous determinations.</p> <p>Ordering legal costs will deter parties from accessing the review unnecessarily.</p>

Judicial review of determinations	A party to an adjudication determination may not bring judicial proceedings to set aside an adjudicator's determination without having first obtained a review determination with respect to the adjudicator's determination.	No restrictions	The rationale stems from the WA Supreme Court in <i>Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd</i> ¹⁸ which referred to various authorities including the High Court's decision in <i>The Queen v Cook; Ex parte Twigg</i> ¹⁹ and held that “availability of prerogative relief will be undermined by circumstances where parties could avail themselves of alternative remedies by way of rehearing, appeal or review
Publication of review determinations	Allowed	Not allowed	The review mechanism will help improve the quality of first instance decisions if the review decisions are published to give adjudicators the opportunity to see how sound determinations should be made. Published review determinations provide some sort of scrutiny. Adjudicators by reading the published decisions will learn how to improve their reasoning. There is no doubt that adjudicators now are a lot better at not falling into a jurisdictional error because there have been many

¹⁸ [2011] WASC 172 [64].

¹⁹ [1980] HCA 36 [29],[30],[34]. See also, *Re Baker; Ex parte Johnston* (1981) 55 ALJR 191 and *Martin CJ in Re Carey; Ex parte Exclude Holdings Pty Ltd* [2006] WASCA 219 [128] - [140].

			published decisions about what is jurisdictional error and what is not. I think publishing review determination will be very effective in promoting best practices in adjudication.
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6. MY RESPONSE TO 86 RECOMMENDATIONS IN MURRAY REPORT

Since Fiocco’s Report aimed to examine the extent that Murray’s recommendations should be followed, I thought it is necessary to have a separate section including my position on 86 recommendations made in Murray Report where Mr Fiocco Report had his say as detailed below. Out of 86 recommendations, I have endorsed 65 recommendations that I fully agree with, 16 recommendations that should be modified and 5 recommendations that should NOT be pursued with the rationale of needed changes as applicable.

No.	Summary of the Murray Report Recommendation	Fiocco Position	My position
1	Security of payment legislation should adopt an East Coast model to promote prompt payment to maintain a contractor’s cash flow.	✓	✓
2	Legislation should be drafted and structured as simply as possible and avoid two-tier system for complex and simple claims, but respondents should be able to request extra time to prepare an adjudication response.	✓	✓
3	Parties to a construction contract should have a statutory right to progress payments and a process to enforce this right.	✓	✓
4	Definition of construction work should be drafted in the broadest terms.	✓	✓
5	Definition of related goods and services should be drafted in the broadest terms.	✓	✓
6	Definition of construction contract should be drafted in the broadest possible terms	✓	✓

7	The definition of ‘construction contract’ should clarify that a claimant must be appropriately licenced or registered.	✓	Modification would be needed to this recommendation. This would create another opportunity to invalidate payment claims and challenge adjudicator’s jurisdiction. I think it is quite important to clearly state what the word “appropriately” actually means.
8	Definition of ‘business day’ should exclude Saturday, Sunday, public holidays, and the period 22 December – 10 January inclusive.	✓	✓
9	Legislation should apply to written and oral construction contracts, but not contracts that are part of a loan agreement, or contracts of guarantee or insurance, or employment contracts.	✓	✓
10	Legislation should not apply to a claimant corporation in liquidation.	✓	✓
11	Legislation should not apply to carve-out amounts a person is entitled to under the contract.	✓	✓
12	The legislation should apply to a residential housing sector so as to enable a residential contractor to serve a payment claim on an owner- occupier.	✂	✓
13	A payment claim served by a residential contractor on an owner- occupier must contain information on how and when to respond to the claim.	✓	✓
14	A party to a construction contract may make payment claim for each and every named month, or more frequently if provided under the contract	✓	✓
15	The legislation should include provisions governing one-off/milestone payments where there are no express terms.	✂	✓
16	Legislation should identify how to determine the date to make a final payment claim.	✓	✓
17	Where a contract is terminated, a claimant may make a payment claim for work done up to the date of termination.	✂	✓
18	‘Pay when paid’ clauses should be prohibited.	✓	✓

19	Payment claims are due to be paid in accordance with the terms of the contract up to a maximum of 25 business days, or within 10 business days if not terms are included.	✂	✓
20	Progress payments are to be calculated in accordance with the contract, or on the value of the goods and/or services provided.	✓	✓
21	Construction work is to be valued in accordance with the contract. If contract does not make express provision, the construction work to be valued in accordance with the contract price or rate, the variation price or rate, or the costs to rectify.	✓	✓
22	Payment claims must identify the contract, describe and quantify the item claimed for, and state how the claimed amount was determined.	✂	✓
23	Payment claims must state that they are made under the Act, the period for which a payment schedule is to be provided and consequences of failing to provide a payment schedule.	✓	✓
24	Payment claims must be made within 6 months after construction work was last carried out under the contract.	✓	✓
25	Final payment claims must be made in accordance with the contract, or the later of 28 days after the defects liability period or 6 months after the work was completed.	✓	✓
26	A payment schedule must identify the claim it relates to, the amount the respondent will pay and (if applicable) the reasons for withholding payment.	✓	✓
27	The regulator may prescribe the form for payment schedules and any additional information required.	✂	✓

28	A payment schedule must be served within the earlier of the time required under the contract, or 10 business days after the payment claim was served.	✂	✓
29	If the respondent fails to serve a payment schedule and fails to pay the claimed amount in time, the claimant may apply for adjudication, or recover the unpaid amount as a debt through the courts.	✓	Modification would be needed to this recommendation. The legislation should include clear directions relating to adjudicator's jurisdiction in absence of respondent's submission. Adjudicators must have a bona fide attempt to decide on jurisdiction then determine the merits of the claim rather than providing a rubber stamp decision.
30	If the claimant elects to recover an unpaid amount as a debt, the respondent may not bring a cross claim or raise any defence.	✓	Modification would be needed to this recommendation. The legislation must include a provision that prevents respondents from seeking injunction or judicial review without first paying the due amounts in trust.
31	If the respondent serves a payment schedule, but fails to pay the scheduled amount on time, the claimant may apply for adjudication, or recover the unpaid amount as a debt through the courts.	✓	✓
32	A head contractor's payment claims must include a supporting statement, which is copied to each subcontractor whose work is included in the head contractor's payment claim.	X	Agree with Murray
33	A supporting statement must state that all subcontractors have been paid.	X	Agree with Murray
34	Making a false supporting statement constitutes an offence.	X	Agree with Murray

35	<p>A claimant must apply for adjudication:</p> <ul style="list-style-type: none"> • within 10 business days of receiving a payment schedule that's less than the claimed amount, or • within 20 business days of the due date for payment if the scheduled amount is not paid, or • within 10 business days after a 5 business day notice period after the due date for payment if no payment schedule was served and the claimed amount is not paid. 	✂	Agree with Murray
36	Adjudicators are appointed by the regulator.	X	<p>Modification would be needed to this recommendation. Considering the dissatisfaction with QLD model and efficiency of regulator in administering the cases, ANAs should continue to appoint adjudicators with stricter policies and closer monitoring. All adjudicators must be registered with the regulator with a proper grading and workload that should be updated from time to time. Every registered adjudicator must have a minimum workload per year in order to ensure quality determinations. This would mean that small ANAs that are not able to secure enough cases per year to shut down and adjudicators to be registered</p>
37	ANAs to nominate accredited adjudicators for the regulator to appoint.	X	Modification would be needed to this recommendation. Rationale is as above
38	Parties to a dispute may agree an adjudicator only at the time the dispute arises and if the disputed amount is more than \$250,000.	✂	Modification would be needed to this recommendation. Parties should have the discretion to mutually agree on adjudicator without any restriction.
39	The respondent must provide an adjudication response within the later of 5 business days of receiving the claimant's application or 2 business days after receiving the adjudicator's acceptance of the application.	✓	<p>Modification would be needed to this recommendation. Adjudicators must only be appointed after the receipt of adjudication response to ensure competent adjudicators are appointed based on the complexity of adjudication response where new jurisdictional arguments are usually raised. For detailed rationale, see my paper, Skaik S (2017), The tip of the iceberg, jurisdiction of statutory adjudicators, Construction Law Journal, vol. 33, no. 2, pp 102-120.</p>
40	The respondent may apply for an extension of time of up to 10 business days to serve an adjudication response.	✓	Modification would be needed to this recommendation. This can only be accepted if the size of claim, in view of adjudicators is substantial enough and adjudication application is too complex to be responded to in just 5 business days.

41	The respondent may only include reasons for withholding payment in its adjudication response that were included in the payment schedule.	✓	Modification would be needed to this recommendation. It should be clear in the legislation that this does not necessarily include reasons relating to adjudicator's jurisdiction as they can be raised at any point of time. Whilst respondents are required to mention the reasons for withholding payment in their response to the payment claim, it is quite possible that jurisdictional objections are only raised in the adjudication response after the adjudicator has been appointed. That approach has multiple risks, including having a potentially valid ground rejected for want of prosecution or excluded by operation of the various statutory provisions ²⁰ excluding new reasons. ²¹ The reasons why many respondents do not address jurisdictional issues in their response to the payment claim may basically be attributed to practical aspects including the high expenses and efforts in establishing jurisdictional arguments in responding to each payment claim ²² as well as the proposition that claimants may not be serious to take their claim further to adjudication.
42	An adjudicator's determination must be made within 10 business days of receiving the adjudication response, or such time as the parties have agreed up to a maximum of 30 business days after receiving the respondent's response.	✓	Modification would be needed to this recommendation. Claimant's approval is only needed to grant the additional time to make determination as they are the most affected party by the delayed payment. This would be more consistent with the Murray recommendations on review mechanism where only the applicant must be approached to grant any extension.
43	A party to an adjudication may apply for a review of the determination if the determination is \$100,000 less than the claimed amount or \$100,000 or more than the scheduled amount or the adjudicator dismisses the application.	X	Agree with Murray. Refer to my proposed review mechanism model and evidence provided to support this recommendation.
44	Applications for adjudication review are made in writing to the regulator within 5 business days of the parties receiving the original determination.	X	Agree with Murray. Refer to my proposed review mechanism model and evidence provided to support this recommendation.

²⁰ See eg, NSW Act, section 20(2B).

²¹ See *John Holland Pty. Limited v. Roads & Traffic Authority of New South Wales* [2007] NSWCA 19 at [29] and *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53.

²² In NSW, the Act no longer requires a payment claim to include a statement that it is a payment claim made pursuant to the Act. This means that any invoice or claim for payment that complies with section 13(1) of the Act is a payment claim within the meaning of the Act even though the claimant may not intend it to be a payment claim under the Act. See also, *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 at [38] (McDougall J).

45	An adjudication determination may not be reviewed if the parties agreed on the adjudicator, as per 38 above.	X	Disagree with Murray. This must be allowed for the simple reasons that mutually agreed adjudicator may also get it wrong and he/she should be vigilant in making determination by the mere availability of the review.
46	A respondent may not apply for adjudication review unless it served a payment schedule, or include any reasons for withholding payment not included in the payment schedule, and must pay into the regulator's trust account any amount due to the claimant under the adjudicator's determination.	X	Agree with Murray.
47	Adjudication reviews are conducted in accordance with the suggested process set out in section 13.5.	X	Disagree with Murray. The process should follow my proposed model for the reasons mentioned above, particularly with regard to jurisdictional challenges and role of ANAs.
48	The regulator is to appoint the most senior adjudicator available to conduct a review.	X	Disagree with Murray. A review application must be made to an authorised nominating authority chosen by the mutual agreement of the parties. The parties may also agree the identity of the review adjudicator to be appointed. In the absence of agreement, the Authority, upon the request of the applicant, shall nominate the authorised nominating authority to which the review application shall be made. A review application shall not be made to the same authorised nominating authority to which the adjudication application was made. Mutual agreement on appointment will increase the parties' confidence of the outcome. Regulators will have less workload if they are only required to nominate an ANA rather than a competent adjudicator. The regulator, then, would not be involved in the review process which is left to ANAs that are more experienced and well resourced.
49	Where an adjudicator determines that the respondent is to pay an amount to the claimant, this must be paid either within 5 business days, or the date the adjudicator determines.	✓	✓

50	Where an adjudicator’s decision is reviewed and the review decision differs from the original determination, the party required to make payment must pay the amount either within 5 business days, or the date the review adjudicator determines.	X	Agree with Murray
51	A claimant may suspend works if: the respondent fails to serve a payment schedule by the due date; or fails to pay the scheduled amount by the due date; or fails to pay the adjudicated amount by the due date. The claimant must comply with certain notice requirements before suspending works.	✓	<p>Modification would be needed to this recommendation. Claimants who do not have access to review mechanism will be at considerable risk of not only becoming insolvent, but also confidently exercising its statutory right to suspend work in case of non-payment. The consequences of any work suspension may be devastating if the adjudication determination is eventually quashed by way of judicial review. Vickery J observed this dilemma in <i>Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd</i> [2009] VSC 156; 26 VR 112 [47]. See also <i>Brodyn v Davenport</i> [2005] NSWCA 394 at [51] (Hodgson JA).</p> <p>In addition, the claimant will be more hesitant and reluctant to apply for further adjudications on other payment claims until certainty materialises upon the outcome of the judicial review. The claimant may also compromise its right and be compelled to settle the issue with the respondent so as to avoid the huge expense and delay in going to court to</p>
52	If parties have the right to apply for adjudication review, the claimant may only give notice to suspend work after the period to apply for review has passed, or after the due date for payment of the review amount has passed.	X	Agree with Murray, but what if parties do not have right to apply for review and respondents sought judicial review to challenge a determination? The above problem will continue to be of concern as explained against recommendation 52 above.
53	If the legislation does not provide for statutory deemed trusts, claimants may serve a payment withholding request on the principal.	✓	<p>Note: If no trust is in place, it is inaccurate to call the legislation “security of payment”. This is because adjudication determination does not on its own right provide security of payment where a respondent may delay payment by way of judicial review or he may get bankrupt.</p>

54	An applicant may reapply for adjudication if an adjudicator is not appointed within 4 business days or if the adjudicator fails to decide the application in time or withdraws from the adjudication.	✓	✓
55	An adjudicator may withdraw from adjudication by giving notice to the parties.	✓	✓
56	An adjudication application is withdrawn if the claimant serves a notice of discontinuance on the adjudicator and the respondent, or if the respondent pays the disputed amount.	✓	✓
57	Where an adjudicator has committed a jurisdictional error of law which does not affect the whole of the decision, the court should have the power to sever the affected part but allow the remainder to be enforceable.	✓	Modification would be needed to this recommendation. Introducing such a provision within legislation, without sufficient guidance on how a court is to allow part of an adjudication decision, could bring many other difficult questions and valid concerns regarding its practicality and application. One example is whether or not denial of natural justice is considered a jurisdictional error that could be severed. If a review mechanism is in place, review adjudicators can do a better job away from courts. Supreme Courts will continue to have supervisor's role on the entire process.
58	Where a claim is made under the Act, a party's contractual and other civil rights are preserved.	✓	✓
59	If an ANA or regulator issues an adjudication certificate, the claimant can file the certificate as a judgment debt in court.	✓	✓
60	The regulator oversees ANAs, including granting, renewing and withdrawing authorisation, receiving appeals, prescribing functions and reporting requirements, and authorising fees.	✂	Modification would be needed to this recommendation. ANAS should lead the process under full monitoring by the regulator due to resources issues within government.
61	Legislation should set out the process and procedures for conducting an adjudication	✓	✓

62	Legislation defines when an adjudicator is disqualified due to conflict of interest.	✂	✓
63	Adjudicators are required to determine jurisdiction.	✓	<p>Modification would be needed to this recommendation. Encouraging adjudicators to determine questions relating to their jurisdiction, as judicially suggested,²³ is a problem considering the fact that adjudicators are not required by the statute to be legally trained or may not be competent to deal with these issues as decided by the Singaporean Court of Appeal in <i>Lee Wee Lick Terence v Chua Say Eng</i>.²⁴</p> <p>Murray recommended to adopt section 25(3) of the QLD Act. The QLD Act does not require adjudicators to avoid unnecessary expenses or costs in adjudication proceedings.²⁵ As such, the expended time and efforts in examining the jurisdiction can significantly vary where some adjudicators may opt to seek further submissions or continue to analyse multiple jurisdictional objections despite that they have found they do not have jurisdiction from examining the first objection. This is because some adjudicators assume that they may have been errant in determining one or more objections.²⁶</p> <p>For more details, please see my paper, Skaik S (2017), <u>The tip of the iceberg: Jurisdiction of statutory adjudicators</u>, <i>Construction Law Journal</i>, vol. 33, no. 2, pp. 102-119.</p>
64	An adjudicator's function is non-delegable, except for minor clerical tasks.	✓	<p>Modification would be needed to this recommendation. With this recommendation, it may be important to empower adjudicators to appoint technical or legal experts in complex matters.</p>

²³ Amongst all jurisdictions operating SOP legislation and encouraging adjudicators to initially decide upon jurisdiction, Singapore is an exception where it was held by the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2012] SGCA 63 that the adjudicator is not competent to decide whether he or she was validly appointed to adjudicate the matter and any jurisdictional objection should be made before the High Court not the adjudicator. The court held that the issues relating to the validity of the payment claim or payment response, were jurisdictional issues which went to the validity of the appointment of the adjudicator.

²⁴ [2012] SGCA 63 at [64].

²⁵ Section 35(1)(b) of the QLD Act states the fees must be reasonable. Apparently, that statement is inconsistent with the intention of the amendment as addressed by Andrew Wallace in his final report.

²⁶ See, eg, *Steve Taylor Builder Pty Limited v Innovation Design and Construct Pty Limited*, application no. 00005515, 23/07/2015; *JJB Builders Pty Limited v Civil Contractors (Aust) Pty Limited*, application no. 00005417, 27/07/2015, accessible online: http://xweb.bcipa.qld.gov.au/ars_xweb/Pages/Default.aspx.

65	Legislation should govern granting, renewing, suspending and cancelling adjudicators registration; adjudicators may appeal these decisions.	✂	✓
66	Adjudicators should be registered and graded by the regulator.	X	Agree with Murray. This should be the case even if ANAs will continue and there is proper and strict monitoring process to oversee their activities. Adjudicators who do not receive work by their respective ANAs for more than 48 months should be required to undertake a further CPD training free of charge.
67	Adjudicators that have made technical errors may not be appointed unless the cause of the error has been resolved.	X	The error should be substantial enough to warrant this remedy.
68	Adjudicators that have not acted in good faith twice or more in the previous 5 years may not be appointed.	X	Agree with Murray
69	The regulator should have the power to fix adjudicators fees for payment disputes up to and including \$25,000.	✓	✓
70	The regulator should have the power to set maximum adjudicators fees for payment disputes above \$25,000.	X	Agree with Murray
71	The regulator should prescribe and publish the fees that a senior adjudicator conducting an adjudication review may charge.	X	Agree with Murray
72	The claimant and respondent are jointly liable for the adjudicator's fee, unless the adjudicator determines otherwise in accordance with the legislation.	✓	✓

73	Adjudicators' decisions are not to be published.	✓	Disagree with Murray at least in case of review determinations. The review mechanism will help improve the quality of first instance decisions if the review decisions are published to give adjudicators the opportunity to see how sound determinations should be made. Published review determinations provide some sort of scrutiny. Adjudicators by reading the published decisions will learn how to improve their reasoning. There is no doubt that adjudicators now are a lot better at not falling into a jurisdictional error because there have been many published decisions about what is jurisdictional error and what is not. I think publishing review determination will be very effective in promoting best practices in adjudication.
74	Adjudicators and ANAs are to be protected from liability.	✓	Agree with Murray except in cases where ANA or adjudicators have acted in bad faith.
75	Notices may be served by personal delivery, post, facsimile, email, or any other method provided under the contract or regulations.	✓	✓
76	Using coercive or threatening conduct in relation to a person's rights under security of payment laws constitutes an offence.	✂	Agree with Murray
77	Legislation should require ANAs/adjudicators to provide the regulator with such information as reasonably requested to enable the Regulator to monitor the operation of the legislation and activities of ANAs/adjudicators.	✓	✓
78	The regulator must publish an annual report on the operation and effectiveness of the legislation.	✓	✓
79	All jurisdictions should develop nationally consistent standards to report data collected from ANAs and adjudicators.	-	✓
80	There will be no other mechanism bodies beside of the security of payment legislation to specifically deal with the enforcement of disputed progress payment claims.	-	✓

81	<p>The legislation should provide that all cash retentions are to be held on trust:</p> <ul style="list-style-type: none"> a. In the case of a principal, the cash retentions should be held on trust for the head contractor. b. In the case of a head contractor, cash retentions should be held on trust for the subcontractors. c. In the case of a subcontractor, the cash retentions should be held on trust for the sub-subcontractor. 	✓	✓
82	An adjudicator may determine if and when retention money and/or security is due to be returned.	✓	✓
83	Legislation should not require trade credit insurance.	-	Disagree with Murray. Trade credit insurance is attractive, at least for major firms, and worth further investigation in the absence of a <u>properly-devised</u> deemed statutory trust account as detailed below against recommendation 85.
84	Contract terms that make claims for payment or extensions of time conditional on giving notice are void where such notice is not reasonably possible, unreasonably onerous or serves no commercial purpose.	✂	Agree with Murray
85	Deemed statutory trusts should apply to all construction projects valued over \$1 million.	✂	<p>Modification would be needed to this recommendation. A concern will remain in case the Principal/client failed to pay the due amounts into the deemed trust. This will expose head contractors and create a major financial burden that may result into head contractor's insolvency. To address this, the Trust account should also go upstream to protect Head contractors from non-payment or late payment by Clients, whilst they still have obligations downstream towards all subbies. Trust accounts should only certify the money that is not disputed upstream or downstream. Disputed amounts should wait until adjudication process is completed including adjudication review as applicable. Adjudicated amounts must be then released even if the aggrieved party challenged the adjudication decision or review decision by way of judicial review.</p>
86	The Commonwealth should work with the states and territories to develop a national consistent deemed statutory trust model.	✓	✓

7. CONCLUSIVE REMARKS:

Despite the fact that Murray and Fiocco reports have provided great insights into the problems of security of payment legislation and offered significant solutions, some of those problems, as identified in both reports, will continue to dominate the operation of security of payment legislation. This submission provides detailed explanation of the remaining problems including delaying tactics, judicial intervention, lack of industry confidence in adjudication, uncertainty and the continuity of delayed or non-payment payment to vulnerable construction firms. This submission contributes to the ongoing positive momentum towards effective security of payment reforms by providing further recommendations, supported by evidence, to address many if not all of the remaining problems. Should none of my recommendations is considered by the legislatures, construction industry expects other remedies or solutions to those problems that are unanimously acknowledged to have a significant role in undermining the object of the security of payment legislation.