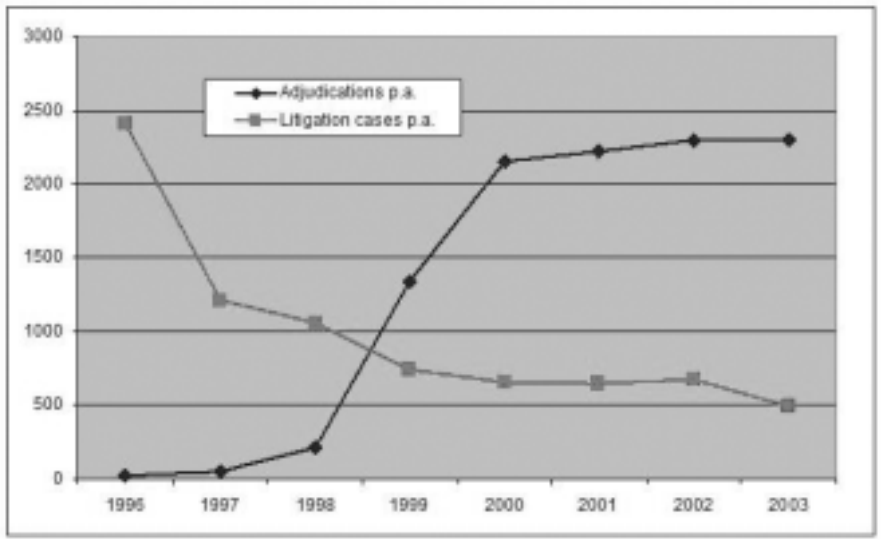
10 Days in Utopia

Robert Fenwick Elliott[1]

It is notorious that most attempts to improve civil litigation or dispute resolution processes by reform are failures, either in the short term, or the long term, or occasionally both. One reason maybe an incidence of one of the one third rules which apply in the law; all dispute resolution processes tend to get more and more complex over time until the average cost of burden per party reaches about one third of the sum in dispute. One can see such a process occurring in arbitration, which has gradually morphed[2] from a quick and inexpensive process to "litigation in the private sector".[3]

At the time that adjudication was first introduced into the UK in 1996, the research by Professor Hazel Genn[4] suggested that, in all but the very largest cases, legal costs in construction disputes taken to litigation had exceeded the limits of that one third rule – indeed aggregate costs tended to exceed the sum in dispute.

The introduction of adjudication in the mid 1990s, first in the UK, and then in Australia, has proved remarkably successful. Figures are easier to obtain in the UK, and they show that within the first few years there was an outright reversal of the relative importance of adjudication and litigation.



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2 At broadly the same pace, its seems, all around the common law world.

3 *Per* Lord Donaldson in *Northern Regional Health Authority v Crouch and Crown* [1984] 2 WLR 679 at 694.

4 Appended to the Woolf Report in civil litigation reform.

Satisfaction levels in the UK are also remarkably high.[5]

In most states in Australia, the adjudication has to take place in just 10 days. The purpose of this paper is to consider adjudication represents a little utopian nugget, and whether its glister is in danger of wearing off. I will seek to do this on a broad brush basis, and not merely national, basis. Adjudication has not taken root in America, where DRBs have had a big impact, but has enjoyed success in several other common law jurisdictions.[6]

Politics or Law?

Many of the jurisdictions seem to have had some difficulty in deciding where adjudication fits on a portfolio basis. In the UK, the legislation was advanced by the Department for the Environment (as it then was), and it was born and taken through the legislative process with little or no interaction from those responsible for arbitration (the Department for Trade and Industry) or the lawyers (the Lord Chancellor's Department). Nevertheless, the focus of the legislation was very much on adjudication as a rapid and inexpensive way of resolving disputes. Of course it was recognised that the party who suffers most immediately and directly from the excessive time and cost in dispute resolution is the sub contractor. There were some contract regulation provisions, and in particular the banning of pay when paid arrangements and the exclusion of set off where an appropriate notice had not been given on time, but the adjudication procedure itself was open to all parties alike, and claims could be made downstream as well as upstream.

When the legislation came to Australia, the focus was, it seems to me, different, and markedly more political. Thus, for example, the Hansard reports of the recent legislative changes in Victoria read like an industrial relations scrap between the two big political parties. In a number of respects, the detail of the legislation is similarly political – the focus is less on effective dispute resolution and more on handing a powerful commercial weapon to “the little guy”.

Before considering these features, I would like to spend a moment looking at what adjudication could and should be, and what its lifespan might be, and what generalised factors might influence that lifespan. In its prime, adjudication plainly could and should be in the centre of the field of dispute resolution.

There are of course several ways to skin a cat and it is worth remarking that in the United States, matters have taken a slightly different course, largely as a result of the considerable success of the dispute resolution board system. This, in brief, is a system particularly adapted to large projects, in which a board of three independent people will track the progress of a project, and when a dispute arises, will hear severely guillotined submissions, on paper and then orally, before giving a decision as to how the dispute should be resolved. In theory, the decision is non binding, but anecdotal evidence suggests that the acceptance rate is somewhat around 99%. This very high percentage reflects sound ADR practice, at any rate at the evaluative rather than facilitative end of the spectrum, and the fact that

5 It is not the purpose of this paper to dwell unduly on the UK experience; for further reading on that topic, see http://www.feg.com.au/papers/AdjudicationUKexperience.htm for an expanded version of remarks made at the IAMA conference in 2006.

6 Including, apart from Australia, England and Wales, Scotland, Northern Ireland, New Zealand and Singapore, with legislation anticipated in some other jurisdictions, including Malaysia and canvassed, apparently, in others.

the parties and their lawyers get a fair, if brief, crack at the whip, engenders the feeling that justice has been done.

The UK adjudication and US DRB procedures are of a roughly equivalent age – a decade or so – and it may well be that, as time goes by, legal barnacles will start to slow these processes down. There are already some signs of this. My guess is that these processes might enjoy success, with a fair to average wind, of around 25 years or so, depending on how the process is managed.

Lest there be scepticism about this cyclical point, consider that Robert Hooke was carrying out adjudications in London in the late 17th century.[7] He used to charge 10 shillings for an adjudication: that has gradually transmuted into the arbitration system we know today.

It seems to me that there are a number of principles at work here which are likely to affect the ageing mechanism of systems such as this.

a. The more these systems are perceived by their users to be fair, the less the pressure on them for change. Fairness is to be seen both in general terms – such that parties should be free to make their contractual arrangements with a minimum of interference – and also on a particular basis; parties are likely to regard a system as unfair in their own particular case if they have not had their "day in court", or (in ADR terms, vented).
b. The key to the reduction of cost is time. If the timescale is kept relatively short, there is simply not time for professionals, including lawyers who charge on a hourly basis, to rack up significant costs. That is, however, only part of the solution, because the short timescale of itself does not prevent claimants from spending considerable amounts of time and hence money preparing very extensive claims which are unleashed in a short timescale adjudication. The answer, of course, to this question is for the adjudicator to reject the lengthy document and give such a claimant a very short amount of time, such as 24 hours, to produce a precis limited in length depending on the case, such a limit might be, for example, 10 pages of A4 original material and 50 pages of copies of existing material (that solution also represents the principal weapon, in practice, against ambush).
c. The third principle is that adjudication must be kept within the confines of a cashflow mechanism, such that losers may have the opportunity, if they wish, to take their dispute to full scale litigation or arbitration if they wish.
d. The process needs to be seen as impartial.
e. Adjudicators' decisions need to be enforceable. All around the world, adjudication has performed reasonably well on this test; Australia is no exception.

How does the security of payment legislation in Australia measure up against the totality of these various tests?

It is perhaps convenient to start at the end, on the basis that the proof of the pudding is always in the eating. Adjudication has been generally successful in Australia, but not so completely or so universally as elsewhere. On that basis above, the system must deserve at least broad approval.

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7 See the paper on the UK experience referred to above. He charged 10 shillings a time. That figure compares with the several thousand pounds that he accumulated from his surveying activities in the rebuilding of London after the Great Fire. Robert Hooke was an extremely busy man, with diverse interests, and it thus seems clear that he was resolving construction disputes at a relatively low cost and rapid pace.

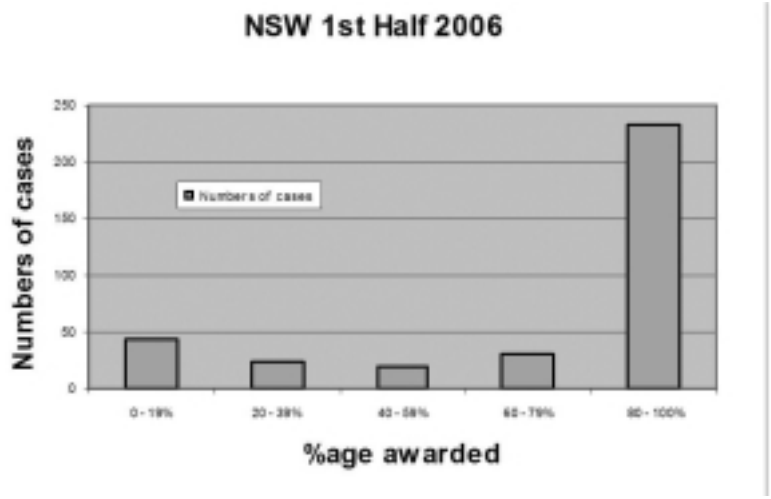
The Quality of The Drafting

The quality of the legislation everywhere has not been particularly high, but it seems unlikely that this is the cause of any particular problem, and it is difficult to see any correlation between the quality of the drafting and the success of the process.[8]

The Default Provisions

A glance at the cases in Queensland[9] and New South Wales[10] suggests that a very significant proportion of adjudications are not determined on the merits at all, but on the basis that one party (almost always the respondent) is locked out by virtue of a default provision – either a failure to get his payment schedule in on time, or on the basis that he is precluded from putting to the adjudicator any argument that was omitted from the payment schedule. The NSW figures show that most decisions are at the top end of the range (i.e. the decision comes in at 80% or more of what is claimed) , that the next biggest concentration is at nothing or less than 20%, with the fewest cases in the middle. It beggars belief that these figures can possibly represent any true reflection of the claimants' entitlements – those of us who have seen many payment claims in the construction industry put to a proper test of a proper evaluation would expect to see a convex, not a concave, profile.

The effect of these statutory provisions thus appears to be precisely what one would expect.



8 As a matter of comparison, the standard of the legislative drafting in the UK was appallingly bad, but this has mattered surprisingly little.

9 The most substantial body of material available to be studied.

10 Where some statistics are available.

Adjudicators are frequently not doing justice at all, but instead, performing an essentially clerical task of ascertaining whether the parties have hopped through the requisite procedural hoops. Indeed, it is something of a mystery why so many parties bother to go to adjudication at all, when the effect of a failure to produce a payment schedule on time entitles claimants to summary judgement straight away.

This feature of adjudication in Australia is wholly unnecessary (it does not exist, for example in the UK model save in respect of set offs) – but it is also most unfortunate. It reflects a political, rather than a judicial, approach. It sets up tens of thousands of procedural traps (one for every payment claim that is received) and if head contractors or principals fail to divert sufficient resources to the massive task of preparing the appropriate payment schedules, a claiming contractor or sub contractor is entitled to obtain a more or less default adjudication decision. It is hard to conceive of any system which could more miserably fail to learn the lessons of ADR, and it means that adjudication, in this form, is unlikely ever to take its full and rightful place centre stage in the construction dispute arena, or even to survive a shift in political fashion.

The Restriction on Hearings

The East Coast model restrictions on hearings is, in my opinion, equally unwise. The job of the adjudicator should be to ascertain what the claiming party is entitled to. For this purpose, he needs to understand as much as possible about the parties' cases, and needs to be able to form a view, where necessary, as to which party is telling the truth and which is not. It is extraordinarily hard to do either of these things, particularly in a complex case, without a hearing, and a hearing at which the parties are refused the right to be represented by their lawyers is less likely to occur and less likely to lead to a useful result.

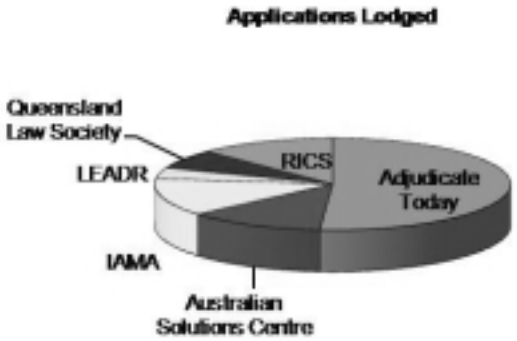
The United States experience of dispute review boards demonstrates the importance of allowing lawyers into the process if the parties are to have confidence in the result. The East Coast restriction on legal representation at hearings or conferences appears again to reflect a political agenda. The practical reality that emerges from experience is that hearings and adjudications are quite unlike court hearings – parties do not obtain an advantage by engaging heavy weight leading counsel. Conversely, if parties are locked out of being able to run their legal cases at all, the system is bound to fall into disrepute and parties are bound to be motivated, following adjudication, to take their dispute onto a "real tribunal".

Choice of Adjudicator

There is, of course, an elephant in the room. The mechanism could readily have been predicted and appears to be all too evident in practise.

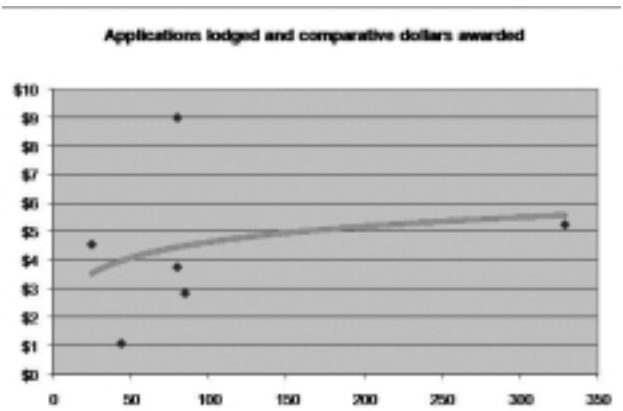
The point is this. If the parties are prohibited from agreeing the identity of the adjudicator, they must go to an ANA for a nomination. They can have no control over the quality of the adjudicator. *Faute de mieux*, it is inevitable that claimants will tend to go to the ANA who is most likely to give them a favourable result.

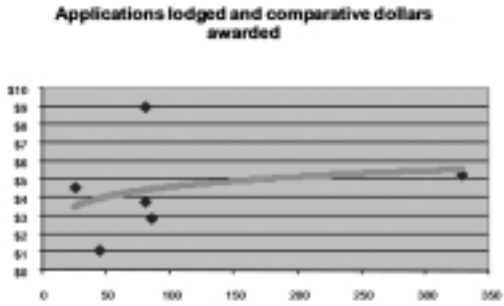
Look at the numbers, again from Queensland. Of the ANAs there, about _ of all nominations go through Adjudicate Today (which alone accounts for over _), RICS and Australian Solution Centre. These three ANAs appoint adjudicators who, on average, award relatively large percentages of sums



claimed to the claimants. On average, Adjudicate Today adjudicators award 84% of sums claimed, with Australian Solutions Centre awarding an average of 90% and RICS awarding an average of 79%. The others award (with a slight overlap) rather less; LEADR awards an average of 82%, with IAMA at 74% and Queensland Law Society at a markedly divergent 52%.

Now it is possible that there might be some difference in nature between cases typically sent to Adjudicate Today on the one hand and the Law Society on the other. But it would stretch credibility a fair bit to believe that this difference can be accounted for by this factor alone. To put the same data in another form, Adjudicate Today is, on average, finding $5.25 due to claimants for every $1 that it finds that respondents can hang onto. For Australian Solutions Centre the figure is a remarkable $9. But for the Law Society, the figure is a mere $1.08. There does seem to be some positive correlation between the percentages awarded to claimants and the numbers of nominations. The mere fact of such a correlation does not, of course, lead to a necessary conclusion of cause and effect, and there, no doubt, several other factors that probably come into play, including such things as the extent of advertising and so forth.





It seems clear that there has also been a trend for the percentages to rise. All other things being equal, one would probably expect that the percentages would bring to bear more care to get their payment schedules in on time and in good order. An explanation that suggests itself for the rise is that the adjudication business is responding – whether consciously or not – to an awareness of market share. I make these remarks, not by any means to point a finger at any particular ANA, still less to suggest any impropriety, but to point up a mechanism which appears to be at work in the system. This conclusion is reinforced on an anecdotal level by views I have heard expressed by practitioners in Queensland, who say, for example, that it is a "no brainer" that they advise their claimant clients to get nominations from the ANAs with the track record for the most claimant friendly decisions.

Such a mechanism is again bound, in the long run, to bring adjudication into disrepute. It is simply not credible, I would suggest, to those with experience of these matters that the averages of around the 80% mark can possibly reflect the typical merits, to some extent, of course, the figures reflect the "no payment schedule" cases, which are often a turkey shoot, but the effect of taking those cases out of account is to bring the average down by only about 8%; they are still high. This is not a picture that is unique to Queensland; the figures from the 1st half of 2006 from New South Wales show that in the considerable majority of cases, the amount awarded out of the amount claimed is about 85% in the "no payment schedule" cases, and about 63% in the others.

What Can Adjudicators Do?

The amount that adjudicators can do under the East Coast model is limited. So long as the rules prohibit the parties from agreeing appointments, an adjudicator cannot, as elsewhere, enhance his reputation and obtain more prestigious appointments by the quality of his work; he is entirely in the hands of the ANA. Ironically, the politicisation of the process, and its treatment as if it were an industrial relations issue, has to this extent proved a self fulfilling prophecy; the adjudicator finds himself in the same position as a worker in an old fashioned closed shop, dependant entirely on the shop stewards for his wellbeing.

What can the Professional ANAs do about it?

I would suggest that enlightened self-interest might well lead to this Institute – and others – establishing a publicised policy of inviting the parties to agree their adjudicator, and if such agreement

is forthcoming, appointing that person.[11] It might be thought that no ANA would want to be obliged to appoint other than "its own" adjudicators, but the international experience shows that a significant proportion of disputants wish to and are able to agree on a person in whom both have confidence, and a process whereby an ANA can do its job better in this respect is itself likely to enjoy an enhanced reputation.

What Can the Courts Do About It?

It is possible to discern two distinct strains of judicial approach. Throughout the world, the legal position on enforcement appears to have settled into a broadly level pattern – the adjudicator's decision can only be impugned if there is a breach of natural justice, compliance with basic procedural requirements and jurisdiction. However, these tests have been applied in rather different ways. For example, in *GW Enterprises v Zentex*,[12] the Queensland Supreme Court refused to impugn and adjudicator's decision, notwithstanding an apparent want of jurisdiction arising out of the fact that the claim was stale,[13] because the paperwork was in order.

A rather more thoughtful approach was adopted by the New South Wales Supreme Court in *Pacific v Solomon*[14] in which the adjudicator disregarded submissions that had not been raised in the payment schedule, and instead accepted the claimant's claim at face value. The Court found that the adjudicator's purported determination was void, because there had been no determination that the work had been done, or of its value, as required by the Act. In other words, the Court had in mind the essential function of the adjudicator, to determine what sum was due. Remarkably, the Pacific v Solomon decision was not referred to in GW Enterprises.

What Can the Parties Do?

There are a couple of points worth noting.

a. There is no need for adjudication to be a creature of statute. Indeed, adjudication in a limited form was flourishing in the UK for years before the legislation; indeed, the legislation was inspired by the contractual model. Even now, the UK legislation works by requiring the parties to agree their own adjudication scheme; it is only if they fail to do so that the statutory rules cut in. And so parties can put a contractual; adjudication scheme of there own choosing in their contracts.[15]

b. Neither is there any need for adjudication to be loaded in favour of claimants. Of course, there is some extent to which any efficient dispute resolution system tends to particularly advantage claimants. But it also advantages employers and head contractors. In particular:-

   i. Employers, and particularly Government employers, have good reason to close off their

11 Where the relevant state legislation so requires (eg section 22(1) of the Queensland Act) such a person must obviously be registered as an adjudicator.

12 [2006] QSC 399.

13 It had been more than 12 months since the work was done, such that on a proper analysis, the right to payment under the legislation did not arise.

14 [2006] NSW SC 13

15 Care obviously needs to be taken that, in states where there is a statutory regime, the contractual scheme is not to be construed a s a contracting out – see the CAG scheme below.

budgets for their projects as soon as possible. For those employers, adjudication represents a particularly attractive means of closing off their liabilities – mediation, particularly at the facilitative end of the scale – offers real problems, in the sense that by definition, there can be no audit trail to the result. Litigation or arbitration tends to involve significant budgeting requirements for legal costs, as well as the carrying over of potential liabilities into further years. The two systems that seem to work best in this environment are adjudications on the Western model and dispute review boards.

ii. There are two particular advantages in the adjudication system that have, in practice, been found by head contractors. The first is that their losses are limited. The legal bill is much smaller than that accompanying a successful court action by a sub contractor. Adjudication decisions tend by their nature to disallow speculative claims, and sub contractors are usually content to accept such a result. Secondly, the process encourages stability and harmony. We all know of the mechanism whereby some head contractors seek to win work by tendering low. They then claim whatever they can from the owners, and if they can possibly manage it, they evade their responsibilities to pay their sub contractors. Such outfits tend to be cyclical; they flourish until overtaken by their reputations. But in the meantime, they spoil the market for contractors who wish to preserve their good relations with the sub contractors who are, these days, carrying out almost all of the work. Market prices soon accommodate either system, the key question is, "What competitive advantage does the guy next to you obtain by maltreating his sub contractors?"

What Can Lawyers and Other Advisors Do?

Good lawyers tend to love adjudication when it is does properly. It enables them to achieve sensible results for their clients at a fraction of the time, trouble and cost of full scale litigation or arbitration. It is equivalent to a doctor being able to administer a modern effective treatment instead of a time consuming and ineffective treatment. It brings professional satisfaction, and also greater professional reward, in the sense that higher hourly rates still represent excellent value for money for the client. But what can lawyers do where there is no statutory scheme, or in states where the statutory scheme is less than ideal?

One solution is to invite both disputants to agree to adopt a satisfactory contractual adjudication scheme. Such a scheme has been developed in Adelaide by the Contractual Adjudication Group. Details of the scheme are appended to this paper.[16]

In brief, the key features are:

- No default provisions. The adjudicator makes his decision on the basis of the actual rights of the parties, not on the basis of any clerical oversights.
- The parties get to choose their adjudicator. This means that the lawyers can get together and agree an independent third party to act as adjudicator in whom they both have confidence. It works in adjudication in other parts of the world, and it works here in Australia in the context of mediation.
- The adjudicator can guillotine the length of submissions, diffusing the risk of ambush.

16 see www.bigbutton.com.au/~afa/CAG/index.html

- The adjudicator has full reign to call for a short hearing, at which the parties and their representatives can make their points. The clients can vent, and the lawyers get to make whatever their submissions they would be able to make in full process subject, again, to a crisp guillotining regime.
- The adjudicator gets a little longer than the Eastern seaboard model – 3 weeks – to make his decision.

In a state such as South Australia or Tasmania where there is no adjudication scheme, or in an industry sector where the legislation does not apply, why would a respondent agree to such a process? Because such a process is likely to be much less expensive and painful than full scale litigation or arbitration.

In a state where there is a statutory adjudication regime, why would a claimant forebear from exercising his statutory adjudication in favour of such a scheme? Because the result of such adjudication is much less likely to be challenged in court by way of enforcement proceedings or by way of re-litigation. And, from both parties point of view, the advantages of putting the adjudication into a mutually agreed safe pair of hands is likely to exceed any serendipitous windfall that is likely to come out of an unsatisfactory statutory scheme.

What Should the Legislators Do?

It is palpably absurd for each state to have its own different security of payment regime. It is hard to see any relevant distinguishing feature between the commercial and legal landscapes of different common law countries around the world, let alone different states within Australia. There was obviously a compelling case for bringing the states together for the purpose of the *Commercial Arbitration Act*; the commercial case for a similar approach to adjudication.

Were there to be a Federal approach, or even a harmonised approach, in which directions should solutions be sought? First, there is no need to restrict one's observations to the Australian experience – adjudication is now truly an international phenomenon. For the reasons which I have sought to summarise above, it seems to be that there is a compelling case – based on the totality of the evidence from all common law jurisdictions – for a system much closer to the Western Australian/UK models, or indeed the CAG scheme, than the current East Coast model.

Does Adjudication Represent a Utopian Ideal?

No, plainly not. But it is much better than the traditional alternatives[17] but the system needs to revise its focus, back towards a prompt and effective way of dispensing justice, rather than attempting commercial reform through the imposition of inflexible, not to say Stalinesque rules.

And 10 days?

That is really rather too short. Like a decent holiday, you really need 3 weeks. And sometimes more.

17 And much, much better than the South Australian *Worker's Liens Act* 1893, which appears to me to be the statutory equivalent of handing out wheel clamps as a response to traffic congestion at a roundabout. It is notable that even *Hudson's Engineering and Construction Contracts* (a work which is hardly at the cutting edge of jurisprudential thinking) characterised the legislation as archaic.

THE CONTRACTUAL ADJUDICATION GROUP SCHEME Version 1.0

Introductory Note:

This scheme provides a means for an interim but binding assessment of disputes about payment in the construction industry at a fraction of the cost of litigation or arbitration and in just three weeks.

1. The following scheme may be incorporated into any contract by reference to The Contractual Adjudication Group Scheme, or the CAG Scheme.

Purpose

2. (a) The purpose of this scheme is to provide a means whereby parties to a Contract may obtain a speedy and enforceable ascertainment of their contractual rights without prejudice to pursue their rights by other means (the "Scheme"). If either party has a statutory entitlement to adjudication in respect of such rights, this adjudication shall not derogate from statutory entitlement.

(b) The parties do not intend this process to be finally determinative of their rights, and as such the Scheme is not an arbitration. Rather, it is intended as a type of expert determination of the right to payment of cash and other rights on account, in order to provide a speedy and effective means of ensuring that contractual obligations are met on at least an interim basis and without resort to full legal process on a “pay now argue later” basis.

Definitions

3. In this Scheme:-

The "Adjudicator Nominating Body" or "ANA" means

- If the parties have agreed on a designated ANA in the Contract, that ANA,
- Otherwise, any ANA that is an Adjudicator Nominating Authority or Adjudicator Nominating Body pursuant to any legislation in Australia, or any state chapter of IAMA.

“Claimant” means a party who serves an Adjudication Notice

"Commencement Day" means the day on which the Adjudicator is empowered under Clause 5.

“Contract” means the agreement(s) identified in the Adjudication Notice and which creates or modifies the Claimant's rights;

“Day” means a day other than a Saturday, Sunday or public holiday in the place of the applicable law.

“Party” means any party to the Contract

“Respondent” means a party on whom an Adjudication Notice has been served.

The Adjudication Notice

4. (a) These Rules shall apply upon any Party giving written notice to any other Party requiring adjudication (the "Adjudication Notice") identifying in general terms the contractual rights in respect of which adjudication is required.
   (b) An Adjudication Notice may be given at any time, notwithstanding that arbitration or litigation has been commenced in respect of such rights, provided that a material part of the rights asserted in the Adjudication Notice shall have accrued or become enforceable within 2 months immediately prior to the date of the Adjudication Notice.
   (c) More than one such Adjudication Notice requiring adjudication may be given in respect of disputes arising out of the same contract, provided that a single specific dispute may be the subject of only one Adjudication Notice.
   (d) The rights in (a) above are limited to those arising under the terms of the Contract and do not include rights to damages.

Appointment

5. (a) If
      (i) before the expiry of 3 days from the service on the Respondent of an Adjudication Notice the parties have agreed upon the identity of a natural person as Adjudicator, and
      (ii) before the expiry of a further period of 3 days the Adjudicator confirms his readiness and willingness to embark upon the Adjudication without any outstanding stipulations

   then that person shall be empowered as the Adjudicator.
   (b) If within the time periods specified in subparagraph (a) above, the Parties do not agree on the identity of an Adjudicator, or the Adjudicator has not indicated his readiness and willingness to undertake the adjudication, then any Party may apply to the ANA to nominate an Adjudicator. Any person so nominated, and who has confirmed his readiness and willingness to act without any outstanding stipulations within 3 days of the nomination shall be empowered as the Adjudicator. If such nominee is not so empowered, the nomination shall lapse, and the parties shall be free to seek another nomination from the ANA.
   (c) Where an adjudicator has already been appointed in relation to another dispute arising out of the Contract, the same or a different person may be agreed or nominated as the Adjudicator.

Scope of the Adjudication

6. (a) The scope of the Adjudication shall be the matters identified in the Adjudication Notice, together with
      (i) any further matters which all Parties agree should be within the scope of the Adjudication, and
      (ii) any further matters which the Adjudicator determines must be included in order that the Adjudication may be effective and/or meaningful.

(b) In so far as the Respondent raises by way of defence, including a set-off, a matter which if sustained would reduce or extinguish the right claimed by the Claimant, the Adjudicator shall consider such matter in arriving at his decision.

(c) The Adjudicator may decide upon his own substantive jurisdiction, and as to whether any matter falls within the scope of the Adjudication. If he decides that any matter falls outside his jurisdiction, he may make his decision in respect of those matters (if any) within his jurisdiction.

The Role and Powers of the Adjudicator

7 (a) The Adjudicator shall have the like power to open up and review any certificate or other thing issued or made pursuant to the Contract as would an arbitrator appointed pursuant to the Contract and/or a court.

(b) If the Contract is subject to any Security of Payment legislation, the Adjudicator shall take account of the content of the Respondent's written submissions as though such content had been contained in a payment schedule and/or adjudication submission within the time stipulated by such legislation.

(c) The Adjudicator shall act fairly and impartially, but shall not be obliged or empowered to act as though he were an arbitrator.

Conduct of the Adjudication

8 (a) Unless otherwise directed by the Adjudicator, the procedure and timetable for the Adjudication will be as follows:

(i) the Claimant shall serve its written submissions within 3 days from the Commencement Day;

(ii) the Respondent shall serve its written submissions within 8 days from the Commencement Day;

(iii) all written submissions must be served on the Adjudicator and the other Party.

(b) Without prejudice to the generality of (a), the Adjudicator may if he thinks fit:-

(i) Require the delivery of further submissions,

(ii) Require any party to produce a bundle of documents

(iii) Require the delivery to him and/or the other parties of copies of any documents other than documents that would be privileged from production to a court,

(iv) Limit the length of any written or oral submission,

(v) Require the attendance before him for questioning of any Party or employee or agent of any Party,

(vi) Make site visits,

(vii) Make use of his own specialist knowledge,

(viii) Obtain advice from specialist consultants, provided that at least one of the Parties so requests or consents,

(ix) Make directions for the conduct of the Adjudication orally or in writing,

(x) Review and revise any of his own previous directions,

(xi) Conduct the Adjudication inquisitorially, and take the initiative in ascertaining the facts and the law,

(xii) Reach his decision with or without holding an oral hearing.

(c) The Adjudicator shall exercise such powers with a view of fairness and impartiality, giving each Party a reasonable opportunity, in light of the timetable, of putting its case and dealing with that of its opponents and/or any Rule 6(a)(ii) matter.

(d) The Adjudicator may not

(i) require any advance payment of or security for his fees;

(ii) refuse any Party the right at any hearing or meeting to be represented by any representative of that Party's choosing who is present;

(iii) act or continue to act in the face of a conflict of interest.

(e) The Adjudicator shall provide his decision to the Parties within 15 days from the Commencement Day or such longer period as may be agreed by the Parties.

Decisions

9 (a) In respect of money claims, the Adjudicator's decision shall dictate what sums (if any) are to be paid by whom to whom and at what time.

(b) In respect of other claims, the Adjudicator's decision shall be declaratory.

(c) The decision of the Adjudicator shall reflect the Adjudicator's interim view of the legal entitlements of the Parties.

(d) In his decision, the Adjudicator shall have the discretion to what party should bear which part of his fees and expenses.

(e) The Adjudicator may in any decision direct the payment of interest on a compound or simple basis as may be commercially reasonable.

(f) All decisions of the Adjudicator shall be in writing. The Adjudicator shall provide written reasons for his decision unless all of the Parties otherwise agree.

(g) The Adjudicator may, on his own initiative or on the application of a Party, correct his decision so as to remove any clerical mistake or error arising from an accidental slip or omission.

Adjudicator's Fees and Expenses

10 (a) The amount of the Adjudicator's fees shall, subject to contrary agreement, be such amount as is reasonable in all the circumstances calculated on an hourly rate basis.

(b) If the Adjudicator shall deliver his decision later than required by this scheme, he shall not be entitled to payment of his fees.

(c) If a Party shall request Adjudication, and it is subsequently established that he is not entitled to do so, that Party shall be solely responsible for the Adjudicator's fees and expenses.

(d) Save as aforesaid, the Parties shall be jointly responsible for the Adjudicator's fees and expenses including those of any specialist consultant appointed by the Adjudicator.

(e) If no contrary direction is made by the adjudicator, the Parties shall bear such fees and expenses in equal shares. If any Party has paid more than his share, that Party shall be entitled to recover the excess from other Parties accordingly.

Parties' Costs

11 The Adjudicator shall have no jurisdiction to order one party to pay the other any sum in respect of its legal or other costs of the adjudication.

Enforcement

12 Every decision of the Adjudicator shall be implemented without delay. The Parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary judgment therefor, regardless of whether such decision is or is to be the subject of any challenge or review. No party shall be entitled to raise any right of set-off, counterclaim or abatement in connection with any enforcement proceedings.

Immunity, Confidentiality and Non-compellability

13 (a) Neither the ANA nor the Adjudicator nor any employee or agent of any of them shall be liable for anything done or not done in the discharge or purported discharge of his functions as Adjudicator, whether negligently or otherwise, unless the act or omission is in bad faith.

(b) Unless otherwise agreed, the Adjudication and all matters arising in the course thereof are and will be kept confidential by the Parties and the Adjudicator except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for the purpose of any subsequent proceedings.

(c) In the event that any Party seeks to challenge or review any decision or proceeding of the Adjudicator in any litigation or arbitration, neither the ANA nor the Adjudicator shall not be joined as a party to, nor shall be subpoenaed or otherwise required to give evidence or provide his notes in such litigation or arbitration. If, in breach of this obligation the ANA and/or Adjudicator is so joined, the joining party shall pay the ANA's and/or adjudicator's costs on an indemnity basis, regardless of whether such order is made in such litigation or arbitration. However, notice of any such challenge or review proceedings shall be given to the Adjudicator, and if the Adjudicator chooses to make a written statement concerning the adjudication, such statement shall be put before the court or arbitrator.

Applicable Law

14 This scheme shall, unless otherwise agreed, be governed by the law of the Contract.

Version 1.0 May 2007. For details of the Contractual Adjudication Group and its work, see http://www.bigbutton.com.au/~afa/CAG/index.html