

Under the security of payment legislation in Victoria and Western Australia, a person seeking to challenge an adjudication determination may, instead of seeking judicial review before the courts, make an adjudication review application to a review adjudicator.

In Victoria, review adjudication is only available on limited grounds. In Western Australia, review adjudication may be sought on the merits generally, subject to a statutory threshold and other requirements. This article examines the broader process of review adjudication in Western Australia and identifies some aspects of the review adjudication process that are problematic.

Review Adjudication in Western Australia

Under the *Building and Construction Industry (Security of Payment) Act 2021* (WA) (SOPA), a claimant or respondent may apply for the review of an adjudication. There are monetary thresholds and other requirements.

A claimant may apply for a review of an adjudicator's determination if the adjudicated amount is less than the claimed amount and the amount of that difference exceeds AU\$200,000,¹ and if the respondent has not already applied for a review (or has withdrawn their application).² Another ground to apply for a review adjudication is if the adjudicator decided they did not have jurisdiction to determine the application and the claimed amount exceeds AU\$50,000.³

A respondent may not apply for a review of a decision of an adjudicator that they had jurisdiction.⁴ A respondent may apply for the review of an adjudication if the adjudicated amount is more than the scheduled amount and the amount of that difference exceeds AU\$200,000.⁵

There are several additional conditions, as follows:

- The respondent must have given the claimant a payment schedule in time in response to the claimant's payment claim⁶
- During the adjudication, the respondent must have given the adjudicator an adjudication response in time⁷
- The claimant must have either:
 - Not already have applied for a review adjudication
 - Withdrawn their application⁸
- The respondent must also have paid any undisputed amount of the adjudication to the claimant and put the part of the adjudicated amount that is disputed by the respondent into a trust account⁹

Adjudication Review Application

An application for review adjudication must be made within five business days of receiving the original adjudication determination.¹⁰ The application must be accompanied by a copy of the construction contract or its relevant provisions, the payment claim, the payment schedule (if any), the original adjudication application, any adjudication response, any submission made to the adjudicator by the claimant or respondent, including any accompanying documents, and the adjudicator's determination.¹¹

Submissions in Support of Adjudication Review Application

The adjudication review application may contain additional submissions relevant to that application which the party applying chooses to include.¹² However, no reasons may be included unless those reasons were raised in the original adjudication.¹³ The party making the review adjudication application must give a copy of the application and any accompanying documents to the other party within one day of the application being made to the authorised nominating authority.¹⁴

1 S. 39(2)(b)(i); *Building and Construction Industry (Security of Payment) Regulations 2022* (WA) reg 8(1).

2 S. 39(2)(a).

3 S. 39(2)(b)(ii); Reg. 8(2).

4 S. 39(4).

5 S. 39(3)(c); Reg. 8(3).

6 S. 39(3)(a).

7 S. 39(3)(b).

8 S. 39(3)(b).

9 S. 40(1)(b).

10 S. 39(5).

11 S. 42(1)(b).

12 S. 42(1)(d).

13 S. 42(2).

14 S. 42(3).

Given that new reasons not included in the original adjudication cannot be the subject of additional submissions, it is suggested that the additional submissions could include reasons why the adjudication determination was in error and clarifications of the reasons in the original submissions.

Adjudication Review Procedures

The review adjudicator may only consider the following:

- SOPA and the regulations¹⁵
- The relevant construction contract¹⁶
- The relevant adjudication review application and any response, together with submissions including accompanying documents duly made¹⁷
- The relevant payment claim, payment schedule, adjudication application and any adjudication response, together with submissions including accompanying documents duly made¹⁸

The review adjudicator must not consider the following:

- Any adjudication review response given out of time¹⁹
- Any reasons that have not been raised in the original adjudication²⁰
- Any submissions including accompanying documents not authorised to be made (not duly made) or that contravene any other limitation prescribed by the regulations on the submission that may be made²¹

Nature of the Review Process

The SOPA does not provide any elucidation on the nature of the review process. There is also little in the way of extrinsic material that appears to be of any real assistance.

An adjudicator is directed by the SOPA to consider their jurisdiction and if that is established then to determine the amount of the progress payment that is the subject of the application.²² A review adjudicator is required to either “confirm” the determination of the adjudicator, or “quash” that determination and make a determination of the amount of the progress claim.²³

It seems from the SOPA's requirement to confirm or quash, the use of the term “review,” and the nature of the documents to be lodged with the adjudication review application, that the initial assessment of the review adjudicator is to consider if the adjudicator has made an error in the determination and, if so, only then consider the merits and make the review adjudicator's own determination of the progress claim.

Accordingly, the adjudication review application and the adjudication review response will focus on whether the adjudicator was in error.

Jurisdictional issues

It is apparent from a comparison of the provisions of the SOPA that apply to each of the original adjudication and review adjudication²⁴ that some but not all of the procedures are common. One aspect that is not common is jurisdiction.

Jurisdiction

An adjudicator must first determine whether there is jurisdiction to determine the adjudication application.²⁵ The adjudicator may decide that they do not have jurisdiction to decide the adjudication application.²⁶ If the adjudicator decides that they do not have jurisdiction, the reasons must be set out in the determination.²⁷

However, there is no mirroring or incorporation of those adjudication provisions in the review adjudication provisions of the SOPA. The lack of incorporation of jurisdictional provisions is significant when it is considered that the provisions relating to conflicts of interest of adjudicators were expressly incorporated into the adjudication review process.²⁸

The SOPA, in many places, clearly draws a distinction between “adjudicators” and “review adjudicators” (for example, in Section 4). This suggests that the powers and the procedures in relation to adjudication and review adjudication are intended to be different.

One consequence of this incongruity is that there is no statutory requirement on a review adjudicator to determine whether they have jurisdiction to proceed to determine the review adjudication.

This may present a dilemma for the review adjudicator as to how to proceed – for instance, what if the adjudication review application is made late or all the mandatory documents that are to accompany the adjudication review application are not provided with the review adjudication application?

15 S. 46(1)(a).

16 S. 46(1)(b).

17 S. 46(1)(c).

18 S. 46(1)(d).

19 S. 46(2)(a).

20 S. 46(2)(b).

21 S. 46(2)(c).

22 ss. 36(1) and 38(1)(a).

23 ss. 48(1) and 48(2).

24 The comparison is between Part 3 Division 2 (adjudication) and Part 3 Division 3 (review adjudication).

25 S. 36(1).

26 S. 36(2).

27 S. 36(4).

28 S. 33, picked up in S. 44(8).

Withdrawal

One option for a review adjudicator, faced with a jurisdictional noncompliance such as a late or deficient adjudication review application, is to withdraw from the review adjudication application. A review adjudicator may withdraw at any time before determining an adjudication review application.²⁹ If the review adjudicator withdraws, the adjudication review application is taken to be withdrawn,³⁰ and the claimant or respondent may make another adjudication review application within five business days of the withdrawal.³¹

A withdrawal could conceivably allow a defaulting party to “cure” the default by simply issuing a new adjudication review application that is issued within five business days of the withdrawal and is otherwise compliant. As well, if the reasons for the withdrawal are jurisdictional (such as a late application) it may be that a second review adjudicator would also withdraw because to proceed would frustrate the strict timeframes in the SOPA – thus leading to a potential cycle of withdrawals until another review adjudicator decided to proceed. It is considered that neither scenario is what the SOPA intended.

Determination/Dismissal

Under the SOPA, where an adjudicator determines they do not have jurisdiction, the adjudicator is obliged to make a determination that no amount is payable.³² However, not only is there is no obligation under the SOPA on a review adjudicator to consider their jurisdiction, but there is also no power given to review adjudicators to dismiss or to determine that no amount is payable for jurisdictional reasons.

Administrative Law Determination

While withdrawal from the review adjudication is the only option stated in the SOPA, a review adjudicator may seek to rely on general administrative law in support of a power to determine whether they have jurisdiction and what to do if jurisdiction is found not to exist.

A review adjudicator may, under general principles of administrative law, seek to decline to proceed in the absence of the establishment of their jurisdiction. It is unclear how this course of action sits with the express provision under the SOPA allowing the review adjudicator to withdraw (with reasons).

Review Adjudicators May Proceed After Determining Their Own Procedure

Review adjudicators may, to the extent that their procedure is not otherwise regulated under SOPA, determine their own procedure.³³ An argument may be made that because the procedure for a review adjudicator to determine jurisdiction is not expressly stated in the SOPA (or at least the SOPA procedure does not regulate what to do when an adjudication review application is procedurally noncompliant), the review adjudicator is free to determine their own procedure in relation to jurisdiction.

Under this argument, where a review adjudicator is faced with a jurisdictional issue, such as the adjudication review application being deficient in the mandatory documentation that is required to accompany the application, the review adjudicator may determine a procedure whereby the missing documentation is provided. Natural justice may underpin a request for missing documentation and would need to be provided for in any such procedure.

However, this argument may fail in the face of a contrary argument that the SOPA contains a procedure that regulates the matter and so this general procedural power is unavailable. On this contrary view, the SOPA regulates the matter of what is to be included in the adjudication review application and makes those requirements mandatory,³⁴ so that failure to comply is fatal.

There is also the problem that whereas an adjudicator may request further submissions (including documents in support) from either party and give the other party an opportunity to make submissions commenting on any further submissions made,³⁵ there is no corresponding provision allowing a review adjudicator to request further submissions or documents. Indeed, the SOPA stipulates that the review adjudicator may consider only submissions duly made.³⁶

29S. 44(5).

30S. 44(6).

31S. 44(6).

32S. 36(2).

33S. 46(6).

34By S. 42(1), S. 45(2) and S. 46(1)(c); as to the requirement that an application together with submissions must be “duly made”, that is, not contrary to mandatory requirements: *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19.

35S. 35(3)(a).

36S. 46(1)(c).

A further difficulty may arise where different documents are served upon the authorised nominating authority and the other party to the adjudication review application. The SOPA requires an applicant for adjudication review to serve “a copy” of the application and of any accompanying documents on the other party within one business day of making the application to the authority.³⁷ An issue may arise as to whether the failure to serve all the same documents is fatal. The review adjudicator may not have power to seek the missing documents for the benefit of the other party for reasons given earlier, although the need to ensure natural justice may drive such a request. There are a number of cases in jurisdictions other than Western Australia that have taken the view that a failure to meet the mandatory requirements of making a valid adjudication application and service of a copy of the application are strict prerequisites to jurisdiction.³⁸

On the other hand, a less strict view of compliance with the relevant legislation, at least as regards service of “a copy” of the application, has also been taken.³⁹ In that case, there were differences in the documents provided to each of the nominating authority and the other party. The differences included missing documents, illegible documents and mislabelling. The court took the view that as the differences were trivial or inconsequential, they were not fatal.

Conclusion

Given the current absence in any Western Australian court ruling and the lack of direction in the SOPA, it remains to be determined how a review adjudicator in Western Australia should proceed where there is a jurisdictional issue related to the review adjudication.

Specifically, where there is noncompliance with the requirements of the SOPA in regard to the required documentation being part of the adjudication review application and service of it, absent natural justice considerations, there appear to be constraints on review adjudicators seeking documents and submissions. There is also competing caselaw on the extent to which documentation noncompliance is strict.

Author



Greg Steinepreis

Partner, Perth

T +61 8 9429 7505

E greg.steinepreis@squirepb.com

³⁷S. 42(3).

³⁸Cases in support of a strict interpretation include *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91; *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190; and *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd* [2017] NSWSC 194.

³⁹*Equa Building Services Pty Ltd v KLG Trading Pty Ltd* [2021] NSWSC 1674.