



Australian Government

Department of Jobs and Small Business

# Review of Security of Payment Laws

Building Trust and Harmony

J Murray AM  
December 2017

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The document must be attributed as the Review of Security of Payment Laws.

The Hon Craig Laundry MP  
Minister for Small and Family Business, the Workplace and Deregulation  
PO Box 6022  
House of Representatives  
Parliament House  
Canberra ACT 2600

Dear Minister Laundry

I am pleased to present to you my final report on the national Review of Security of Payment Laws, which I have undertaken in accordance with the Terms of Reference established by Senator the Hon Michaelia Cash in her then capacity as Minister for Employment.

As many would attest, security of payment is a challenging area, with many complex issues and competing interests. Following extensive industry consultation, I have made 86 recommendations on matters that I consider to not only be legislative best practice, but also balance the competing interests of all stakeholders.

Key among my recommendations is the use of a legislative model which is based on what is commonly known as the East Coast model of security of payment laws, most notably that existing in the state of NSW, and the establishment of a system of statutory trusts to apply throughout the contractual payment chain and to certain construction projects and monies.

It is my belief that should these recommendations be accepted and implemented consistently across all states and territories, they will greatly improve the level of protection afforded to construction industry subcontractors and ensure that they obtain prompt payment for work they have completed. To that end, I encourage the Australian Government to work closely with its state and territory counterparts to deliver what is widely considered within the industry to be a long overdue process of essential national reform of security of payment legislation.

I would like to acknowledge the cooperation and assistance I received from many organisations, government officials and individuals during the course of the Review. Many people generously set aside their time to share viewpoints on key issues.

I am particularly grateful for the assistance provided by the Australian Government Department of Jobs and Small Business. I specifically acknowledge the professional support I received from the Security of Payments Review team, which provided valuable secretariat support throughout the Review.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Murray', with a long horizontal flourish extending to the right.

John Murray AM  
22 December 2017



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## Acronyms and abbreviations

<b>ABCC</b>	Australian Building and Construction Commission
<b>ACA</b>	Australia Constructors Association
<b>ACT Act</b>	<i>Building and Construction Industry (Security of Payment) Act 2009 (ACT)</i>
<b>AIB</b>	Australian Institute of Building
<b>AMCA</b>	Air Conditioning and Mechanical Contractors' Association
<b>AMCA SA</b>	Air Conditioning and Mechanical Contractors' Association SA branch
<b>ANA</b>	authorised nominating authority
<b>ANB</b>	authorised nominating body
<b>ASBFEO</b>	Australian Small Business and Family Enterprise Ombudsman
<b>ASIC</b>	Australian Securities and Investments Commission
<b>BCIIP Act</b>	<i>Building and Construction Industry (Improving Productivity) Act 2016 (Cth)</i>
<b>BCIPA</b>	<i>Building and Construction Industry Payments Act 2004 (Qld)</i>
<b>BLA Act</b>	<i>Building Legislation Amendment (Consumer Protection) Act 2016 (Vic)</i>
<b>CCF</b>	Civil Contractors Federation
<b>CFMEU</b>	Construction, Forestry, Mining and Energy Union
<b>CGE</b>	Conveyor & General Engineering
<b>Corporations Act</b>	<i>Corporations Act 2001 (Cth)</i>
<b>CPD</b>	continuing professional development
<b>DBC Act</b>	<i>Domestic Building Contracts Act 1995 (Vic)</i>
<b>DBDRV</b>	Domestic Building Dispute Resolution Victoria
<b>DOCA</b>	deed of company arrangement
<b>ETQA</b>	<i>Electronic Transactions (Queensland) Act 2001</i>
<b>FEG</b>	Fair Entitlements Guarantee
<b>GDP</b>	Gross Domestic Product
<b>HIA</b>	Housing Industry Association
<b>LCA</b>	Law Council of Australia
<b>MBA</b>	Master Builders Association (National)
<b>MBA SA</b>	Master Builders Association of South Australia
<b>MBA WA</b>	Master Builders Association of Western Australia
<b>MBNT</b>	Master Builders Northern Territory
<b>MBT</b>	Master Builders Tasmania
<b>MBAV</b>	Master Builders Association of Victoria
<b>MEA</b>	Master Electricians Association
<b>Model WHS Act</b>	<i>Model Work Health and Safety Act (2011)</i>

<b>MPA</b>	Master Plumbers Association
<b>MPAQ</b>	Master Plumbers Association of Queensland
<b>NECA</b>	National Electrical and Communications Association
<b>NECA SA/NT</b>	National Electrical and Communications Association South Australian / Northern Territory Chapter
<b>NSW Act</b>	<i>Building and Construction Industry Security of Payment Act 1999</i> (NSW)
<b>NT Act</b>	<i>Construction Contracts (Security of Payments) Act 2004</i> (NT)
<b>Ontario Act</b>	<i>Construction Lien Act R.S.O 1990</i> (Ontario)
<b>PBA</b>	Project Bank Account
<b>QBCC</b>	Queensland Building and Construction Commission
<b>QBCC Act</b>	<i>Queensland Building and Construction Commission Act 1991</i> (Qld)
<b>QMBA</b>	Queensland Master Builders Association
<b>QRC</b>	Queensland Resources Council
<b>Queensland Act</b>	<i>Building and Construction Industry Payments Act 2004</i> (Qld)
<b>Queensland Bill 2017</b>	Building Industry Fairness (Security of Payment) Bill 2017 (Qld)
<b>Queensland Regulation</b>	<i>Building and Construction Industry Payment Regulation 2004</i> (Qld)
<b>RBWCDR Act</b>	<i>Residential Building Work Contracts and Dispute Resolution Act 2016</i> (Tas)
<b>SA Act</b>	<i>Building and Construction Industry Security of Payment Act 2009</i> (SA)
<b>SA Liens Act</b>	<i>Worker's Liens Act 1893</i> (SA)
<b>SA Review Bill 2017</b>	Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA)
<b>SA SBC</b>	South Australia Small Business Commissioner
<b>SAT</b>	State Administrative Tribunal
<b>SC Act</b>	<i>Subcontractors' Charges Act 1974</i> (Qld)
<b>SERC Inquiry</b>	Senate Economics References Committee Inquiry into Insolvency in the Australian Construction Industry
<b>Singapore Act</b>	<i>Building and Construction Industry Security of Payment Act 2004</i> (SG)
<b>Singapore Regulations</b>	<i>Building and Construction Industry Security of Payment Regulations 2006</i> (SG)
<b>SoCLA</b>	Society of Construction Law Australia
<b>SoP, SOP</b>	security of payments
<b>Tasmanian Act</b>	<i>Building and Construction Industry Security of Payment Act 2009</i> (Tas)
<b>VBA</b>	Victorian Building Authority
<b>Victorian Act</b>	<i>Building and Construction Industry Security of Payment Act 2002</i> (Vic)
<b>WA Act</b>	<i>Construction Contracts Act 2004</i> (WA)
<b>WA Regulations</b>	<i>Construction Contracts Regulations 2004</i> (WA)
<b>WHS</b>	work health and safety



## Executive Summary

### Purpose of the Review

The Review was announced on 21 December 2016. The purpose of the Review was to identify legislative best practice, with a view to improving consistency in security of payment legislation and the level of protection afforded to construction industry subcontractors to ensure they obtain payment for work they have completed or for goods and services they have supplied. The Review was required to report back by 31 December 2017 and include a range of recommendations to be considered by government.

### Conduct of the Review

The Review was conducted by Mr John Murray AM with assistance from the Australian Government Department of Jobs and Small Business. Mr Murray is the former National Executive Director of Master Builders Australia and a specialist in building contract disputes and security of payment legislation. He became a Member of the Order of Australia in 2014 for his service to the construction industry.

### Current security of payment legislative models

Over the past 18 years, every state and territory government has progressively enacted security of payment legislation with the prime objective of facilitating prompt progress payments. All of the jurisdictions, other than Western Australia and Northern Territory, have based their legislation on the *Building and Construction Industry Security of Payment Act 1999* (NSW) and such legislative regimes have come to be referred to as ‘the East Coast model’. The legislative regimes that operate in Western Australia and the Northern Territory are based on a different model, referred to as ‘the West Coast model’. There are significant differences, not only between the two models, but particularly within those jurisdictions that have adopted the East Coast model.

It should be noted that during finalisation of this Report the Queensland Government passed the Building Industry Fairness (Security of Payment) Bill 2017 (Qld) on 26 October 2017 with 144 amendments. The Bill was read a third time on 8 November 2017 and received Royal assent on 10 November 2017. Many of the changes to be affected by the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) are to be dealt with in Regulations, which at the time of writing had not yet been released. Given timing for delivery of the interim report and this final report, that Act is therefore only considered in its original Bill form as introduced to the Queensland Parliament on 22 August 2017.

### Issues with security of payment legislation

Notwithstanding that two fundamentally different models have developed and been adopted in divergent ways across jurisdictions, there have been some improvements in payment practices within the construction industry. However, major problems associated with the current security of payment legislative regimes remain, including:

- a) With the exception of Queensland, none of the existing state and territory legislations provide any effective ‘security’ of payment where a party higher up the contractual chain becomes insolvent.
- b) The legislative regimes are unduly complex and this has discouraged their usage and caused confusion.
- c) There are questions around the process of appointing adjudicators; the adequacy of qualifications, training and grading of adjudicators; and the variable quality of adjudication decisions.

- d) There is an imbalance of bargaining power within the contractual chain and the practice of passing on contractual risks has resulted in the imposition of unfair contract terms that operate to prevent payment to the party that has carried out construction work.
- e) There are suggestions that acts of intimidation and retributive conduct by head contractors discourage subcontractors from pursuing their entitlements.
- f) Late payment continues to be a major issue for the construction industry.

### Review methodology

To gain an appreciation of these issues and how they may be addressed, an extensive process of targeted face-to-face consultations was conducted with key stakeholders across all levels of governments, business, unions and other relevant interested parties. An Issues Paper was produced for the purposes of setting out the matters for discussion during the targeted consultations.<sup>1</sup> The Issues Paper identified key issues related to security of payment and posed questions for consideration by stakeholders.

### Consideration of an appropriate best practice legislative model

Whilst the majority of stakeholders agree that the construction industry would benefit from a nationally consistent legislative model, there were differing views on what the key features of such legislation should be – in particular, whether legislation should be based on the East Coast or the West Coast model, and whether it should provide for progress payments to be paid into a trust account.

In identifying an effective security of payment regime, consideration of the issues and stakeholders' feedback was underpinned by the following three policy considerations:

1. Preserving the cash flow of the party that has carried out construction work or provided related goods and services by enshrining its right to receive prompt payment of progress claims
2. Providing an adjudication process that ensures disputed payment claims are quickly and efficiently determined so that prompt payment can be made, and
3. Protecting payments made in respect of a progress claim so that the party who receives the payment holds the payment for those to whom it is rightfully due.

### Conclusions

In relation to the **first** policy consideration—preserving the cash flow by enshrining the right to receive prompt payment of progress claims—the Review has formed the view that the legislative scheme should ensure the recipient of a progress payment claim will provide a prompt response, and that incentivising a recipient to do so is an essential precursor to achieving the objective of maintaining a contractor's cash flow. Knowing whether or not a progress payment claim will be paid, and if not, then the reasons for withholding payment, is of critical importance to a claimant.

The East Coast model is considered best able to achieve this policy objective because the legislation includes a provision requiring the recipient of a progress payment claim to respond within a prescribed time period. The failure to do so results in the claimed amount being deemed to be a debt and capable of being enforced in a court of competent jurisdiction. Under the West Coast model, a respondent who has failed to reply to a payment claim faces no immediate consequences.

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<sup>1</sup> Murray, J. (2017), *Review of Security of Payments laws: Issues Paper*, Department of Jobs and Small Business, Canberra, Australia, February 2017  
<[https://docs.jobs.gov.au/system/files/doc/other/review\\_of\\_security\\_of\\_payments\\_laws\\_-\\_issues\\_paper.pdf](https://docs.jobs.gov.au/system/files/doc/other/review_of_security_of_payments_laws_-_issues_paper.pdf)>

Accordingly, from the perspective of promoting the objective of facilitating the prompt payment of progress claims, the approach in the East Coast model is preferred.

The Review has identified that the legislation should apply to any construction contract and should require progress payment claims to be made in a timely manner after the completion of the construction work or supply of related goods and services. However, the legislation should also be clear that a claimant that is in liquidation is not permitted to make a payment claim under the legislation. The legislation should, subject to appropriate safeguards, also enable a house builder to make a payment claim against an owner of a residential dwelling.

Payment claims should be required to identify not only the amount claimed but also the time period within which the recipient is to provide a response. Payment claims should be endorsed as a claim made under the Act, and all payment claims should be subject to the same process, in contrast to the composite system that currently operates in Queensland. The legislation also should not exclude certain claimed amounts as is the case in Victoria.

The legislation should incentivise respondents to promptly reply to a payment claim by way of a payment schedule. If the scheduled amount is less than the claimed amount, the respondent should be required to set out all its reasons for withholding payment and should not be permitted to subsequently provide any new or additional reasons.

In relation to the **second** policy consideration—providing a quick and efficient adjudication process—the Review has determined that the legislative scheme ought to provide an appropriate balance regarding timing in the adjudication process. Thus, whilst an adjudication process should be rapid, it should not be so rapid as to deny procedural fairness. A respondent should, in appropriate circumstances, also be able make an application to the adjudicator for additional time to submit its response. In order to ensure that the adjudication process remains cost effective, adjudication fees for payment claims of less than \$25 000 should not exceed a capped fee.

The Review also recommends that authorised nominating authorities (ANAs) continue to receive adjudication applications but be confined to only referring nominations of suitable adjudicators, with regulators being responsible for the actual appointment of adjudicators. The parties to a payment dispute should, in appropriate circumstances, also be permitted to agree on their own adjudicator. All adjudicators should be trained, registered and graded by the Regulator. Further, in certain circumstances and subject to appropriate restraints, a party that is aggrieved with an adjudication decision should be permitted to apply for an adjudication review. Each of these measures should ensure not only a more transparent process but one that produces superior decision making and enhances industry confidence in the process.

In relation to the **third** policy consideration—protecting progress payments for those to whom they are rightfully due—the Review notes that the overwhelming majority of construction work and materials is carried out and/or supplied by subcontractors, many of whom operate as small businesses. It is therefore incongruous that so little protection is given to secure payments to these contractors who operate at the base of the contractual chain. Moneys paid to a head contractor represent payment not only for its project management but also for the construction work and construction materials carried out and supplied by subcontractors. Such payments should be passed promptly down the contractual chain and not used by the head contractor for its own purposes. Similarly, payments made by a head contractor to a subcontractor should also be passed down to the sub-subcontractors engaged by the subcontractor, and so on down the contractual chain. The Review concluded that the most effective way that payments can be secured from misuse and the risk of head contractor insolvency is by implementing a cascading statutory trust. Only such a statutory trust would secure the payments of all subcontractors, including the most vulnerable at the base of the contractual chain.

Ultimately, the Review notes that it is time that security of payment is dealt with at a national level in a cohesive and cooperative manner. It is clear that the only way to achieve a nationally consistent and effective set of security of payment laws is with Australian Government involvement. As such, implementation of the best practice recommendations resulting from the Review will require the relevant Australian Government, state and territory Ministers to work together. Leaving it to the states and territories alone to implement the report's recommendations will only result in cherry-picking and further divergence in the security of payment legislations operating across the nation.

### Table of recommendations

Following from the above, the specific recommendations on the issues identified by the Review are listed below.

RECOMMENDATION	REFERENCE
<b>Chapter 7: A recommended best practice model</b>	
<p>1. Security of payment legislation should seek to promote prompt payment so as to maintain a contractor's cash flow. Such an outcome is more effectively achieved through adoption of a legislative regime broadly based on the East Coast Model.</p>	Section 7.5
<p>2. The legislation should be drafted and structured as simply as possible and not provide for a two-tier / composite system of 'complex' and 'standard' claims, as is the case under the Queensland legislation. However, the legislation should enable a respondent, in appropriate circumstances, to make a request to the adjudicator for additional time to respond to a claimant's adjudication application.</p>	Section 7.6
<b>Chapter 8: The objects of the legislation</b>	
<p>3. The objects of the legislation should be to provide a party who has undertaken construction work (or supplied related goods and services) under a construction contract with:</p> <ul style="list-style-type: none"> <li>a) a statutory right to progress payments for that work (or for the supply of related goods and services), and</li> <li>b) a procedure whereby they can enforce their statutory right to progress payments.</li> </ul> <p>The 'object' provision set out in Section 3 of the <i>Building and Construction Industry Security of Payment Act 1999</i> (NSW) (the NSW Act) provides a suitable model.</p>	Section 8.1
<b>Chapter 9: Definitions</b>	
<p>4. The legislation should include a definition of 'construction work', which should be drafted in the broadest terms.</p> <p>The definition of 'construction work' in section 5 of the NSW Act provides a suitable model.</p>	Section 9.1

RECOMMENDATION	REFERENCE
<p>5. The legislation should include the definition of ‘related goods and services’, which should be drafted in the broadest terms.</p> <p>The definition of ‘related goods and services’ in section 6 of the NSW Act provides a suitable model.</p>	Section 9.2
<p>6. The legislation should include a definition of ‘construction contract’ which is drafted in broad terms.</p> <p>The definition of ‘construction contract’ in section 4 of the NSW Act provides a suitable model.</p>	Section 9.3
<p>7. The definition of ‘construction contract’ should also clarify that a claimant contractor who undertakes to carry out construction work under a ‘construction contract’ must hold the requisite licence to carry out such construction work.</p>	Section 9.3
<p>8. The legislation should include a definition of ‘business day’ which excludes:</p> <ul style="list-style-type: none"> <li>a) Saturday and Sunday</li> <li>b) public holidays, and</li> <li>c) the period between 22 December and 10 January inclusive.</li> </ul> <p>The definition of ‘business day’ as set out in section 4 of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model.</p>	Section 9.4
<h3>Chapter 10: Application of the legislation</h3>	
<p>9. The legislation should apply to any construction contract, whether written or oral, or partly both, but should not include construction contracts that form part of a loan agreement, a contract of guarantee or a contract of insurance or where the work is to be undertaken by an employee of the party for which the work is being done.</p> <p>The ‘application’ provision in section 7 of the NSW Act provides a suitable model, other than the exception set out in section 7(2)(b) should not be included.</p>	Section 10.1
<p>10. The legislation should <b>not</b> apply to a claimant corporation in liquidation.</p>	Section 10.1
<p>11. The legislation should <b>not</b> include the carve-out of amounts that a person is entitled to under a construction contract.</p>	Section 10.2
<p>12. The legislation should apply to the residential housing sector so as to enable a residential contractor/builder to make a progress payment claim against an owner-occupier.</p>	Section 10.3

RECOMMENDATION	REFERENCE
<p><b>13.</b> The legislation should prescribe that whenever a residential contractor/builder serves a payment claim on an owner-occupier, the payment claim must include:</p> <ul style="list-style-type: none"> <li>a) information on how the owner-occupier respondent can reply to the payment claim, and</li> <li>b) the time period within which the reply/payment schedule must be given.</li> </ul>	Section 10.3
<b>Chapter 11: Rights to progress payments</b>	
<p><b>14.</b> To avoid confusion within industry the use of the expression ‘reference date’ should be abandoned. The legislation should provide that a person who has undertaken to carry out construction work (or who has undertaken to supply related goods and services) under a construction contract is able to make a payment claim for every named month, or more frequently if so provided under the contract.</p>	Section 11.1
<p><b>15.</b> The legislation should include specific provisions dealing with single (one-off)/milestone payments in circumstances where a construction contract makes no express provision in relation to these matters.</p> <p>Section 9(2)(c) of the <i>Building and Construction Industry Security of Payment Act 2002</i> (Vic) (the Victorian Act) provides a suitable model.</p>	Section 11.1
<p><b>16.</b> The legislation should set out the manner in which the date relating to the making of a final payment claim can be identified.</p> <p>Section 9(2)(d) of the Victorian Act provides a suitable model.</p>	Section 11.1
<p><b>17.</b> The legislation should enable a claimant, where a construction contract has been terminated, to make a payment claim for construction work carried out (or related goods and services supplied) up to the date of termination.</p> <p>Section 67(2) of the Building Industry Fairness (Security of Payment) Bill 2017 (Qld) provides a suitable model.</p>	Section 11.1
<p><b>18.</b> The legislation should prohibit ‘pay-when-paid’ clauses in construction contracts. Section 12 of the NSW Act provides a suitable model.</p>	Section 11.2
<p><b>19.</b> The legislation should provide that the due date for when a progress payment is to be paid is:</p> <ul style="list-style-type: none"> <li>a) the date provided for under the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, or</li> <li>b) if the contract makes no express provision with respect to the matter, 10 business days after the payment claim has been made.</li> </ul>	Section 11.3

RECOMMENDATION	REFERENCE
<p><b>20.</b> The legislation should provide that the amount of a progress payment is to be calculated:</p> <ul style="list-style-type: none"> <li>a) in accordance with the terms of the contract, or</li> <li>b) if the contract does not make any such provision, on the basis of an assessment of the value of the construction work carried out, or goods and services provided.</li> </ul> <p>Section 9 of the NSW Act provides a suitable model.</p>	Section 11.4
<p><b>21.</b> The legislation should provide that construction work and related goods and services is to be valued:</p> <ul style="list-style-type: none"> <li>a) in accordance with the terms of the contract, or</li> <li>b) if the contract does not make an express provision with respect to the matter, then having regard to: <ul style="list-style-type: none"> <li>(i) the contract price for the work/goods and services</li> <li>(ii) any other rates or prices set out in the contract</li> <li>(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and</li> <li>(iv) if any of the work/goods is defective, the estimated costs of rectifying the defect.</li> </ul> </li> </ul> <p>Section 10 of the NSW Act provides a suitable model.</p>	Section 11.5
<b>Chapter 12: Process for recovering progress payments</b>	
<p><b>22.</b> The legislation should require a claimant to identify in its payment claim:</p> <ul style="list-style-type: none"> <li>a) the contract (or arrangement) on which the claim is based, and</li> <li>b) a breakdown of the items claimed, including: <ul style="list-style-type: none"> <li>(i) a description of the item</li> <li>(ii) quantification of the item, and</li> <li>(iii) an outline as to how the claimed amount has been assessed</li> </ul> </li> </ul> <p>Clause 5(2) of the Singaporean <i>Building and Construction Industry Security of Payment Regulations 2006</i> provides a suitable model.</p>	Section 12.1
<p><b>23.</b> The legislation should expressly require a payment claim to:</p> <ul style="list-style-type: none"> <li>a) state that it is a payment claim made under the Act,</li> <li>b) provide the period for which a payment schedule is to be provided, and</li> <li>c) the potential consequences for failing to provide a payment schedule.</li> </ul>	Section 12.2

RECOMMENDATION	REFERENCE
<p><b>24.</b> The legislation should require that, unless the construction contract provides for a longer period, a progress payment claim must be made within 6 months after the construction work was last carried out or the related goods and services were supplied.</p>	Section 12.3
<p><b>25.</b> The legislation should provide that where a payment claim relates to a final payment (including recovery of retention, or the return of alternative security) the claim must be made:</p> <ul style="list-style-type: none"> <li>a) within the period specified in the construction contract, or</li> <li>b) if the construction contract does not so provide, the later of: <ul style="list-style-type: none"> <li>(i) 28 days after the end of the defects liability period, or</li> <li>(ii) 6 months after completion of all construction work had been carried out or related goods and services were supplied.</li> </ul> </li> </ul> <p>Sections 17A(3) and (4) of the Queensland Act provide a suitable model.</p>	Section 12.3
<p><b>26.</b> The legislation should require a payment schedule to identify:</p> <ul style="list-style-type: none"> <li>a) the payment claim to which it relates</li> <li>b) the amount that the respondent proposes to pay (schedule amount), and</li> <li>c) if the schedule amount is less than the claimed amount, the respondent's reasons for withholding payment.</li> </ul>	Section 12.4
<p><b>27.</b> The legislation should provide the Regulator with powers to prescribe:</p> <ul style="list-style-type: none"> <li>a) the form that a payment schedule must take, and</li> <li>b) additional information requirements.</li> </ul>	Section 12.4
<p><b>28.</b> The legislation should require a payment schedule to be served by the respondent on the claimant within the earlier of:</p> <ul style="list-style-type: none"> <li>a) the time required by the relevant construction contract, or</li> <li>b) 10 business days after the payment claim was served.</li> </ul>	Section 12.4
<p><b>29.</b> The legislation should provide that when a respondent fails to provide a payment schedule within the prescribed timeframe or fails to pay the whole or part of the claimed amount by the due date of payment, the claimant may:</p> <ul style="list-style-type: none"> <li>a) make an application for adjudication, or</li> <li>b) recover the unpaid portion of the claimed amount as a debt from the courts.</li> </ul> <p>Section 15 of the NSW Act provides a suitable model.</p>	Section 12.5



RECOMMENDATION	REFERENCE
<p><b>30.</b> The legislation should provide that where a claimant elects to recover the unpaid portion of a claimed amount as a debt from the courts, the respondent is not entitled to:</p> <ul style="list-style-type: none"> <li>a) bring a cross claim against the claimant, or</li> <li>b) raise any defence in relation to matters arising under the construction contract.</li> </ul> <p>Section 15 of the NSW Act provides a suitable model.</p>	Section 12.5
<p><b>31.</b> The legislation should provide that where a respondent has provided a payment schedule within the prescribed time period, but fails to pay the whole or part of the scheduled amount by the due date of payment, the claimant may:</p> <ul style="list-style-type: none"> <li>a) make an application for adjudication, or</li> <li>b) recover the unpaid portion of the claimed amount as a debt from the courts.</li> </ul> <p>Section 16 of the NSW Act provides a suitable model.</p>	Section 12.6
<p><b>32.</b> The legislation should include a requirement for a ‘supporting statement’ to be included in any payment claims submitted by a head contractor to the principal, and that a copy of the supporting statement be provided to each of the subcontractors whose work has been included in the head contractor’s payment claim.</p>	Section 12.7
<p><b>33.</b> A ‘supporting statement’ should include a declaration that all subcontractors have been paid the amounts due and payable to them for construction work done.</p> <p>Sections 13(7)–(9) of the NSW Act, and Regulation 19 of the NSW Regulations provide suitable models.</p>	Section 12.7
<p><b>34.</b> The legislation should provide that making a false or misleading ‘supporting statement’ constitutes an offence.</p>	Section 12.7

RECOMMENDATION	REFERENCE
<b>Chapter 13: Adjudication of disputes</b>	
<p><b>35.</b> The legislation should provide the following timelines for lodging an adjudication application:</p> <ul style="list-style-type: none"> <li>a) Where the amount set out in the payment schedule is less than the claimed amount, the adjudication application must be lodged within 10 business days after the claimant received the payment schedule, or</li> <li>b) Where the respondent, having provided a payment schedule, has nonetheless failed to pay the whole or part of the scheduled amount by the due date for payment, the adjudication application must be lodged within 20 business days after the due date for payment, or</li> <li>c) Where: <ul style="list-style-type: none"> <li>(i) a respondent has failed to provide a payment schedule, and</li> <li>(ii) a respondent has failed to pay the whole or part of the claimed amount, and</li> <li>(iii) the claimant has notified the respondent of their intention to apply for adjudication,</li> </ul> <p>the adjudication application must be lodged within 10 business days after the end of the 5 business day period referred to in the claimant's notice.</p> <p>Sections 17(3)(c), (d) and (e) of the NSW Act provide suitable models.</p> </li> </ul>	Section 13.1
<p><b>36.</b> The legislation should provide that a function of the Regulator is to appoint adjudicators (whether nominated by the authorised nominating authority, or otherwise) to determine an adjudication application.</p>	Section 13.2
<p><b>37.</b> The legislation should provide for authorised nominating authorities to make nominations of accredited adjudicators to the Regulator for appointment to determine an adjudication application.</p>	Section 13.2
<p><b>38.</b> The legislation should provide that the parties to a payment dispute may agree on an accredited adjudicator, but such agreement may only be made:</p> <ul style="list-style-type: none"> <li>a) at the time when the dispute arises</li> <li>b) within 2 business days of the claimant serving a notice of adjudication and a copy of the adjudication application on the respondent, and</li> <li>c) where the dispute relates to a payment claim of more than \$250 000.</li> </ul>	Section 13.2

RECOMMENDATION	REFERENCE
<p><b>39.</b> The legislation should require a respondent to provide an adjudication response within the later of:</p> <ul style="list-style-type: none"><li>a) 5 business days after the respondent receives a copy of the claimant’s adjudication application, or</li><li>b) 2 business days after the respondent receives a copy of the adjudicator’s acceptance of the claimant’s adjudication application.</li></ul>	Section 13.3
<p><b>40.</b> The legislation should provide that a respondent may make a written application to the adjudicator to request an extension of time of up to 10 business days for giving an adjudication response, subject to that application:</p> <ul style="list-style-type: none"><li>a) being made within 2 business days of the respondent having received a copy of the claimant’s adjudication application, and</li><li>b) setting out the respondent’s reasons for requesting the extension.</li></ul>	Section 13.3
<p><b>41.</b> The legislation should prohibit a respondent from including in its adjudication response any reasons for withholding payment unless those reasons have already been included in a payment schedule provided to the claimant.</p>	Section 13.3
<p><b>42.</b> The legislation should provide that the timeframe for an adjudicator to make an adjudication decision is:</p> <ul style="list-style-type: none"><li>a) 10 business days after the respondent has lodged an adjudication response, or</li><li>b) such further time as agreed to by the parties, subject to the total timeframe for the adjudicator to make a decision being not more than 30 business days.</li></ul>	Section 13.4
<p><b>43.</b> The legislation should provide that a party to an adjudication is entitled to make an application to the Regulator for a review of an adjudication decision if:</p> <ul style="list-style-type: none"><li>a) the adjudicated amount is:<ul style="list-style-type: none"><li>(i) equal to or greater than \$100 000 of the <b>scheduled</b> amount, or</li><li>(ii) lower than \$100 000 of the <b>claimed</b> amount, or</li></ul></li><li>b) the adjudicator has rejected the adjudication application.</li></ul>	Section 13.5

RECOMMENDATION	REFERENCE
<p><b>44.</b> In making an application for adjudication review the legislation should provide that:</p> <ul style="list-style-type: none"> <li>a) the application must be made in writing to the Regulator within 5 business days of the adjudication decision being released to the disputing parties, and</li> <li>b) a copy of the application is to be provided to the other party within 1 business day of being lodged with the Regulator.</li> </ul>	Section 13.5
<p><b>45.</b> The legislation should provide that a party to an adjudication is <b>not</b> entitled to make an application for a review of the adjudication decision if the parties had agreed the adjudicator in accordance with Recommendation 38.</p>	Section 13.5
<p><b>46.</b> The legislation should further provide that, in relation to an application for adjudication review, a respondent:</p> <ul style="list-style-type: none"> <li>a) is not entitled to apply for an adjudication review unless it has lodged a payment schedule</li> <li>b) cannot include in its application for adjudication review reasons as to why payment is being withheld, unless those reasons have been included in the payment schedule, and</li> <li>c) must, when making an application for adjudication review, lodge with the Regulator's trust account any amount the respondent is required to pay to the claimant as a consequence of the adjudicator's decision.</li> </ul>	Section 13.5
<p><b>47.</b> The legislation should set out the relevant procedure for the conduct of an adjudication review. A suggested procedure is provided in Section 13.5 of this Report.</p>	Section 13.5
<p><b>48.</b> The legislation should require the Regulator to appoint the most senior registered adjudicator available to conduct the adjudication review.</p>	Section 13.5
<p><b>49.</b> The legislation should provide that (except in case of an adjudication review) where an adjudicator has determined that the respondent is to pay an amount to the claimant, the respondent must pay that amount:</p> <ul style="list-style-type: none"> <li>a) within 5 business days after the adjudication decision is served on the respondent, or</li> <li>b) by the date at which the adjudicated amount is determined by the adjudicator to be payable.</li> </ul>	Section 13.6

RECOMMENDATION	REFERENCE
<p><b>50.</b> The legislation should provide that where an application for review of an adjudicator decision is made and the adjudication review decision differs from the original adjudicator decision, the party required to make payment as a result of the adjudication review decision must pay that amount:</p> <ul style="list-style-type: none"> <li>a) within 5 business days after the adjudication decision is served on that party, or</li> <li>b) if the review adjudicator has decided that payment may be made on a later date, then on or before that date.</li> </ul>	Section 13.6
<p><b>51.</b> The legislation should provide that a claimant may suspend construction work (or the supply of related goods and services) for the respondent in certain circumstances, and subject to the provision of notice to the respondent of its intention to suspend work.</p> <p>Section 27 of the NSW Act provides a suitable model.</p>	Section 13.7
<p><b>52.</b> The legislation should provide that where the parties have the right to apply for an adjudication review, a claimant’s notice of intention to suspend work (or the supply of related goods and services) can only be made:</p> <ul style="list-style-type: none"> <li>a) after the end of the period allowed for completion of an application for adjudication review (i.e. 5 business days after a copy of the adjudication decision is served on the respondent), or</li> <li>b) if an adjudicator’s decision has been referred for an adjudication review and the respondent has not paid the amount determined by the review adjudicator by the due date, after the due date for payment has passed.</li> </ul>	Section 13.7
<p><b>53.</b> Absent implementation of a statutory trust (see Recommendation 85), the legislation should provide that:</p> <ul style="list-style-type: none"> <li>a) a claimant may serve a payment withholding request on the ‘principal contractor’ to require it to withhold sufficient money from payment that is, or becomes, payable by the principal contractor to the respondent to cover the claimed amount, and</li> <li>b) a principal contractor who fails to comply with such a request will become jointly and severally liable with the head contractor.</li> </ul> <p>Sections 26A–26F of the NSW Act provide a suitable model.</p>	Section 13.8

RECOMMENDATION	REFERENCE
<p><b>54.</b> The legislation should provide that a claimant may withdraw its adjudication application and make a new application if:</p> <ul style="list-style-type: none"> <li>a) the claimant has not received notice that an adjudicator has accepted its application within 4 business days after the application was lodged, or</li> <li>b) an adjudicator has accepted the claimant’s application but failed to decide the application within the prescribed timeframe, or</li> <li>c) the adjudicator has given notice of their withdrawal from the adjudication.</li> </ul> <p>Section 26 of the SA Act provides a suitable model.</p>	Section 13.9
<p><b>55.</b> The legislation should specifically provide that an adjudicator who has accepted an adjudication application may withdraw from the adjudication by giving notice to the parties.</p>	Section 13.9
<p><b>56.</b> The legislation should provide that a claimant is taken to have withdrawn its application if:</p> <ul style="list-style-type: none"> <li>a) it serves a notice of discontinuance on the adjudicator and the respondent, or</li> <li>b) the respondent pays the claimed amount, which is the subject of the adjudication application, to the claimant.</li> </ul> <p>Section 35B of the Queensland Act provides a suitable model.</p>	Section 13.9
<p><b>57.</b> The legislation should expressly provide that, where an adjudicator has committed jurisdictional error of law in a part of the adjudication decision which does not affect the whole of the decision, a court with the power to sever that affected part of the decision may do so and allow the remainder of the decision to be enforceable.</p> <p>Section 100(4) of the Queensland Act provides a suitable model.</p>	Section 13.10
<p><b>58.</b> The legislation should provide that where a claim is made under the security of payment legislation, a party’s contractual and other civil rights under the construction contract are preserved.</p> <p>Section 32 of the NSW Act provides a suitable model.</p>	Section 13.11
<p><b>59.</b> The legislation should provide that if an authorised nominating authority or Regulator issues an adjudication certificate, the claimant can file the certificate as a judgement debt in any court of competent jurisdiction.</p> <p>Section 25 of the NSW legislation offers a suitable model.</p>	Section 13.12

RECOMMENDATION	REFERENCE
<b>Chapter 14: General provisions relating to adjudicators</b>	
<p><b>60.</b> The legislation should contain provisions regulating the oversight of authorised nominating authorities, including in relation to:</p> <ul style="list-style-type: none"> <li>a) granting, renewing and withdrawing of authorisations</li> <li>b) the appeals process regarding decisions in respect of the granting, renewal and withdrawal of authorisation</li> <li>c) the functions of authorised nominating authorities</li> <li>d) requiring authorised nominating authorities to provide information to the Regulator in relation to its activities</li> <li>e) authorising the fees that authorised nominating authorities may charge, and</li> <li>f) statutory indemnity of authorised nominating authorities.</li> </ul>	Section 14.1
<p><b>61.</b> In determining an adjudication application, the legislation should include provisions setting out:</p> <ul style="list-style-type: none"> <li>a) the procedures an adjudicator may follow in proceedings</li> <li>b) what an adjudicator is to determine</li> <li>c) the matters the adjudicator is to consider</li> <li>d) the format and information that the determination is to include, and</li> <li>e) that the adjudicator may, on their own initiative, correct errors, defects etc. in the determination.</li> </ul> <p>Sections 21(4) and (4A), and sections 22(1)–(5) of the NSW Act offer a suitable model.</p>	Section 14.2
<p><b>62.</b> The legislation should include specific provisions dealing with an adjudicator’s disqualification due to conflict of interest. A suggested provision is provided in Section 14.2 of this Report.</p>	Section 14.2
<p><b>63.</b> The legislation should include specific provisions requiring an adjudicator to decide jurisdiction.</p>	Section 14.2
<p><b>64.</b> The legislation should provide that an adjudicator’s function (other than in respect to minor clerical tasks) is personal and non-delegable.</p>	Section 14.2

RECOMMENDATION	REFERENCE
<p><b>65.</b> Legislation should provide for:</p> <ul style="list-style-type: none"> <li>a) the registration and renewal of adjudicators and for the suspension, cancellation or amendment of adjudicators' registrations, and</li> <li>b) a process for reviewing decisions associated with adjudicators' registrations.</li> </ul> <p>The provisions relating to the regulation of adjudicators as set out in Part 4, Divisions 3, 4, 5 and 6, and Part 5 of the Queensland Act and clause 3 of the Queensland Regulation provide a suitable model.</p>	Section 14.3
<p><b>66.</b> Adjudicators should be registered and graded by the Regulator.</p>	Section 14.3
<p><b>67.</b> Where an adjudicator has been found, by a court in Australia, to have made technical errors in performing adjudications, an ANA must not nominate the adjudicator unless it is satisfied that the cause of the error has been resolved.</p>	Section 14.3
<p><b>68.</b> Where an adjudicator has been found by a court in Australia to have acted not in good faith twice or more within the last 5 years in relation to adjudication duties, an authorised nominating authority must not nominate the adjudicator for adjudication and the Regulator must not appoint such person as an adjudicator.</p>	Section 14.3
<p><b>69.</b> The legislation should provide that in the case of adjudication applications involving payment claims of <b>up to and including \$25 000</b>, the fees that an adjudicator may charge should be fixed at a rate prescribed by the Regulator.</p>	Section 14.4
<p><b>70.</b> The legislation should provide that in the case of adjudication applications involving payment claims <b>over \$25 000</b>, the fees that an adjudicator may charge should not exceed a capped rate prescribed by the Regulator, unless otherwise agreed by the parties.</p>	Section 14.4
<p><b>71.</b> The legislation should provide that in the case of applications for adjudication review, the fees that a review adjudicator may charge should be prescribed and published by the Regulator.</p>	Section 14.4
<p><b>72.</b> The legislation should provide that a claimant and respondent are equally liable for payment of the adjudicators fees, unless the adjudicator determines otherwise, and set out the matters an adjudicator may consider when deciding the apportionment of their fees and expenses.</p> <p>Section 35A of the Queensland Act provides a suitable model.</p>	Section 14.4
<p><b>73.</b> The legislation should <b>not</b> require adjudicators' decisions to be published.</p>	Section 14.5



RECOMMENDATION	REFERENCE
<p><b>74.</b> The legislation should provide protection from liability for adjudicators.</p> <p>The protections set out in section 46 of the Victorian Act provide a suitable model.</p>	Section 14.6
<b>Chapter 15: Miscellaneous issues</b>	
<p><b>75.</b> The legislation should provide for a notice to be served on a person by:</p> <ul style="list-style-type: none"> <li>a) personal delivery</li> <li>b) post</li> <li>c) facsimile</li> <li>d) email, or</li> <li>e) any other method as provided in the construction contract or by regulations.</li> </ul> <p>Section 31 of the NSW Act provides a suitable model.</p>	Section 15.1
<p><b>76.</b> The legislation should make it an offence to use coercive and threatening conduct, whether directly or indirectly, in relation to a person's statutory rights to, or claim for, a progress payment under the legislation.</p> <p>Clause 32A of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model.</p>	Section 15.2
<p><b>77.</b> The 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.</p> <p>Section 43B of the Victorian Act provides a suitable model.</p>	Section 15.3
<p><b>78.</b> The legislation should require the Regulator to publish an annual report on the operation and effectiveness of the legislation.</p>	Section 15.3
<p><b>79.</b> The jurisdictions should cooperate to develop a consistent set of standards for reporting data collected from authorised nominating authorities/adjudicators about the use of security of payment legislation. The reporting of such information should be based on the NSW format and published annually.</p>	Section 15.3
<p><b>80.</b> There should <b>not</b> be a separate mechanism besides the security of payment legislation to specifically deal with the enforcement of disputed progress payment claims.</p>	Section 15.4

RECOMMENDATION	REFERENCE
<p><b>81.</b> The legislation should provide that all cash retentions are to be held on trust:</p> <ul style="list-style-type: none"> <li>a) In the case of a principal, the cash retentions should be held on trust for the head contractor.</li> <li>b) In the case of a head contractor, cash retentions should be held on trust for the subcontractors.</li> <li>c) In the case of a subcontractor, the cash retentions should be held on trust for the sub-subcontractor.</li> </ul>	Section 15.5
<p><b>82.</b> The legislation should expressly provide for an adjudicator to be able to decide whether a retention amount and/or security is to be returned, and the date on which it is to be returned.</p>	Section 15.5
<p><b>83.</b> Trade credit insurance should <b>not</b> be made a legislative requirement. It is noted that while trade credit insurance can provide useful additional protection it is not a viable alternative to security of payment laws.</p>	Section 15.6
<h3>Chapter 16: Unfair contract terms</h3>	
<p><b>84.</b> The legislation should void a contractual term that purports to make a right to claim or receive payment, or a right to claim an extension of time, conditional upon giving notice where compliance with the notice requirements would:</p> <ul style="list-style-type: none"> <li>a) not be reasonably possible; or</li> <li>b) be unreasonably onerous; or</li> <li>c) serve no commercial purpose.</li> </ul>	Section 16.6
<h3>Chapter 17: Statutory trusts</h3>	
<p><b>85.</b> A deemed statutory trust model should apply to all parts of the contractual payment chain for construction projects over \$1 million. The deemed statutory trust model outlined in the Collins Inquiry provides a suitable basis.</p>	Section 17.4
<p><b>86.</b> The Australian Government should take a lead role in working with the states and territories and key industry stakeholders towards the establishment of a nationally consistent deemed statutory trust model. The establishment and implementation of such a model should be accompanied by a program of industry-wide education and training.</p>	Section 17.4

## Report structure

**Chapter 1** provides background information on the Review, including its purpose, the Terms of Reference and processes involved.

**Chapter 2** briefly discusses the meaning of the term ‘security of payment’ and the origins of security of payment legislation.

**Chapter 3** looks at the payment practices of the construction industry and how these are influenced by the hierarchical structure of the industry. The extent of the problem of late payment and its linkages with high rates of insolvencies in the construction industry is also examined. Some examples of the impacts of late payment and insolvency are also provided.

**Chapter 4** provides an overview of how the issue of late payment has been addressed through state and territory legislation. The key features of the various legislative models are identified and discussed along with the outcomes of recent reviews and other relevant industry developments.

**Chapter 5** examines the case law to date so as to identify the extent to which adjudication decisions are subject to judicial review.

**Chapter 6** briefly considers why national consistency in security of payment legislation is desirable and highlights the various supporting arguments.

**Chapter 7** provides a comparative analysis of the effectiveness of the current jurisdictional security of payment legislative regimes and models in operation and considers which model provides a suitable best practice basis for national consistency.

**Chapters 8 to 16** follow on from the conclusions in Chapter 7 and consider what the detailed aspects of a best practice legislation should include.

**Chapter 8** considers what the objects of a best practice legislative model should be.

**Chapter 9** looks at key terms in the legislation and how these should be defined.

**Chapter 10** deals with the application of the legislation, and specifically what types of contracts it should apply to and whether certain matters should be specifically excluded from coverage of the legislation.

**Chapter 11** deals with key issues associated with making a progress payment claim, including when a claim can be made, how a progress payment is to be calculated and how construction work (or related goods and services) are to be valued.

**Chapter 12** assesses the process for recovering progress payments and in particular how payment claims should be made, when they should be made and what information they should contain. Also considered is the process for responding to a payment claim and the consequences of not providing a response. The use of statutory declarations to support payment claims higher up the contractual chain is also considered.

**Chapter 13** considers the process for adjudication of disputes relating to payment claims. Matters covered include how adjudication applications are to be made and the associated timeframes, how adjudicators are to be appointed, the requirements for responding to an adjudication application and the timeframes in which an adjudication decision is to be made. This chapter also considers what actions should be available to the parties following an adjudication determination, including whether there should be a process for review of adjudicators’ decisions.

**Chapter 14** examines the role of the Regulator and Authorised Nominating Authorities in the appointment process for adjudicators, the skills, qualifications and experience that should be required of adjudicators and the statutory obligations adjudicators should have in undertaking an adjudication and arriving at a determination. This chapter also considers related issues in regard to adjudicator fees and whether adjudication determinations should be published.

**Chapter 15** deals with a number of miscellaneous issues related to the adjudication process, including how notices should be served and, importantly, reported acts of intimidation and retribution against those who seek to invoke their statutory rights to make a payment claim under security of payment legislation.

**Chapter 16** examines the various power imbalances in the contractual chain and the use of unfair contract terms in construction contracts, and how current security of payment laws deal with such unfair provisions.

**Chapter 17** examines the use of statutory trusts as a mechanism to protect subcontractors from the impacts of insolvencies higher up the contractual chain. The historical scrutiny of statutory trusts by various jurisdictional reviews and inquiries, as well as recent trials of project bank accounts by some jurisdictions and responses from stakeholders, are considered in arriving at a recommendation on this issue.

**Chapter 18** considers various options for implementing the recommendations made in this report and associated issues before noting the most appropriate way forward.

# Chapter 1: Introduction

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## 1. Introduction

### 1.1 Background to the Review of Security of Payment Laws

Various reviews and inquiries over the past twenty-five years have identified security of payment as an issue in the building and construction industry. The lack of consistent security of payment laws across jurisdictions has been identified as an ongoing issue over the past fifteen years, and in particular by the 2003 Cole Royal Commission into the Building and Construction Industry<sup>2</sup> (the Cole Royal Commission) and most recently by the 2015 report by the Senate Economics References Committee Inquiry into Insolvency in the Australian Construction Industry (the SERC Inquiry Report).<sup>3</sup> The SERC Inquiry Report found that:

- Businesses operating in the construction industry face an unacceptably higher risk than any other stand-alone industry of either entering into insolvency themselves, or becoming a victim of insolvency further up the contracting chain.<sup>4</sup>
- The construction industry's rate of insolvencies is out of proportion to its share of national output and, while the construction industry has accounted for 8–10% of Gross Domestic Product (GDP) over the past decade, it also accounted for 20–25% of all insolvencies in Australia.<sup>5</sup>
- '... A principal cause of insolvency in the construction industry is poor payment practices<sup>6</sup> and these practices compound difficulties arising from the pyramidal structure of the industry, which inequitably allocates risk to those least able to bear it.'<sup>7</sup>

The SERC Inquiry Report noted that all states and territories have sought to rectify the construction industry's poor payment practices through security of payment legislation.<sup>8</sup> The Inquiry subsequently analysed jurisdictional security of payments legislation as a mechanism to assist in ensuring that participants within the industry are paid money owed to them for work performed and recommended that '... the Commonwealth enact national legislation providing for security of payment and access to adjudication processes in the commercial construction industry.'<sup>9</sup>

In light of these reviews and the findings of the SERC Inquiry Report, the Australian Government announced a national Review of Security of Payment Laws in the building and construction industry (the Review) on 21 December 2016.

### 1.2 Conduct of the Review

Mr John Murray AM (the Reviewer) was appointed by the then Minister for Employment, the Hon Michaelia Cash, to conduct the Review with assistance from the Australian Government Department of Jobs and Small Business.

Mr Murray is the former National Executive Director of Master Builders Australia. He is a specialist in building contract disputations and security of payment legislation and has 40 years' experience in

<sup>2</sup> Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report of the Royal Commission into the Building and Construction Industry*, 2003, vol. 8, pp. 255–256.

<sup>3</sup> Senate Economics References Committee (SERC), Commonwealth Parliament, *Insolvency in the Australian Construction Industry* (2015).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, p. 121.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p. 22.

<sup>9</sup> *Ibid.*, see recommendation 28.

the construction industry. Mr Murray holds degrees in Law and Economics and has been admitted as a Solicitor. Mr Murray is also an accredited Adjudicator under the security of payment legislations in NSW, Victoria, Queensland, South Australia, Tasmania and the ACT. Mr Murray became a Member of the Order of Australia in 2014 for his service to the construction industry.

### 1.3 Purpose of the Review

The purpose of the Review was to identify legislative best practice with a view to improving consistency in security of payment legislation and the level of protection for subcontractors nationally. More specifically, the Review sought to identify a best-practice legislative model to overcome the current fragmented nature of the security of payment laws and consider why subcontractors are either unwilling or reluctant to use those laws and avail themselves of their statutory rights.

### 1.4 Terms of Reference

The Terms of Reference for the Review are to:

- Examine security of payment legislation of all jurisdictions to identify areas of best practice for the construction industry.
- Take into account any reviews and inquiries that have recently been conducted in relation to security of payments, including the December 2015 report by the Senate Economic References Committee on Insolvency in the Australian Construction Industry and the draft legislation developed by the 2003 Cole Royal Commission into the Building and Construction Industry.
- Consult with business, governments, unions and interested parties and the Security of Payment Working Group<sup>10</sup>.
- Consider how to prevent various types of contractual clauses that restrict contractors in the construction industry from obtaining payments for work that has been completed.

In making recommendations, the Review is to consider other models, including the model that operated in Queensland prior to 2014.

The Review is to provide a progress report to the Minister for Employment by 30 September 2017 with the final report, which includes recommendations, provided to the Minister no later than 31 December 2017.

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<sup>10</sup> The Working Group is comprised of construction industry representatives from unions, head contractors, subcontractors and others with an interest in security of payment. The role of the Working Group is to monitor the work of the Australian Building and Construction Commission (ABCC) in improving compliance with current security of payment legislative requirements. The ABCC is established by the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (the BCIP Act), to promote an improved workplace relations framework to ensure that building work is carried out fairly, efficiently and productively, and to investigate contraventions of that Act and related regulations. Section 34 of the BCIP Act requires building industry participants to comply with the *Code for the Tendering and Performance of Building Work 2016* (Cth) (Building Code) from the first time that they, or a related entity, submit an expression of interest or tender for Commonwealth funded building work on or after 2 December 2016. Regulations 11D and 11E of the Building Code require code-covered entities to comply with all security of payment laws and other payment-related matters.

## 1.5 Review process and consultations

To inform the Review, an extensive process of targeted face-to-face consultations was conducted with stakeholders across all levels of governments, business, unions and other relevant interested parties throughout the period from February to April 2017. These targeted consultations involved over 70 meetings with key stakeholders from all of the states and territories including:

- Australian Constructors Association
- Australian Small Business and Family Enterprise Ombudsman
- Construction, Forestry, Mining and Energy Union
- Housing Industry Association
- leading academics
- Master Builders Australia and its various state and territory MBAs
- Master Plumbers' Association of Queensland
- Master Plumbers and Mechanical Contractors Association of New South Wales
- Master Plumbers' and Mechanical Services Association of Australia (Vic)
- members of the judiciary
- National Electrical and Communications Association
- representatives of ANAs and senior adjudicators
- senior legal practitioners
- state and territory government regulators and officials
- Subcontractors Alliance
- Subcontractors WA (formerly known as Subcontractors for Fair Treatment).

A comprehensive list of stakeholders consulted as part of the Review is provided at **Appendix A**.

An Issues Paper<sup>11</sup> was produced for the purposes of setting out the matters for discussion with those parties and/or persons targeted for consultation. The Issues Paper identified a total of 15 key issues related to security of payment and posed 29 questions for consideration by stakeholders.

A process of targeted consultations was chosen over a general public consultation as it was considered to be more effective in generating detailed responses on what are generally considered to be highly technical issues, rather than simply relying on written submissions received.

Nonetheless a number of written submissions were also received from stakeholders, mostly as a consequence of the targeted stakeholder meetings. Such submissions were generally made for the purpose of expanding on the specific points raised at the meetings, particularly where the

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<sup>11</sup> Murray, J. (2017), op cit , *Review of Security of Payments laws: Issues Paper*, Department of Jobs and Small Business, Canberra, Australia, February 2017  
<[https://docs.jobs.gov.au/system/files/doc/other/review\\_of\\_security\\_of\\_payments\\_laws\\_-\\_issues\\_paper.pdf](https://docs.jobs.gov.au/system/files/doc/other/review_of_security_of_payments_laws_-_issues_paper.pdf)>



stakeholder indicated that they would prefer to consult further with their membership before giving a more considered formal response.

To ensure that broad industry consultation has taken place as part of the Review, a cross-sectional survey of contractors and subcontractors in the building and construction industry was also conducted. The survey was intended to complement the targeted consultation meetings already conducted with key industry stakeholder groups and provide further understanding of contractors' and subcontractors' views and experiences with security of payment laws.

The survey was conducted by AMR Interactive Pty Ltd (AMR). AMR was engaged for its expertise in survey design and conduct. Various industry associations organised participation in the survey by circulating it to their members for completion on a voluntary basis.

# Chapter 2: What is security of payment?

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## 2. What is security of payment?

### 2.1 Meaning of the term

‘Security of payment’ refers to the entitlement of contractors, subcontractors, consultants or suppliers in the contractual chain to receive progress payments due to them for construction work undertaken under a construction contract.

The term ‘security of payment’ was described by Commissioner Cole, who headed the 2003 Cole Royal Commission into the Building and Construction Industry, as referring to:

... attempts to redress a consistent failure to ensure that participants in the building and construction industry are paid in full and on time for the work they have done even though they have a contractual right to be paid.<sup>12</sup>

The term has come to be closely linked to the notion of enabling the party that has carried out construction work (or supplied materials on a construction project) to receive prompt progress payment so as to maintain cash flow. This linkage between progress payments and cash flow was first articulated by Lord Denning in *Dawnays Ltd v FG Minter Ltd and Trollope & Colls Ltd*<sup>13</sup> (*Dawnays Ltd v FG Minter*):

... Every businessman knows the reason why interim certificates are issued and why they have to be honoured. It is so that the sub-contractor can have the money in hand to get on with his work and the further work he has to do. Take this very case. The sub-contractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it.

Leaving aside the fact that the principle enunciated in *Dawnays Ltd v FG Minter* was later qualified by the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*<sup>14</sup>, the observation made by Lord Denning as to ‘the importance of preserving a contractor’s cash flow’ remains essentially valid.<sup>15</sup>

### 2.2 Legislative origins

Twenty years after Lord Denning’s observation, Sir Michael Latham, in his seminal report *Constructing the Team*<sup>16</sup> recommended that the UK Government enact legislation to alleviate the cash flow difficulties experienced by contractors who carried out construction work. Latham recommended the introduction of adjudication as a cost-effective alternative to expensive and lengthy litigation or arbitration processes that could resolve construction disputes quickly.<sup>17</sup>

In particular, Latham considered that adjudication would enable a contractor to refer any payment disputes for a quick determination where the adjudicator’s determination would be binding, even if it were to be subsequently overturned by the courts of an arbitrator. Latham recommended that ‘[i]f the award of the adjudicator involves payment it must be made at once.’<sup>18</sup> This part of Latham’s

<sup>12</sup> Cole Royal Commission, op cit, p. 229.

<sup>13</sup> [1971] 1 WLR 1205 [at 1209G–1210A].

<sup>14</sup> [1974] AC 689.

<sup>15</sup> Sundaresh Menon CJ, V K Rajah JA and Quentin Loh J in *W Y Steel Construction Pty Ltd v Osko Pty Ltd* [2013] SGCA 32 [21].

<sup>16</sup> Latham, M. (1994), *Constructing the Team: Final report of the Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry* (1994) ch. 8, pp. 84–85, paras 8.9–8.11.

<sup>17</sup> Ibid, ch. 9, para. 9.14, p. 91.

<sup>18</sup> Ibid, ch. 9, para. 9.7, p. 89.

recommendation was implemented by the UK Parliament when it enacted the *Housing Grants, Construction and Regeneration Act 1996* (UK).

# Chapter 3: Payment practices in the construction industry

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### 3. Payment practices in the construction industry

There have been many inquiries and reviews conducted over the past twenty-five<sup>19</sup> years which examined what measures can be taken to better secure payments for subcontractors. The magnitude of this issue was, however, best encapsulated by the Report of the Cole Royal Commission where Commissioner Cole observed:

[Security of payment] ... is an issue that critically affects the ability of participants in the industry to make a living, and to be rewarded for work that they have performed. During the course of their investigations, Commission investigators have repeatedly been told of the suffering and hardship caused to subcontractors by builders who are unable or unwilling to pay for work from which they have benefited. The subcontractors who experience payment problems are often small companies or partnerships. Frequently they do not have the expertise or resources to enforce their legal rights, because enforcement would require protracted litigation against much better resourced and more sophisticated companies. Consequently, subcontractors that have operated profitably and well for many years can be forced into liquidation through no fault of their own, often with devastating consequences for the owners of these businesses, their families, their employees and the creditors.<sup>20</sup>

#### 3.1 Overview of the Australian construction industry

The construction industry is a significant driver of economic activity in Australia. It is Australia's second largest industry, contributing approximately 7.6% to national GDP per year, which equates to an annual contribution of around \$128.7 billion.<sup>21</sup>

The industry is characterised by low market concentration and high competition, and is primarily driven by smaller businesses. The nine largest construction companies are estimated to hold less than 10% of the market share, with the top two companies holding approximately 4.5% of the market share.<sup>22</sup>

As of June 2016, the building and construction industry had the highest number of businesses operating in Australia, with 358,466 businesses.<sup>23</sup> Almost 99% of these businesses were self-employed (59%) or engaged less than twenty employees (39.8%).<sup>24</sup>

The critical role of trade skills in the construction industry is reflected in the 44.9% share of construction industry workers who have completed a Certificate III/IV qualification, with approximately 10% having completed a Bachelor degree or higher.<sup>25</sup>

<sup>19</sup> For example, New South Wales, *Independent Inquiry into Construction Industry Insolvency in NSW* (2012), the Cole Royal Commission and New South Wales, *Royal Commission into Productivity in the Building Industry in New South Wales* (1992).

<sup>20</sup> Cole Royal Commission, op cit, p. 229, para. 2.

<sup>21</sup> Australian Bureau of Statistics (2017), *Australian National Accounts: National Income, Expenditure and Product, December Quarter 2017*, ABS Cat. No. 5206.0, Table 37.

<sup>22</sup> IBISWorld (2017), *IBISWorld Industry Report E: Construction in Australia*, January 2017.

<sup>23</sup> Australian Bureau of Statistics (2012), *Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016*, ABS Cat. No. 8165.0.

<sup>24</sup> Ibid.

<sup>25</sup> Australian Bureau of Statistics (2016), *Education and Work*, Australia May 2016, ABS Cat. No. 6227.0.

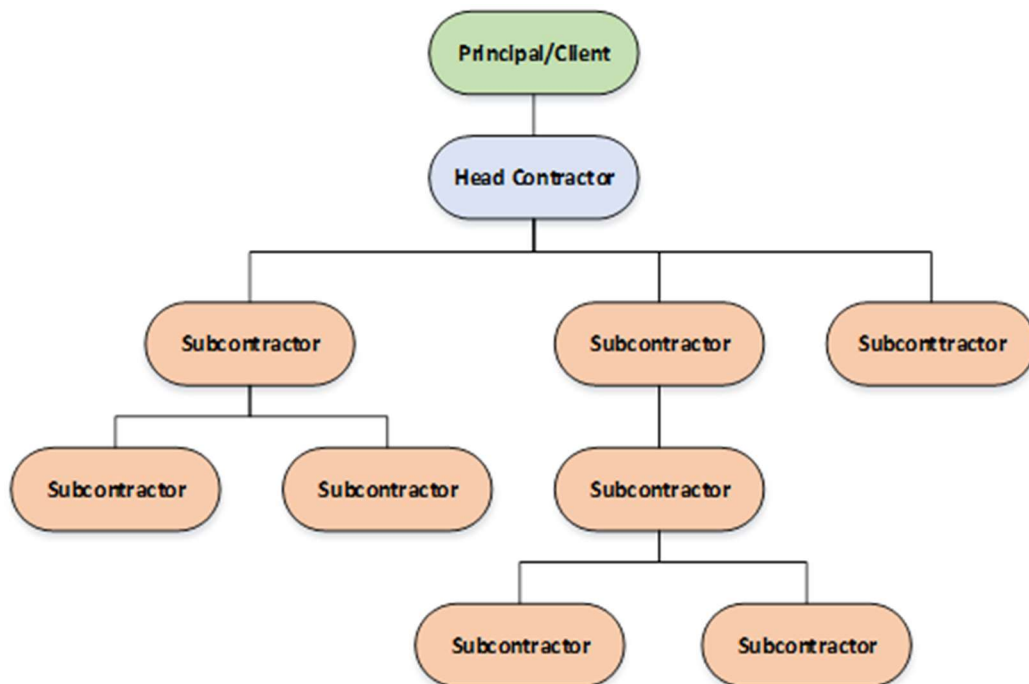
The construction industry is comprised of three main sectors:

1. **Residential building:** Construction of traditional single-unit detached houses, multi-unit apartments and townhouses, alterations and additions
2. **Non-residential building:** Construction of offices, retail and wholesale trade, industrial, accommodation, education, entertainment and recreation, health and aged care
3. **Engineering construction:** Construction of railways, roads, pipeline construction, harbour works, water supply systems and other recreational and social infrastructure.

### 3.2 The hierarchical structure of payments

Across all sectors, the construction industry operates on a pyramidal structure with the client, who finances a project, at the top, and multiple layers of contractors, subcontractors, consultants and suppliers, who are carrying out the work or supplying most of the related goods and services, at the bottom. Sitting in between the client and subcontractors and others is the head contractor. This structure is demonstrated in **Figure 1**.

**Figure 1: Structural hierarchy of payments**



### 3.3 The impact of industry structure on payments

Why is it that governments have felt it necessary to introduce specific legislation to assist participants in the building and construction industry to receive prompt payments? After all, cash flow is just as important to businesses that operate in other sectors of the economy and the issue of late payment is not confined to the building and construction industry.<sup>26</sup> What is so unique about the building and construction industry that can explain this emerging trend of special legislation to protect contractors from the hardships that flow from late payments?

The answer is very much related to the structure in which the industry operates, and in particular, the impact the hierarchical contractual chain has had on the most vulnerable participants.

Because of the pyramidal structure of the construction industry, whatever contractual terms the head contractor has agreed with the client, the contracts that the head contractor will enter into with subcontractors will be on a back-to-back basis. Thus, if the head contractor agreed to onerous provisions in the contract with the client (such as unfavourable payment terms or tight timeframes in respect to giving notices etc.), the head contractor will seek to pass on the associated risks to its subcontractors.

Importantly, the subcontractors at the base of the pyramid lack the bargaining power to negotiate more favourable provisions, such as better payment terms or interest for late payment.

This hierarchical contractual chain leaves subcontractors not only vulnerable to the consequences of late payment (and therefore having to draw on their own sources of finance, such as overdraft facilities, to meet payment obligations to suppliers and their employees), but also to the risk of insolvency of parties higher up the pyramid. Indeed, the SERC Inquiry Report highlighted that:

Owing to the pyramidal structure of the construction industry in Australia, the failure of businesses up the contractual chain can affect contractors and subcontractors further down the chain, as well as suppliers, developers and other participants within the industry. The failure of one business can push others over the fiscal cliff, ultimately resulting in significant financial cost to individuals throughout the industry.<sup>27</sup>

It could be argued that if subcontractors are asked to take on onerous contractual conditions they can either refuse to enter into such contracts or alternatively adjust their tender price to reflect the additional risk. However, the reality within the construction industry is very different. Consultations for this Review highlighted that subcontractors are often presented with 'non-negotiable' contracts with many of the standard industry provisions having been extensively amended. Thus, in circumstances where a head contractor has, for example, accepted onerous payment terms under its head contract with the client, the head contractor will in turn, through its subcontracts, impose even more onerous terms on its subcontractors, thereby slowing the flow of money further down the contractual chain. The irony is that the party having the least capacity to obtain finance (i.e. the subcontractor at the base of the pyramid) is left to wait the longest before receiving payment.

There is, however, another aspect regarding the operation of the hierarchical chain that needs to be highlighted. The usual or 'ordinary' process associated with making a progress payment involves various stages and occurs over a period of time. By their nature, construction contracts require a contractor to carry out construction work before being entitled to make a claim for payment, and when making such a claim the contractor is typically required to include key documentation in support of the claim (e.g. copies of invoices from suppliers, proof of payment of its subcontractors

<sup>26</sup> As observed by Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 [718] when he said that 'Cash flow is the lifeblood of the village grocer too ...'.

<sup>27</sup> SERC Inquiry Report, p. 39, para 3.35.



and workers' entitlements etc.). Once the subcontractor's claim has been assessed and/or approved by the head contractor, it is then submitted by the head contractor, together with payment claims from other subcontractors, to the client's representative (i.e. the superintendent) for approval/certification. When the approval/certification process has been completed, there will be a further time associated with the client's cheque run before payment is made to the head contractor. The head contractor will then require a period of time within which to make payment to its subcontractors.

Within the 'usual' or 'ordinary' course of payment, there is an inevitable time delay associated with the submission of payment claims up the contractual chain, the approval/certification process, and payments being made back down the contractual chain. Each participant within this payment cycle is endeavouring to manage their own cash flow and the head contractor will essentially structure their operations so payments to its subcontractors are released once it has been paid by the client. Importantly, however, each subcontractor is heavily dependent on timely and full payment of their invoices so as to operate their business, meet payroll obligations and purchase materials for the next stages of the construction project.

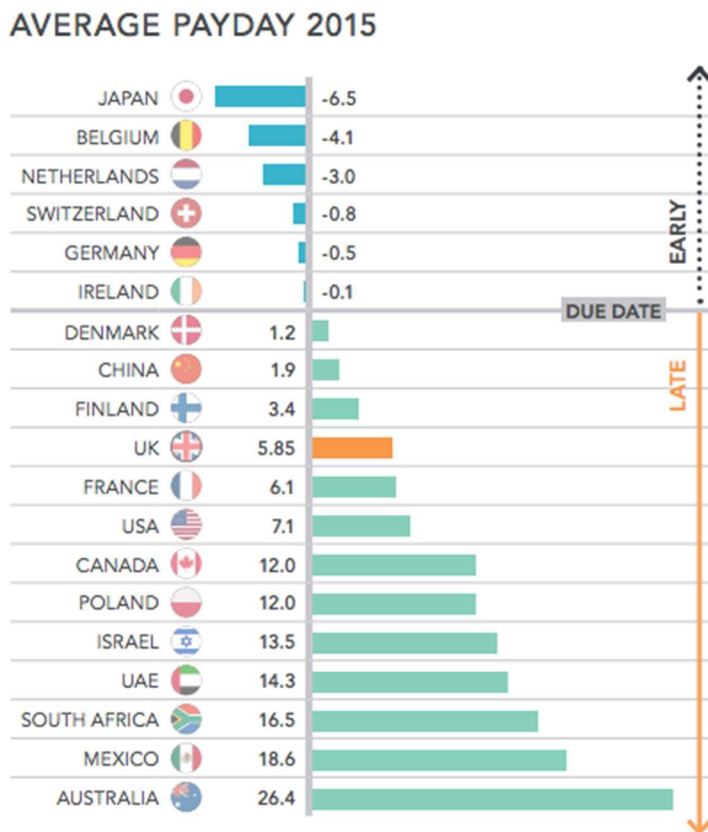
Sometimes there are delays to this 'ordinary' course due to the failure by the subcontractor to provide the necessary documentation to substantiate their payment claim or to demonstrate that they have paid subcontractors, suppliers and/or all of their workers' entitlements. Similarly, the 'ordinary' course may be delayed because the information provided by the head contractor does not meet the stringent audit requirements of the client, particularly where the client is a government agency. However, frequently the delays to the 'ordinary' course may occur for no apparent reason, or because the head contractor has disputed the subcontractor's entitlement to the claimed amount. For example, where a subcontractor makes a claim for variations to the work carried out, the head contractor may dispute that the claimed amount constitutes a variation, or that the amount claimed for the variations is excessive.

Given the hierarchical contractual chain and that the overwhelming majority of industry participants are small subcontractors, the focus by governments has been on formulating a legislative regime that will not only ensure subcontractors' progress payments are not unreasonably withheld beyond the 'ordinary' payment cycle, but that where there is a dispute on a claimed progress payment, the dispute is able to be determined in a rapid and cost-effective manner.

### 3.4 The extent of the problem of late payment

Globally, many countries are grappling with the issue of late payment generally, but recent analysis suggests Australia is by far the worst performer on a global comparison.

**Figure 2** provides a global comparison of all industries payment times across countries compared to the baseline due date for payment. As can be seen, in Australia payments are on average overdue by 26.4 days, compared to the next worst performer, Mexico, with an average overdue period of 18.6 days. The best performing country, Japan, paid its invoices on average 6.5 days before the due date.

**Figure 2: Global comparison of payment times, all industries**

**Source:** MarketInvoice, *The State of Late Payment 2016*, [www.marketinvoice.com](http://www.marketinvoice.com).

In Australia, the construction industry in particular is notorious for its payment issues along the whole supply chain. In order to obtain some measure on issues relating to invoicing practices, payment terms and reasons for late payment in the construction industry, a survey of construction industry contractors was commissioned for this Review. The survey results confirmed that late payment continues to be a major issue for the construction industry.

In total, 526 survey responses were received. When asked about payment terms, 78% of all survey respondents indicated they use 30 days or less as their standard payment terms; however, 30-day payment terms were the most common with almost half of all respondents (46%), indicating they use this period for invoices.

When asked about late payment, 72% of all respondents said that 40% or more of their invoices were paid late. Significantly, more than one third (36%) of respondents said 60% or more of their invoices were paid late and 44% of all respondents claimed that on average their invoices remain unpaid for more than 30 days after the due date. When this is considered in conjunction with the fact that the most common payment term is 30 days, the survey results suggest that many construction industry contractors are not receiving payment until at least 60 days after work has been completed. Further findings of the Review survey are provided at **Appendix B**.

The results of the Review survey broadly align with the findings of a separate but similar nationwide survey on payment times and practices, which was conducted by the Australian Small Business and

Family Enterprise Ombudsman (ASBFEO) as part of its Payment Times and Practices Inquiry (the ASBFEO Inquiry).<sup>28</sup> The ASBFEO survey, which covered all industry sectors, received a total of 2783 responses, of which 510 were from the construction industry. The survey was undertaken during the period December 2016 – February 2017.

Of the construction industry responses to the ASBFEO survey, 96% indicated they had 30 days or less standard payment terms. However, around 60% reported that 40% or more of their invoices were paid late last financial year, while 37% reported more than 60% of their invoices were paid late. This was higher than the all-industries averages of around 50% and 28% of respondents respectively.

As with the survey for this Review, around 44% of construction industry respondents to the ASBFEO survey reported that on average their invoices remain unpaid for more than 30 days after the due date, while 20% of respondents reported payment delays of more than 60 days. This was comparable to the all-industries averages of approximately 47% and 20% respectively.

The ASBFEO survey also identified that around one in five (21%) construction businesses have over \$100 000 in late payments owing to them, with 4% having more than \$500 000 in late payments owing to them. This was higher than the all-industry average of 14% for \$100 000 or more in late payments owing.

Some 64% of construction industry responses to the ASBFEO survey said that large/multinational businesses ‘always’ or ‘frequently’ make late payments. This was followed closely by 61% of respondents reporting medium businesses and 39% reporting small businesses ‘always’ or ‘frequently’ make late payments.

In terms of the impact of late payments to construction businesses, the ASBFEO survey found that:

- 31% of construction businesses reported difficulty paying salaries and benefits (above the all-industry average of 22%).
- 50% reported they were at increased risk of insolvency/liquidation as a result of late payments (above the all-industry average of 35%).
- 64% found it difficult to pay their own suppliers (above the all-industry average of 50%).
- 68% needed to borrow or use credit cards due to late payments to their business (above the all-industry average of 57%).
- 74% reported adverse impacts on physical wellbeing/loss of sleep and/or appetite (above the all-industry average of 59%).
- 88% experienced adverse impacts on mental wellbeing/increased stress/anxiety (above the all-industry average of 78%).

### 3.5 The link between poor payment practices and insolvency

In examining the issue of insolvency in the construction industry, the SERC Inquiry Report observed that the industry’s rate of insolvencies is out of proportion to its share of national output and that:

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<sup>28</sup> Australian Small Business and Family Enterprise Ombudsman (2017), Payment Times and Practices Inquiry – Survey, (ASBFEO 2017, unpublished data).

Businesses operating in the Australian building and construction industry face an unacceptably higher risk than any other stand-alone industry of either entering into insolvency themselves, or becoming the victim of insolvency further up the contracting chain.<sup>29</sup>

Over the past decade, while the construction industry has accounted for 8–10% of GDP, it has also accounted for 20–25% of all insolvencies in Australia. Indeed, there are on average more than 1700 insolvencies in the construction industry every year,<sup>30</sup> affecting thousands more creditors.

**Table 1** shows the number of insolvencies in the construction industry over the period 2004/05 to 2015/16.

**Table 1: Construction industry insolvencies 2004–16, percentage of all insolvencies<sup>31</sup>**

Financial year	Total number of insolvency events (all industries)	Number of construction industry insolvency events	Construction industry insolvencies as a percentage of all industries
2004/05	4,648	935	20.1
2005/06	5,785	1,177	20.3
2006/07	6,865	1,396	20.3
2007/08	6,933	1,517	21.9
2008/09	7,733	1,760	22.8
2009/10	7,903	1,905	24.1
2010/11	8,054	1,862	23.1
2011/12	10,074	2,229	22.1
2012/13	9,254	2,245	24.3
2013/14	9,459	2,153	22.8
2014/15	8,354	1,771	21.2
2015/16	9,465	1,964	20.8
<b>Total</b>	<b>94,527</b>	<b>20,914</b>	<b>22.1</b>
<b>Average</b>	<b>7,877</b>	<b>1,743</b>	<b>22</b>

**Source:** Australian Securities and Investment Commission, *Insolvency statistics – Series 3 External administrator reports*

For the 2016/17 financial year, available statistics from the Australian Securities and Investments Commission (ASIC) show that 1509 construction companies entered external administration.<sup>32</sup>

<sup>29</sup> SERC Inquiry Report, Executive Summary.

<sup>30</sup> Australian Securities and Investment Commission, *Insolvency statistics – Series 3 External administrator reports*: <<<http://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/-3.2>>>.

<sup>31</sup> Australian Securities and Investment Commission, *Insolvency statistics – Series 3 External administrator reports*: <<<http://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/>>>.

<sup>32</sup> Australian Security and Investment Commission, *Insolvency statistics – Series 1A Companies entering external administration by industry*: <<http://asic.gov.au/regulatory-resources/find-a->

However, these ASIC figures are likely to underestimate the actual incidence of insolvency in the construction industry. As the NSW Government noted in its Discussion and Issues Paper for the Inquiry into Construction Industry Insolvency in NSW, the ASIC figures are ‘...likely to be significantly understated as only 30% of all small businesses are incorporated, the overwhelming majority trading as sole traders and partnerships.’<sup>33</sup>

While business failures may be attributed to a number of causes, an analysis of ASIC Initial External Administrators' Reports lodged between 2009/10 and 2015/16 shows that ‘Inadequate cash flow or high cash use’ was the most frequent cause, closely followed by ‘poor strategic management of business’ and ‘poor financial control including lack of records’ (see **Appendix C.**)

The SERC Inquiry Report also identified cash flow problems as a principal cause of financial stress in the industry and noted that many submissions argued that cash flow difficulties resulting from poor industry payment practices were ‘a key driver of financial distress and risk of insolvency’.<sup>34</sup>

### 3.6 Examples of the impacts of late payment and insolvency

The devastating and far-reaching social and economic impact of insolvencies in the construction industry was highlighted during the period of the Review by the following high-profile cases, which were identified in the media:

- In NSW:
  - Bower Projects was placed into administration in **December 2016** owing around \$20 million
  - Peter O’Brien Constructions went into voluntary administration in **September 2017** after being owed \$12 million by debtors including a government organisation. The company itself owes around \$5.7 million to creditors including regional subcontractors
  - Severino Homes entered administration in **October 2017** owing more than 110 creditors, including homeowners and small businesses, more than \$1 million in total
  - Edwards Constructions (NSW) Pty Ltd went into administration in **October 2017** reportedly owing around 200 creditors up to a total of \$6 million
- In Victoria:
  - WSH (Watersun Homes) Group Pty Ltd was placed into voluntary administration in **April 2017** owing more than 800 creditors –many of them homeowners and small businesses — about \$20 million
  - Imagebuild Group entered into liquidation in **August 2017** reportedly owing \$20 million
- In Queensland:
  - The Cullen Group Australia Pty Ltd collapsed in **December 2016** owing about 500 subcontractors an estimated \$30 million

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[document/statistics/insolvency-statistics/insolvency-statistics-series-1a-companies-entering-external-administration-by-industry/>.](#)

<sup>33</sup> Department of Finance & Services (2012), *NSW Discussion and Issues Paper: Inquiry into Construction Industry Insolvency in NSW*, 12 October 2012, citing the NSW Small Business Commissioner, p. 15.

<sup>34</sup> SERC Inquiry Report, pp. 21–22.

- Bloomers Construction (Qld) Pty Ltd went into administration in **February 2017** reportedly owing creditors \$14 million
- Trac Construction (Qld) Pty Ltd went into liquidation in **March 2017**, owing creditors, most of whom are subcontractors, \$20 million
- Ostwald Bros Pty Ltd was placed in administration in late **August 2017** owing approximately \$31 million to 536 unsecured creditors and \$30 million to the main secured creditor, ANZ Bank. 260 staff were also made redundant and are owed around \$4 million in unpaid entitlements. On 1 December 2017 the Ostwald Bros Civil arm of the company was placed into liquidation resulting in a further 150 job losses
- In South Australia:
  - TS Morgan Developments was placed into administration in **March 2017**
  - Coombs Barei Constructions was placed into administration in **October 2017** owing around \$6.5 million
- In Western Australia:
  - Diploma Group was placed into administration in **December 2016** owing creditors \$60 million
  - BultonCorp Pty Ltd was placed into administration in **January 2017** with over \$16 million in outstanding debts to 350 unsecured creditors, mostly subcontractors, and \$500 000 to staff
- In the ACT:
  - SMI Group Pty Ltd was placed into administration in **February 2017**, owing creditors \$7 million

During consultations the Review also heard many personal accounts of the direct impact of insolvencies and late payments on subcontractors. Some of these accounts, and other relevant accounts from the ASBFEO inquiry are provided below:

#### CASE 1

'I was contracted to provide the plumbing works for a refurbishment project. During the contract, my invoices were paid late, not in full and records were not kept accurately. For example, I would issue an invoice for \$11 000 (\$10 000 plus \$1 000 GST). I would receive a remittance stating the invoice amount as \$10 450 and would be paid that much. The missing 5% was for retention money but it was never recorded as such. When I questioned these things, I was threatened with being charged for liquidated damages if I didn't continue working and was told not to worry, I was 100% absolutely guaranteed to be paid because it was a 'government job'. I did not receive any of the retention money due to me even though it was approved for payment by the architect. In fact, the head contractor had received payment from the client for 98% of the contract before going into administration but did not pay me for my last invoices totalling \$53 226.36.

I met with the client who informed me that, although the money still owed by them to the builder would easily have covered what was due to me, they would not pay me directly.

Furthermore, I went through FOI [freedom of information] channels to find out details of what money had been paid to the head contractor and if the required statutory declarations (stating that

all employees and subbies were paid) had been submitted. If so, then a fraud had been committed because I had not received payment.

I discovered that although 10 payments had been made to the head contractor by the client, only 9 of the required statutory declarations had been provided. I wrote to the client again asking how this could be so, considering the statutory declaration system was supposedly set up to protect people like me. His response was that all moneys had been paid to the builder despite the fact the last statutory declaration was not submitted; therefore, there was no fraudulent statutory declaration because one didn't exist at all. I was dumbfounded.

In the end, we borrowed money against our house to ensure our employees and subbies were paid and our supplier was good enough to put me on a payment plan for the \$25 000+ worth of fixtures I had supplied (as I was still liable for these regardless of if I had been paid or not) to allow me to continue to trade. We have just now almost finished paying this off.

Needless to say, it not been a fun year for us at all but I'm grateful for the fact it wasn't even more money and we didn't lose everything as others have.

What's worse is the knowledge that the directors/shareholders of the head contractor were able to just walk away and continue on with their other company without paying their debts. That coupled with the ridiculous and offensive amount of money that was charged by the administration company plus the total lack of empathy from the government at the time, with us not being able to do a thing about it, has really left us with a sour taste in our mouths.'

## **CASE 2**

'We are a small business. We work with bigger known contractors who have us on 45–60-day terms of payment based on WHEN the invoice arrives to them. For example, invoice dated 11/11/16 would be processed END of the month to be paid in the following month being January. So, you can see it puts a lot of strain on the business finances when we are still paying our crew weekly, and other overhead bills weekly to monthly. We have found that we have had to dip into our own personal savings, to carry the time lag between payments to sustain the business, and then return the personal funds back to us when we get the payment through. It's a lot of money movement and handling, which puts a strain on not only the business and what we can AFFORD to pay for at any given time, but also on our personal finances, as we are having to sustain the business which means it's affecting our personal livelihood.'

## **CASE 3**

'At noon last Friday, instead of receiving near \$76 000 from a major client we were given, two minutes before it closed for the Christmas break, \$1 900. The money was to be used to pay our staff Christmas wages but instead they left empty handed and with a loss of good will that WE had let them down. A number of one-man subcontractors also then missed out on their Christmas money as a consequence.

We had phoned the customer previously to endeavour to ensure no delay with payment, knowing that this particular company does this sort of thing regularly and boasts about how much money of subcontractors it uses to fund its development works on its own account. We expected a hit ... maybe down to \$60 000. The idea of less caused us dread but nothing prepared us for not even \$2 000.

No reason, no explanation, no one to answer the phone to listen to our pleadings for another issue of money, just the recorded message that 'We are closed for Christmas ... back in three weeks' time.'



We are in a provincial city and have built a business with over 25 employees to give timely and experienced service but the danger is our vulnerability to stunts like this. We see it as a win-lose system because we either terminate many valuable employees and scale down or put up with it because the customer produces an ongoing volume of work.'

#### **CASE 4**

'A few years ago, I had a judgement in my favour against a contractor.

This judgment was made under the *Building and Construction Industry Security of Payment Act 2002*.

A court order was issued with no result. I then payed \$171.40 to the sheriff to collect my money. The sheriff couldn't find the contractor. That was that. I don't understand how he was able to continue to do business, ignore a court order (contempt of court) and I am left out of pocket. My business operates on the edge. If someone owes me \$4 000 then I need that payment. It took me some time to recover. It impacts your judgement of people and the ability to deal with your next client. It's hard to sell your services to people when in the back of your head you worry about being paid.

If an Act can't be enforced, then it's not an Act. I was confidently doing business thinking the Security of Payment Act would protect me. It's not enforceable and as a result I am out of pocket.'

#### **CASE 5**

'We are in the construction industry and find that our suppliers dictate to us when payments will be made. As we are a small business and need the work we have to just go along with their terms if we want the job. The retentions are the worst, with some being delayed as long as 5–6 months and we have no control, even if there are no defects to our work. They also put clauses in the contracts which states that first retention is payable 'at practical completion of all works', not just of our works, which could be months from when we finished. It is difficult to push the issues as there is a fear that if you make waves you will not get any future work'



# **Chapter 4: Legislative intervention to address the issue of late payment**

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## 4. Legislative intervention to address the issue of late payment

### 4.1 State and territory regulation

In Australia, regulation of the building industry, including payment arrangements, is generally the responsibility of state and territory governments.

In order to rectify poor payment practices in the construction industry, each state and territory government has enacted specific 'security of payment' legislation to promote prompt payment so as to preserve cash flow and provide rapid adjudication where there are payment disputes.

#### NSW

The NSW Government was the first jurisdiction to introduce security of payment legislation with the *Building and Construction Industry Security of Payment Act 1999* (NSW) (NSW Act). The underlying philosophy of the Act was reiterated by the then Minister for Public Works and Services, the Hon. Morris Iemma, in 2002 in his second reading speech for the Building and Construction Industry Security of Payment Amendment Bill (NSW):

The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid ...

Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act ...

... There will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, and assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined.<sup>35</sup>

#### Victoria

Victoria followed the lead of NSW when it introduced the *Building and Construction Industry Security of Payment Act 2002* (Vic.) (Victorian Act). During the second reading speech for that legislation, the then Minister for Planning, the Hon. Mary Delahunty, expressly stated that the Victorian legislation was modelled on the NSW Act with the aim of:

... The main purpose of this bill is to provide for an entitlement to progress payments for persons who carry out building and construction work or who supply related goods and services under construction contracts. This bill represents a major initiative by the government to remove the inequitable practices in the building and construction industry whereby small contractors are not paid on time, or at all, for their work. This can be due to poor payment practices of contractors or financial failure of a head contractor when a dispute or litigation is in progress.

... The bill will alleviate the hardship which subcontractors suffer by reason of poor payment practices in the industry. The bill creates standards, and a balanced and equitable process, for payment and will reform payment behaviour in the industry.

<sup>35</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, p. 6541 (the Hon. Morris Iemma, Minister for Public Works and Services).

The essential elements of the bill are that if the contract does not provide for progress payments, a progress payment process is implied into the contract; quick adjudication of disputes is provided for with an obligation to pay or provide security of payment.<sup>36</sup>

### Queensland, South Australia, Tasmania and the Australian Capital Territory

The Queensland<sup>37</sup>, South Australian<sup>38</sup>, Tasmanian<sup>39</sup> and ACT<sup>40</sup> governments also followed the NSW lead, modelling their legislation on the NSW Act, and expressing similar sentiments regarding the purpose of the legislation<sup>41</sup>. Those governments enacted the following legislation respectively:

- *Building and Construction Industry Payments Act 2004* (Qld)
- *Building and Construction Industry Security of Payment Act 2009* (SA)
- *Building and Construction Industry Security of Payment Act 2009* (Tas), and
- *Building and Construction Industry (Security of Payment) Act 2009* (ACT).

### Western Australia

However, in Western Australia the decision was made to align its legislation more with the UK model, as noted by the then Minister for Planning and Infrastructure, the Hon. Alannah MacTiernan in her second reading speech for the Construction Contracts Bill 2004 (WA) (enacted as the *Construction Contracts Act 2004* (WA)):

The Bill draws on legislation already enacted in the United Kingdom, New South Wales and Victoria, but has been drafted to overcome a number of problems that have become apparent in those jurisdictions. In particular, it is based on enforcing the contract between the parties and does not introduce a separate, and possibly conflicting, statutory right to payment.<sup>42</sup>

Minister MacTiernan set out the intended aim of the proposed legislation as follows:

The Bill supports good payment practices in the building and construction industries by prohibiting payment provisions in contracts that slow or stop the movement of funds through the contracting chain; implying fair and reasonable payment terms into contracts that are not in writing; clarifying the right to deal in unfixed materials when a party to the contract becomes insolvent; and providing an effective rapid adjudication process for payment disputes ...

When a party to a contract believes it has not been paid in accordance with the contract, the Bill provides a rapid adjudication process that operates in parallel to any other legal or contractual remedy. The rapid adjudication process allows an experienced and independent adjudicator to review

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<sup>36</sup> Victoria, *Parliamentary Debates*, House of Assembly, 21 March 2002, pp. 426–7 (Mary Delahunty, Minister for Planning).

<sup>37</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2004, pp. 71–2 (Robert Schwarten, Minister for Public Works).

<sup>38</sup> South Australia, *Parliamentary Debates*, House of Assembly, 5 March 2009 (Tom Kenyon).

<sup>39</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 4 November 2009, pp. 30–186 (Lisa Singh, Minister for Workplace Relations).

<sup>40</sup> Australian Capital Territory, *Parliamentary Debate*, 15 October 2009, pp. 4540–44 (John Hargreaves, Minister for Industrial Relations).

<sup>41</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2004, pp. 71–2 (Robert Schwarten, Minister for Public Works); South Australia, *Parliamentary Debates*, House of Assembly, 5 March 2009 (Tom Kenyon); Tasmania, *Parliamentary Debates*, House of Assembly, 4 November 2009, pp. 30–186 (Lisa Singh, Minister for Workplace Relations); Australian Capital Territory, *Parliamentary Debate*, 15 October 2009, pp. 4540–44 (John Hargreaves, Minister for Industrial Relations).

<sup>42</sup> Western Australia, *Parliamentary Debates*, Assembly, 3 March 2004, 274d-275a (A MacTiernan, Minister for Planning and Infrastructure).

the claim and, when satisfied that some payment is due, make a binding determination for money to be paid. The rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and side-lining protracted or complex disputes. The process is kept simple, and therefore cheap and accessible, even for small claims. In most cases the parties will be satisfied by an independent determination and will get on with the job. If a party is not satisfied, it retains its full rights to go to court or use any other dispute resolution mechanism available under the contract. In the meantime, the determination stands, and any payments ordered must be made on account pending an award under the more formal and precise process.

### Northern Territory

The Northern Territory followed Western Australia in enacting the *Construction Contracts (Security of Payments) Act 2004* (NT) (the NT Act). In the second reading speech for the Act, the then Attorney General and Minister for Justice, the Hon. Peter Toyne, stated that:

The Bill is modelled on Western Australia's Construction and Contracts Act 2004 ...

... [it] will promote good payment practices in the building and construction industry. It does this by prohibiting provisions in contracts that slow, or halt the movement, of funds through the contracting chain. It will also help speed up the movement of funds by providing a rapid, and cost-effective adjudication process, for payment disputes. The building and construction industry is vital to the Territory's economy. The failure to pay at any stage in the contracting chain can have disastrous effects for those further down the chain waiting payment.<sup>43</sup>

### Evolution of the 'East Coast Model' and the 'West Coast Model'

As can be seen from the above, all of the second reading speeches emphasised that the purpose of the legislative intervention was to improve the payment practices within the construction industry and to ensure that the cash flow of small business contractors and subcontractors would be maintained. However, the approach adopted by the NSW legislature and all of the other jurisdictions that modelled their legislation on the NSW Act (i.e. Queensland, Victoria, South Australia, Tasmania and the ACT, which has come to be referred to as the 'East Coast Model') was to provide a separate statutory right to payment with a rapid adjudication process to deal with payment disputes.

On the other hand, the approach adopted by Western Australian and the Northern Territory legislature (which has come to be referred to as the 'West Coast Model') was to provide a rapid adjudication process that would enable either party to enforce their contractual rights, of which the enforcement of a party's contractual entitlement to payment could be but one of such disputes.

In other words, the NSW-based legislation envisaged the adjudication process as a means to an end, with the end being the enforcement of the statutory entitlement of a progress payment. In contrast, the legislation based on the Western Australian legislation envisaged the adjudication process more as a mechanism that would enable all disputes arising under a construction contract to be dealt with quickly.

This difference in the thrust of the East Coast and West Coast Models can be seen in the specific wording describing the objects of the legislation. Thus, in the case of the NSW Act, section 3 of that Act reads as follows:

#### 3. Object of Act

- 1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract

<sup>43</sup> Northern Territory, *Parliamentary Debate*, 14 October 2004, p. 1 (Peter Toyne, Attorney General and Minister for Justice).

is **entitled to receive, and is able to recover, progress payments** in relation to the carrying out of that work and the supplying of those goods and services.

- 2) The means by which this Act ensures that a person is entitled to receive a progress payment is **by granting a statutory entitlement to such a payment** regardless of whether the relevant construction contract makes provision for progress payments.
- 3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
  - (a) the making of a payment claim by the person claiming payment, and
  - (b) the provision of a payment schedule by the person by whom the payment is payable, and
  - (c) the referral of any disputed claim to an adjudicator for determination, and
  - (d) the payment of the progress payment so determined.
- 4) It is intended that this Act does not limit:
  - (a) any other entitlement that a claimant may have under a construction contract, or
  - (b) any other remedy that a claimant may have for recovering any such other entitlement. [emphasis added]

Similar wording can be found in the relevant legislation of each of the other jurisdictions that have adopted the East Coast Model (i.e. Victoria<sup>44</sup>, Queensland<sup>45</sup>, South Australia<sup>46</sup>, Tasmania<sup>47</sup> and ACT<sup>48</sup>).

The above provision may be contrasted with the provisions set out in the WA and NT Acts. The recital of the WA Act states that it is:

An Act –

- to prohibit or modify certain provisions in construction contracts;
- to imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts;
- to provide a means for adjudicating payment disputes arising under construction contracts, and for related purposes.<sup>49</sup>

Despite being based on the WA Act, the object of the NT Act is expressed in a different manner:

### 3. Object and its achievement

- 1) The object of this Act is to promote security of payments under construction contracts.
- 2) The object of this Act is to be achieved by:
  - (a) facilitating timely payments between the parties to construction contracts; and

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<sup>44</sup> See s. 3 of the Victorian Act.

<sup>45</sup> See ss. 7–8 of the Queensland Act.

<sup>46</sup> See s. 3 of the SA Act.

<sup>47</sup> See s. 3 of the Tasmanian Act.

<sup>48</sup> See s. 6 of the ACT Act.

<sup>49</sup> See the *Construction Contracts Act 2004* (WA), p. 1.

- (b) providing for the rapid resolution of payment disputes arising under construction contracts; and
- (c) providing mechanisms for the rapid recovery of payments under construction contracts.

Significantly, section 30 of the WA Act, and section 26 of the NT Act, which relates to the adjudication process, state that the object of the adjudication process is ‘... to determine the dispute fairly and as quickly, informally and inexpensively as possible’.<sup>50</sup> There is no equivalent provision under the East Coast Model.<sup>51</sup>

Although it is unclear as to whether any specific meaning is to be given to the expression ‘security of payment’ as that term is used in section 3(1) of the NT Act,<sup>52</sup> it was nonetheless made clear by the then Minister when introducing the NT Act that the scheme of the Act is modelled on the WA Act. In other words, whereas the object of the NT Act states that it is aimed at promoting ‘security of payments under construction contracts’, the means by which this object is to be achieved is not by creating a separate statutory entitlement to a progress payment, but rather by enabling a party to enforce timely payment by referring such claims to a rapid adjudication process.

## 4.2 Key features of the East Coast and West Coast models

### The East Coast Model

The key features of the East Coast Model (based on the NSW Act which is largely replicated in Victoria, Queensland, South Australia, Tasmania and the ACT) include:

1. An interim payment regime operates in conjunction with and in certain circumstances, overrides the contractual payment regime for work done.<sup>53</sup>
2. A claimant’s right to make a payment claim is restricted to claims for payment for construction work carried out, or related goods and services supplied, under a construction contract.<sup>54</sup> The Victorian legislation is, however, more restrictive as it excludes certain amounts from being claimed.<sup>55</sup>
3. Except in the case of NSW, the Act will apply wherever a claimant identifies that its payment claim is made under that applicable legislation.<sup>56</sup>

<sup>50</sup> See s. 30 of the WA Act.

<sup>51</sup> Other than a requirement that an adjudicator is to determine an adjudication ‘as expeditiously as possible’, but, in any case, within the prescribed time period. For example, see s. 21(3) of the NSW Act.

<sup>52</sup> The expression is not included in the list of definitions set out in s. 4 of the NT Act.

<sup>53</sup> Such as when a payment claim may be made, when responding to a payment claim, when a progress payment becomes due and payable and the rate of interest payable on an unpaid amount — see, for example, ss. 11(1), 11(1A), 11(B), 11(2), 13(4) and 14(4) of the NSW Act.

<sup>54</sup> The expression ‘for construction work carried out’ can, if the construction contract so provides, include a claim for delay damages — see *Coordinated Construction Co Pty Ltd v JM Hargreaves Pty Ltd* [2005] NSWCA 228; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229; *Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing (NSW) Pty Ltd & Ors* [2005] NSWCA 142; and *John Holland Pty Limited v Roads and Traffic Authority of New South Wales & Ors* [2007] NSWCA 19.

<sup>55</sup> Sections 10A and 10B of the Victorian Act provide for certain matters to be ‘excluded amounts’ and therefore not able to be included in a payment claim under the Act. Included within the expression ‘excluded amounts’ are variations (other than ‘claimable variations’) and claims for damages for breach of contract and claims for compensation due to the happening of an event relating to latent conditions, time-related costs and changes in regulatory requirements.

<sup>56</sup> The 2014 amendments to the NSW Act removed the previous provision which required all payment claims made under the Act to specifically state that the claim was a claim made under the Act. All the other

4. The recipient of a payment claim (i.e. the respondent) is entitled to respond by way of a payment schedule setting out the amount it proposes to pay in response to the claim. If a respondent does not issue a payment schedule in response to the payment claim within the prescribed time period, then the respondent will be liable to pay the full amount of the payment claim on the due date. The claimant can then seek summary judgement in a court for the debt due, in which case the respondent is not entitled to bring a cross claim or raise any defence. Alternatively, the claimant may apply for the payment claim to be determined by adjudication, in which case the claimant is required to provide the respondent with a second opportunity to provide a payment schedule. However, the respondent retains the right to dispute the claimant's entitlement outside the adjudication process.
5. Except in Queensland and Victoria, the respondent must set out any reasons it may have for not agreeing to pay the amount of the claim in the payment schedule as the respondent is not subsequently permitted to give additional reasons for withholding payment.<sup>57</sup>
6. Any dispute in respect to the amount claimed can be referred for determination via a fast track adjudication process. The various legislations provide for a process whereby authorised nominating authorities (ANAs) appoint adjudicators to determine disputed payment claims.<sup>58</sup>

### The West Coast Model

The West Coast Model (which is largely replicated in the Northern Territory) is based on the WA Act, and the key features include:

1. Like the East Coast Model, the West Coast Model is an interim payment regime providing a fast track adjudication process. However, any party to a construction contract may make an application for adjudication up and down the contractual chain.
2. Either party can make claims for amounts in relation to the performance or non-performance of obligations under a construction contract. This could include not only a claim for progress payments but also a claim for damages for breach of contract.
3. Whereas the East Coast Model prescribes a statutory payment scheme that overrides any inconsistent contractual provisions, the West Coast Model only provides legislative assistance where the construction contract does not contain express terms regarding payment claims and their assessment and payment, by implying terms to deal with such situations.
4. Unlike the East Coast Model, the West Coast Model does not require a payment claim to refer to the relevant legislation or require the recipient of a payment claim to include all reasons for rejecting the claim. A party who does not respond to a payment claim by way of a payment schedule is not automatically liable to pay the claimed amount.

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jurisdictions that have adopted the East Coast model require such an endorsement to be made, although the Queensland Bill 2017 will, like the current NSW Act, remove the requirement to endorse a payment claim.

<sup>57</sup> Refer, for example, to s. 20(2B) of the NSW Act, but note that in Queensland, under s. 24(5) of its Act, and in the case of a complex claim, the respondent can include in its adjudication response any reasons for withholding payment, whether or not those reasons were included in the payment schedule. In Victoria, s. 21(2B) of its Act provides that where an adjudication response includes any reasons for withholding payment that were not included in the payment schedule, then the adjudicator must serve a notice on the claimant setting out those reasons and providing the claimant with 2 business days to respond to those reasons.

<sup>58</sup> The 2014 amendments to the Queensland Act abolished ANAs. Thus, in Queensland, the function of appointing an adjudicator to decide an adjudication application is now carried out by the Adjudication Registrar of the QBCC.



### 4.3 Jurisdictional legislation and key reviews and developments

Even where jurisdictions have implemented a similar model, over the years, inconsistencies have emerged between each of the states and territories. This means the laws can vary significantly from one jurisdiction to the next.

These inconsistencies have implications for the level of protection afforded to subcontractors. All jurisdictions have conducted major reviews of their legislation, which in many instances resulted in substantive amendments regarding key issues. The last five years in particular have seen a significant increase in activity in the area of security of payment. This is demonstrated in the timeline of jurisdictional security of payment acts and key reviews and legislative amendments at **Appendix D**.

All of this activity culminated in 2017 with four concurrent jurisdictional projects, including legislative reviews in NSW and the Northern Territory and legislative amendments in Queensland and South Australia. Given the direction of some of the reviews and legislative amendments, it appears that the trend in divergence of approach to security of payment is set to continue, and in some cases, escalate.<sup>59</sup>

The following sections provide a summary of the key elements of the legislation operating in each jurisdiction as well as key recent reviews and legislative amendments, including amendments currently before state and territory parliaments. Also included is an overview of overlapping work by the Commonwealth.

#### New South Wales

It was the NSW Act that introduced the concept of a statutory right to progress payments, even where the contract does not contain payment terms.

Where a claimant has made a payment claim under the Act and the respondent has failed to respond to the claim by way of a payment schedule within the prescribed time period and failed to pay the whole or part of the claimed amount, the respondent will become liable to pay the amount by the due date for payment. In such circumstances, the Act provides that the claimant may recover the unpaid portion of the claimed amount from the respondent as a debt due to the claimant in the courts.

The NSW Act also provides a contractor with a right to interest on late payments, as well as a right to suspend work. Significantly, the Act provides for a rapid adjudication process to deal with any disputed payment claims.

#### 2012 Collins Inquiry

In 2012, the NSW Government appointed Mr Bruce Collins QC to chair the *Inquiry into Construction Industry Insolvency in NSW* (the Collins Inquiry). Mr Collins final report, with some 44 recommendations, was released to the public on 28 October 2013.<sup>60</sup> Its main recommendations were:

- a) The establishment of a statutory trust for all projects over \$1 million whereby '[a]ny payment by a principal to a head contractor or by a head contractor to a subcontractor on account of, or in respect of, any work done or materials supplied by the head contractor, any subcontractor,

<sup>59</sup> This is particularly so in the case of Queensland where, on 22 August 2017, the Queensland Government tabled its Building Industry Fairness (Security of Payment) Bill 2017, which contains major changes to its security of payment regime, including the introduction of project bank accounts.

<sup>60</sup> Collins, B. QC (2012), *Final Report: Independent Inquiry into Construction Industry Insolvency in NSW*, November 2012 (Collins Inquiry).



sub-subcontractor or supplier' are made into the trust account<sup>61</sup>; and that '[t]he contractor or subcontractor is the trustee of the trust fund.'<sup>62</sup>

- b) The insertion of requirements within the NSW Act that '[t]he principal must pay progress payment claims to the head contractor within 15 days of the receipt of ...' such claims,<sup>63</sup> and that '[t]he head contractor must pay progress payment claims to the subcontractor within 28 days of the receipt of ...' such claims.<sup>64</sup>
- c) The requirement that any amount determined by an adjudicator to be due and payable by the head contractor to the subcontractor be paid by the head contractor directly into a trust account.<sup>65</sup>
- d) The removal of (then) section 13(2)(c) of the NSW Act, which required that a payment claim must expressly state that it is made under the Act.<sup>66</sup>
- e) The jurisdiction and powers of the adjudicator be amended by:
  - (i) enabling the adjudicator to decide, on an interim basis, disputes concerning bank guarantees and whether or not a party was entitled to cash a bank guarantee
  - (ii) providing for the resolution of disputes concerning the entitlement or otherwise to retain retention funds
  - (iii) enabling the resolution of disputes in the home-building sector for projects valued over \$1 million
  - (iv) providing adjudicators with the power to issue a final certificate after hearing both sides to a dispute involving less than \$40 000, and
  - (v) removing the right of a claimant to choose its own adjudicator.<sup>67</sup>
- f) The requirement for adjudicators to undergo more structured and comprehensive training.<sup>68</sup>

### ***2014 Amendments to the NSW Act***

In November 2013, in response to the recommendations of the Collins Inquiry Final Report, the NSW Government passed the Building and Construction Security of Payment Amendment Bill 2013 (NSW). The Act commenced on 21 April 2014 and implemented the following significant amendments:

- a) Payment claims from a head contractor to be accompanied by a 'supporting statement', which includes a declaration that all subcontractors and suppliers have been paid (sections 13(7) and 13(9) of the NSW Act).
- b) A progress payment made to a:
  - (i) head contractor, by a principal, becomes due and payable 15 business days after a payment claim is made (section 11(1A) of the NSW Act), and

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<sup>61</sup> Ibid, Recommendation 6.

<sup>62</sup> Ibid, Recommendation 8.

<sup>63</sup> Ibid, Recommendation 24.

<sup>64</sup> Ibid, Recommendation 29.

<sup>65</sup> Ibid, Recommendation 33.

<sup>66</sup> Ibid, Recommendation 38.

<sup>67</sup> Ibid, Recommendation 39.

<sup>68</sup> Ibid, Recommendation 40.

- (ii) subcontractor, becomes due and payable 30 business days after the payment claim is made (section 11(1B) of the NSW Act).

Further, any provision within a contract which provides for payment of a progress payment later than these maximum periods is of no effect.

- c) Removal of the requirement to expressly endorse a payment claim made under the Act, and
- d) The insertion of a provision enabling regulations to be made with respect to requiring retention money to be held in trust for the subcontractor.

### *2015 Review of the NSW Act*

Following the 2014 amendments, the NSW Government announced it would conduct a full review of the NSW Act in 2015. A discussion paper was released for public comment in December 2015. The discussion paper sought feedback on a series of questions, many of which were focused on the adequacy of timeframes and processes in the NSW Act. However, feedback was also sought on the use of PBAs and statutory trust accounts. The NSW Government is still considering feedback provided in response to the discussion paper.

### *Victoria*

The Victorian Act was introduced in 2002 and was modelled on the NSW Act.

### *2006 Amendments*

Victorian Government amendments to its legislation in 2006<sup>69</sup> significantly limited what may be included in a valid payment claim. Under the 2006 amendments, a valid payment claim may not include variations other than 'claimable variations' under section 10A of the Victorian Act, nor may it include certain types of claims described as 'excluded amounts' under section 10B of the Act.

Although the language set out in section 10A of the Victorian Act has been described as 'tortuous',<sup>70</sup> the statutory mechanism can be summarised as follows:

- a) If there is no dispute in relation to a claimed variation, then such a variation will be a claimable variation. The Act refers to this kind of variation as a First Class Variation (see section 10A(2)).
- b) However, if the variation is a disputed variation, then any analysis as to whether such disputed variation is a claimable variation commences with an examination of the construction contract **and** whether the contract contains a dispute resolution clause.
- c) If the contract does not contain a dispute resolution clause then, regardless of the value of the original contract sum, the disputed variation will be treated as a claimable variation.
- d) If the contract does contain a dispute resolution clause but the original contract sum is less than \$150 000, then the disputed variation is a claimable variation.
- e) If the contract does contain a dispute resolution clause and where the original contract sum is between \$150 000 and \$5 million, then, subject to the total value of all disputed variations not exceeding 10% of the contract sum, such variations will be regarded as claimable variations.

The rationale for excluding variation claims where the value of the construction contract exceeds \$5 million and where the contract contains a method for resolving disputes was given during the

<sup>69</sup> See the *Building and Construction Industry Security of Payment (Amendment) Act 2006*.

<sup>70</sup> Refer to *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC631 (Vickery J).

## Second Reading Speeches for the Building and Construction Industry Security of Payment (Amendment) Bill 2006 (Vic):

The effect of the \$5 million cap is that disputed variations in contracts in the small contracting sector and almost all the subcontracting sector would be subject to the scheme. Disputed variations on large contracts, initiated by building owners and big contractors will be exempt from the scheme.<sup>71</sup>

Disputed variations will be excluded where the contract provides a mechanism for determining whether there is an entitlement to be paid for a variation and for determining the quantum and due date for such payment. These changes are aimed at avoiding uncertainties that have been experienced in other jurisdictions.<sup>72</sup>

Section 10B of the Victorian Act has the effect of excluding such 'excluded amounts' from the payment claim, and prohibits the adjudicator from taking such excluded amounts into account in determining the amount payable by the respondent to the claimant. Excluded amounts would include the following types of claims:

- a) damages
- b) delay costs
- c) latent conditions
- d) non-contract related claims (e.g. claims for deceptive and misleading conduct).

Further, in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor*<sup>73</sup>, Vickery J determined that a respondent was unable to set-off from a payment claim any claim for liquidated damages.

### **2016 legislative reforms impacting domestic building disputes**

Under the *Building Legislation Amendment (Consumer Protection) Act 2016* (Vic) (BLA Act), significant changes were made as to the manner in which domestic building disputes are to be handled under the *Domestic Building Contracts Act 1995* (Vic) (DBC Act). Those changes impact on the Victorian Act insofar as the Act applies to a building owner who is in the business of building residences, and the contract is entered into in the course of, or in connection with, that business.<sup>74</sup>

From 1 July 2017, both the Victorian Act and the DBC Act applied to building contracts between developers who are building owners and domestic building contractors. Accordingly, where a domestic building contractor claims that a building owner has failed to make payment for domestic building work performed under a contract, the building contractor may either make a payment claim under the Victorian Act or refer its payment dispute to a Dispute Resolution Officer for compulsory conciliation.

However, the Victorian Act (like all other legislation in those jurisdictions that adopted the East Coast Model, except Tasmania) does not apply in relation to disputes arising from a construction contract entered into by a 'mum-and-dad' home owner and a domestic building contractor. Clearly now, any payment dispute between such a home owner and a home builder will now be handled under the new conciliation framework established under the BLA Act.

<sup>71</sup> Victoria, *Parliamentary Debates*, Legislative Council, 15 June 2006, p. 2420 (Marsha Thomson, Minister for Consumer Affairs).

<sup>72</sup> Victoria, *Parliamentary Debates*, House of Assembly, 9 February 2006, p. 219 (Rob Hulls, Minister for Planning).

<sup>73</sup> [2011] VSC 183.

<sup>74</sup> See s. 7 (2)(b) of the Victorian Act.

Significantly however, any payment disputes between the same domestic building contractor and its subcontractors in relation to the same housing project can be determined by adjudication under the Victorian Act. This can then lead to a potential problem where a domestic building contractor has been required to make payment under an adjudication determination to a subcontractor but may not in turn be able to obtain payment for that part of the subcontractor's work that it had claims from the mum-and-dad home owners under the separate dispute resolution process set up under the BLA Act.

### Queensland<sup>75</sup>

In Queensland, there are currently three main pieces of legislation dealing with security of payment. The Queensland Act establishes a statutory-based right to payments and a system of adjudication to ensure construction payment disputes are resolved quickly. Under the Queensland Act, adjudication is available to persons who enter into a contract to carry out construction work or supply related goods and services. While the Queensland Act provides subcontractors with a right to payments it does not guarantee the payments.<sup>76</sup>

Most notably, and as a result of amendments to the Queensland Act in 2014 (see below), Queensland is now the only jurisdiction which provides for a 'two-tier' system, where the timelines associated with the adjudication process in relation to a 'complex' claim differ from the timelines prescribed for a 'standard' claim. Queensland is also the only jurisdiction that has adopted the East Coast Model but has abolished ANAs and provided for the appointment of adjudicators to be made by a government agency (i.e. the Registrar of the Queensland Building and Construction Commission (QBCC)).

In addition to the Qld Act, the *Subcontractors' Charges Act 1974* (SC Act) establishes a statutory mechanism by which a subcontractor, in certain circumstances, can secure payment of moneys owed under their contract with a contractor.

Further, the *Queensland Building and Construction Commission Act 1991* (QBCC Act) regulates the building industry and establishes a licensing and regulatory system for the conduct of building work in Queensland. Importantly, the QBCC Act establishes the QBCC as the State's building and construction industry regulator.

### 2013 Wallace Review

In May 2013, Mr Andrew Wallace completed a review of the Queensland Act (the Wallace Review).<sup>77</sup> Many of Mr Wallace's recommendations were accepted by the former Queensland Government and in 2014, amendments to the Queensland Act were introduced to implement Mr Wallace's

<sup>75</sup> Note that this information was current at the time of drafting. However, during finalisation of this Report the Queensland Government passed the Building Industry Fairness (Security of Payment) Bill 2017 (Qld) on 26 October 2017 with 144 amendments. The Bill was read a third time on 8 November 2017 and received assent on 10 November 2017. Many of the changes to be affected by the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) are to be dealt with in Regulations, which at the time of writing had not yet been released. Given timing for delivery of this report, the Act is only considered in its original Bill form as introduced to the Queensland Parliament on 22 August 2017.

<sup>76</sup> Queensland Department of Housing and Public Works 2015, *Security of Payment: Discussion Paper*, December 2015, p.8.

<http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDiscussionPaper.pdf>.

<sup>77</sup> Wallace, A. (2013), *Discussion Paper: Payment Dispute Resolution in the Queensland Building and Construction Industry – Final Report*, Queensland Building and Construction Commission, Brisbane, May 2013, pp. 182–183 (Wallace Review). Refer to [https://www.qbcc.qld.gov.au/sites/default/files/Final\\_Report\\_-\\_Discussion\\_Paper\\_-\\_Payment\\_dispute\\_resolution\\_in\\_the\\_Queensland\\_building\\_and\\_construction\\_industry\\_PDF.pdf](https://www.qbcc.qld.gov.au/sites/default/files/Final_Report_-_Discussion_Paper_-_Payment_dispute_resolution_in_the_Queensland_building_and_construction_industry_PDF.pdf).

recommendations. The main recommendations of the Wallace Review (and subsequently implemented by 2014 amendments to the Queensland Act) included:

- a) The introduction of a two-tier system whereby ‘complex’ claims would be distinguished from ‘standard’ claims. Where a claim is a ‘complex’ claim, longer timeframes and more opportunities to respond to the claim should be provided than under a ‘standard’ claim.
- b) In circumstances where a respondent has failed to provide a payment schedule nor paid the amount claimed, the claimant should be required to first give notice to the respondent of its intention to commence court proceedings or apply for adjudication.
- c) ANAs should be abolished, with the Adjudication Registrar of the QBCC to be the only person empowered to appoint adjudicators.
- d) In the case of a complex claim, a respondent should be able to include additional reasons for withholding payment in its adjudication response, irrespective of whether or not such reasons were raised in the payment schedule.

### ***2015 Review of the Queensland Act***

Following the election of the Palaszczuk Government in Queensland in 2015 a further review of Queensland’s security of payment framework including, the 2014 amendments to the Queensland Act, was undertaken. A discussion paper<sup>78</sup> for the review was released for comment from 17 December 2015 to 31 March 2016. As a result of that consultation, a number of systemic problems within the building and construction industry were identified.

The Queensland Government then engaged Deloitte Australia to undertake economic and financial analysis of reform proposals arising from the consultations.<sup>79</sup> The Deloitte analysis claimed that implementing PBAs would deliver positive cost-benefit ratios over a 20-year evaluation period in certain scenarios and also supported delivery of an education program. The Deloitte analysis also claimed positive overall benefits from proposed changes to the Queensland Act, which included removing the requirement to state that a payment claim is made under the Act and an extension of the timeframes to apply for adjudication.

In November 2016, the Queensland Government commenced a further round of consultations on a package of reforms which resulted from the 2015 Discussion Paper and proposed a number of reforms to security of payment.<sup>80</sup>

### ***Queensland Bill 2017***

Following public consultation, on 22 August 2017 the Queensland Government introduced the Building Industry Fairness (Security of Payment) Bill 2017 (the Queensland Bill 2017). Significantly, the Queensland Bill 2017 provides for:

- a) the amendment and consolidation of the Queensland Act and the SC Act into a single new Act
- b) implementation of PBAs
- c) amendments to the QBCC Act, and

<sup>78</sup> Queensland Department of Housing and Public Works (2015), *Security of Payment: Discussion Paper* <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDiscussionPaper.pdf>>.

<sup>79</sup> Deloitte (2016), *Analysis of security of payment reform for the building and construction industry*, report to the Queensland Department of Housing and Public Works, 8 November 2016: <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDeloitteReport.pdf>>.

<sup>80</sup> Department of Housing and Public Works (2016), *Queensland Building Plan: A discussion paper for industry and consumers*, <<http://queenslandbuildingplan.engagemthq.com/23620/documents/47339>>.

d) new measures and powers aimed at allowing the government to curb corporate phoenixing.

The existing Queensland Act and the SC Act will be repealed and their amended provisions inserted in a new Act.

The legislation will mandate the use of PBAs on government projects between \$1 million and \$10 million from 1 January 2018 (phase 1) before expanding the requirement for PBAs to both government and private sector projects over \$1 million from 1 January 2019 (phase 2). Head contractors will be required to set up a PBA for the project within 20 business days after entering into the first subcontract. In doing so the head contractor will be required to open three separate trust accounts:

1. a general trust account
2. a retention trust account, and
3. a disputed funds trust account.

A head contractor may be liable for a penalty of up to 500 penalty units (initially \$63 075) if it fails to establish a PBA.

Significant amendments to the Queensland Act include:<sup>81</sup>

- removing the requirement to state that a payment claim is being made under the Act
- extending the timeframe to lodge an adjudication application (but not an adjudication response) by 20 business days to 30 business days for all applications, unless it relates to a respondent's failure to pay the scheduled amount, in which case claimants will be provided 40 business days
- removing the requirement for claimants to issue a 'second chance' notice. If a respondent fails to give a payment schedule within the required timeframe in all circumstances, the respondent will become liable to pay the amount claimed
- precluding respondents from providing an adjudication response in circumstances where the respondent failed to provide a payment schedule
- removing respondents' ability to include 'new reasons' in an adjudication response if those reasons were not included in a payment schedule (this is currently permitted in relation to 'complex payment claims' above \$750 000)
- if a contract is terminated, deeming the date of termination to be a reference date if the contract does not provide for, or purports to prevent, a reference date surviving beyond termination
- creating an offence where a respondent fails to provide a payment schedule or fails to pay an adjudicated amount without reasonable excuse (up to a maximum of 100 penalty units)
- prescribing by regulation:
  - limits on the size and length of adjudication applications and adjudication responses to minimise the complexity of adjudications

<sup>81</sup> Explanatory Notes, Building Industry Fairness (Security of Payment) Bill 2017.

<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T1395.pdf>.

- limits on the amount of fees and expenses to be paid to an adjudicator
- requirements for continuing professional development (CPD) for adjudicators to retain and renew their registration
- requirements for grading of adjudicators
- permitting an adjudicator to order that the claimant be reimbursed by the respondent for the cost of the application fee, in whole or in part, and
- giving adjudicators the discretion to order that the respondent pay interest on the adjudicated amount.

The Queensland Bill 2017 also provides more powers for the QBCC to:

- require a building company to produce their financial records and re-introduces mandatory financial reporting for building companies, and
- regulate corporate phoenixing by extending the concept of 'excluded individual' to a person who was a director or an influential person of a company within two years of it going into liquidation.

The Queensland Bill 2017 was referred to the Public Works and Utilities Committee, which tabled its report on the Bill on 13 October 2017. The Committee recommended passing the Bill but that the Minister consider the following relevant recommendations:

- Ensure the review of phase 1 of the PBA roll-out commences at least three months prior to the commencement of phase 2 and report on the phase 1 review findings prior to the commencement of phase 2 being proclaimed
- Review the appropriateness of the proposed imprisonment penalties for a number of new offences contained in the Bill
- Report to the House during the second reading speech on those issues raised by stakeholders
- Provide examples in the second reading speech of any proposed regulations that the Minister intends to make should the Bill be passed, and
- Consult with the building and construction industry when developing the regulation that will mandate and prohibit certain conditions for building contracts and with regard to any subsequent amendments to the regulation.

The Queensland Bill 2017 was subsequently passed by the Queensland Parliament on 26 October 2017 with 144 amendments, including the following:

- Amended timeframes for both simple and complex adjudication applications
- Providing adjudicators discretion to allow parties to have legal representation at conferences
- Providing that no payment schedule is necessary if a respondent pays the entire amount of the payment claim before the end of the response period
- Allowing an adjudicator to disregard an adjudication application or adjudication response to the extent that it contravenes any limitation relating to submissions or accompanying documents prescribed by regulation



- Changes to the timing of the response period, and
- Requiring the Minister to commence a review of the operation and effectiveness of the reforms no later than 1 September 2018.

The Queensland Bill 2017 was read a third time on 8 November 2017 and received Royal assent on 10 November 2017.

Given the timing for completion of this Review and the passage and assent of the Queensland Bill 2017 and the number of amendments involved, there was not sufficient time for this Review to consider the Bill's final form as the *Building Industry Fairness (Security of Payment) Act 2017*.

### South Australia

Any consideration of security of payment laws in South Australia involves an examination of the *Building and Construction Industry Security of Payment Act 2009* (the SA Act) and the *Worker's Liens Act 1893* (SA) (the SA Liens Act). The SA Liens Act and the SA Act operate side by side and a claimant can enforce its rights to progress payments under either legislation.

The SA Act is similar to the NSW Act except for some differences in timeframes. For example, in South Australia a claim can only be served within the period specified in the contract or within the period of 6 months after the relevant construction work was carried out, whichever is later. Under the NSW Act the default period is 12 months.

The SA Liens Act enables a subcontractor to place a charge on any money payable to its contractors for that portion of the contract price payable to the subcontractor in respect to the work done or the materials supplied under the relevant contract. When the South Australian Select Committee of the House of Assembly reviewed the SA Liens Act in 1990, it noted that the legislation should be repealed because of its low usage within industry. Notwithstanding the introduction of the SA Act in 2009, the SA Liens Act has not been repealed.

### Moss Review

In December 2014, Mr Alan Moss, a retired District Court judge, was appointed by the South Australian Government to conduct a legislative review of the SA Act. The Moss Review represented the first occasion that the SA Act had been reviewed since its proclamation in December 2011.<sup>82</sup>

Mr Moss noted that the SA Act '...is not often used in the small construction area' but that:

[t]he class of subcontractors that seems to need the Act the most are the middle ranking sub-contractors, dealing with big construction firms on major projects. Work on major projects involves a much greater level of complexity and risk. In this environment, some sub-contractors will be working at the edge of their experience and competence... They have little flexibility. A break in their cash flows threatens their viability and the jobs of their staff. It was submitted that the Act affords them protection against unreasonable delay in payment.<sup>83</sup>

However, Mr Moss also noted that the Act was biased in favour of the claimant and that this perception had caused head contractors to challenge the adjudication process in the courts:

... The courts, it is said, have become increasingly willing to quash adjudicator's determinations upon the basis of apparent bias...It is suggested that the default mechanism process and the very short

<sup>82</sup> Section 36 of the SA Act requires the Minister to review the Act after a period of three years from the date the Act commenced operation to determine whether the policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives.

<sup>83</sup> Moss, A. (2015) *Review of Building and Construction Industry Security of Payments Act 2009 (SA)*, South Australia Small Business Commissioner, (Moss Review), p. 7, para. 20



response time, push the parties into dispute and consequent adjudication, unnecessarily when an initial process of negotiation would be more successful.<sup>84</sup>

Mr Moss was attracted to the 2014 Queensland amendments because '[t]he Act encourages parties to negotiate when a dispute arises ...'. Accordingly, Mr Moss went on to recommend that several of the key features of those amendments be incorporated within the SA Act and in particular:

- a) The withdrawal of all authority from the current ANAs with the Minister appointing the South Australia Small Business Commissioner (SA SBC) as the sole ANA under section 29(1)(a) of the SA Act.
- b) That either the SA SBC, as the ANA, or the adjudicator determine whether an adjudication is 'standard' or 'complex'
- c) That the scale of fees to be charged by adjudicators be set by regulation, depending on whether the adjudication is 'standard' or 'complex'
- d) The adjudicator (pursuant to section 21 of the SA Act) being permitted to extend the time limits in complex matters where considered appropriate, and
- e) The SBC arrange for the publication of adjudication decisions, except when such publication may cause unreasonable loss and damage to the parties.<sup>85</sup>

Further, Mr Moss found that subcontractors fear acts of retribution from head contractors if they use the Act to recover payments. The SA SBC accordingly recommended that a penalty for such acts be set at a maximum of \$100 000, or two years' imprisonment. The SA SBC considered that such measures would go a long way in bringing about behavioural change within the industry.

### *SA Review Bill 2017*<sup>86</sup>

On 5 July 2017, the South Australian Government introduced the Building and Construction Industry Security of Payment (Review) Amendment Bill (the SA Review Bill 2017) to the South Australian Parliament. If passed, the Bill will amend the SA Act to:

- allocate responsibility for the administration of the SA Act to the SA SBC
- introduce penalties for individuals and companies who assault, threaten or intimidate someone seeking a payment for work:
  - fines of up to \$50 000 or two years in prison or both for individuals
  - fines of up to \$250 000 for companies
- provide the SA SBC with greater oversight of ANAs
- clarify the meaning of 'business days' to recognise the annual industry shut-down period of 22 December to 10 January, thereby excluding this period for the purposes of various statutory timeframes under the security of payment legislation, and

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<sup>84</sup> Ibid, p. 8, [21].

<sup>85</sup> Ibid, pp. 17–18, [40].

<sup>86</sup> The Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) has now lapsed, but it remains the SA SBC's position that the proposed changes will be re-recommended to the Government of the day post the March 2018 election.

- require adjudication decisions to be published.

### Western Australia

The *Construction Contracts Act 2004* (WA) (the WA Act) is structured to provide for timely payments between parties to construction contracts and for adjudication of payment disputes arising under such contracts. Unlike the legislation modelled on the NSW Act (i.e. the East Coast Model) the WA Act does not establish any new rights that override the contract. The WA Act however prohibits a provision in a construction contract that:

- is predicated on a pay-if-paid/pay-when-paid basis, and
- requires payment to be made more than 42 days after payment is claimed.

A payment dispute arises if the amount claimed in a payment claim is due to be paid under the contract and the amount paid has not been paid in full; or the claim has been rejected wholly or is partly disputed; or the retention moneys/security has not been paid/released by the time set out in the contract.

The WA Act also implies default provisions (refer to Schedule 1, Division 1 – Division 9) in the absence of written contractual provisions that relate to:

- the entitlement of the amount, or a means of determining the amount, that the contractor is entitled to be paid for work performed
- variations of the contractor's contractual obligations
- when and how a party is to make a payment claim and how the other party is to respond to such a claim
- the time by when a payment must be made and whether interest is to be paid on late payments, and
- the status of the retention moneys.

### 2014 Evans Review

In June 2014 Professor Philip Evans was appointed to enquire into, make recommendations and report on the operation and effectiveness of the WA Act.

In his final Report,<sup>87</sup> Professor Evans found that in the decade of operation, the WA Act was working well and 'had a very positive influence on payment issues'.<sup>88</sup> However, Evans also found that the WA Act's influence in dealing with payment disputes at the lower end of the contractual chain was falling short of expectations and that security of payment and the impact of insolvencies remained a major unresolved issue within the construction industry.

Professor Evans accordingly recommended that the WA Government establish a separate taskforce of major public sector construction agencies to address the concerns about the consequences of insolvencies for major public projects, or in the industry generally.<sup>89</sup> Significantly however, Evans expressly stated that the WA Act should not be amended to require a claimant to provide a statutory

<sup>87</sup> Evans, Professor P. (2015), *Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA), August 2015 (Evans Review):

<[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca\\_review\\_report.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca_review_report.pdf)>

<sup>88</sup> Ibid, p.10.

<sup>89</sup> Ibid, see Recommendation 21(c).

declaration attesting to the payment of workers, subcontractors or suppliers as a precondition of a payment claim under the contract.<sup>90</sup>

Professor Evans also recommended that the jurisdiction of the WA Act be expanded by amending:<sup>91</sup>

- section 4(3)(a) and (b) so as to include mining activities
- section 4(3)(c) so as to include the construction of extracting and processing plant, and
- section 4(3)(d) to allow construction work associated with the ‘wholly artistic’ work (with the term ‘wholly artistic’ to be expressly defined).

As indicated above, the Evans Review did not consider that there was any need for significant structural amendments to the WA Act. The recommendations set out in the Evans Review were relatively minor in nature and made for the purposes of assisting ‘...in improvement to the operation and effectiveness of the Act in achieving its stated objectives.’<sup>92</sup> Professor Evans echoed the sentiments expressed by Collins and Moss when he said that there was a lack of awareness of the legislation by industry stakeholders and that there was a need for a widespread education and training campaign to address these concerns.

However, what was equally notable in Professor Evans’ report were the numerous recommendations that the existing legislation **not** be amended in respect to the following:

- (i) The time limits in which an adjudication can be made should not be increased from the 28-day period set out in section 26(2) of the WA Act.<sup>93</sup>
- (ii) The timelines within which a respondent is to provide its response, as set out in section 27(1) of the WA Act (i.e. 14 days), should not be amended. Professor Evans did not consider that the prescribed timelines should be extended in circumstances where the nature and/or size of the claim may be ‘complex’.<sup>94</sup>
- (iii) The timelines within which the adjudicator can either dismiss or determine an adjudication (i.e. 14 days<sup>95</sup>) should remain. Professor Evans noted the 2014 Queensland amendments allowed extended timeframes for a payment schedule when responding to large or ‘complex’

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<sup>90</sup> Ibid, see Recommendation 28.

<sup>91</sup> Ibid, see Recommendations 11, 12 and 13.

<sup>92</sup> Ibid, p. 1.

<sup>93</sup> Ibid, p. 23. ‘The time limits in which an Application can be made should remain at 28 days. If the provisions of the contract have been followed with respect to the submission of the original payment claim, and if all supporting documentation has been provided to the superintendent or contract administrator in order to reasonably consider the basis of the claim, then it is considered that 28 days to prepare an Application under the Act is adequate. There should be no amendment to the 28-day period based on an arbitrary assessment of the type of construction work or quantum of the claim.’

<sup>94</sup> Ibid, p. 25. ‘... the objective intent of the Act was to provide a uniform and streamlined mechanism for promptly and efficiently resolving payment disputes in order to maintain cash flow, and the introduction of a tiered approach has the potential to promote an undue level of complexity associated with the prompt resolution of the dispute.’

<sup>95</sup> See s. 31 of the WA Act.

claims and where the payment claim is a 'complex' claim, but expressed a preference for the legislation to be kept simple to preserve the prime objective of the Act.<sup>96</sup>

- (iv) The notion of introducing an alternative dispute resolution mechanism for small construction firms to refer small claims.<sup>97, 98</sup>
- (v) The current regulation of adjudicators in respect to their qualifications, fees and/or performance is generally satisfactory.<sup>99, 100, 101</sup>
- (vi) The exclusion of particular claims agreed to in a contract from the making of an adjudication determination, such as liquidated damages, is not appropriate.<sup>102</sup>
- (vii) No changes should be made to the current arrangements relating to the appointment of adjudicators.<sup>103</sup>
- (viii) The provisions prohibiting contracting out of the WA Act should be retained, even where the amount exceeds a certain value and even where the contracting parties are sophisticated contractors.<sup>104</sup>

### **2016 amendments to the WA Act**

Following the recommendations of the Evans Review, in 2016 the WA Act was amended to provide for:

- future payment terms exceeding 42 days (previously 50 days) to be prohibited

<sup>96</sup> Ibid, p. 27. 'The existing 14-day timeframe should remain. This is necessary if the objects of rapid determination, in the absence of complex legal arguments, are to be retained.'

<sup>97</sup> Ibid, p. 37. 'I am not convinced that a third statutory rights-based process (additional to adjudication or arbitration) is required for the resolution of payment disputes.'

<sup>98</sup> Ibid, p. 38. 'It is not considered that the objectives of the Act will be significantly improved by amendments to the Act or associated legislation which create a separate dispute resolution service provided by the Building Commission ...'

<sup>99</sup> Ibid, p. 42. 'The consensus from the written submissions, together with comments made at the stakeholder meetings, indicate that the registration requirements are generally satisfactory.'

<sup>100</sup> Ibid, p. 45. 'With respect to the issue of prescribed fees there was some divergence of opinion. There is no evidence that high hourly rates result in expensive determinations. There is some validity in the argument that experienced adjudicators with higher rates may be able to determine the issues in a shorter time.'

<sup>101</sup> Ibid, p. 46. 'The current registration requirements for adjudicators do not require amendment. The purposes of the Act are best achieved by having the widest pool of adjudicators available.'

<sup>102</sup> Ibid, p. 47. 'There are however strong arguments in support of granting liquidated damages as part of an adjudication. Firstly, claims for liquidated damages can impact significantly on the financial position of the parties. Also, they are 'pre-agreed' at the time of entering into the contract... Secondly, the scheme of the Act is that the outcome of the determination with respect to the payment claim must reflect the legal obligation and entitlements of the parties. Excluding particular claims outside the parameters of the previously agreed contract terms is not appropriate.'

<sup>103</sup> Ibid, p. 63. 'The current governance issues relating to the prescribed appointor organisations are consistent with the aims and objectives of the dispute resolution functions of the Act and no amendments to the Act are required.'

<sup>104</sup> Ibid, p. 97. 'Following submissions made to me about inequalities in bargaining power in the industry, I am concerned that some parties may misuse their dominant market position and coerce parties to contract out of the provisions of the Act. Contracting out is also clearly inconsistent with the express provisions of the Act.'

- the time limit for lodgement of an adjudication application to be increased to 90 business days (previously 28 calendar days)
- ‘recycled’ payment claims (i.e. allowing a party whose initial claim for progress payment under a construction contract had been rejected to include such claim in its subsequent payment claim)
- exclusion of the period 24 December – 7 January from the counting of days
- amendment of the definition of ‘construction work’ so as to exclude the fabrication or assembly of items of plant used for extracting or processing oil, gas or mineral bearing or other substances, and
- enabling adjudicators to adjudicate on a payment dispute where an applicant has failed to strictly comply with some of the formal requirements.

## Tasmania

The Tasmanian Act is based on the NSW Act but, unlike the security of payment legislation in other jurisdictions, the Tasmanian Act applies to ‘residential structures’ (regardless of whether the party for whom the work is carried out resides or intends to reside at the premises).

### *2016 Building Regulation Framework Review*

The Tasmanian Government completed its Building Regulation Framework Review in 2016. The review looked at all aspects of building regulation in Tasmania with a view to reducing red tape. The resulting Building Reform Package consisted of three main elements; the *Building Act 2016* (Tas), the *Residential Building Work Contracts and Dispute Resolution Act 2016* (Tas) (RBWCDR Act) and the *Occupational Licensing Amendment Act 2016* (Tas).

The key provisions of the RBWCDR Act include:<sup>105</sup>

- Protections for builders as well as consumers (i.e. home owners).
- Minimum contractual clauses.
- Mandatory consumer warranties.
- Contractual variations must be in writing.
- For projects of \$20 000 or more, a Residential Consumer Building Guide must be provided.
- Restrictions on the amounts of an initial deposit for works and for progress payments.
- A process for formal mediation of disputes and a more formal adjudication process where mediation is not effective or suitable.

The rights of a building contractor to make a claim for payment for work done under the Tasmanian Act are not affected.

## Northern Territory

The NT Act adopted the West Coast Model and is similar to the WA Act apart from differences in the timelines relating to periods within which an adjudication application is to be made (90 calendar days after the dispute arises). When the NT Act was introduced, the Northern Territory Government repealed the *Workmen’s Lien Act 2002* (NT).

<sup>105</sup> Parliament of Tasmania, *Fact Sheet: Residential Building Work Contracts and Dispute Resolution Bill 2015*, <[http://www.parliament.tas.gov.au/bills/Bills2015/pdf/notes/54\\_of\\_2015-Fact\\_Sheet.pdf](http://www.parliament.tas.gov.au/bills/Bills2015/pdf/notes/54_of_2015-Fact_Sheet.pdf)>.

### 2017 Review of the NT Act

The Northern Territory Government commenced a statutory review of the *Construction Contracts (Security of Payments) Act (NT)* in October 2017. An issues paper released by the Department of the Attorney-General and Justice on 27 October 2017 seeks feedback on the general operation of the NT Act as well as specific issues raised either by stakeholders relating to the NT Act or recent court decisions concerning the operation of the NT Act.<sup>106</sup> The timeframe for completing the 2017 Review has not been announced.

### Australian Capital Territory

The ACT Act is based on the NSW Act. Unlike other jurisdictions, the ACT Act expressly entitles a party to appeal an adjudication decision to the Supreme Court on any question of law arising out of an adjudicator's decision where either party consent, or with leave of the Supreme Court. However, a Supreme Court must not grant leave to appeal unless:

- it considers that the determination of the question of law concerned could substantially affected the rights of one or more parties to the adjudication decision, or
- there has been a manifest error of law on the face of the adjudication decision, or
- there is strong evidence that the determination of a question may be likely to add substantially to the certainty of the law.<sup>107</sup>

### 2015 Review of the ACT Building Regulatory System

In response to the 2010 Building Quality in the ACT report<sup>108</sup>, the ACT Government undertook a policy review of the *Building Act 2004 (ACT)* and associated regulatory and administrative systems. The review found that the effect of insolvencies and bankruptcies in the building and construction sector was increasing, with the majority of creditors unable to recover any debt, and that there were constraints to timely resolution of disputes and few options for quick and low-cost dispute resolution.

In November 2015, the ACT Government released a discussion paper<sup>109</sup> which considered a number of matters related to security of payment, including:

- the use of retention trusts and PBAs to address the issue of insolvencies
- setting a maximum legislated contractual payment period for progress payment claims, which would not affect the default period of 10 business days for contracts where a timeframe is not specified, and
- removing the requirement to endorse a payment claim as a claim under the Act.

As a result of consultations, the ACT Government decided not to proceed with amendments to remove the requirement to endorse a payment claim. However, the ACT Government did commit to

<sup>106</sup> Northern Territory Department of the Attorney-General and Justice 2017, *Review of the Construction Contracts (Security of Payments) Act (NT): Issues Paper*. See [https://justice.nt.gov.au/\\_data/assets/pdf\\_file/0011/456077/Issues-paper-on-NT-Construction-Contracts-Security-of-Payments-Act2-FINAL-AS-AT-26.10.2017.pdf](https://justice.nt.gov.au/_data/assets/pdf_file/0011/456077/Issues-paper-on-NT-Construction-Contracts-Security-of-Payments-Act2-FINAL-AS-AT-26.10.2017.pdf).

<sup>107</sup> Section 43 of the ACT Act.

<sup>108</sup> ACT Legislative Assembly, *Building Quality in the ACT* (2010).

<sup>109</sup> Environment, Planning and Sustainable Development Directorate 2015, *Improving the ACT Building Regulatory System: Discussion Paper*. [http://www.planning.act.gov.au/\\_data/assets/pdf\\_file/0006/898458/Improving\\_the\\_ACT\\_Building\\_Regulatory\\_System-201115-BM-accessible.pdf](http://www.planning.act.gov.au/_data/assets/pdf_file/0006/898458/Improving_the_ACT_Building_Regulatory_System-201115-BM-accessible.pdf).

further exploring a trial of retention funds/project accounts, and to a review the security of payments system in the ACT.<sup>110</sup>

This Review is not aware of any trials of retention funds/project accounts having commenced in the ACT, while the review of the security of payments system in the ACT is awaiting the findings of this Review.

## Commonwealth

### *Cole Royal Commission*

In February 2003, the Cole Royal Commission handed down its Final Report.<sup>111</sup> Whereas most of the recommendations related to industrial relation matters, Volume 8 of the Final Report dealt with the issue of security of payments.

The Commission found that security of payments was an issue that critically affected the many small businesses that primarily operate as subcontractors. Accordingly, the Commission recommended that the Commonwealth enact legislation to deal with this issue. A draft Bill of the legislation was set out in Appendix 1 to Volume 8 of the Report.

The structure of the Bill was similar to the WA Act that was to be subsequently enacted by the then WA Government. Importantly, and to avoid potential difficulties associated with the state and territory legislation that were then in existence, the draft Bill stated that it would not apply to construction contracts that are governed by the terms of a state or territory 'in which adequate alternative legislation is in force'.<sup>112</sup> The draft Bill would have allowed the Governor-General to declare by regulation that particular state and territory legislation is 'adequate'. The draft Bill would have applied to override state or territory legislation that relates to the rapid recovery of moneys or rapid dispute resolution.

The draft Bill was intended to only apply to a construction contract:

- to which the Commonwealth, a Commonwealth authority or a constitutional corporation (being a body corporate that is a foreign corporation, or a trading or financial corporation formed within Australia) is a party
- which relate to the business of a constitutional corporation or work in trade or commerce to which section 51 (1) of the constitution applies, or
- which affect matters connected with a Territory.

Significantly, the draft Bill included default provisions for making payment claims, entitling a party to submit a claim at any time after the commencement of work under the contract and then at 20 business day intervals. Within 10 business days of receipt of a claim, a party would either have to pay in full, or give notice of rejection of the claim (including reasons).

Further, the draft Bill provided that any provision of a construction contract under which the operation of the legislation is excluded, modified or restricted, or which has such effect, is void.

Finally, the draft Bill provided for a rapid adjudication process, which is similar to the process that had been adopted under the NSW Act.

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<sup>110</sup> Environment, Planning and Sustainable Development Directorate 2016, *Improving the Act Building Regulatory System: Summary of Proposed Reforms*, ACT Government, June 2016. See [http://www.planning.act.gov.au/\\_data/assets/pdf\\_file/0012/898680/Summary\\_of\\_reforms.pdf](http://www.planning.act.gov.au/_data/assets/pdf_file/0012/898680/Summary_of_reforms.pdf).

<sup>111</sup> Cole Royal Commission, op cit

<sup>112</sup> Ibid, refer to clause 6(1) of the Draft Bill.



The Commission did not recommend the adoption of a trust model (although the Commissioner expressly stated that the failure to make such a recommendation should not be construed that he did not support such concept). The Commission did however recommend that in the event that a party to a construction contract that holds security and retention moneys becomes insolvent, that party will be deemed to hold the security and retention moneys in trust for the party that provided the security or retention moneys. The draft Bill contained a provision that implemented this recommendation.<sup>113</sup>

### *SERC Inquiry into Insolvency in the Building and Construction Industry*

On 4 December 2014, the Senate referred an inquiry into the scale and incidence of insolvency in the Australian construction industry to the Senate Economics References Committee for inquiry and report.

In its report released on 3 December 2015,<sup>114</sup> the Committee made 44 recommendations aimed at dealing with ‘the completely unacceptable culture of non-payment of subcontractors for work completed on construction projects’,<sup>115</sup> noting that the clearest indicator that a business is in financial difficulty is its failure to pay money owed.

Significantly, the Committee made a number of recommendations (Recommendations 22–31) regarding security of payment, including in particular that ‘... the Commonwealth enact uniform, national legislation for a security of payment regime and rapid adjudication process in the commercial construction industry’.<sup>116</sup> The Committee considered it ‘absurd’ to have eight separate security of payment regimes which differ markedly from one another, especially given ‘... participants, large and small, routinely operate across state borders.’<sup>117</sup>

The Committee further recommended (Recommendations 29–31) that the Australian Government trial and evaluate the use of PBAs on construction projects where the ‘funding for the project exceeds \$10 million, and refer the matter of statutory trusts for the construction industry to the Australian Law Reform Commission for inquiry and report – including what statutory trust model should be adopted.

The Committee recommended the states and territories:

- closely scrutinise the practice of providing false statutory declarations and where necessary, launch prosecutions as a practical deterrent<sup>118</sup>
- publish ‘de-identified’ information concerning the outcomes of payment disputes<sup>119</sup>
- make it a statutory offence to intimidate, coerce or threaten a participant in the building industry in relation to the participant’s access to remedies available to it under security of payments legislation, and<sup>120</sup>
- provide education, awareness and support for industry participants who may wish to access remedies under security of payment legislation.<sup>121</sup>

<sup>113</sup> Ibid, refer to clause 57 of the Draft Bill.

<sup>114</sup> SERC Inquiry Report, op cit.

<sup>115</sup> Ibid, p. xvii.

<sup>116</sup> Ibid, see also Recommendation 28.

<sup>117</sup> Ibid, p.156, para. 9. p. 105.

<sup>118</sup> Ibid, Recommendation 22.

<sup>119</sup> Ibid, Recommendation 23.

<sup>120</sup> Ibid, Recommendation 24.



The Committee also recommended that:

- industry groups be more proactive in educating and training members on the relevant security of payment systems, including streamlining complaints and providing dedicated help lines,<sup>122</sup> and
- adjudicators of payment disputes under the security of payments Acts should be required to be independent and impartial.<sup>123</sup>

The Australian Government formally responded to the SERC Inquiry on the 13 June 2017,<sup>124</sup> noting that this Review addressed some of the recommendations of the SERC Inquiry Report. However, also of interest was the Government's response to the implementation of PBAs, which was to refer the matter to the Attorney General's Department for further investigation.<sup>125</sup>

### ***Australian Small Business and Family Enterprise Ombudsman (ASBFEO) Inquiry***

The ASBFEO initiated an inquiry into Payment Times and Practices in Australia in November 2016. The inquiry came about as a result of feedback from small business and family enterprise during 2016 saying that late and extended payments was a major problem.

Overall the inquiry found that governments should take a greater role as payment leaders and setting best practice to ensure prompt payment to small business. Relevant recommendations of the ASBFEO's Final Report include:<sup>126</sup>

- setting 15 business day payment times and processes to ensure these timeframes flow through the supply chain
- mandating the use of PBAs in public works and construction projects
- industry codes which regulate business to business transactions and set payment times, and
- introducing legislation which sets a maximum payment time for business to business transactions.

## **4.4 Other relevant international legislation**

In addition to the legislation in Australia, it is worth considering similar legislation in Singapore and New Zealand.

### **Singapore**

Singapore's equivalent legislation, the *Building and Construction Industry Security of Payment Act 2004* (SG) (the Singapore Act), is substantially similar to the East Coast Model.

The Singapore Act commenced on 1 April 2005 and is based on the NSW Act, but incorporates some distinctive features, including:

<sup>121</sup> Ibid, Recommendation 25.

<sup>122</sup> Ibid, Recommendation 26.

<sup>123</sup> Ibid, Recommendation 27.

<sup>124</sup> Australian Government (2017), *Australian Government response to the Senate Economic References Committee Report: Insolvency in the Australian Construction Industry*, [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Insolvency\\_construction](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction).

<sup>125</sup> Ibid, pp. 16–17.

<sup>126</sup> Australian Small Business and Family Enterprise Ombudsman (2017), *Payment Times and Practices Inquiry – Final Report*, Canberra, April 2017: [http://www.asbfeo.gov.au/sites/default/files/ASBFEO\\_Payment\\_Times\\_and\\_Practices\\_Inquiry\\_Report.pdf](http://www.asbfeo.gov.au/sites/default/files/ASBFEO_Payment_Times_and_Practices_Inquiry_Report.pdf).

- the Act only applies to contracts in writing
- the default statutory regime only applies where the contractual terms are silent on payment terms or the contractual payment terms are considered to be unfair, or not aligned with the intention of the Act
- respondents who are dissatisfied with an adjudicator's determination may apply for a review of the determination where the adjudicated amount is more than \$100 000 greater than the response amount. The review is carried out by a new adjudicator or panel of adjudicators, and
- a 7-day 'dispute settlement period' aimed at encouraging the parties to clarify for each other any matters relating to payment claim. This dispute settlement period commences after the last day on which the respondent is required to provide a payment schedule. The dispute may then be referred to adjudication after the dispute settlement period expires.

### **New Zealand**

In New Zealand (NZ), equivalent legislation, the *Construction Contracts Act 2002* (the NZ Act) contains many of the features of the East Coast Model. The legislation came into force in 2003, although significant amendments came into effect in 2016 and 2017 following the commencement of the *Construction Contracts Amendment Act 2015* and the *Regulatory Systems (Commercial Matters) Amendment Act 2017*.

As in the case of all the jurisdictions that have adopted the East Coast Model, the NZ legislation enables the parties to agree on a range of matters relating to payments, including the one date for payment but, absent agreement, the Act provides for a default scheme whereby payment becomes due and payable 20 working days after a payment claim is served.

### ***Right to progress payments***

The NZ Act enshrines the right to progress payments for the party who has agreed to carry out construction work under a construction contract. Progress payments can be made for each 'relevant period', which is defined to mean the period determined in accordance with the contract, but if the contract does not provide for this matter, then it is deemed to be the last day of the month when the construction work was first carried out and every month after that period.

The NZ Act provides that a payment claim must not only state that it is made under the Act but must also:

- contain sufficient details to identify the construction contract to which the payment claim relates
- identify the construction work and the relevant period to which the payment claim relates
- state a claimed amount and the due date for payment
- indicate the manner in which the claimed amount has been calculated, and
- include an outline of the process for responding to the payment claim and an explanation of the consequences of not responding and not paying the claimed amount.

As in the case of many of the Australian jurisdictions that have adopted the East Coast Model, the NZ Act provides that if a respondent to a payment claim fails to provide a payment schedule within the prescribed time period and does not pay the claimed amount, then it will be deemed to be liable to pay the claimed amount. Significantly, the NZ Act applies to both commercial and residential construction work.

### *Adjudication of claimed amounts*

Any party can refer any dispute to adjudication. An adjudication is initiated by the service of an adjudication notice which is required to not only set out the nature and description of the dispute but also a statement of the respondent's rights and obligations in the adjudication as well as a brief explanation of the adjudication process. Such accompanying details could be provided in any prescribed form.

A claimant has a right of reply to a response to an adjudication claim, subject to such reply being given within five working days after it has received a copy of the respondent's response. An adjudicator may choose to ignore any new issues raised in the reply and can also allow the respondent an additional response (rejoinder) subject to this being provided within two working days.

The parties can agree on the choice of an adjudicator or a nominating body but if that agreement was made before the dispute arose then it is not binding.

### *Treatment of retention money*

Finally, as from 31 March 2017, retention money withheld under commercial construction contracts must be held on trust in the form of cash or other liquid assets readily converted to cash, unless a financial instrument is purchased.

# Chapter 5: Judicial review under the East Coast Model

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## 5. Judicial review under the East Coast Model

### 5.1 Tension between competing policy considerations

As outlined previously, the East Coast Model establishes a statutory right to progress payments and creates a rapid adjudication procedure to resolve payment disputes. This ‘rough and ready’ adjudication of payment disputes results in determinations which are interim only.<sup>127</sup> The overriding philosophy is ‘pay now, argue later’.<sup>128</sup> The enactment of the various security of payment legislative regimes (particularly with those jurisdictions that adopted the East Coast Model) have ‘spawned’ hundreds of court challenges of adjudicators’ determinations/decisions.<sup>129</sup>

An examination of the cases discloses the difficulties in striking a balance between:

- a) upholding the legislature’s intention of providing a rapid, informal process for resolving progress payment disputes (thereby maintaining a contractor’s cash flow), and
- b) preserving a party’s right to seek judicial relief from adjudication errors.

Unfortunately, obtaining an understanding as to what kind of adjudication errors are susceptible to judicial review has not been a straightforward exercise because the approach adopted by the courts has not always been consistent. The courts’ inconsistent pronouncements on this issue have caused confusion and uncertainty and this uncertainty has discouraged industry participants from availing themselves of the statutory process.

### 5.2 What is meant by judicial review?

There can be no doubt that, because an adjudicator’s authority is derived from the Act, an adjudicator is performing a public law function and that accordingly an adjudicator’s determination becomes amenable to judicial review.

The expression ‘judicial review’ refers to the court’s power to review the actions of decision makers exercising a public law function and to hold them accountable for conduct that is not authorised by law. The purpose of judicial review is to ensure that the decision maker exercises only the powers duly vested to them. The court’s power to review a decision is, however, confined to determining the validity of the decision maker’s exercise of their function and not its substantive merit. The courts have recognised that even where a decision maker is empowered to only make an interim decision, such a decision could nonetheless have a significant impact on the unsuccessful party. This is particularly the case with adjudications where an unsuccessful respondent will be required to comply with the adjudicator’s decision and to immediately pay the adjudicated amount before being able to initiate proceedings, either through arbitration or litigation, so as to obtain a final determination on the disputed issue.

The authority of the Supreme Courts to undertake judicial review is derived from the inherent, or common law jurisdiction of the courts.<sup>130</sup> The inherent jurisdiction enables the court to grant the prerogative writs such as *certiorari* and equitable remedies such as declarations.

<sup>127</sup> As in *Musico & Ors v Davenport* [2003] NSWSC 977 (McDougall J)

<sup>128</sup> as in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 [96] (Palmer J).

<sup>129</sup> SoCLA (2014); *op. cit.*, p. 37.

<sup>130</sup> As codified in the various state Supreme Court Acts. See, for example, s. 23 of the *Supreme Court Act 1970* (NSW).

In respect to judicial reviews relating to adjudication determinations an applicant will usually seek prerogative relief in the nature of *certiorari*, so as to quash an unfavourable determination. The grounds upon which *certiorari* will be granted are:

- jurisdictional error
- breach of natural justice
- fraud, and
- non-jurisdictional error (or an error of law on the face of the record).

In the context of those jurisdictions that have adopted the East Coast Model, one of the key issues relates to the scope of judicial review, especially given the inclusion of a privative provision such as section 25(4)(a)(iii) of the NSW Act. That section states that where a claimant has filed an adjudication certificate as judgement for a debt and the respondent has commenced proceedings to have the judgement set aside, the respondent is not, in those proceedings entitled to challenge the adjudicators determination.

### 5.3 Court attempts at reconciling tension

The following discussion sets out how the courts have attempted to reconcile their inherent jurisdiction with the doctrine of parliamentary supremacy, particularly in the context of a provision like section 25(4)(a)(iii) of the NSW Act.

#### Musicco

The first case to consider whether an adjudicator's determination was susceptible to judicial review was *Musico & Ors v Davenport* [2003] NSWSC 977 (*Musico*) in which McDougall J held that review is available for denial of natural justice and jurisdictional error, including jurisdictional error of law on the face of the record. However, His Honour did not consider that a determination can be quashed on the basis of non-jurisdictional error by reason of section 25(4) of the NSW Act:

By s. 25(4)(a)(iii), a respondent seeking to set aside a judgment based on an adjudication certificate cannot challenge the adjudicator's determination. That must mean that in any such proceedings, the judgment cannot be set aside upon the basis that the adjudicator (for example) erred in law in some step of his or her reasoning. It would be quite inconsistent with the legislative intention that is evident in s. 25(4) to permit a challenge to be raised, by way of relief in the nature of prerogative relief, upon the ground of error of law. The legislature could hardly be taken to have intended that, having forbidden entry by the front door, it was nonetheless happy for access to be obtained from the rear.<sup>131</sup>

The distinction between jurisdictional errors and errors of law on the face of the records has been said to be not always a 'bright line'.<sup>132</sup> Thus, for example, adjudicators will have made a jurisdictional error where they have incorrectly made a finding of the existence of a construction contract. Similarly, an adjudicator will have made a jurisdictional error where there has been a denial of natural justice (e.g. proceeding to make a determination by relying on an issue, or on any evidence not advanced by either part and not providing the parties with an opportunity to make submissions on such issue or evidence). In both those circumstances, the adjudicator's decision will be held to be invalid.

Reference to non-jurisdictional error in the context of adjudications is where an adjudicator's decision contains an error of law (e.g. by incorrectly interpreting a provision within the construction

<sup>131</sup> *Musico & Ors v Davenport* [2003] NSWSC 977 [55] (McDougall J).

<sup>132</sup> *Amasya Enterprises Pty Ltd and Anor v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 [83] (Vickery J).

contract) but has however correctly applied the Act. In *Musico*, McDougall J however held that such an error may constitute a jurisdictional error:

The more difficult question is whether the impugned determinations or conclusions amounted to jurisdictional error. By ss.9(a) and 10(1)(a) of the Act, the adjudication in this case was to be carried out by reference to the relevant provisions of the contract. As Mr Davenport recognised, the relevant provision was, on the face of things, clause 10.2. That directed his attention to the Architect's certification. But because of the errors in approach that I have identified ... Mr Davenport failed to have regard to the relevant provisions of the contract. He therefore failed to carry out the task that the Act requires to be carried out in the manner that the Act requires ... It must follow that Mr Davenport failed to exercise the jurisdiction given by the Act.<sup>133</sup>

## Brodyn

The following year, 2004, the NSW Supreme Court of Appeal in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*<sup>134</sup> (*Brodyn*) considered the respondent's application for an order to quash the adjudicator's determination on the grounds that the relevant payment claim was invalid because the contract had been terminated and the final payment claim had been made. The Court of Appeal however rejected the respondent's argument and held that the legislative intent of the Act was to exclude judicial review, except for certain limited circumstances, so as to ensure that adjudication determinations remained a rapid and interim process with minimal court involvement.

The effect of *Brodyn* was to significantly restrict the ability of the parties to a construction contract to seek judicial review of an adjudicator determination and in doing so the NSW Court of Appeal overturned *Musico*. The Court of Appeal held that an adjudicator's determination can only be challenged if:

- (a) The basic and essential requirements for a valid determination are not satisfied.<sup>135</sup> The Court provided a non-exhaustive list of five basic and essential requirements:
  - (i) the existence of a construction contract between the parties (sections 7 and 8 of the Act)
  - (ii) the service of a payment claim by the claimant on the respondent (section 13)
  - (iii) the making of an adjudication application to an ANA (section 17)
  - (iv) acceptance of the adjudication application by an eligible adjudicator (sections 18–19), and
  - (v) determination by the adjudicator of the amount of the progress payment, the due date, rate of interest payable and written reasons (sections 19(2), 21(5) and 22(1), and section 22(3)(a)).
- (b) The purported determination is not a bona fide attempt to exercise the power granted under the Act,<sup>136</sup> and
- (c) There has been a substantial denial of natural justice required under the Act.<sup>137</sup>

Significantly, Hodgson JA expressed the view that in the case of an adjudication that was void (for failure to comply with one or more of the basic and essential requirements) a 'court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the

<sup>133</sup> *Musico & Ors v Davenport* [2003] NSWSC 977 [199] (McDougall J).

<sup>134</sup> [2004] NSWCA 394 (*Brodyn*).

<sup>135</sup> *Brodyn Pty Ltd t/as Time Cost and Quality V Davenport* [2004] NSWCA 394 [53].

<sup>136</sup> *Ibid*, [55]–[56].

<sup>137</sup> *Ibid*.

need to quash the determination by means of an order in the nature of *certiorari*.<sup>138</sup> His Honour also stated that given the legislative intent, adopting an approach by posing the question of whether any non-compliance with the above requirements is a jurisdictional or non-jurisdictional error would be to 'cast the net too widely'.<sup>139</sup> Thus, in effect, the Court of Appeal displaced the 'broad' jurisdictional approach adopted in *Musico* in favour of the 'narrow' concept, whereby only a failure to satisfy the basic and essential requirements to the exercise of an adjudicator's power under the Act would amount to a jurisdictional error.

For a period of about five years afterwards, the NSW Supreme Court applied the principles enunciated in *Brodyn*.<sup>140</sup>

### Impact of High Court decision in Kirk

However, in *Kirk v Industrial Relations Commission of New South Wales*<sup>141</sup> (*Kirk*) the High Court was asked to consider whether the Supreme Court had powers to review a decision of the Industrial Relations Court under the *Occupational Health and Safety Act 1983* (NSW) and in particular whether the NSW Parliament had power to enact legislation that would exclude judicial review. The High Court reaffirmed the inherent power of state Supreme Courts to review the decisions of inferior courts or anybody exercising public functions<sup>142</sup> and went on to state 'legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.'<sup>143</sup>

The High Court's reasoning in *Kirk* suggested that the state legislation cannot limit the power of the Supreme Court to quash jurisdictional errors of law made by adjudicators. How then would this decision sit next to the approach that the NSW courts had adopted since *Brodyn*?

### Chase Oyster Bar

In 2010, shortly after the High Court decision in *Kirk*, the NSW Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*<sup>144</sup> (*Chase Oyster Bar*) had occasion to consider whether an adjudicator had the power to make a determination in relation to an adjudication application that did not comply with the requirements set out under section 17(2)(a) of the NSW Act.<sup>145</sup>

The NSW Court of Appeal decided that, in the circumstances of the case, an adjudication application had not been made in compliance with section 17(2)(a) and that, accordingly, the determination made by the adjudicator was invalid and that the Court had power to grant relief in the nature of *certiorari* and set aside the determination. Further, the Court of Appeal said that, in light of the High Court decision in *Kirk*, the decision in *Brodyn* should not be followed in relation to an adjudication application which was not in compliance with section 17(2)(a) of the Act, insofar as *Brodyn* had held that:

<sup>138</sup> *Ibid*, [52].

<sup>139</sup> *Ibid*, [54].

<sup>140</sup> For example, refer to *Coordinated Construction Co v JM Hargreaves* [2005] NSWSC 77 [45]; *Energetech v Sides Engineering* [2005] NSWSC 801 [26]; *Coordinated Construction Co Pty Ltd v Climatec (Canberra) Pty Ltd* [2005] NSWSC 312 [13]; *Holmwood Holdings Pty Ltd v Halkat Electrical Contractor Pty Ltd* [2005] NSWSC 1129 [46]–[9]; *Timwin Constructions Pty Ltd v Façade Innovations Pty Ltd* [2005] NSWSC 548 [38] and [41–3]; *Schokman v Xception Construction Pty Ltd* [2005] NSWSC 297 [1415]; *Falgat Construction Pty Ltd v Masterform Pty Ltd* [2005] NSWSC 728 [35].

<sup>141</sup> [2010] HCA 1 (*Kirk*)

<sup>142</sup> *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1 at pp. 97–99.

<sup>143</sup> *Ibid*, [100].

<sup>144</sup> [2010] NSWCA 190 (*Chase Oyster Bar*)

<sup>145</sup> Section 17(2)(a) of the NSW Act provides that an adjudication application cannot be made unless the claimant has given the s. 17(2) notice within the period of 20 business days after the due date for payment.



- (a) the Supreme Court of NSW was not required to consider and determine the existence of jurisdictional errors by an adjudicator in reaching a determination under the Act;
- (b) an order of *certiorari* was not available to quash or set aside a decision of an adjudicator under the Act; and
- (c) the Act expressly or through implication limited the Supreme Court of NSW's power to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the Act.

Significantly, however, the Court of Appeal held that the Act does not limit the power of the Supreme Court to review an adjudicator's determination for jurisdictional error.

It can thus be seen that in *Oyster Bar*, the NSW Court of Appeal clarified that the remedy of *certiorari* would be available to quash an adjudicator's determination, not only in circumstances where the adjudicator had failed to comply with any of the 'basic and essential requirements' identified in *Brodyn*, but also where the adjudicator had made an error in relation to a fact that gives rise to their jurisdiction.

Thus, the requirement of notice of the applicant's intention to apply for adjudication within the 20-day period specified in section 17(2)(a) is an example of a jurisdictional fact, and without such a fact being established, the adjudicator has no statutory authority to make a determination.

#### 5.4 Jurisdictional error if no reference date

If the requirements of compliance with section 17(2)(a) is an example of a jurisdictional fact, could the same be said of the existence of a reference date?

##### Southern Han Breakfast Point Pty Ltd

###### Initial decision

The issue of a reference date was considered initially by Ball J in *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd*<sup>146</sup> (*Southern Han*) where the respondent sought a declaration that the adjudicator's purported determination was void, or alternatively, an order in the nature of *certiorari* quashing the purported determination. His Honour held that because the contract had come to an end and because the contract provided for the right of payment to be suspended upon termination, no reference date could arise after termination:

"Reference date" is relevantly defined in s. 8 (2) of the Act to mean "a date determined by or in accordance with the terms of the contract as the date upon which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out... under the contract." However, if the contract says that all payments are suspended there can be no date under the contract on which a claim for a progress payment may be made and consequently no reference date.<sup>147</sup>

###### NSW Court of Appeal decision

The NSW Court of Appeal however set aside Ball J's decisions and in doing so held the existence of a reference date to support a payment claim is not a jurisdictional fact:

<sup>146</sup> [2015] NSWSC 502 (*Southern Han*).

<sup>147</sup> *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Limited* [2015] NSWSC 502 [45].

I consider that ... the existence of a reference date ... is not a jurisdictional fact or essential precondition for the making of a valid payment claim (and hence of there is a dispute about that issue it is for the adjudicator to determine).<sup>148</sup>

### Other jurisdictions arrive at a different conclusion

Earlier, the Supreme Courts in Queensland and Victoria had arrived at a contrary view on the same issue.

In *Walton Constructions (Qld) v Corrosion Control Technology Pty Ltd (Walton)*,<sup>149</sup> Lyons J referred to the differences in the term 'reference date' as defined under the Queensland Act compared to the NSW Act and concluded that the definition in the Queensland Act 'gives greater primacy to the provisions of the contract with the making of a claim for a progress payment than does the language of the NSW Act'.<sup>150</sup> Accordingly His Honour was not prepared to adopt the *obiter* statement made by Hodgson JA in *Brodyn*.<sup>151</sup> Lyons J concluded that because the contract provided for reference dates, by both enabling their identification and by providing in effect that there is no right to make a progress claim after the contract is terminated, the consequence was 'that no further reference date of this kind would then accrue'.<sup>152</sup>

Lyons J's reasoning was adopted by De Jersey CJ in *McNabb NQ Pty Ltd v Walkrete Pty Ltd (McNab)*<sup>153</sup> where the Chief Justice said:

I do not regard the absence, from the instant sub-contract, of an express provision in terms of cl 44.10 of the contract which was before that Judge, as warranting a difference conclusion here. That clause equated the rights and liabilities of the parties on termination to the common law situation where a repudiation is accepted. Such a provision does no more than reflect the common law.<sup>154</sup>

A similar position was adopted by Applegarth J in *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Receivers and Managers Appointed)*,<sup>155</sup> wherein it was stated '... the decisions in *Walton* and *McNab* establish that a reference date will not arise for the purpose of the Act after termination unless the contract expressly provides for one'.<sup>156</sup>

The issue of whether the existence of a reference date is a jurisdictional fact was considered by the Victorian Court of Appeal in *Saville v Hallmarc Construction Pty Ltd*<sup>157</sup> and articulated in unambiguous language:

The considerations identified by the New South Wales Court of Appeal as described [in *Chase Oyster Bar*] indicate that the strict observance of the procedural steps in the statutory scheme, including time limits, was mandated by the legislature as the price by which a claimant can take the benefit of the

<sup>148</sup> *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 [60] (Ward JA).

<sup>149</sup> [2011] QSC 67 (Walton).

<sup>150</sup> *Walton Constructions (Qld) v Corrosion Control Technology Pty Ltd* [2011] QSC 67 [43].

<sup>151</sup> 'However, s. 8(2) of the Act does not provide that reference dates cease on termination of contract or cessation of work. This may be the case under s. 8(2), if the contract so provides but not otherwise; while s. 8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits of s. 13(4) (limiting the period within which to make a claim to 12 months after the relevant work was carried out). Reference dates cannot support the service of any payment claims outside these limits', *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394 [63].

<sup>152</sup> *Walton Constructions (Qld) v Corrosion Control Technology Pty Ltd* [2011] QSC 67 [45].

<sup>153</sup> [2013] QSC 128 (*McNab*).

<sup>154</sup> *McNabb NQ Pty Ltd v Walkrete Pty Ltd* [2013] QSC 128 [29].

<sup>155</sup> [2013] QSC 269.

<sup>156</sup> *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Receivers and Managers Appointed)* [2013] QSC 269 [44].

<sup>157</sup> [2015] VSCA 318.

regime. The observance of certain procedural steps are essential to the assumption of jurisdiction by an adjudicator. An assessment of whether those procedural steps have been observed may require matters of evaluation that travel beyond a mechanical process.

Furthermore, although the Act provides a 'rough and ready' regime intended to be swift and conducted without undue formality, Basten JA in *Chase Oyster Bar* and Vickery J in *Sugar Australia*, have each accepted the proposition that practical considerations and considerations of inconvenience are not determinative where deciding whether a requirement in the type of regime created under the Act is jurisdictional.

Here, Saville's right to a progress payment was dependent upon the fixing of a reference date. In turn this required a characterisation of whether the first payment claim was a final payment claim or not. If it was not (as the adjudicator found) the requirement under s. 9(2)(b) applied and required a calculation of the reference date as a date occurring 20 business days after the commencement of construction work under the construction contract. If it was (as the judge found) the requirement under s. 9(2)(d) applied and the reference date was relevantly the date immediately following the day that construction work was last carried out under the construction contract. These matters involved questions of evaluation in relation to the scope of the construction contract and the timing of work undertaken within that scope. In our view, the need for evaluation by the adjudicator, by reference to the evidence, does not preclude the fixing of a reference date under s. 9(2) from being a jurisdictional fact and thus reviewable<sup>158</sup>.

Although it would appear that the Victorian Court of Appeal had not referred to the NSW Court of Appeal's decision in *Lewence* (which had been delivered only a few weeks earlier) it was nonetheless clear that, as at the end of November 2015, the position that the NSW Court of Appeal had adopted as to whether an adjudicator's decision regarding the existence of a reference date was a jurisdictional fact (and therefore reviewable by the courts) was fundamentally different to the position that had been adopted by the Supreme Courts of Queensland and Victoria.

### **High Court decision in *Southern Han***

One year later, the High Court of Australia in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd*<sup>159</sup> in setting aside the NSW Court of Appeal's decision in *Lewence*, finally confirmed that the existence of a reference date is a jurisdictional fact. For the claimant in *Southern Han*, the journey from the referral of its payment claim to adjudication in January 2015 until its eventual resolution by the High Court in December 2016, proved to be not only a very drawn out exercise, but also very expensive.

## **5.5 Judicial review for non-jurisdictional error**

### **Different approach in Victoria to NSW**

The above discussion of the different positions that members of the judiciary had adopted in respect of one of the fundamental concept of the East Coast Model is not an isolated example. Indeed, the position that the NSW Supreme Court has adopted on the issue of judicial review of an adjudicator's determination is in sharp contrast to that adopted by the Supreme Court of Victoria.

As outlined above, the position that the New South Wales Court of Appeal had posited in *Brodyn* as to whether jurisdictional review of an adjudicator's decision would be amendable to a writ of *certiorari* had been recast in *Chase Oyster Bar*. Nonetheless, the willingness of the NSW Court of Appeal to permit judicial review, particularly in the case of non-jurisdictional error, and after *Chase Oyster Bar* is fundamentally different to that adopted in Victoria. It is worthwhile expanding on this difference, not only because the High Court has agreed to hear an appeal of the NSW Court of

<sup>158</sup> *Saville v Hallmarc Construction Pty Ltd* [2015] VSCA 318 [95]–[97] (Warren CJ and Tate JA; Kaye JA agreeing).

<sup>159</sup> [2016] HCA 52.

Appeal decision in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd*<sup>160</sup> (No 2) (*Shade Systems*), but also because it is a demonstration on how the different approaches by the NSW and Victorian Supreme Courts have created legal uncertainty and confusion within the construction industry.

It should be noted that even before the NSW Court of Appeal had handed down its decision in *Chase Oyster Bar, Vickery J, in Hickory Developments Pty Ltd V Schiavello (Vic) Pty Ltd & Anor*<sup>161</sup> and in *Grocon Constructions v Planit Cocciardi Joint Venture*<sup>162</sup>, held that an adjudication determination was susceptible to a writ of *certiorari*. In arriving at that conclusion, Vickery J declined to follow *Brodyn* on the basis of the specific provisions of the Victorian Act and the Victorian Constitution:

In *Brodyn*, the view was taken in relation to the NSW Act that, although there was not an explicit exclusion of the jurisdiction of the Court prior to the obtaining of judgment, an intention was disclosed to exclude curial intervention for errors of law in the adjudicator's determination. It followed that, under the NSW Act properly construed, relief in the nature of *certiorari* was not available to quash an adjudicator's determination which is not void and merely voidable.

In my opinion, this construction is not open under the Victorian Act.<sup>163</sup>

His Honour went on to note that whereas section 51 of the Victorian Act referred to section 85 of the Victorian Constitution Act:

Critically, there is no reference in the Act to altering or varying s. 85 of the Constitution Act in relation to any other matter, including the grant of relief by way of *certiorari*. It follows, in my opinion, that no implication can arise in construing the Act which has this effect. Indeed, it could be said that the implication operates in the opposite direction. Having specifically turned its mind to the matter of which provisions in the Act should operate to limit the jurisdiction of the Supreme Court under the Constitution Act, it appears to have been the intention of the Legislature not to limit the Court's jurisdiction by excluding or restricting judicial review by the Court of a determination of an adjudicator under the Act ...

In my opinion, the only way to correct the position in Victoria, if the legislature saw fit to do so in order to reinforce the purposes and objects of the Act and provide for desirable uniformity with similar interstate legislation, is by passing an act of Parliament which properly addresses s.85 of the Constitution Act 1975 [Vic].<sup>164</sup>

The result of Vickery J's interpretation of the privative provision within the Victorian Act (i.e. section 28 R (5)) and section 85 of the Victorian *Constitution Act 1975* is that, unlike NSW, judicial review is available for non-judicial error of law on the face of the record as well as jurisdiction error in Victoria.<sup>165</sup>

Indeed, the NSW approach was confirmed in *Shade Systems* where the NSW Supreme Court of Appeal overturned the decisions of the primary judge Emmett AJ who found that section 69 of the *Supreme Court Act 1970* (NSW) provides the court with jurisdiction to grant any relief including by way of a writ of *certiorari*, to quash an adjudication determination made on the basis of an error of law on the face of the record. According to the primary judge:

<sup>160</sup> [2016] NSWCA 379 (*Shade Systems*)

<sup>161</sup> [2009] VCS 156

<sup>162</sup> [2009] VCS 426 (No 2)

<sup>163</sup> *Grocon Constructions v Planit Cocciardi Joint Venture* (No 2) [2009] VCS 426 [93]–[94].

<sup>164</sup> *Ibid*, [97] and [101].

<sup>165</sup> The position regarding this issue in Western Australia is similar to NSW — refer to the WA Supreme Court of Appeal's decision in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130 [197].

The process of adjudication in Part 3 of the Security of Payment Act involves the exercise of public powers, in that it is a statutory power conferred by legislation. Accordingly, in principle, a determination by an adjudicator is amenable to judicial review under s. 69 of the Supreme Court Act and there is no reason why the Court would not have power to quash a determination by an adjudicator that involves an error of law.

However, the provisions of s. 69 do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those provisions, effective to prevent the Court from exercising its powers to quash or otherwise review a decision. Thus, if one can find a clear legislative intention to exclude the availability of judicial review in the case of non-jurisdictional error on the face of the record of a determination made by an adjudicator under the Security of Payment Act, relief under s. 69 would not be available to quash the determination. *Shade Systems* contends that, on the proper construction of the Security of Payment Act, relief under s. 69 of the Supreme Court Act is not available to Probuild, even if the Adjudicator made such an error of law...

Hodgson JA expressed [in *Brodyn*] the opinion that the reasons that he had stated for excluding judicial review on the basis of non-jurisdictional error of law justified the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements of the Security of Payment Act was essential to the existence of a determination. His Honour said that what was intended to be essential was compliance with the basic requirements, a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to that power, and no substantial denial of natural justice that the Security of Payment Act requires to be given. If the basic requirements are not complied with, his Honour said, or if the purported determination is not a bona fide attempt or if there is a substantial denial of the relevant measure of natural justice, a purported determination will be void because there will not then have been satisfaction of the requirements that the legislature has indicated as essential to the existence of a determination...

However, a provision conferring jurisdiction on or granting powers to a court should not be construed by implying or imposing limitations that are not found in the express words of the provision. Against the quite cogent reasons for excluding the operation of judicial review, as outlined above, it is clear that there is nothing in the Security of Payment Act that directly addresses the possibility of proceedings for judicial review in respect of a determination made by an adjudicator...

I do not consider that there is a clear indication or implication to be found in the Security of Payment Act that the jurisdiction conferred by s. 69 of the Supreme Court Act is intended to be excluded ... I consider, on balance, that judicial review under s. 69(3) is available to quash a determination made by an adjudicator where an error of law that leads to an adjudicated amount that is different from the amount that would have been determined but for the error of law appears on the face of the record.<sup>166</sup>

It should be observed that the conclusion arrived at by Emmett AJ as outlined above was consistent with those expressed by the Victorian Court of Appeal where in *Saville v Hallmarc Construction Pty Ltd*<sup>167</sup> it stated:

Errors made with respect to a jurisdictional fact are thus to be distinguished from, relevantly, errors of fact-finding made by an administrative tribunal within the course of an enquiry properly embarked upon. Errors made within jurisdiction (non-jurisdictional errors) are unreviewable in a proceeding for judicial review save where the error amounts to an error of law on the face of the record. As the High Court observed in *Refugee Review Tribunal; Ex parte Aala*:

The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by

<sup>166</sup> *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSW SC 770 [56]–[57], [62], [70] and [74].

<sup>167</sup> [2015] VSCA 318

considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.<sup>168</sup>

However, the NSW Court of Appeal in overturning Emmett AJ's decisions<sup>169</sup> emphasised that *Brodyn* was authority for the proposition that judicial review was not available for a non-jurisdictional error of law and that this position had been followed not only in NSW but also in other jurisdictions:

It is the unanimous view of cases in this Court that both McDougall J in *Musico* and this Court in *Brodyn* concluded that relief is not available to quash an adjudicator's determination on a ground other than jurisdictional error. (*Brodyn* may have gone further.) The contrary conclusion would undermine the underlying purposes of the Security of Payment Act, which are manifest in the statement of the object of the legislation (s 3), the scheme revealed by the structure of the Act and, to make the same point from a different perspective, the combined effect of the provisions discussed above. The reasoning has been accepted in numerous cases, not only here but in other jurisdictions. No sufficient reason has been put forward to doubt its correctness.<sup>170</sup>

### South Australia follows NSW approach

The reference to the NSW position having been adopted in other jurisdictions refers to the South Australia Supreme Court decision of Stanley J in *Maxcon Constructions P/L v Vadasz & Ors* (No. 2)<sup>171</sup> and in particular the following statements of His Honour:

The plaintiff submits that non-jurisdictional errors of law are amenable to judicial review relying on *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*. In *Probuild* Emmett AJA concluded that judicial review under s. 69(3) of the Supreme Court Act 1970 (NSW) is available to quash a determination made by an adjudicator under the cognate legislation in New South Wales where an error of law, that leads to an adjudicated amount that differs from the amount that would have been determined but for the error of law, appears on the face of the record.

I do not accept the plaintiff's submission.<sup>172</sup>

... While Emmett AJA in *Probuild* was of a different view, the analysis of Hodgson JA was adopted by Mason P and Giles JA in *Brodyn*. Subsequently, the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* revisited the correctness of the judgment in *Brodyn* in light of the High Court's reasons in *Kirk* and while it reversed the conclusion in *Brodyn* that determinations by adjudicators are not amenable to judicial review for jurisdictional error, the Court of Appeal did not criticise the conclusion in *Brodyn* that judicial review would not lie for non-jurisdictional error of law on the face of the record.

On appeal, the South Australian Full Court of Appeal held that whilst the error by the adjudicator was an error of law on the face of the record, relief by way of *certiorari* was, on the basis of the New South Wales' Court of Appeal's decision in *Shade Systems*, impliedly excluded. In regard to the NSW Court of Appeal's decision, Blue J said:

Mr Vadasz rightly does not contend that this Court is obliged to follow decisions of the New South Wales Court of Appeal in respect of the non-availability of *certiorari* for error of law on the face of the record prior to the decision in *Shade Systems*. Nevertheless, the line of authority between 2004 and

<sup>168</sup> *Ibid*, [62].

<sup>169</sup> *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSW SC 770.

<sup>170</sup> *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* (No 2) [2016] NSWCA 379 [85].

<sup>171</sup> [2016] SASC 156.

<sup>172</sup> *Ibid* at [15]–[16], [23].



2016 should be taken into account when considering whether this Court is convinced that the decision in *Shade Systems* is plainly wrong.

I am not convinced that the construction adopted by the New South Wales Court of Appeal in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* is plainly wrong. It is a considered decision of a five member Court of Appeal especially convened to determine the issue of construction authoritatively. It followed an earlier line of authority dating back to 2004, albeit the issue had not been considered in detail before *Shade Systems*. While I do not find the reasoning in favour of implied exclusion persuasive for the reasons given above, equally I recognise that there are arguments in favour of implied exclusion.

In the circumstances, this Court is bound to follow the decision of the New South Wales Court of Appeal in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* that the Act impliedly excludes certiorari in respect of an adjudication determination on the ground of error of law on the face of the record.<sup>173</sup>

### High court to resolve this issue

The High Court of Australia granted leave to hear an appeal of the NSW Court of Appeal in *Shade Systems*. Leave had also been granted by the High Court to hear an appeal of the South Australian Court of Appeal's decision in *Maxon Constructions*. The High Court heard arguments relating to those two appeals on 8 and 9 November 2017. In each case almost two years will have elapsed before a resolution as to whether the adjudicator's decision, which has contained a non-jurisdictional error of law, will be able to be set aside by the higher court.<sup>174</sup> However, it is also clear that, should the High Court overrule the decisions of the NSW and South Australia Court of Appeal, then it will have a profound effect on adjudication determinations in other jurisdictions and undoubtedly result in a sharp increase in the number of adjudications that will be reviewed by the courts.

## 5.6 Commentary: Why the courts are prepared to intervene

It is important to emphasise that the evolving propensity of the courts to intervene does not reflect a disregard as to the intent of the legislation. Indeed, the initial approach of the courts was one of recognising the objects and purposes of the legislation regime.<sup>175</sup> However, as the Society of Construction Law Australia (SoCLA) observed in its 2014 *Report on Security of Payment*:

It is not hard to see an explanation for this collapse of confidence in the adjudication process by the courts. The courts came to the process eager to enforce the legislative intent. As time has gone by the courts have seen more and more cases where the quality of the adjudication decision making process has been so poor that the courts have been increasingly willing to intervene.

It is to be emphasised that the courts do not quash adjudicators' determinations merely because that are wrong, even obviously wrong on their face. The courts have recognised that the intent of the legislation is for rough justice, and thus there are bound to be cases in which errors are made (as noted above, these errors are almost always made in favour of the claimant). In many cases, the determinations are quashed because of the traditional judicial review grounds - bias, denial of natural justice, want of good faith and acting without jurisdiction. More recently, there has been a trend for the courts also to quash decisions which are of such poor quality that it cannot be said that the adjudicator had done his or her job at all. Thus, Sackar J recently remarked in *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879:

<sup>173</sup> *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2 [207], [209].

<sup>174</sup> The claimant in *Shade Systems* lodged its adjudication application in January 2016 and the claimant in *Maxon Constructions* lodged its adjudication application in March 2016.

<sup>175</sup> *Leighton Contractor Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103; *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136; *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140; *Amflo Constructions Pty Ltd v Jefferies* [2003] NSWSC 856; *Hickory Developments Pty Ltd v Schiavella (Vic) Pty Ltd + Anor* [2009] VSC 156.

'[126] After reading the clauses of the contract identified by the adjudicator, one is left in a state of bewilderment, as the clauses (apart from clause 40) bear no apparent relevance to the issue at hand. This is not an instance where an adjudicator has grappled reasonably with the relevant provisions of the contract and arrived at an erroneous result within jurisdiction, rather it is an instance where there is no reasoning process at all, and no attempt at one.'

In other words, the courts on the Eastern seaboard have been saying that respondents are entitled to at least some intellectual process before being ordered to pay a sum in dispute and this is what has been lacking. In *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359, McDougall J said:

'[40] In this case, [the relevant paragraph] of the determination gives no intellectual justification for the decision that was made. It does not involve any process of consideration or reasoning; it is, in my view, an abdication of the obligation to reason. ... [P]arties to an adjudication application are still entitled to see some intellectual process that leads to the conclusion, particularly where, in many cases, very substantial sums of money are involved.'

<sup>176</sup>

It is difficult not to agree with SoCLA's observation that notwithstanding the courts' acknowledgment of the legislature's intention, there is an expectation that an adjudicator who is performing a statutory function should discharge that obligation in good faith, applying an independent mind and demonstrate in the reasons given for the making of determination that the appropriate intellectual process has been applied. Indeed, it became evident during interviews conducted with many senior legal practitioners that there remained a high level of concern regarding the quality of the adjudication making process. The concerns expressed by the legal profession regarding the variable quality of adjudication decisions cannot be ignored and is accordingly dealt with in greater detail in Sections 13.5 and 14.3 of this report. Equally disconcerting however, is the inconsistent approach that the judiciary have adopted regarding its willingness to allow an adjudicator's decision to be reviewed and this inconsistency has caused considerable confusion and uncertainty within industry.

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<sup>176</sup> SoCLA (2014), *Report on Security of Payment and adjudication in the Australian Construction Industry*, Australian Legislation Reform Sub-Committee, February 2014, paras 110–12.



# Chapter 6: The need for national consistency

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## 6. The need for national consistency

One of the key Terms of Reference for this Review is to ‘examine security of payment legislation of all jurisdictions to identify areas of best practice for the construction industry’. In observing this term of reference, it has become evident that a best practice model of security of payment legislation is to be delivered, which could provide the basis for improved national consistency in this field.

The review in Chapter 5 of the different ways in which the courts have construed the current security of payment legislation provides a platform for determining what measures are appropriate to overcome the current fragmented nature of the security of payment laws and address the need for national consistency.

### 6.1 The need for consistency

As already identified in Chapter 4, there are now eight separate pieces of legislation in Australia which deal specifically with security of payment. However, as noted by the Honourable Justice Peter Vickery:

We now have a national scheme comprising 8 Acts. It is a scheme which has at least two common themes — the recognition of a common objective and a manifest divergence in approach to achieving it.<sup>177</sup>

The need for consistency in security of payment laws has been well established over the years by various expert legislative reviews and academic and other works. It can be traced back as far as the 2003 Cole Royal Commission.<sup>178</sup> Commissioner Cole’s advocacy for a consistent national approach has been repeated by many since.<sup>179</sup> It is therefore not necessary to again explain this need in great detail. However, I will for completeness outline a number of the valid arguments that have been raised over the years in support of a consistent approach to the issue of security of payment.

### 6.2 Key arguments to support a consistent approach

The key arguments in support of a consistent national approach to security of payment can be summarised as follows:

1. A national industry requires a national approach.
2. Equality of rights and protections across jurisdictions.
3. A national approach will reduce complexity and administrative burden.
4. There is significant practical and legal experience to support a national approach.
5. There is widespread industry support.

<sup>177</sup> Hon. Justice Peter Vickery, ‘Security of Payment Legislation in Australia: Differences between the States – Vive la Difference?’ (Speech delivered to the Building Dispute Practitioners Society, Melbourne, 12 October 2011 (Vickery J’s Speech delivered to the Building Dispute Practitioners Society, 2011).

<sup>178</sup> Cole Royal Commission, *op. cit.*

<sup>179</sup> Vickery J’s Speech delivered to the Building Dispute Practitioners Society, 2011; Zhang T (2009), ‘Why national legislation is required for the effective operation of the security of payment scheme’, *Building and Construction Law Journal* 25, p. 376; Society of Construction Law (2014), *Report on Security of Payment and Adjudication in the Australian Construction Industry*; Bell M. and Vella D. (2010), ‘From Motley Patchwork to Security Blanket: The Challenge of National Uniformity in Australian Security of Payment Legislation’; *Australian Law Journal*, Volume 8; Coggins J, PhD thesis, 2012; Jacobs MS, *Security of payment in the Australian Building and Construction Industry* (5th edition, 2016).

These points are further discussed in the following sections.

### **A national industry requires a national approach.**

The construction industry is a national industry. As such it is reasonable that a national approach be taken to issues arising in that industry. This was recently highlighted by the 2015 SERC Inquiry Report which stated:

The construction industry is a national industry. Its participants, large and small, routinely operate across state borders. It is absurd that in this day and age there are eight separate SOP [*security of payment*] regimes which differ markedly from one another.<sup>180</sup>

The Inquiry concluded that a national approach to security of payment was required and made a recommendation to that effect. Prior to that, SoCLA argued for a national system in its 2014 Report on Security of Payment, where it stated that there ‘... are no evident differences in the conditions relating to the construction industry between the States, so as to justify any State by State treatment.’<sup>181</sup>

Indeed, many activities of the industry are already regulated at a national level so as to enhance industry efficiencies and outcomes – for example, the National Construction Code (NCC),<sup>182</sup> the *Building Code 2016*<sup>183</sup> and the National Australian Building Environment Rating System (NABERS).<sup>184</sup>

SoCLA also noted that not only is the construction industry a national industry, but so too is adjudication:

... the practical reality is that adjudication is a national business. Most appointments are by ANAs who operate nationally. Many adjudicators operate in States other than their home State. The State courts, in considering challenges to determinations, have regard to decisions from other States. Insofar as States have introduced a ‘red card, yellow card’ system, they look at failings of adjudicators throughout Australia.

For these reasons, we suggest that the present State-based system for authorising ANAs and registering adjudicators be replaced by a national system.

### **Equality of rights and protections across jurisdictions**

Similar businesses operating in different jurisdictions should be able to enjoy the same rights and protections. As already identified, an observation of various pieces of security of payment legislation highlights a number of differences in the process across jurisdictions which can have a significant impact on the prospects of both respondents and claimants.

For example, there are differences in what can be claimed; the timeframes under which the payment claim, payment schedule, adjudication application and adjudication response must be lodged; and the respondent's ability to raise reasons in an adjudication response.

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<sup>180</sup> SERC Inquiry Report, op. cit., p. 156, para. 9.105.

<sup>181</sup> SoCLA 2014, op. cit., p. 21.

<sup>182</sup> The NCC incorporates all on-site construction requirements for safety, health, amenity and sustainability in the design and construction of new buildings (and new building work in existing buildings) into a single code.

<sup>183</sup> Because so much of the nation's infrastructure facilities (such as transport, education, health care) are subject to Australian Government funding, construction firms submitting an expression of interest or tendering for Australian Government funded building work, must meet the requirements of the *Building Code 2016* and obtain a formal letter of compliance from the Australian Building and Construction Commission (ABCC).

<sup>184</sup> NABERS is a single national rating system that measures the environmental performance of buildings.

As noted by Commissioner Cole in 2003:

... it is not obvious why subcontractors in one State or Territory have better prospects of receiving payment for their work than subcontractors working in any other State or Territory.<sup>185</sup>

Commissioner Cole's observations have been echoed by other proponents of a national system and remain valid today.

### **A national approach will reduce complexity and administrative burden**

There is a reasonable expectation that a national approach will reduce complexity and administrative burden associated with operating across multiple jurisdictions. By its nature, the construction industry operates on the basis of a complex set of relationships with a range of diverse suppliers, including trade contractors (e.g. plumbing, bricklaying, carpentry, electrical), material manufacturers (e.g. structural steel, windows, wall panelling, floor and wall tiling) and services (engineering, design consultancy).

Many of these contractors, subcontractors and suppliers operate in more than one state and the need to become familiar with the requirements of numerous pieces of legislation is administratively burdensome. Other participants in the security of payment process, such as ANAs, adjudicators and lawyers, likely face similar burdens. Surely, then, one national legislation is more desirable and will be simpler and far more accessible for those who use the laws or otherwise become involved in the security of payment process.

As noted by Commissioner Cole:

National consistency in this area is important because it reduces the cost of businesses moving between jurisdictions and operating in different jurisdictions. It minimises duplication and reduces the cost of education campaigns. It means that the costs of subcontractors and the cost of building are not inflated in those States and Territories where there is a higher risk that subcontractors will not get paid.<sup>186</sup>

In its 2015 report, the SERC Inquiry said of the differences across jurisdictions:

Some of the differences are small while some are large and significant, but what they all do is present manifold difficulties for construction industry businesses that routinely operate in more than one state. This has resulted in a great deal of wasteful litigation in which parallel points of law are raised in the different jurisdictions.<sup>187</sup>

One of the industry's most experienced practitioners, Mr Anthony Igra, expressed the current confusion caused by having eight separate pieces of legislation:<sup>188</sup>

These differences serve no purpose at all in practice and have not made any one version of the Act any better than another. None of the Inquiries noted any great benefit from these differences; only problems.

There are around 2 000 adjudication applications made each year in Australia. Do we really need eight different versions of the Act to deal with them?

<sup>185</sup> Cole Royal Commission, p.255, para. 120.

<sup>186</sup> Ibid.

<sup>187</sup> SERC Inquiry Report, p. 156.

<sup>188</sup> Igra A, 2017, 'Security of Payment: Why Not a Single Act for the Whole Country?', *Sourceable*, Wednesday, 19 April 2017, <<https://m.sourceable.net/m/single/?name=security-of-payment-why-not-a-single-act-for-the-whole-country>>.

During the course of the Review various stakeholders identified the impact that a lack of national uniformity has on the construction industry. The National Electrical and Communications Association (NECA) said the various security of payment legislative regimes around Australia impose an additional and unnecessary administrative and compliance burden on their members. Similarly, the Queensland Resources Council (QRC) said that:

Many of QRC's members operate nationally across state boundaries. Accordingly, the different legislative requirements in each state adds an unnecessary degree of complexity and confusion and creates administrative inefficiencies.<sup>189</sup>

The law firm Baker McKenzie agreed, stating:

Divergent regimes remain a barrier for businesses operating across state and territory borders. Parties incur additional time and monetary costs to become familiar with the nuances and differences of interstate legislation, and amend their contracts or business arrangements accordingly. We have drafted a 'retrofit' table of state laws for a leading retailer as an annexure to its standard construction contract. This table, covering not only SOP [security of payment] but also Work Health and Safety and other state variances, extends to nine pages and requires the Contractor Administrator to consult between the General Conditions of Contract and the Annexure regarding the appropriate provision depending on the jurisdiction in which the project is located.

These legislative differences also create confusion about statutory obligations and rights to payment for construction work, which can adversely impact parties' compliance with SOP laws. We believe national harmonisation would improve industry understanding and engagement with SOP law.<sup>190</sup>

Additionally, as outlined in Chapter 5, there have equally been instances where the courts in different jurisdictions have given a different interpretation to key concepts of the security of payment legislation. Such differing interpretations by the courts only add to the current confusion and uncertainty.

### **There is significant practical and legal experience to support a national approach**

There are almost two decades of practical and legal experience on which a national approach could be founded. In 2009, Teena Zhang noted that a consistent national security of payment system would facilitate knowledge sharing between jurisdictions and result in better clarification of issues arising from the various legislations:

There will also be quicker incremental development of the common law when courts extrapolate on the one piece of legislation and resources expended in education programs are saved because there is less duplication.<sup>191</sup>

The Honourable Justice Peter Vickery similarly noted in 2011 that:

We now have the luxury of more than a decade of experience derived from the 'hard knocks' of litigation and the practice of adjudication. This is an excellent foundation to build upon. Most of the problems, both practical and legal, one way or another have been exposed. It is surely now time to capture the best from all jurisdictions and consolidate them into a coherent national framework.<sup>192</sup>

More recently, SoCLA has pointed to the way in which the 'already voluminous case law caused by many referrals to Supreme Courts' continues to be 'inflated by parallel points being taken in

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<sup>189</sup> QRC written submission, p. 2

<sup>190</sup> Baker McKenzie, written submission, p. 5.

<sup>191</sup> Zhang, T. (2009), 'Why national legislation is required for the effective operation of the security of payment scheme', *Building and Construction Law Journal* (2009) 25, p. 391.

<sup>192</sup> Vickery J's speech delivered to the Building Dispute Practitioners Society, 2011.

different jurisdictions’ and that ‘the partial but incomplete application of principles as between States is wasteful’.<sup>193</sup>

The issue raised by SoCLA is of particular concern and has been discussed in Chapter 5 of this report.

### **There is widespread industry support**

Perhaps one of the best arguments in support of a national approach to security of payment is the apparent widespread support from the construction industry. As far back as 2003, shortly after the introduction of security of payment legislation in NSW and Victoria, Commissioner Cole noted that there was ‘widespread support for a nationally consistent approach to security of payment reform’.

The 2015 SERC Inquiry reported that ‘Witnesses and submitters to the inquiry expressed near universal support for a single set of rules applying around the country for security of payment and related matters in the construction industry.’<sup>194</sup>

During the consultation process for this Review, the overwhelming majority of stakeholders repeated the call for a national approach and confirmed that the difference and inconsistencies between the various state and territory legislations has not served the interests of industry participants. In particular, their ability to enforce their entitlement to prompt payment for construction work carried out, or goods and services provided.

However, not everyone gave unqualified support for national uniformity. The Western Australia Chapter of the Resolution Institute submitted:

The Chapter recognizes that differences in the legislation between jurisdictions is undesirable in principle. Differences between the jurisdictions imposes unnecessary administrative burdens on those industry participants who carry on business in more than one jurisdiction. Differences between jurisdictions is, of course, less of a concern for those industry participants, such as smaller subcontractors who only carry on business in a single jurisdiction. The Chapter is concerned that the Federal Government should not pursue national uniformity of security of payment at the cost of imposing a legislative regime that is significantly worse than the existing legislation in WA and the NT. Legislation modelled substantially on the East Coast model would have this effect.<sup>195</sup>

Despite the manifest consensus as to the need for a national system for security of payment, the next question of ‘what should that system be?’ elicits a severe divergence of opinions. Chapter 7 attempts to sift through the competing views and arguments for a nationally consistent approach and present a model that recognises the best practice elements currently in place and ultimately achieves the objective of promoting cash flow and establishing a rapid and cost-effective process for resulting dispute payment claims.

<sup>193</sup> SoCLA 2014, op cit, p. 21, para 34.6.

<sup>194</sup> SERC Inquiry Report, p. 156 [9.106].

<sup>195</sup> Resolution Institute WA Chapter, written submission, para. 8.

# Chapter 7:

# A recommended best practice model

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## 7. A recommended best practice model

### 7.1 Reviewing the effectiveness of the current legislations

Despite the fact the various security of payment Acts have been in place for at least 15 years, the issue of late payment appears not to have produced the change in payment culture that the state and territory parliaments had hoped for when introducing the legislation. This raises a number of questions. Have the various security of payment Acts been ineffective, or are industry participants simply not making use of the statutory mechanisms available to them to enable prompt payment for construction work carried out, or goods and services supplied? Is the East Coast or West Coast Model more effective in enabling parties to receive such payment in a timely and cost-effective way?

#### Outcomes of previous reviews

The above questions were the threshold issues canvassed during stakeholder consultations, but this was not the first time that the various security of payment regimes had been reviewed. As outlined in Section 4.3 of this Report, most state and territory governments have conducted recent reviews of their legislation. In some instances, such reviews involved extensive consultation with industry and the release of detailed reports containing recommendations for legislative amendments – for example, the 2012 Collins Inquiry<sup>196</sup> included a review of the effectiveness of the NSW Act and several of Mr Collins' recommendations were incorporated in amendments to the NSW Act in 2014.<sup>197</sup>

In 2013, the Queensland Government commissioned Mr Andrew Wallace to review the Queensland Act (the Wallace Review).<sup>198</sup> Mr Wallace recommended an extensive overhaul of the Queensland Act, which the Queensland Government implemented in 2014.<sup>199</sup>

In 2015, the Western Australian Government commissioned Professor Philip Evans to review the effectiveness of the WA Act (the Evans Review).<sup>200</sup> In December 2016, the Western Australian Government amended the WA Act to implement several of Mr Evans' recommendations.<sup>201</sup>

Also in 2015, the South Australian Government commissioned retired District Court Judge Alan Moss to review the SA Act (the Moss Review).<sup>202</sup> In July 2017, the South Australian Government introduced legislation to amend the SA Act to implement a number of Moss' recommendations.<sup>203</sup>

Finally, in December 2015 the SERC Inquiry released its report which considered security of payment laws across Australia and the need for national harmonisation of those laws.<sup>204</sup> Of course, it was this aspect of the Committee's recommendations that ultimately led the Australian Government to conduct this current Review.

Each of the above reviews started with a consideration of the same question that was posed at the outset of stakeholder consultations for this Review: Is the existing legislation successfully meeting its

<sup>196</sup> Collins Inquiry, op cit.

<sup>197</sup> See the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), which commenced on 21 April 2014.

<sup>198</sup> Wallace Review, op cit, pp. 182–183.

<sup>199</sup> See the *Building and Construction Industry Payments Amendment Act 2014* (Qld), which commenced on 15 December 2014.

<sup>200</sup> Evans Review, op cit.

<sup>201</sup> See the *Construction Contracts Amendment Act 2016* (WA), which commenced on 15 December 2016.

<sup>202</sup> Moss Review, op cit.

<sup>203</sup> See the *Building and Construction Industry Security of Payment (Review) Amendment Bill 2017*, which was introduced into the South Australian Parliament on 5 July 2017.

<sup>204</sup> SERC Inquiry Report, op cit



stated objectives? Other than the review conducted by Professor Evans, all of the other reviewers, by reason of the scope and nature of their recommendations, clearly concluded that the legislative regime within the jurisdiction they were reviewing was sub-optimal.

The findings and recommendations of these reviews demonstrate an on-going trend towards an ever-diverging legislative landscape. Not only did the various jurisdictions commence their journey of legislative intervention by not collectively agreeing to adopt the same model, but each jurisdiction then introduced amendments to their own legislation that in some instances fundamentally altered key features of their existing legislative regime.

For example, in the case of Victoria, its 2006 amendments to the Victorian Act restricted a claimant's entitlement to include claims for disputed variations to only those claims that qualify under the highly convoluted definition set out in section 10A of the Act. Claimants also cannot make payment claims for 'excluded amounts' as defined in section 10B(2) of the Act. No other jurisdiction has adopted the same restrictions to its interim payment regime.

In Queensland, its 2014 amendments to the Queensland Act introduced a two-tier system with the parties now required to comply with different timelines depending on whether the payment claim is a 'complex' or 'standard' claim. The 2014 amendments to the Queensland Act also abolished the ANAs and transferred their functions to the QBCC Registrar. Again, no other jurisdiction that has adopted the East Coast Model has chosen to implement a two-tier process or abolish the ANAs.<sup>205</sup> The Queensland Bill 2017, which followed a review conducted by then newly elected Palaszczuk government in 2015, has maintained these two key features which were introduced in the 2014 amendments to the Queensland Act. The Queensland Bill 2017 has, however, also introduced a number of other significant amendments to the Queensland legislative scheme, the details of which have been summarised in Section 4.3 of this Report.

In the case of NSW, which first introduced the East Coast Model and where the notion of a statutory entitlement to a progress payment claim is so pivotal to the scheme of the Act, its 2014 amendments to the NSW Act removed the requirement for a claimant, whenever making a statutory payment claim, to state that a claim is a claim made under the Act. All other jurisdictions that have adopted the East Coast Model expressly require the claimant to include such an endorsement so that the respondent is aware whether a claim is being made under the relevant construction contract or under the Act. In the case of a claim under the Act, the endorsement alerts the respondent to the need to provide a payment schedule within the prescribed timeframe. The 2014 amendments to the NSW Act also provided for a differing default due date for payment after a payment claim has been served, depending on whether the claim is between a head contractor and subcontractor (30 business days<sup>206</sup>) or between a head contractor and principal (15 business days<sup>207</sup>). None of the other jurisdictions have adopted a different default due date that is dependent on whether the party making a payment claim is a head contractor or a subcontractor, although different jurisdictions specify different default due dates.<sup>208</sup>

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<sup>205</sup> Notwithstanding the Moss Review, the South Australian Government declined to incorporate a two-tier process when it introduced the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 to amend the SA Act.

<sup>206</sup> Refer to s. 11(1B)(a) of the NSW Act.

<sup>207</sup> Refer to s. 11(1A)(a) of the NSW Act.

<sup>208</sup> The default due date for payment after a payment claim has been served is 10 business days in Victoria (s. 12(1)(b) of the Victorian Act), Queensland (s. 15(1)(b) of the Queensland Act), Tasmania (ss. 15(2) and 19(3) of the Tasmanian Act) and the Australian Capital Territory (s. 13(1)(b) of the ACT Act); 15 business days in South Australia (s. 11(1)(b) of the SA Act); and 28 days in Western Australia (sch. 1, div. 5, sub-cl. 7(3) of the WA Act) and the Northern Territory (s. 13 of the NT Act).

Noting the above, there is some irony in the current state of the security of payment landscape, as it has evolved in Australia, that despite the best intentions of each state and territory government when enacting security of payment legislation, the issue of late payment remains a major issue within the construction industry. This is clear from the responses to surveys conducted by this Review and the ASBFEO.

For an industry that operates at a national level, the disparate nature of the legislative approaches to security of payment has produced confusion and inefficiencies. In 2002, Commissioner Cole observed that ‘it is not obvious why subcontractors in one State or Territory have better prospects of receiving payment for their work than subcontractors working in any other State or Territory’.<sup>209</sup> Fifteen years later, Commissioner Cole’s sentiment is more apt the ever.

### Responses from stakeholders

The consultation process with stakeholders commenced with a high-level discussion on the various legislative schemes currently operating in Australia. Stakeholders were invited to express not only their views and preferences regarding the East Coast and West Coast Models but also their views on the effectiveness of the various legislations and the relative merits of a legislative regime based on a ‘one-size-fits-all’ or ‘two-tiered’ system (as currently operates in Queensland).

#### *The effectiveness of existing legislation in different jurisdictions*

Not surprisingly when stakeholders were asked to comment on the effectiveness of the legislation operating in their jurisdiction, their responses differed not only on where the parties stood within the contractual chain, but also on their respective background and interests.

#### NSW

In NSW, stakeholders were of the view that the NSW Act is largely meeting its overall objectives in enabling industry participants to receive prompt payment for completed work. For example, NECA submit that the NSW Act assists subcontractors in being paid promptly because the adjudication mechanism is faster and less expensive than other legal options. Similarly, Master Builders Association (MBA) of NSW said the NSW Act appears effective as it is used by both subcontractors and head contractors for unpaid or disputed progress payment claims.

Nonetheless, stakeholders also referred to several deficiencies of the NSW model, including that it was too complicated, overly prescriptive, imposed confusing timeframes and did not operate effectively for larger payment claims. In particular, concern was expressed in respect to the amendments introduced by the NSW government in 2014. According to NECA:

... feedback received from NECA’s members indicates that some of the amendments introduced more recently, in particular the abolition of the default payment date of 10 business days provision, have watered down the effectiveness of the [NSW Act].<sup>210</sup>

Adjudicate Today expanded on the manner in which the removal of the former section 11(1) – which contained a default provision that, in the absence of an express contract provision, results in the progress claim becoming payable after 10 business days – had adversely impacted on the cash flow of subcontractors and head contractors:

- 3.39 In relation to the majority of subcontractor contracts:
  - 3.39.1 Oblige subcontractors to continue working for an additional 4 weeks without any payment before they can give notice to suspend work.
  - 3.39.2 Extend the time before adjudication can commence by 4 weeks.

<sup>209</sup> Cole Royal Commission, op cit, p. 255.

<sup>210</sup> NECA, written submission, p. 8.

- 3.40 In relation to some head contractor contracts:
- 3.40.1 Oblige contractors to continue working for an additional 1 week without any payment before they can give notice to suspend work.
  - 3.40.2 Extend the time before adjudication can commence by 1 week.
- 3.41 These consequences are quite inconsistent with the fundamental principle and contribute to a greater number of insolvencies in the building industry.<sup>211</sup>

The Law Council of Australia (LCA) advised that its NSW Committee considered that although the NSW Act was generally meeting its stated objectives, the legislation placed respondents at a significant disadvantage to claimants. In particular, the NSW Committee expressed the view that the nature of claims that can be made under the NSW Act should be restricted in a similar fashion to what is the case under the Victorian Act:

One of the NSW Committee's key concerns is the absence of restrictions in the legislation regarding certain types of claims such as time cost claims and latent condition claims. In our experience, those sorts of claims cannot be dealt with fairly within the current adjudication regime. In this respect, the restrictions contained in the Victorian legislation (sections 10A and 10B) which seek to exclude (amongst other things) claims in respect of disputes variations, time related cost claims and latent conditions claims are appropriate and ought to be included.<sup>212</sup>

## Victoria

Some stakeholders, such as Master Builders Association of Victoria (MBAV), expressed the view that the relatively low number of claims lodged in Victoria is indicative that the legislative regime is working well in that state. According to MBAV, the lower number of claims, when compared to other states, is an indicator that the Victorian system is more relationship-based and that disputes are being resolved earlier through dialogue, with the security of payment legislation considered as a last resort to resolving disputes. The Victorian Government expressed a similar view:

Victoria's SOP laws have sometimes been the subject of criticism on the basis that there have been, and still are, fewer adjudications in Victoria than there are in New South Wales and Queensland.

While the number of adjudications in a jurisdiction may reflect, in part, the nature of the SOP legislation in a particular jurisdiction, there are a number of possible causes for differences in the number of adjudications between jurisdictions. Whatever the mix of causes, a higher number of adjudications is a measure of the extent of disputation within the local industry. It is also a reflection of the extent to which the primary aim of SOP legislation, the entitlement to payment for work fulfilled in accordance with the contract, is not being fulfilled in the first place.<sup>213</sup>

However, organisations representing subcontractors<sup>214</sup> and several senior legal practitioners who practice construction law in Victoria disagreed with such an interpretation. In their view, the reason for the low usage of the legislation was due to the highly complex language and technical nature of the Victorian Act and in particular the inclusion of a number of exclusionary claims. The following viewpoint expressed by Adjudicate Today best encapsulated the sentiments expressed by many subcontractor organisations and senior legal practitioners:

- 3.53 Sections of the Victorian Act are confusing and most difficult to follow. Without legal advice from an expert practitioner, applications other than the simplest are likely to suffer deficiencies in their preparation. Areas which create problems for industry parties and limit the effectiveness of the Act include:

<sup>211</sup> Adjudicate Today, written submission, p.14, paras 3.39 to 3.41.

<sup>212</sup> LCA, written submission, p.3, para. 1.6(b).

<sup>213</sup> Victorian Government, written submission, p. 2.

<sup>214</sup> Including AMCA

- 3.53.1 The exclusion of amounts from progress claims such as non-claimable variations, latent conditions, time-related costs and damages;
- 3.53.2 A claim under the contract for defective work may be regarded as a claim for damages; and
- 3.53.1 New reasons for withholding payment may be provided in the adjudication response.

3.54 We know of no industry representative organisation or party who will defend the Victorian Act in its current form. The Act fails the fundamental principle.<sup>215</sup>

## Queensland

There were varying opinions as to the effectiveness of Queensland's laws. Several stakeholders<sup>216</sup> indicated that the security of payment regime was more effective prior to the 2014 amendments to the Queensland Act. The most strident criticisms of those amendments were expressed by Adjudicate Today:

The Queensland Newman Government's amendments to the [Queensland Act] were focussed on strengthening the position of respondents, particularly government, property developers and larger contractors over the interests of subcontractors and those providing related goods and services to the industry.<sup>217</sup>

Specifically, Adjudicate Today criticised those parts of the 2014 amendments to the Queensland Act that introduced the concept of a two-tier payment claim process:

There is no obvious benefit to splitting the applications on the basis of complexity or value. The complex matters in Qld have extended [the adjudication process] across many months and delivered little to no benefit to cash flow (a key reason for the creation of the scheme). Further it has proved fertile ground for parties to make multiple submissions that they require more time and the documents cannot be prepared in the times required. Ultimately, a party will take this to court as part of the challenge to validity of the decision based on a denial of procedural fairness.

For complex payment claims, the Qld amendments also allow for the respondent to provide additional reasons for withholding payment. This can extend the time taken for adjudication by significantly more than 20 business days because the claimant must be allowed time in which to consider and respond to the new reasons. Basic tenets of the Australian model of notifying the subcontractor or other provider with all the reasons for withholding payment and paying what is due without delay were broken...

The main reason for the difference is the absence of free, professional advice to parties seeking to understand the adjudication process and receive information on the nature of information that should be provided in an adjudication application. The abolition of ANAs in Qld has been a disaster for the smaller subcontracting and supply businesses. It is little wonder that the number of Qld industry insolvencies continues at an unacceptably high rate.<sup>218</sup>

Similar views regarding the concept of a two-tier system were expressed by the LCA:

The Committee's view is that the objectives of the legislation would best be served by one simple set of rules applying to all payment claims, rather than Queensland's current two-tier approach. We understand the rationale behind the Wallace Report's recommendation to adopt a two-tier system, particularly the concern that a 'one size fits all' approach fails to cater for the varying complexity of claims. However, for any statutory payment process to operate effectively it must be able to be easily understood and adopted in practice. This is particularly the case in the building and construction

<sup>215</sup> Adjudicate Today, written submission, p. 16, paras 3.53–3.54.

<sup>216</sup> Including NECA and the Subcontractors Alliance.

<sup>217</sup> Adjudicate Today, written submission, p.15, paragraph 3.49.

<sup>218</sup> Ibid, pp. 20–21, pars 4.22–4.23, and p.42, para. 11.69.

industry where parties who rely on the security of payment process are often unaided by lawyers. In our view, the splitting of claims into complex and standard categories unnecessarily complicates and elongates the payment process for little benefit.<sup>219</sup>

The Queensland MBA (QMBA) noted the current Queensland legislative framework is highly complex and difficult to comprehend even for lawyers, let alone subcontractors and small businesses. QMBA viewed the Queensland laws as unfairly balanced towards subcontractors. QMBA also submitted that subcontractors were not using the legislation because of its potential to destroy their commercial relationship with head contractors. Similarly, the Master Plumbers Association of Queensland (MPAQ) noted that subcontractors were not using the Queensland Act because they were afraid of ‘burning’ the relationship with the builder/head contractor. NECA referred to compressed timeframes for claimants and the appointment of adjudicators by the QBCC instead of ANAs as some of the changes made in 2014 which, in its view, have made the Queensland security of payment regime a far less attractive option for claimants.

Some stakeholders, however, strongly support the 2014 Queensland amendments. For example, in its written submission Stockland stated:

Whilst we consider that there are pros and cons to all of the SOP Legislation on foot across the jurisdictions, we consider that the current Queensland model is the most successful. This is due primarily to the ‘complex’ claims process (subject to the resolution of the present complications arising in relation to due dates for payment in relation to Complex Payment Claims), and the more rigid requirements in place regarding the appointment of adjudicators ...<sup>220</sup>

Similarly, a senior and experienced adjudicator, Mr Barry Tozer, expressed strong support for the current Queensland legislation, as amended by the 2014 amendments:

In my opinion, the legislation in Queensland is the most successful in meeting the stated objectives of the legislation. I am regularly nominated as adjudicator to make a decision on small value subcontractor payment claims. These are the payment claims which the legislation was introduced to address. In my opinion, one reason that the adjudication system in Queensland is so successful is the low cost to a subcontractor of obtaining a result in these adjudication applications. Fixed lump sum amounts are paid to adjudicators for their fees on these small value claims.

It has been stated by those (generally the owners of some ANAs in other states and their employed adjudicators) who are critical of the Queensland system that a high percentage of these adjudication applications ‘fall over’ (are withdrawn) before a decision is made. In my experience, there is a proportion of these claims which are settled by either payment of an agreed amount or withdrawal of the claim after discussion between the parties after making the application. I note that recent statistics in Victoria suggest that only 64–68% of adjudication applications proceed to a determination.

I would regard this late change of heart by the respondent or the realisation of the speculative nature of the claim by the claimant as beneficial to both parties. It is one aspect of the success of the process. I note that where an adjudication is discontinued in Queensland, the Registrar is now seeking the reason for withdrawal and recording the result.

There are other benefits to the Queensland legislation. It is administered transparently by the Registrar, is better targeted to identify the quality of adjudicator’s decisions and more particularly addresses the qualifications and experience of registered adjudicators. It also sets a cap on adjudicator’s hourly rate fees (as well as the maximum lump sum fees noted above) based on the ‘experience’ classification of the adjudicator.

<sup>219</sup> LCA, written submission, p. 3, para. 2.1.

<sup>220</sup> Stockland, written submission, Annexure 1, p. 1.

In my opinion, it is beneficial for the legislation to provide for two separate types of claims. I note that the number of 'complex' claims dealt with in Queensland is only a small proportion (less than 10%) of the total submitted to adjudication. These 'complex' claims are given to the most experienced category of adjudicators for making a decision. Less experienced adjudicators are not required to deal with these types of claims in Queensland. Better decisions are likely made as a result.<sup>221</sup>

Mr Tozer's views regarding the impact of the 2014 Queensland amendments are, however, to be contrasted with those provided by another experienced adjudicator, Mr Stuart Wood. Given that Mr Wood was previously the senior public servant who held administrative responsibilities for the NSW Act, his observations regarding issues he has encountered with matters referred to him since the 2014 amendments to the Queensland Act came into effect are worthy of consideration. Mr Wood contends that the 2014 amendments to the Queensland Act:

... have resulted in a substantial increase in the adjudication process time and have transferred the balance of power under adjudication to the [often non-paying] respondent, contrary I believe to the original intent of Parliament when creating the Act.<sup>222</sup>

Mr Wood then makes the following comment relating to the adjudication appointment process:

... some of the adjudication applications referred to me have been very poorly prepared, particularly in comparison with the quality of applications made prior to the 2014 amendments to the Act. Simple errors were also made by the Claimant on the QBCC's adjudication application form. Oral feedback given to me by other Adjudicators indicates that these are relatively common problems with the more recent applications made under the [amended] BCIP Act.

In each of these cases, the adjudication application has been received and accepted by the QBCC. I understand that QBCC charges an administrative fee for each application. It seems to me that for this fee, QBCC could assist the industry if it were to carry out a high level preliminary review of each adjudication application.

I am not suggesting that QBCC stand in the shoes of the Adjudicator. However, mistakes in the filling out of the application form and/or obvious errors that will be fatal to the process might be picked up early. Feedback could then be provided to the Claimant by QBCC. Such a pro-active approach should serve to reduce the number of aborted adjudication processes, thus avoiding wasted cost and time for all of the parties involved...

As for the removal of the Authorised Nominating Authorities under the 2014 amendments to the BCIP Act, I believe that this was an error in decision making, based on unfortunate innuendo and misinformation.

The Act, under Part 4, previously gave the Registrar [and the Minister] substantial powers to effectively and efficiently manage the ANA's. These administrative arrangements provided an accountability framework to enable proper oversight of the ANA's nominated to determine adjudication applications. As far as I am aware however, these powers were never used to 'sanction' an ANA for a failure to comply with their obligations under the Act. This gives me the very strong impression that, regardless of what was suggested in the Wallace Report, there really was no compliance issue and no objective reason to support a need to abolish the ANA's.

In New South Wales, as in all other States except Queensland, most of the functions of the 'Registrar' have been devolved to the Authorised Nominating Authorities. This is to avoid what would otherwise be a significant cost to government of staffing and maintaining the registry. Under their conditions of authorisation in New South Wales, the Authorised Nominating Authorities are required to perform the registry functions but at no cost to government in what is essentially a user pays system. This

<sup>221</sup> Tozer, B., written submission, pp. 1–2.

<sup>222</sup> Wood, S., written submission, p. 1.



approach also enables government to maintain a level of independence from the adjudication processes.<sup>223</sup>

Interestingly, the Resolution Institute, which is a not-for-profit membership-based organisation that promotes and facilitates the development of use of dispute resolution and is also a recognised ANA in many jurisdictions, made the following comments on the post 2014 Queensland Act:

We consulted our NSW adjudicator members previously in 2016 in relation to the Queensland model. There was diversity of opinion as to whether the Queensland Registrar of Adjudicators system is preferable to the ANA system. Our adjudicators were quite polarised in their views, with a small majority strongly favouring the NSW ANA system. One adjudicator noted that the QLD registry has removed all the assistance that was previously available to claimants along with promotion of the Act. The remaining adjudicators strongly favoured the QLD model.

One adjudicator member commented that the QLD experiment has caused long delays, additional cost and little or no improvement in the outcomes. It was further noted that the single benefit is the neutrality of appointment. There was a concern expressed that there are too many adjudicators which is diluting quality as adjudicators are not doing enough adjudication each year to maintain their skills.

Another adjudicator noted that the division of claims into categories in QLD is artificial and not helpful. For example, 'A claim for \$740 000 is treated vastly differently to a claim for \$751 000.'

Adjudicators with direct experience of the QLD model noted that they had found it to be less than positive. One summation is that removal of ANAs in QLD has resulted in:

- 'A loss of expertise in adjudicator standards;
- An increased complexity in the adjudication process, which goes against the purpose of the security of payment legislation; and
- Reduced utility of the adjudication process'.<sup>224</sup>

### South Australia

In South Australia, stakeholders found the SA Act to be robust and successful but noted that the legislation was underutilised. The National Electrical and Communications Association South Australian / Northern Territory Chapter (NECA SA/NT) raised concerns that threats of intimidation by head contractors deter subcontractors from utilising the laws and that there is a widespread perception among subcontractors that they will not receive future work if they make a claim under the SA Act.

The Master Builders Association of South Australia (MBA SA) suggested that the underutilisation of South Australia's security of payment laws may reflect the fact that South Australia was the last jurisdiction to enact such legislation. However, MBA SA did acknowledge that contractors may seek to avoid using this mechanism in a 'small town' for fear of being sidelined from future work by going down an adversarial pathway. Other stakeholders, such as the Air Conditioning and Mechanical Contractors' Association (AMCA) SA branch (AMCA SA), suggested that while the current South Australian regime is effective, the legislation could be further simplified to facilitate the making of claims.

### Tasmania

The low usage of the existing security of payment regimes was a theme raised by Tasmanian stakeholders with the Master Builders Tasmania (MBT) noting that the current Tasmanian regime is unnecessarily complex and not cost effective. Despite this, MBT indicated its continued support for

<sup>223</sup> Wood, S., written submission, pp. 2–4.

<sup>224</sup> Resolution Institute, written submission, p. 36.

the existing regime noting that the Tasmanian system, unlike other jurisdictions, extends coverage to the residential sector of the construction industry.

## ACT

In the ACT, low usage of the existing security of payment laws was raised as a concern by all stakeholders. According to the ACT officials the low usage was due to several reasons including complexity, the adversarial nature of the process and the desire among parties to preserve existing working relationships. Many stakeholders, such as the Master Builders Association of the ACT, emphasised that parties will often try to resolve disputes relating to payments themselves rather than pursue legal avenues.

## Western Australia

In Western Australia, stakeholders' views were mixed. Subcontractor groups<sup>225</sup> said recent changes to the WA Act – enacted in late 2016 – have improved protections for subcontractors. In particular, the removal of the 28-day time limit for lodging claims was seen as a positive step. However, those groups representing head contractors<sup>226</sup> considered the introduction of a 90-business-day period for the making of an adjudication application as far too generous. Organisations representing adjudicators and the legal profession submitted that the WA Act had assisted contractors to seek expedited payment that would have otherwise had to go through a longer and more expensive dispute resolution process to recover moneys.

However, Subcontractors WA submitted that the WA Act contains a 'fundamental flaw' in that it fails to require a payment schedule to be provided within a reasonable timeframe and that accordingly key aspects of the East Coast Model should be adopted in any national or harmonised security of payment regime.

## Northern Territory

In the Northern Territory, stakeholders, including the MBA NT, viewed the existing security of payment laws as antiquated, noting the system appears to be an 'every-man-for-himself' process rather than a cooperative one. Master Builders Northern Territory (MBNT) also noted that subcontractors do not utilise the security of payment regime because of concerns regarding complexity and costs. MBNT suggested that the current process needs to be more cost effective, particularly in relation to small claims.

## Summary and conclusions

As can be seen from the above discussion, there is no consensus for one form of legislative regime over another. While there is some support for the NSW Act, there are also some stakeholders who argue that the NSW Act should be amended so as to incorporate the changes that were made to the Queensland Act in 2014. On the other hand, many stakeholders, particularly those representing the interests of subcontractors, strongly oppose the amendments to the Queensland Act that were made in 2014. Some stakeholders support the carve out provisions contained in the Victorian Act, but the overwhelming majority do not.

Regardless of the legislative model, subcontractor groups<sup>227</sup> reported failure by contractors to pay subcontractors, unreasonable and onerous contracts, and non-enforcement of statutory declarations as issues that need to be addressed. Further, the sheer complexity of security of payment laws was often highlighted as a key area of concern, resulting in many building industry participants bypassing the system altogether. As a result, many stakeholders called for the security of payment process to be simplified.

<sup>225</sup> Including Subcontractors WA

<sup>226</sup> Including MBA WA.

<sup>227</sup> Including Subcontractors WA and the Subcontractors Alliance.



## 7.2 Feedback on the current East Coast and West Coast models

There were divergent views from stakeholders on whether they preferred the East Coast Model or the West Coast Model. However, many noted that the differences between the two models were expanding over time and that it would be good to regain some consistency nationally.

### In favour of the East Coast Model

Several stakeholders representing the interests of subcontractors indicated their preference for the East Coast Model.<sup>228</sup> NECA considered the East Coast Model to be superior because it includes an express provision that a failure to provide a payment schedule in reply to a payment claim and to pay by the due date creates a statutory debt for the claimed amount. NECA contends that the failure of the West Coast Model to include such a provision results in there being less incentive for head contractors and principals to comply with payment requests from subcontractors and that for this reason, smaller subcontractors in Western Australia utilise security of payment laws less often than their counterparts in other states. As previously outlined, Subcontractors WA expressed a similar view in regard to what it considered to be the major deficiency associated with the WA Act.

### In favour of the West Coast Model

SoCLA contends that, under the East Coast Model, a party's failure to serve a payment schedule within the prescribed (tight) timeframe (usually because of an administrative oversight) not only results in a denial of justice but also goes against the sense of commercial fair play which ordinarily operates within the construction industry:

43. The essential problem with the East Coast Model may be simply stated. Section 15(4) of the New South Wales Act provides that if a claimant makes a payment claim, and the respondent does not respond within 10 business days, then the respondent is not entitled to raise any defence in relation to matters arising under the construction contract if sued for the claimed amount. Similarly, section 20(2A) precludes the respondent from putting in any defence in the adjudication if the respondent did not submit a payment schedule during that 10 business days, and if the claimant enters judgment following a determination, then under section 25(4) the respondent is not, in seeking to set such judgment aside, permitted to raise any defence in relation to matters arising under the construction contract ...

43.3. The parties who more typically fail to serve payment schedules in time are the more vulnerable players; small contractors which are often family businesses with limited administrative resources or subcontractors who have themselves sub-subcontracted. Under the East Coast Model, a failure to provide a payment schedule within the period of 10 business days becomes liable to pay the claimed amount, whether it is really due or not, and the Act contains a number of measures designed to ensure that the paying party is not permitted to rely on any defences that it may have ...

43.5. There are some cases, of course, where a paying party decides not to put in a payment schedule because it knows that it has no answer to the claim being made. Far more often, however, a failure to put in a payment schedule in time is symptomatic, quite simply, of administrative oversight. Such administrative oversight is all the more facilitated by the fact that the words required to turn any claim into a payment claim under the legislation do not have to include any warning at all as to the significant consequences for failing to put in a payment schedule on time.<sup>229</sup>

As such, in SoCLA's view, the West Coast Model is to be preferred because it adopts:

... a much more straightforward approach: leaving the contractual rights in place and giving claimants the right to a rapid, unbiased and fair adjudication. Instead of being constrained by draconian and

<sup>228</sup> Including MBT, MEA and NECA.

<sup>229</sup> SoCLA (2014), *op. cit.*, pp. 23–24

artificial procedures, adjudicators are given inquisitorial powers, so that they can better evaluate what is the real entitlement to payment. There has been a good deal of research around the world as to the effectiveness of this evaluative approach, and that research indicates that such an evaluative approach works well, being supported by all sectors of the industry, and with adjudication decisions rarely being the subject of successful court challenge.

The principal defects of the East Coast Model are that it has far too often led to unfairness, is irredeemably tainted by a perception of bias, has led to massive litigation and is regarded by many paymasters as so toxic that claimants are all too often warned off using the system at all. The fact that both New South Wales and Queensland have recently found it necessary to make radical changes to their legislation (albeit in entirely different directions) is symptomatic of those defects.

We recognise, of course, that the East Coast Model carries with it considerable momentum within Australia. Nevertheless, the evidence is so strong that an evaluative approach is superior to the East Coast Model on almost any test that we say the East Coast Model should be rejected as a potential starting point for new federal legislation. As bankers sometimes say, the time to stop further investment in a project which is irredeemably failed is always 'now'.<sup>230</sup>

There were some stakeholders who expressed the view that, although they prefer the West Coast Model, the 2014 amendment to the Queensland legislation has improved the operation of the East Coast Model. For example, MBA NSW supports the changes introduced in Queensland in 2014 regarding the appointment of adjudicators by the Registrar, and the shift towards a two-tiered system of 'standard' and 'complex' claims, as significant areas of reform that should be adopted in other jurisdictions. Similarly, SoCLA submits that insofar as the East Coast Model were to be adopted in any harmonised legislation, then the current Queensland legislation (as amended in 2014) would be the 'least inefficient' legislative regime.

SoCLA's views were endorsed by a number of industry associations.<sup>231</sup> The Master Builders Australia contend that the West Coast Model is the most effective model and that the East Coast Model is perceived as inefficient because of the differences between jurisdictions and its highly prescriptive nature. MBA urged that the West Coast Model be used as a starting point in considering any national system.

QMBA asserted that the East Coast Model is a fundamentally flawed and unfair process and cannot be regarded as a proper alternative dispute resolution model. According to QMBA, the East Coast Model only allows certain parts of the contracts to be taken into account; is stacked in the claimant's favour; gives the claimant the ability to pick what information is provided in the claim; gives an inadequate response time for the respondent; exacerbates conflict in the subcontractor-builder relationship; and is confusing for subcontractors, due to the interim nature of decisions. Accordingly, QMBA support the adoption of the West Coast Model and consider that this would result in a positive cultural change across the industry. The Resolution Institute considers that the West Coast Model is 'significantly superior' to the East Coast Model and the Housing Industry Association (HIA) also supports the West Coast Model. HIA submit that:

The Eastern state model is based on default — namely a failure of the respondent to provide paperwork within a set period of time. As this model is largely geared towards maintaining the contractor's cash flow, many decisions are made by adjudicators in the absence of a response and without any real resolution of the dispute underlying the failure to make payment in the first place. Often there is much more focus on the process, rather than the substance. There is also no ability for the parties to seek to mutually appointed adjudicator.

<sup>230</sup> SoCLA, written submission, paras 7–9.

<sup>231</sup> Including HIA, MBA National Office, QMBA, MBA NSW and MBA WA.

On the other hand, under the Western model, rapid adjudication is only available after payment ‘as due’ under the contract has not been made. Parties are able to refer a broader range of matters to adjudication and can select the adjudicator. This can lead to greater confidence and trust in the final result.

On balance, HIA considers the Western model preferable.<sup>232</sup>

### In favour of a hybrid model

A number of stakeholders<sup>233</sup> supported a hybrid model. For example, AMCA SA proposes a dual process of statutory adjudication which combines the East Coast Model and the West Coast Model. MBA suggested that a hybrid two-tier system, incorporating both the West and East Coast Models and providing for ‘standard’ and ‘complex’ claims, may provide an effective system for the rapid processing of small payment claims while enhancing procedural fairness for respondents in relation to larger more complex claims. In this regard, the Review notes the extensive research work relating to a hybrid model as formulated by a leading academic, Dr Jeremy Coggins,<sup>234</sup> as well as his submissions to this Review which detailed how such a hybrid legislative model could operate.

Most ANAs consider that the East Coast Model legislation (other than the Victorian Act and the current Queensland Act) is working well and is vastly superior to the West Coast Model, but that, as noted by Adjudicate Today, it could be improved:

The [East Coast] model is both more efficient and cost effective in ensuring parties are paid quickly for work they have performed. The West Coast model fails the fundamental principle, particularly in relation to smaller claims.<sup>235</sup>

## 7.3 Feedback on the two-tier system for claims in Queensland

As noted in Chapter 4, Queensland is the only jurisdiction to provide for a ‘two-tier’ system, where the timelines associated with the adjudication process in relation to a ‘complex’ claim differ from the timelines prescribed for a ‘standard’ claim. This concept followed from one of the major recommendations of the Wallace Review, which found:

... the ‘one-size-fits-all approach’ adopted by the current provisions of the Act whilst attractive for its relative simplicity, has the potential to result in significant injustice, particularly to contracting parties in complex matters.

... Although it is by no means perfect, I have reached the conclusion that the most appropriate delineation of whether a claim should be considered under the existing scheme or the ‘composite scheme’ is by among other things, the setting of a monetary limit on the value of a payment claim.

... Whilst I am not particularly wedded to the sum, I have concluded that it is appropriate to tie the monetary limit to that of the civil jurisdiction of the District Court of Queensland, which is currently set at \$750 000.<sup>236</sup>

The 2014 amendments to the Queensland Act went on to define a complex payment as ‘a payment claim for an amount more than \$750 000 (exclusive of GST), or, if a greater amount is prescribed by regulation, the amount prescribed’.<sup>237</sup>

<sup>232</sup> HIA, written submission, p. 1.

<sup>233</sup> Including AMCA SA and MBA National Office.

<sup>234</sup> Coggins, J (2011), ‘From disparity to harmonisation of construction industry payment legislation in Australia: a proposal for a dual process of adjudication based upon size of progress payment claim’, *Australasian Journal of Construction Economics and Building*, 2011, 11(2), pp. 34–59.

<sup>235</sup> Adjudicate Today, written submission, p. 17.

<sup>236</sup> Wallace Review, op cit, pp. 182–3.

## Responses from stakeholders

Many stakeholders<sup>238</sup> gave support for a two-tier system comprising of ‘standard’ and ‘complex’ claims similar to that introduced by amendments to the Queensland Act in 2014. Some stakeholders acknowledged that small claims require a simpler and speedier process<sup>239</sup> and that complex claims should be given longer timeframes.<sup>240</sup>

MBAV noted concerns with the current ‘one-size-fits-all’ model in Victoria, where a claim for \$1 000 must follow the same procedural steps towards adjudication as a claim for \$10 million even though the former is likely to be much less complex and require less evidence and material to be submitted for the adjudicator’s consideration. SoCLA expressed a similar view, but argued that rather than dividing adjudications into either ‘standard’ or ‘complex’ claims:

Individual aspects of the scheme should be tailored according to complexity. Thus, for example, it is appropriate that the adjudicator should have more time to consider his determination in a complex case. Similarly, it is appropriate to allow legal representation in conferences in complex cases, but not in very small cases. There is no need for the benchmark to be the same for each of these ‘fine-tuning’ issues.<sup>241</sup>

Subcontractors Alliance indicated their preference towards a single system, considering that a two-tier system has created additional complexity. The Master Builders Association of Western Australia (MBA WA) also argued against the separation of claims because there is no clear indication as to where claims should or could be delineated. The Resolution Institute also considers that the concept of a two-tier system would make the adjudication process more complex.

Similarly, NECA does not support the adoption of a two-tier approach, raising concerns that this is likely to lead to delays in adjudication, as evidenced by the experience in Queensland post 2014, where the period between the service of a complex payment claim and the making of an adjudication decision has increased from six weeks to six months. Moreover, NECA submits that any division into different classes of claims based on size would be arbitrary. MPAQ and the Construction, Forestry, Mining and Energy Union (CFMEU) expressed similar concerns with the elongation of the process that the two-tier system had caused in respect of disputes involving large payment claims.

Some ANAs, such as Adjudicate Today and Adjudication Forum, are also opposed to the notion of a division between standard and complex claims. As stated by Adjudicate Today:

There is no obvious benefit to splitting the applications on the basis of complexity or value. The complex matters in Queensland have extended across many months and delivered little to no benefit to cash flow (a key reason for the creation of the scheme). Further it has proved fertile ground for parties to make multiple submissions that they require more time and the documents cannot be prepared in the times required. Ultimately, a party will take this to court as part of the challenge to validity of the decision based on a denial of procedural fairness.<sup>242</sup>

Among jurisdictions, South Australia and Tasmania indicated their support for a two-tier approach, while ACT officials noted there may be merit in allowing adjudicators more time to consider complex claims, noting the difficulty in defining what is ‘complex’. The Victorian Government had not yet identified a need for two types of claims in the context of its current legislation. However, the

<sup>237</sup> Refer to the Dictionary in Schedule 2 of the *Building and Construction Industry Payments Act 2004* (Qld).

<sup>238</sup> Including MBA NSW, MEA, MPAQ, NECA SA/NT, AMCA SA, QMBA, AMCA, QRC, MBA SA, MBA National Office, MBT and AIB.

<sup>239</sup> Including MEA and HIA Qld.

<sup>240</sup> Including AMCA SA and MBA NSW.

<sup>241</sup> SoCLA, written submission, p. 3.

<sup>242</sup> Adjudicate Today, written submission, p. 20.

Victorian Government indicated it was open to considering the findings of this Review on the effectiveness of the Queensland system.<sup>243</sup>

The Law Council of Australia (LCA) emphasised that whatever approach is adopted great care must be taken not to over-complicate the overall scheme of the security of payment legislation:

... the objectives of the legislation would best be served by one simple set of rules applying to all payment claims, rather than Queensland's current two-tier approach. We understand the rationale behind the Wallace Report's recommendation to adopt a two-tier system, particularly the concern that a 'one size fits all' approach fails to cater for the varying complexity of claims. However, for any statutory payment process to operate effectively it must be able to be easily understood and adopted in practice. This is particularly the case in the building and construction industry where parties who rely on the security of payment process are often unaided by lawyers. In our view, the splitting of claims into complex and standard categories unnecessarily complicates and elongates the payment process for little benefit.<sup>244</sup>

### *Differentiation between 'standard' and 'complex' claims*

Some stakeholders supported the concept of claims being distinguished on value, as opposed to the nature of the claim being made. On the other hand, some stakeholders suggested that a number of factors should be considered in distinguishing between 'standard' and 'complex' claims, including not only the value of the claim, but also the complexity of the issues associated with the claim.

Some stakeholders<sup>245</sup> supported the two-tiered system of 'standard' and 'complex' claims, as adopted in Queensland, based only on the value of the claim. However, the views amongst those stakeholders varied as to what the monetary threshold should be set at, and not all agreed to the delineation being based on an amount of \$750 000 as adopted under the Queensland Act.

AMCA SA suggested that a monetary threshold of \$750 000 would be appropriate. Some stakeholders, such as Subcontractors Alliance and NECA SA/NT, said that \$750 000 is too low a threshold for complex claims and that a monetary threshold of \$1 million would be more appropriate. Other stakeholders<sup>246</sup> thought a lower monetary threshold of \$500 000 should be the determinant for whether a claim is considered 'standard' or 'complex', saying that the monetary threshold of \$750 000 as set out in the Queensland Act is too high.

The Subcontractors Alliance also expressed concern that the timelines for complex claims which were introduced by the 2014 amendments to the Queensland Act, are too long and that these have a detrimental impact on the cash flow of subcontractors. The Alliance suggested that consideration could be given to establishing two separate streams for claims, depending on whether the parties involved were head contractor and client/principal, or subcontractor and head contractor.

QMBA and QRC advocated for claims to be differentiated based on the nature of the claim, as opposed to its value. According to QMBA, claims should not be distinguished on monetary value, as this is too easy to manipulate. QMBA therefore suggested that differentiation should focus on the complexity of the issue (i.e. variations to the contract, or delay cost claims). QRC suggested it may be more appropriate to use a claimant's size or sophistication to differentiate claims rather than the value of a claim itself, as this would help protect small cash-flow dependent subcontractors and separate them from larger contractors that have greater commercial flexibility and access to capital.

<sup>243</sup> Victorian Government, written submission, p. 2

<sup>244</sup> Law Council of Australia, written submission, pp. 3–4.

<sup>245</sup> Including MBA NSW, MBT and AMCA SA.

<sup>246</sup> Including MBA NSW and MPA NSW.

Notably, some stakeholders<sup>247</sup> suggested that a multitude of factors ought to be taken into consideration when determining whether a claim was considered to be ‘standard’ or ‘complex’. MBAV suggested that the appropriate test should be a combination of the value and complexity of the claim. MBA SA expressed a similar view and emphasised that several characteristics could potentially distinguish ‘complex’ claims including monetary limits; issues of delay and delay costs; and claims involving technically complex issues. Both MBAV and MBA SA were of the opinion that different processes and additional timeframes should apply depending on whether a claim is deemed ‘complex’. MBA SA also suggested further provisions extending the ‘drop-dead dates’ in ‘complex’ claims as an option, but that this must be balanced against the interim ‘pay-now-argue-later’ nature of adjudications.

The LCA contend that a two-tier system based on a dollar value of the payment claim fails to recognise that low value disputes can give rise to complex issues and high value disputes can involve straightforward issues:

Claims for amounts which fall within the standard claim framework are often just as complex as those which fall within the complex framework. This means a respondent has less time to respond to what is for all intents and purposes, a complex claim.<sup>248</sup>

LCA therefore argue that the appropriate solution is to adopt the system in place in Western Australia of allowing adjudicators to have the discretion to dismiss an application if it is too complex.

There were mixed views among those jurisdictions who responded to this issue. For example, ACT officials did not consider the value of the claim to be a true indicator of complexity and noted that if claims were to be separated based on a financial threshold, \$750 000 was too high given that the majority of claims in the ACT sit below \$100 000. Tasmania considers a threshold of \$500 000 would be more appropriate. The Victorian Government said they would consider the Review’s finding in relation to the effectiveness of the Queensland system,<sup>249</sup> while the SA SBC advised that it would consider differentiation between ‘standard’ and ‘complex’ claims given that this was one of the recommendations set out in the Moss Review.

## 7.4 Comparative analysis of the models — East Coast versus West Coast

It can be seen from the stakeholders’ feedback in Section 7.1 that there is general agreement that the various state and territory Acts are not operating as effectively as originally intended. In those jurisdictions that have adopted the East Coast Model there is frustration that legislation that was designed to be user friendly, cost effective and provide a speedier route than the traditional course of litigation or arbitration, has been neither rapid nor cost-effective.

Indeed, a considerable part of the adjudication process requires the parties and the adjudicator to consider complex legal issues relating to jurisdiction. Unfortunately, as identified in Chapter 5, several of these jurisdictional issues have received different interpretations from the various state Supreme Courts.

### East Coast model producing uncertainties

I discussed in Chapter 5 of this Report how the different approach that the NSW Supreme Court had adopted from the Queensland and Victorian Supreme Courts on the issue of whether a claimant is able to make a payment claim under the Act subsequent to termination of a construction contract and how that issue was finally resolved by the High Court in *Southern Han*.

<sup>247</sup> Including HIA, AIB, MBAV and MBA SA.

<sup>248</sup> LCA written submission, p. 4

<sup>249</sup> Victorian Government, written submission, p. 2



Similarly, on the issue of whether an adjudicator's decision is susceptible to judicial review where there has been a non-jurisdictional error of law on the face of the record, the NSW and South Australian Supreme Courts of Appeal have adopted a different approach from that adopted by the Victorian Supreme Court of Appeal in *Saville*. Given that the High Court has granted leave to the respondents in *Shade Systems* and *Maxon*, this issue will be finally resolved when the High Court hands down its decision early in 2018. The Victorian Supreme Court has also adopted a different approach from the NSW and Queensland Supreme Courts as to whether a party can submit a payment claim prematurely.<sup>250</sup>

Therefore, to the extent that key features of the East Coast Model have been the subject of differing judicial interpretation from the various state Supreme Courts, this then points to a legislative regime that is causing uncertainty as to the potential outcomes of a party's statutory entitlements. Such uncertainty is undesirable as it discourages parties from availing themselves of the legislation.

### **Uncertainty in the adjudication process**

There is an additional element of uncertainty and unpredictability associated with the adjudication process. Unlike the West Coast Model, the East Coast Model does not permit the parties to agree on an adjudicator to determine a disputed payment claim. The process relating to the appointment of an adjudicator under the East Coast Model has been criticised as creating a perception of being claimant-friendly. It is this perception, together with the many instances where an adjudicator's decision has been successfully challenged in the courts due to the adjudicator having breached the fundamental requirements of natural justice, that has created further uncertainty with the adjudication process and the quality of some of the adjudication decisions.<sup>251</sup>

This is an important issue because a claimant may find that due to an error committed by an adjudicator, the adjudicator's decision may be successfully challenged in the courts, thereby resulting in the claimant not only not being able to obtain a valid decision relating to its entitlement to receive a progress payment, but also incurring considerable (and unexpected) legal costs.

All this may then explain the increasing hesitation of parties to continue accessing the legislation, as was borne out from the responses received for the survey conducted for this Review. Legislation intended to provide claimants with a straightforward, rapid and cost-effective pathway for obtaining an enforceable interim decision enabling the prompt payment of a progress claim has, in certain circumstances, failed to achieve its stated objectives.

### **West Coast model also not meeting objectives**

Whereas much of the above discussion has related to issues associated with the East Coast Model, it should not be construed that the legislative regime under the West Coast Model is devoid of problems. On the contrary, and notwithstanding the views expressed by the MBA movement, HIA, SoCLA and a large number of representatives of the legal profession, I consider that the West Coast Model has also not achieved its intended objective of providing a rapid and cost-effective means for the enforcement of progress payment claims, particularly smaller claims made by subcontractors.

In the Evans Review, Professor Evans emphasised the successful features of the West Coast Model and on the issue of national uniformity and harmonisation made the following observation:

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<sup>250</sup> Compare the judgements of Vickery J in *Metacorp. Australia Pty Ltd v Andecco Construction Group Pty Ltd* [2010] VSC 119 and *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 to that of Nicholas J in *Walter Construction Group Pty Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 166 and Lyons J in *F K Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2006] QSC 243.

<sup>251</sup> See, for example, *Musico or Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 and (on appeal) *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32.

Given the marked advantages of the West Coast model (particularly with respect to the issue of procedural fairness and the comparatively lower number of grounds for review of determinations), if harmonisation were to take place it should be based on the West Coast Model rather than the East Coast Model. In the absence of such an approach to harmonisation, Western Australia should maintain its current model...<sup>252</sup>

### *Judicial review becoming more common*

Professor Evans<sup>253</sup> indicated that he arrived at the view that a harmonised legislative model should be based on the West Coast model because of the writings of various academics, including Coggins, Elliott, Bell, Vella and Zhang, as well as SoCLA.<sup>254</sup>

However, as detailed in his written submission to this Review, Dr Coggins notes that there has in fact been a spike, since 2014, in the number of challenges of adjudicators' decisions to the Western Australia Supreme Court which have in turn resulted in an increase in the number of quashings. It would therefore appear that the number of judicial reviews of adjudicators' decisions and the instances of the quashing of such reviews cannot now be said to be more prevalent under jurisdictions that have adopted the East Coast Model.<sup>255</sup>

### *Low usage by small subcontractors*

More importantly, however, and as noted by Professor Evans,<sup>256</sup> there is an under-utilisation of the WA Act by contractors and subcontractors in respect to small claims. Whilst Professor Evans recommended that this could be addressed by way of greater industry awareness and training, it would seem that the prime reasons for the low usage for such claims relates to costs. On this issue, Professor Evans notes:

... There were comments that the costs of the applications and adjudications were possibly deterring applications from smaller parties, but there was no definitive evidence with respect to this issue. Whilst no evidence was given with respect to the legal costs incurred in preparing an application or response, the information obtained from the Commissioner's Annual Reports indicate that adjudicators fees represent, on average, only 0.35% of the quantum of the claims.

However, it should be noted that this may not accurately reflect the adjudicators fees in respect to smaller claims.<sup>257</sup>

Nonetheless, in his written submission, Dr Coggins referred to the comparative analysis he had carried out on the statistical data published by the WA Building Commission with those published in NSW and Queensland and concluded that the adjudicator's fees were:

... significantly lower in Queensland and NSW for smaller payment claims, specifically those below \$25 000. For payment claims less than \$25 000, the mean adjudication fee in WA is generally around double of that in each of Queensland and NSW.<sup>258</sup>

<sup>252</sup> Evans Review, op cit, p. 59.

<sup>253</sup> Evans Review, op cit, pp. 56-59

<sup>254</sup> Coggins, J, Elliott, R. Fenwick and Bell, M. (2010), 'Towards Harmonisation of Construction Industry by the East and West Coast Models in Australia', *Australian Journal of Construction Economics and Building* (2010) 10 (3); Bell, M. and Vella, D. (2010), 'From Motley Patchwork to Security Blanket: The Challenge of National Uniformity in Australian 'Security of Payment' Legislation', *Australian Law Journal*, (2010) 84; Zhang, T. (2009) op. cit.; SoCLA (2014), op cit.

<sup>255</sup> There have also been instances of an adjudicator's decision being quashed in a decision of the Northern Territory Supreme Court — refer to *Inpex Operations Australia Pty Ltd v Ichtys LNG Pty Ltd and JKC Australia LNG Pty Ltd* [2017] NTSC 45.

<sup>256</sup> Evans Review, op cit, pp. 31 and 36.

<sup>257</sup> Ibid, p. 36.

<sup>258</sup> Coggins, J., written submission, para. 10, p. 4.



Indeed, the findings of Dr Coggins regarding the lower usage of the WA Act in respect of small payment claims supports the perception that the West Coast Model has now become a useful means for large contractors to refer larger disputes to adjudication. This perception appears to be further supported by the analysis of the published Western Australian statistics carried out by Mr Auke Steensma where he arrives at the following conclusion:

In the first year, FY 2005/06, the mean of payment claims was \$361,580.28. The average now stands at \$3,048,846.04. This amount equates to a percentage increase of 743.20%. The combined mean for payment claims since 2004 til 2016 is \$1,372,413.29. It is no longer viable or cost effective for small businesses, in the building and construction industry, to pursue a payment claim through the Act; the costs have become too prohibitive...

It appears that small claims under \$25 000 are now in decline and (this) indicates that the 'upper end' or 'big end of town' is employing the Act to determine payment claims given that it is quicker and cheaper than the alternative of litigation. The costs associated with adjudications are becoming cost prohibitive.<sup>259</sup>

### *No consequences of not replying to payment claim*

Subcontractors WA submitted that it was:

... pushing very hard in WA that we adopt some of the East Coast Model namely the requirement for payment schedules, within a designated period of time. The implied nature of the CCA [WA Act] in Australia means that some contractors give themselves 50 days + to agree/dispute invoices/payment claims. This is unacceptable when the rest of the country can receive confirmation for payment/dispute within 10/14 days.<sup>260</sup>

Specifically, the reference by Subcontractors WA to the East Coast Model was clearly intended to refer to that model's requirement for a respondent to provide a reply to a payment claim either within the time required under the relevant construction contract, or within 10 business days after the payment claim is served, whichever time expires earlier. Failure to comply with this requirement will result in the respondent becoming 'liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates'.<sup>261</sup>

Under the East Coast Model, the consequences that will flow to a respondent who has failed to provide a payment schedule within the prescribed time on or before the due date can be drastic, as can be seen by section 15 of the NSW Act (which is typical of the provision that appears under most of the jurisdictions that have adopted the East Coast Model):

15 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent:

(a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

<sup>259</sup> Steensma, A., draft PhD thesis provided as part of written submission, ch. 34, p. 57.

<sup>260</sup> Subcontractors WA, email of L Stewart, Chairperson, 27 July 2017.

<sup>261</sup> See s. 14 (4) of the NSW Act.

- (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
  - (ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and
- (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
- (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
  - (b) the respondent is not, in those proceedings, entitled:
    - (i) to bring any cross-claim against the claimant, or
    - (ii) to raise any defence in relation to matters arising under the construction contract.

Thus, the concerns raised by Subcontractors WA focus on one of the major deficiencies associated with the West Coast Model.

Under the East Coast Model, once a payment claim has been made under the Act and the respondent fails to provide a payment schedule, the respondent will not only be liable to pay the claimed amount to the claimant on the due date for payment, but the claimant can elect between:

- a) recovering the amount from the respondent as a debt through the courts, or
- b) having the payment claim adjudicated.

If the claimant elects to commence proceedings to recover the unpaid portion of its claimed amount as a debt through the courts, then the respondent will not be permitted to bring any cross claim or raise any defence in relation to matters arising under the construction contract (e.g. that the claimed amount relates to work that is defective). Further, the claimant may serve a notice on the respondent of its intention to suspend the carrying out of construction work under the construction contract.

However, under the WA Act, if the contractor does not provide a subcontractor with a payment schedule setting out its reasons for withholding payment, there is no provisions within the Act deeming that the failure to provide a payment schedule, or to detail the reasons for withholding payment, will result in the contractor being liable to the subcontractor for the amount claimed on the due date of payment. In fact, it is only when a subcontractor has served a contractor with an adjudication application that the contractor will be obliged to provide the subcontractor with the reasons for withholding payment.<sup>262</sup> Further, and by reason of section 42 of the WA Act, the subcontractor's right to give notice to the contractor of its intention to suspend the works can only be given **after** the adjudication determination has been made and only where the contractor has not paid the adjudicated amount.

What matters for a subcontractor when submitting a payment claim is that it is advised as to the status of its claim as early as possible. It is not satisfactory that the subcontractor must first serve an

<sup>262</sup> See s. 27 of the WA Act.

adjudication application before it becomes formally apprised as to the reasons why its payment claim has been rejected. If the object of the security of payment laws is to promote the prompt payment of progress claims so as to enhance the cash flow of subcontractors, then clearly the East Coast Model contains a more effective mechanism (i.e. by requiring a respondent to provide a payment schedule within 10 business days, the failure of which will result in the respondent being liable to pay the claimed amount on the due date).

The critics of the East Coast Model, and in particular SoCLA, contend that the effect of a provision like section 15(4) of the NSW Act, operates to the prejudice of respondents who operate as small businesses and is ‘by its very nature a denial of natural justice’.<sup>263</sup>

## 7.5 Which model to be preferred?

### Discussion and recommendation

I consider that the criticism regarding the East Coast model is fundamentally misconceived. The very essence of the East Coast Model is predicated on establishing a legislative scheme whereby a party who claims to be entitled to a progress payment can be quickly apprised as to where it stands with respect to the amount claimed. The most effective way that this objective can be achieved is by requiring the recipient of a progress payment claim to respond within a prescribed time period, the failure of which will result in the amount being deemed to be a debt and capable of being enforced as such in a court of competent jurisdiction. The alternative of not including such a default arrangement is to cause the claimant to be unaware of why its payment claim has not been paid until it formally applies to have its payment claim adjudicated and receives the respondent’s response.

Accordingly, I do not consider that the process set out in the West Coast Model promotes the payment of progress payment claims as effectively as the East Coast Model. At the end of the day, it is more important to establish a legislative scheme which promotes the interests of the party seeking a progress payment for construction work claimed to have been carried out. This is in contrast to a scheme that provides no incentive for a respondent to reply to progress payment claims. It all comes down to identifying priorities — either advancing the interests of the party that has carried out construction work for which the other party to a construction contract is said to have received the benefit; or alternatively, protecting the interests of a respondent where, due to an ‘administrative oversight’ or otherwise, it has failed to respond to a progress payment claim. If, as in the case of the West Coast Model, a respondent who has failed to respond to a payment claim (for whatever reason) faces no immediate consequences if it fails to reply, then such a system can hardly be said to promote the objective of prompt payment.

Nonetheless, and for the purpose of completeness, it is necessary that I address each of the key advantages that the proponents of the West Coast Model contend flows from that model relative to the East Coast Model.

### *Consideration of claimed advantages of the West Coast Model*

#### **The primacy of the contractual terms**

It is said that the West Coast Model operates by reference to the parties’ own contractual arrangements. Therefore, unlike the East Coast Model, which provides for a statutory payment regime that overrides any inconsistent contractual provisions, the West Coast Model is said to give primacy to the parties’ contractual terms relating to payment.

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<sup>263</sup> SoCLA (2014), op. cit., p. 24, para. 43.8.

I consider that such a proposition misconstrues the operation of the East Coast Model, and in particular the manner in which a provision like section 34 of the NSW Act operates. Again, it must be emphasised that the East Coast Model legislation creates and regulates a claimant's right to obtain a progress payment and once the legislation is seen from this perspective the inclusion of the no-contracting-out provision is perfectly consistent with the scheme of the legislation. As to how a particular provision within a construction contract is to be interpreted given the no-contracting-out provision in the Act, the following passage of Applegarth J when considering the effect of the relevant provision of the Queensland Act (i.e. section 99) in *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors*<sup>264</sup> (*BRB Modular*) is most illuminating:

Provisions of this kind should be applied according to their terms and no more widely. In interpreting and applying the provisions of s. 99, it is necessary to pay due regard to the objects of and policy underlying the [Queensland] Act. That said, the Act does not require the Court to 'strain to find that a provision of a contract offends the Act'.

I had occasion to consider the operation of s. 99 of the Act in *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd*<sup>265</sup> and observed that in assessing the validity of a condition, a useful inquiry is whether it facilitates or impedes the purpose of the Act. That observation was not intended to place a gloss upon s. 99 or to be a substitute for the words of the statute. I accept BRB's submission that a contractual provision could not be contrary to the Act simply because it does not further the objects of the Act. In considering whether a provision of a contract is contrary to the provisions of the Act or otherwise is ineffective by reason of s. 99, it is necessary to be specific about how the Act and its operation are said to be affected by the contractual provision. As I observed in *Lean Field*, the extent to which a particular condition is contrary to the Act, or purports to change the effect of the Act, depends upon its content and practical consequences. A provision which has the purpose of regulating contractual rights to progress payments may not be appropriate to condition a statutory right to a progress payment. The condition is likely to be contrary to the Act or unjustifiably change the effect of the Act's provisions 'where it does not facilitate a statutory entitlement to progress payments or the resolution of payment claims made under the Act'. This is likely to be the case where the condition impedes the making of a payment claim with no corresponding benefit in achieving the Act's purpose.

If, absent a contractual provision, a contractor would have a statutory entitlement to make a claim for a progress payment under the Act, then the provision will have the effect of excluding, modifying, restricting or otherwise changing the effect of the Act. The position is otherwise where, even absent the provision, there would be no entitlement under the Act, for example, because no reference date will have arisen.<sup>266</sup>

Thus, a contractual clause which provides that:

The Subcontractor must deliver to the Contractor's Representative a completed and signed statutory declaration in the form set out in Schedule 3, at least 2 working days prior to the time when, subject to the requirements of clause 14.1 (a) to (d), each claim for payment may be made pursuant to clause 14.1.<sup>267</sup>

was held to contravene the no contracting out provision set out in section 99 of the Queensland Act. In the words of Applegarth J:

Without the inclusion of cl 14.10 in the contract (and assuming compliance with other preconditions which are not in issue in this case or which would otherwise be ineffective to prevent a statutory entitlement arising), AWX would have a statutory entitlement to a progress payment. I accept AWX's argument that the consequences of non-compliance with cl 14.10 are severe. Those consequences

<sup>264</sup> [2015] QSC 218

<sup>265</sup> *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd & Anor* [2014] QSC 293.

<sup>266</sup> *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 218, [48]–[50].

<sup>267</sup> *Ibid*, [1]

will be disproportionate in a case in which the relevant non-compliance is trivial or where there is a reasonable justification for not being able to give a declaration in the form of paragraph 5 without qualification.

The contractual provision has no real utility in advancing the purposes of the Act. Non-compliance with the statutory declaration precondition thwarts the payment of a statutory payment claim which otherwise would be payable on or after the reference date. The withholding of such a payment affects cash flowing to a contractor and the contractor, in turn, paying its creditors, including sub-contractors. The contractual provision enables a party to withhold payment in a case in which a contractor experiences a temporary lack of liquidity or otherwise has a good reason to not pay a sub-contractor.<sup>15</sup> Depriving such a contractor of the cash flow required to carry on its business and complete the construction contract is inconsistent with the objectives of the Act.

The condition impedes rather than facilitates the purpose of the Act. It has little, if any, practical utility in facilitating the payment of a statutory entitlement. Its practical operation is to impede the payment of a statutory entitlement without any corresponding benefit. Any utility which the condition has in terms of facilitating payment of a statutory entitlement and advancing the objectives of the Act is outweighed by its effect in excluding what would otherwise be an entitlement to a progress payment and thereby ensuring cash flow to the contractor.<sup>268</sup>

### **Contractual terms subordinated?**

It is also incorrect for the proponents of the West Coast Model to contend that the parties agreed contractual arrangements are subordinated under the East Coast Model. The East Coast Model legislation provides that the agreed contractual arrangements will apply where, for example, in the case of a reference date, the contract sets out the date on which a progress payment claim can be made. Similarly, where the contract sets out the amount of a progress payment to which a person is entitled, then the Act provides that the amount claimed will be calculated in accordance with the terms of the contract. Likewise, in respect to the manner in which the construction work (or related goods and services) is to be valued, the Act provides that if the contract expressly deals with this matter, then that will be how the work will be valued.<sup>269</sup> It is only where the contract makes no express provision in respect to when a progress payment claim can be made, or in respect to the amount of a progress payment, or as to the valuation of construction work, that the relevant statutory default provisions apply.<sup>270</sup>

It should be observed (as was indeed reinforced in the judgment of Applegarth J in *BRB Modular*<sup>271</sup>) that, unlike the West Coast Model, the scheme of the East Coast Model operates to only override contractual payment arrangements when the consequences of non-compliance are outweighed by the consequences of a claimant being denied a statutory progress payment. In this sense, the scheme of the East Coast Model operates to override unfair contractual payment arrangements.

Further, and insofar as the proponents of the West Coast Model contend that such a model is to be preferred because it gives effect to the contractual arrangements freely entered into by commercial parties, then such a proposition is misplaced. In the context of an industry where there is an imbalance of bargaining power and where one party is presented with contract documentation on a non-negotiable, take-it-or-leave-it basis, the notion of preserving the principles of freedom of contract is very much misconceived. Against such a commercial backdrop, I consider that the East Coast Model is to be preferred because it provides some measure of protection to the party that is most vulnerable.

<sup>268</sup> *Ibid*, [59]–[61].

<sup>269</sup> Refer, for example, to ss. 8 (2)(a), 9 (a), 10(1)(a) and 10(2)(a) of the NSW Act.

<sup>270</sup> Refer, for example, to ss. 8 (2)(b), 9 (b), 10(1)(b) and 10(2)(b) of the NSW Act.

<sup>271</sup> *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 218.

### **Either party may make an adjudication application**

It is said that unlike the East Coast Model, the West Coast Model enables claims to be made up and down the contractual chain. It is therefore argued that because neither party is prevented from making an adjudication application, the West Coast Model is perceived as providing a fairer dispute resolution process which is more likely '...to produce outcomes that parties are either content to live with, or which provide a reasonable basis for commercial negotiations and eventual settlement on terms that are satisfactory to both parties.'<sup>272</sup>

It may well be that in a dispassionate and theoretical sense the above proposition may have some currency; however, the fact remains that the bigger mischief is to redress the current industry payment practices and that this is more likely to be achieved under the East Coast Model. It is little comfort for a claimant who has had payment withheld to be advised that it is better for its progress payment claim to be dealt with under a less rapid and potentially more expensive adjudication process because such a process is more likely to preserve the existing commercial relationship.

For a claimant, the fact that its progress payment claim has been withheld has already severely strained or fractured its existing commercial relationship and unless it is able to refer its disputed progress payment claim to a rapid and cost-effective adjudication process it may not be able to continue to survive commercially.

Again, it is all a question of what the prime purpose of any security of payment legislation should be. Should such legislation provide the means of enabling a progress payment claim to be quickly determined on a 'pay-now-argue-later' basis; or should such legislation provide an alternative dispute resolution mechanism that enables either party to refer any contractual dispute for evaluation on an interim basis (including claims such as the amount of damage that a contractor must pay to the other party)? It is my view that the prime thrust of the legislation is to provide a process whereby an interim decision in respect to the entitlement and assessment of a payment claim is more important. This is because such a legislative regime is more likely to ensure that a contractor's cash flow will be maintained.

### **Importance of being able to claim up the chain**

It is also important to observe that, notwithstanding that the West Coast Model permits claims to be made up and down the contractual chain, in actual fact the number of claims that have been made down the contractual chain (i.e. claims made by owners on head contractors or by head-contractors on subcontractors), under either the WA or NT Acts, have been very rare. The overwhelming number of matters that have been referred to adjudication under either Act have arisen as a result of claims made up the contractual chain. This confirms that the main cause of disputation within the industry relates to the withholding of progress payment claims and that it is the party that has had its payment claim withheld that is the party that almost always initiates an adjudication application.

### **The inquisitorial powers of adjudicators**

It is claimed that the merits of a dispute are more able to be fleshed out under the West Coast Model because an adjudicator is able to exercise inquisitorial powers in ascertaining issues of facts. In the words of Gerber P and Ong BJ:

Notwithstanding that the objective of the adjudication process is to 'determine the dispute fairly and as quickly, informally and inexpensively as possible', it is clear that a passive, 'rubber stamp' approach to adjudication is not conducive to the final and just determination of a dispute. Indeed, the tight time frame associated with the conduct of adjudication under the East Coast Model, coupled with its passive approach, will increase the likelihood that a losing party will argue that the adjudication was conducted in breach of the rules of natural justice/procedural fairness. Indeed, since the introduction of statutory adjudication, Australian courts have been inundated with cases where a party is seeking

<sup>272</sup> SoCLA (2014), op. cit. at para. 86.



to challenge an adjudicator's determination on the grounds that the process breached the rules of natural justice/procedural fairness.<sup>273</sup>

Thus (so it is argued), under the West Coast Model, the adjudicator is not unduly restricted in arriving at their decision on a document-only basis but can 'inform himself or herself in any way he or she thinks fit.'<sup>274</sup> Hence, for example, under the West Coast Model, an adjudicator can convene a conference where the parties' legal representatives and the various experts who have provided a written report can attend. The adjudicator can then request that the parties' submissions be re-submitted and presented in a specific manner (e.g. in a tabulated format with clear cross-references to any supporting documentation). Alternatively, the adjudicator may request the experts to provide clarification on specific aspects of their written reports. It is said that such a process is more likely to enable an adjudicator to arrive at a more reliable conclusion on the evidence presented by the parties.

During the consultation process I was given examples of how some adjudicators who have made adjudication decisions under the West Coast Model have applied their inquisitorial powers. It nonetheless became apparent from discussions with the relevant officials and regulators that the overwhelming number of adjudications carried out in Western Australia and the Northern Territory are carried out on the same document-only approach as adjudications made under the East Coast Model. This may perhaps reflect the fact that as in the case with the East Coast Model, it is not uncommon for interstate persons to be appointed as adjudicators and that therefore the costs associated with conducting a conference can become problematic.

Nonetheless, I accept the proposition that there may well be instances where the convening of a conference may assist the adjudicator in obtaining a better understanding of key aspects of a party's evidence, particularly in larger, more complex matters. In this regard, it is important to emphasise that there are provisions within all of the legislations that have adopted the East Coast Model that empower an adjudicator to convene a conference (albeit, other than in Victoria,<sup>275</sup> on the basis that the parties are not entitled to any legal representation), or to conduct a site inspection, or to request further written submissions to be provided (within specified deadlines).<sup>276</sup>

Thus, to the extent that proponents of the West Coast Model seek to contrast the process under that model with what they characterise as the passive approach adopted under the East Coast Model,<sup>277</sup> then I consider that such a comparison is somewhat exaggerated and misplaced. I do, however, accept that adjudicators should make greater use of their power to convene conferences rather than solely confine their decision-making process to a document-only basis, but this is an observation that applies equally to adjudications carried out under the West Coast Model as it does under the East Coast Model.

### Participation of legal representatives

I also accept the proposition that the parties' legal representatives should not be excluded from participating at a conference convened by an adjudicator, particularly in an adjudication involving a large matter and complex legal issues. Further, and as will be evident from my recommendations in Chapter 13, I accept that the existing timeframes associated with adjudications conducted under the

<sup>273</sup> Gerber, P and Ong, BJ (2013), *Best practice in construction disputes: avoidance, management and resolution*, LexisNexis Butterworths, Chatswood, NSW, 2013, [16.50].

<sup>274</sup> See s. 32(a)(b) of the WA Act.

<sup>275</sup> Following consultation, clause 84(3) the Queensland Bill 2017 was amended so as to provide the adjudicator with the discretion to allow parties to have legal representation. The Queensland Bill 2017 was passed on 26 October 2017 with 144 amendments and received Royal assent on 10 November 2017.

<sup>276</sup> See for example ss. 21(4) and (4A) of the NSW Act. Compare the NSW provision with section 22(5A) of the Victorian Act, which empowers an adjudicator to permit the parties to legal representation at a conference.

<sup>277</sup> Gerber, P and Ong, BJ (2013), *op cit*.

East Coast Model can at times (and particularly in a large and complex matter), operate not only in an unfair manner but discourage adjudicators to convene a conference. I therefore consider that with appropriate modifications to the existing process associated with the East Coast Model, adjudicators would feel more comfortable in convening conferences so as to obtain clarification from the parties in key aspects relating to the dispute.<sup>278</sup>

However, it is important to emphasise that the adjudication process, no matter how large the issue in dispute may be, is intended to operate on a ‘quick and dirty’ basis so as to enable an interim decision to be made. The process has not been designed to mimic the more formal procedures such as say, arbitration. That is why, given the time constraints prescribed by the legislation, adjudications will, for the main, be conducted on a document-only basis.

### Parties can agree an adjudicator

Finally, proponents of the West Coast Model contend that allowing the parties to choose their adjudicator ‘encourages confidence in the adjudication system and encourages higher standards and tends to produce fairer results’,<sup>279</sup> and that the East Coast Model does not enable this to occur. This observation is closely related to the view that the current process associated with the appointment of adjudicators has created a perception that the process is claimant friendly. This view has been expressed by Gerber and Ong in the following terms:

Indeed, it has been noted that in Victoria there are ANBs which have built a reputation of being more claimant friendly than others and are ‘selected on this basis’. As a result, questions as to whether adjudication outcomes are in any way affected by a claimant’s choice of a particular appointing body arise and this inevitably taints the impartiality of any adjudication process. Unsatisfactory adjudication selection processes may be the reason why, in the UK, there ‘has been a significant move towards parties ... agreeing the appointment of one (adjudicator) when dispute has arisen.’ The mutual appointment of an adjudicator once parties are in dispute allows the parties to select an adjudicator whose skill-set reflects the issues in dispute and increases the likelihood that the adjudicator will arrive at a just and acceptable solution to the dispute.<sup>280</sup>

I agree with the proposition that, in certain types of disputes, the parties should be afforded with the opportunity to agree on their own adjudicator and I deal with this issue in further detail in Section 13.2 of this Report. I believe that the security of payment system should enable the parties to agree on an adjudicator at the time of the dispute.

### Conclusion

For the reasons set out above, I have come to the conclusion that a legislative model that incorporates the prime objectives and broad structure of the East Coast Model is preferable, but with significant modifications so as to provide greater flexibility and to ensure greater procedural fairness. The details of this new model are set out in the following chapters of this Report.

#### Recommendation 1:

Security of payment legislation should seek to promote prompt payment so as to maintain a contractor’s cash flow. Such an outcome is more effectively achieved through adoption of a legislative regime broadly based on the East Coast Model.

<sup>278</sup> Note that clause 84(3) the Queensland Bill 2017 was amended following consultation so as to provide the adjudicator with the discretion to allow parties to have legal representation. The Queensland Bill 2017 was passed on 26 October 2017 with 144 amendments and received Royal assent on 10 November 2017.

<sup>279</sup> SoCLA (2014), op. cit., para. 203.

<sup>280</sup> Gerber P and Ong BJ, op. cit., [16.45].



## 7.6 Is a two-tier system of ‘complex’ and ‘standard’ claims needed?

Having arrived at the conclusion that the East Coast Model is more effective in maintaining a contractor’s cash flow and is therefore the preferred best practice legislative model, the next question to consider is whether that model should incorporate a composite two-tier system of ‘standard’ and ‘complex’ claims as provided under the Queensland legislation.

### Discussion and recommendation

Just as the earlier sections discussed the balance between accommodating the parties agreed contractual arrangements and the requirements of the overriding legislative scheme, there is a similar tension between ensuring that the legislative scheme is kept simple whilst also affording procedural fairness to both parties.

#### *In favour of a two-tier system*

I understand the rationale of those who argue that the ‘one-size-fits-all’ approach adopted under the East Coast Model in all jurisdictions other than Queensland ‘can result in significant injustice’,<sup>281</sup> particularly in relation to payment claims involving large amounts and/or claims for complex matters.<sup>282</sup> The notion that a claimant can have up to 12 months after the relevant construction work was carried out to prepare its payment claim<sup>283</sup> (including the compilation of detailed submissions and supporting documentation such as witness statements and expert reports), whilst the respondent is only provided with an extremely short time period to respond,<sup>284</sup> has been the subject of extensive criticism.

The imbalance of time within which the parties are required to submit their respective payment claim, payment schedule and adjudication response under the East Coast Model can, in some cases, result in a respondent not being provided with a fair opportunity to respond to and answer a claimant’s submissions and arguments, particularly where the payment claim involves complex and multiple technical issues. Such an ‘imbalance in preparation time allows one party to take advantage of the element of surprise and effectively ‘ambush’ the other’.<sup>285</sup> It was so as to address this imbalance that the Wallace Review recommended the adoption of a two-tier system, which grants longer time periods to the respondent to provide its payment schedule and adjudication response in circumstances where it had been served with a complex payment claim. This part of the Wallace Review was incorporated in the 2014 amendments to the Queensland Act.<sup>286</sup>

#### *Against a two-tier system*

Nevertheless, after only being in operation for three years since its introduction, the two-tier system, or composite scheme, of the Queensland Act has been criticised as having unduly complicated and elongated the adjudication process relating to large matters.

Having been involved as an adjudicator under the post-2014 Queensland legislative regime relating to several complex payment claims, I well understand the following sentiments that have been expressed by Baker McKenzie and Adjudicate Today:

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<sup>281</sup> Wallace Review, op cit, p. 182.

<sup>282</sup> Such as a claim for costs incurred due to a latent condition or a claim for time-related costs.

<sup>283</sup> As in the case of the NSW, Tasmania and ACT Acts.

<sup>284</sup> Under the NSW Act and in the case of responding to a payment claim by way of a payment schedule, this is required to be provided within 10 business days after service of the payment claim, and in the case of providing an adjudication response, this is required to be provided within either 5 business days after receiving a copy of the adjudication application or 2 business days after receiving notice of the adjudicator’s notice of acceptance of the application, whichever time expires later — refer to ss. 14 (4) and 20 (1) of the NSW Act.

<sup>285</sup> Baker McKenzie, written submission, p. 16.

<sup>286</sup> Refer to ss. 18A(3) and 24A(4)–(7) of the Queensland Act.

We have recently had the experience of advising a claimant in relation to a Queensland Complex Claim in which the Payment Claim was issued on 17 October 2016 and the Adjudication Determination was not issued until 15 March 2017. The 5-month duration of this Complex Claim was the inevitable consequence of the extended periods allowed by the Complex Claim procedure compounded by the Christmas/New Year shutdown period from the calculation of Business Days. We consider this period is too long and is inconsistent with the objectives of the legislation.<sup>287</sup>

And:

No claimant, properly advised by experienced lawyers, should commence a potential 24-week process for an interim decision ...

There is no obvious benefit to splitting the applications on the basis of complexity or value. The complex matters in Qld have extended across many months and delivered little to no benefit to cash flow (a key reason for the creation of the scheme).

Further, it has proved fertile ground for parties to make multiple submissions that they require more and the documents cannot be prepared in the times required. Ultimately, a party will take this to court as part of the challenge to validity of the decisions based on a denial of procedural fairness.<sup>288</sup>

At its most basic and fundamental level, an effective security of payment legislative regime must:

1. be simple, not only in drafting style but also in relation to its process
2. provide for a rapid process, from the service of a payment claim to the making of an adjudication decision
3. be costs effective so that costs do not deter usage by claimants seeking to enforce progress payment claims, and
4. produce a fair outcome, and perceived to be fair, for all parties.

However, the current two-tier system under Queensland Act fails when assessed against these criteria.

### *Observations of the two-tier system under the Queensland Act*

#### **The two-tier system is complex and confusing**

The current two-tier system in Queensland is complex and confusing and has introduced further layers of uncertainty into the adjudication process. A claimant who has served a payment claim for an amount greater than \$750 000 may now have to wait for up to 30 business days after it had served such claim on the respondent before receiving a formal response to its claim by way of a payment schedule. This is an extraordinarily long period for a claimant to wait.

Even after the claimant has received a payment schedule, and if it disputes the scheduled amount and wishes to refer its payment claim to adjudication, the claimant may not know all of the reasons that the respondent may have for withholding payment. This is because (by reason of section 24(5) of the Act) a respondent is now permitted under the Queensland Act to include in its adjudication response any reason for withholding payment, regardless of whether or not such reason had been included in the payment schedule. Placing a claimant in a position of not knowing all of the reasons as to why payment is being withheld can hardly be regarded as satisfactory.

<sup>287</sup> Baker McKenzie, written submission, at p. 18

<sup>288</sup> Adjudicate Today, written submission, at paragraphs [4.12] and [4.22].

Then, once the claimant has been served with a copy of the adjudication response, the claimant will need to carefully read through the document (which may be voluminous) to see if it does contain any reasons that had not been included in the payment schedule. If this should be the case, then the claimant will only have a period of 5 business days to give notice to the adjudicator of its intention to provide a reply to those new reasons. Further, the claimant's reply to those new reasons must be provided within 15 business days after it had received a copy of the adjudication response, although it can make an application to the adjudicator to request a further 15 business days to give such a reply.<sup>289</sup>

However, when submitting its reply, the claimant must confine its submissions only to the new reasons. The adjudicator would be in breach of section 26(2)(c) of the Act (and therefore have committed a jurisdictional error) if they took into account any submission (or documentation) made by the claimant in its reply that did not relate to the new reasons (unless the adjudicator gave the respondent an opportunity to comment on the matters contained in the reply that did not relate to any new reasons).

In other words, the right to submit a reply is not an opportunity for the claimant to salvage, embellish, perfect or merely reiterate submissions it has previously made in its adjudication process. It can therefore be seen that the introduction of a two-tier system has significantly complicated the Queensland legislative regime.

### **Differentiating claims based on a dollar value is misconceived**

The notion of differentiating a 'complex' claim from a 'standard' claim based on the dollar value of the payment claim is fundamentally misconceived. It does not follow that because a claim is over \$750 000 it is necessarily more complex than a claim of, say \$500 000 (or even for a lesser amount). Nor does it follow that because a claim is for a larger amount that it is necessarily less pressing than a claim for a smaller amount. Indeed, given the hierarchical nature of the contractual arrangements within the industry, it is not inconceivable that a multi-million-dollar claim made by a subcontractor will be of critical importance in enabling the subcontractor to make prompt payment to its subcontractors. Thus, if the process relating to the adjudication of such a claim falls within the elongated timelines associated with a 'complex' claim then such a process will not facilitate the intended objectives of the legislative scheme.

Additionally, differentiating a 'complex' claim from a 'standard' claim based on the dollar value of the payment claim invariably results in some claimants trying to 'game' the regime by submitting claims below the threshold amount and thus depriving respondents of the additional time in which to provide their response had the payment claim fallen within the definition of a 'complex' claim. To the extent that the legislative scheme is able to be manipulated to enable such practices to occur, then this causes industry resentment and undermines the integrity of the legislation. If the purpose of the legislation is to provide a respondent with more time to adequately prepare its response to a payment claim that included complex issues, then delineating a two-tier system based on the dollar value of the payment claim is unlikely to achieve the intended outcome.

### **Parties to large disputes are often more sophisticated and well-resourced**

It is not uncommon for parties involved in disputes involving larger amounts (particularly where the respondent is a major head contractor) to be well resourced and therefore able to deal with complicated issues quickly. This is not to suggest that a well-resourced respondent should have a lesser entitlement to be afforded procedural fairness than in the case of a less resourced party. Rather, it only highlights that in disputes between a subcontractor and a head contractor involving large amounts, the head contractor is more likely to be sophisticated and well-resourced and therefore able to apply the necessary resources to enable it to respond quickly to payment claims.

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<sup>289</sup> Refer to ss. 24B (1) to (7) of the Queensland Act.

### **The two-tier model is not rapid**

A legislative regime that takes between five and six months to make an interim decision cannot be regarded as being able to provide a rapid means of resolving disputed payment claims. For the reasons outlined previously, the adjudication process relating to a payment claim for an amount greater than \$750 000 has been elongated to the degree where it is now no longer an attractive option for claimants. True, payment claims for amounts greater than \$750 000 represent less than 10% of the claims made under the Queensland Act.<sup>290</sup> However, as pointed out above, it is nonetheless important that such claims are able to be dealt with in a rapid fashion because of the knock-on effect such a claim will have to subcontractors further down the contractual chain.

Put simply, the 2014 amendments to the Queensland Act overcompensated the additional time given to respondents to provide a payment schedule and adjudication response in relation to a complex payment claim such that the adjudication process has come to be regarded by industry as no longer rapid.

The task of designing a legislative regime that affords procedural fairness to all parties whilst enabling a payment claim to be decided in a rapid manner is not without its difficulties. What is the point of introducing such extensive additional timelines if it results in a claimant no longer being provided with a rapid process for the adjudication of a 'complex' payment claim? It very much seems that the legislature was more concerned with ensuring that the respondent's interests were duly accommodated, even if in so doing it resulted in a legislative scheme that has come to be viewed by claimants as no longer able to provide a viable process for dealing with 'complex' payment claims.

### **The two-tier model has increased costs for all parties**

It is apparent that the elongated process associated with the adjudication of 'complex' payment claims has substantially increased both the parties' legal costs, as well as, the fees charged by adjudicators. Not only does the Queensland Act provide the adjudicator with more time to decide a 'complex' payment claim than a 'standard' claim,<sup>291</sup> but the process also now provides the parties with additional opportunities in which to provide further documentation and/or submissions to the adjudicator.

For example, where a respondent has included new reasons in its adjudication response, this will inevitably involve the claimant incurring additional costs as it instructs its lawyers to prepare a reply. Indeed, the service of a 'complex' payment claim can be a very risky decision for a claimant as it can never be able to reliably estimate or budget for the costs associated with the matter if it refers the payment claim to adjudication, and if the adjudication response includes new reasons, and if also the adjudicator grants the parties an extension of time for the forwarding of the adjudication response and reply.

Further, any elongation of the process from the service of a complex payment claim to the making of an adjudication decision may well require a claimant to extend its overdraft facility or to seek alternative short-term financing in order to meet its on-going commitments.

**Table 2**, produced by Adjudicate Today and based on the statistics published by the QBCC, confirms that there has been a significant increase in the adjudication fees for larger payment claims made under the Queensland Act since 2014.

<sup>290</sup> Refer to the QBCC Registry adjudication statistical data for 2015/16 and 2016/17. In each year payment claims for amounts over \$750 000 represented 6.3% and 5.9% of total claims respectively. Previous year's data only provides statistics for payment claims above \$500 000 <<http://www.qbcc.qld.gov.au/adjudication-reports-archive>>

<sup>291</sup> Refer to s. 25A(5) and compare the deadline to that set out in s. 25A(4).

**Table 2: Queensland adjudication fees statistics**

Value of claim	Pre-amendments 1 July 2014 – 30 December 2014	Post-amendments 1 July 2015 – 30 June 2016	Post-amendments 1 July 2016 – 31 December 2016
\$0–\$4 999	23.4%	25.4%	41.5%
\$5 000–\$9 999	15.0%	10.9%	12.0%
\$10 000–\$24 999	9.8%	7.5%	8.7%
\$25 000–\$39 999	8.8%	10.1%	9.8%
\$40 000–\$99 999	6.2%	7.5%	8.5%
\$100 000–\$249 999	4.8%	4.2%	4.8%
\$250 000–\$499 999	2.5%	2.5%	4.3%
\$500 000–\$749 999	0.2%	2.4%	2.8%
\$750 000+	0.2%	1.8%	2.1%

Source: Adjudicate Today, written submission, p. 19.

### Conclusion

For the reasons set out above, I consider that a two-tier system as currently exists under the Queensland Act, does **not** provide the basis for a preferred model. I consider that the preferred model should **not** have comprise such a composite system.

Nonetheless, I believe that the legislative scheme, whilst adopting a single process for all claims, can be designed with sufficient flexibility to provide a respondent, in appropriate circumstances, with additional time in which to provide its reply to a payment claim that involves a large amount, includes extensive documentation and relates to complex technical issues.

However, the flexibility to be provided to a respondent in such circumstances will not compromise the legislation's prime objective of ensuring that a payment claim can be dealt with in a rapid manner. Rather, a claimant should be required to provide more details in its payment claim than is currently the case, thereby enabling a respondent to be better apprised of the claim being made and as to how the claimed amount has been arrived at. This should enable a respondent to provide its payment schedule within the prescribed time period and set out all its reasons for withholding payment.

The legislation should **not** provide an opportunity for a respondent to include new reasons when lodging its adjudication response, thereby obviating the need for the claimant to provide a reply and therefore avoiding the elongation of the process.

Chapter 12 of this Report outlines the manner in which I consider that an appropriate balance can be struck between the need to accord procedural fairness to all parties whilst retaining the essential requirement that the process will enable a disputed payment claim to be dealt with rapidly.

### Recommendation 2:

The legislation should be drafted and structured as simply as possible and not provide for a two-tier / composite system of 'complex' and 'standard' claims, as is the case under the Queensland legislation. However, the legislation should enable a respondent, in appropriate circumstances, to make a request to the adjudicator for additional time to respond to a claimant's adjudication application.

# Chapter 8: The objects of the legislation

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## 8. The objects of the legislation

### 8.1 The objects of a security of payment Act

In Chapter 4, when discussing the underlying purpose for the legislature's intervention, I compared the objects provisions as currently set out under the different legislative regimes. I also quoted section 3 of the NSW Act, which details the object of the legislation and noted that most have adopted the East Coast Model have incorporated a similar provision.

#### Responses from stakeholders

The consultation process did not specifically seek stakeholders' views on which of the various legislative regimes they considered best dealt with the objects of the legislation. Nonetheless, by seeking stakeholders' views regarding the relative merits of the East Coast and West Coast Models, discussions relating to the underlying philosophy that underpinned the different models inevitably came to the fore.

Proponents of the East Coast Model supported the thrust of a legislative regime that enshrined the concept of giving the party that has carried out construction work (or supplied related goods and services) a statutory right to progress payment and for the contractor to refer disputed progress payment claims to rapid adjudication.

On the other hand, proponents for the West Coast Model believed that the object of the legislative scheme should be to provide either party under a construction contract with the right to refer any contractual dispute to an adjudication process that is both rapid and fair.

#### Discussion and recommendation

In Chapter 4, I outlined the reason as to why governments in various jurisdictions considered it necessary to introduce legislation to ensure that the party that has carried out construction work (or supplied goods and services) under a construction contract would be better able to receive prompt progress payments. In other words, governments have sought to intervene in order to redress the consistent failure of a contractor being paid in full and on time for the work it had done, notwithstanding that it had a contractual entitlement to receive such payment. I have also outlined that the most effective way in which the legislature has been able to achieve such an outcome was to provide the contractor with a statutory entitlement to progress payment (regardless of whether the construction contract makes provision for such progress payment) and to provide a procedure whereby a contractor is able to enforce such statutory entitlement.

There are many reasons why the legislature has felt it necessary to intervene, not least of which is the recognition that the hierarchical contractual chain does not enable the party at the lower part of the chain to negotiate fair and reasonable contract terms, including provisions relating to prompt payment. This has resulted in the party at the lower part of the contractual chain being unable to maintain its cash flow and thereby incurring significant financial hardship.

Once this is accepted as the prime reason for the legislature's intervention, then various things follow. First and foremost, the procedure for enforcing one's statutory entitlement to rapid adjudication becomes a means to an end. In other words, the purpose of the rapid adjudication process is to enable the contractor to enforce its statutory progress payment claim, and to be able to do so in an expeditious manner. It is not, as the legislations that have adopted the West Coast Model infer, an end to itself.

The legislature has seen fit to intervene, not so as to introduce a rapid adjudication process that can resolve **any** dispute between the parties, but rather to quickly determine on an interim basis, the contractor's progress payment claim. The interests of enshrining a contractor's rights to progress

payment is front and centre in the mind of the legislature. That is why the jurisdictions that have adopted the East Coast Model expressly provide that the only party who can make a claim is the party that has carried out the construction work (or supplied goods and services).

It is for this reason that I consider that security of payment legislation should set out its objects in similar wording to that set out in section 3 of the NSW Act. That section captures the essence or the *raison d'être* for the legislature's intervention and it of course explains why all the other jurisdictions that have adopted the East Coast Model have adopted similar wording in the equivalent object clause of their legislation.

**Recommendation 3:**

The objects of the legislation should be to provide a party who has undertaken construction work (or supplied related goods and services) under a construction contract with:

- a) a statutory right to progress payments for that work (or for the supply of related goods and services), and
- b) a procedure whereby they can enforce their statutory right to progress payments.

The 'object' provision set out in Section 3 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the NSW Act) provides a suitable model.



# Chapter 9: Definitions

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## 9. Definitions

All of the legislation includes provisions that seek to define a number of key expressions or terms. Rather than deal with each of the definitions, the Review has focused only on those expressions/terms that emerged during the consultation process or were identified as related to other matters being considered.

### 9.1 Definition of ‘construction work’

‘Construction work’ is an essential concept underpinning the legislative scheme. In order for a claimant to avail itself of the benefit of the legislation, it must demonstrate that it has entered into a ‘construction contract’, which is defined in the various legislation that have adopted the East Coast Model as a ‘contract or arrangement under which one party undertakes to carry out construction work...’.

The definition of ‘construction work’ is generally consistent across all jurisdictions and typically means the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings, structures or works forming, or to form, part of land, whether permanent or not, as well as the installation of fittings and associated preparatory and finishing works.<sup>292</sup> Most jurisdictions also provide for regulations to prescribe other ‘work’ that is, or is not, ‘construction work’ for the purposes of the Act.

Although the definition of ‘construction work’ is largely consistent between jurisdictions, there are some notable differences which create confusion and add a level of uncertainty as to whether activities of the same type will be covered in different jurisdictions. This is further complicated by exclusions from the definition of ‘construction work’, and in particular the exclusion of mining activities. These differences are discussed further below.

#### East Coast Model definition

The definition of ‘construction work’ in section 5 of the NSW Act is reproduced by all jurisdictions employing the East Coast Model with only minor variations, which are as follows:

- In the Queensland Act, ‘construction work’ also includes carrying out the testing of soils and road making materials during the construction and maintenance of roads.<sup>293</sup>
- In the SA Act, ‘construction work’ includes the erection, maintenance or dismantling of ‘fences’ as well as ‘scaffolding’.<sup>294</sup>
- In the Tasmanian Act, the definition of ‘construction work’ is drafted more expansively than the NSW definition on which it is based, and incorporates broader terminology such as:
  - road, rail, energy, aviation and marine ‘infrastructure’, as opposed to roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways
  - ‘plumbing’, rather than drainage, sanitation and water supply
  - ‘systems and services’ rather than fittings, which also extends to include ‘passenger lifts and goods lifts’, and

<sup>292</sup> Refer to s. 5 of the NSW Act, s. 5 of the Victorian Act, s. 10 of the Queensland Act, s. 5 of the SA Act, s. 4 of the WA Act, s. 5 of the Tasmanian Act, s. 6 of the NT Act, and s. 7 of the ACT Act.

<sup>293</sup> Refer to s. 10(1)(g) of the Qld Act.

<sup>294</sup> Refer to ss. 5(1)(e)(iii)

- section 5(1)(d)(iii) refers to ‘plant and equipment’ rather than ‘scaffolding’.

Interestingly, the definition of ‘construction work’ under the Tasmanian Act also includes:

- ‘structures, such as poles, wires and netting, erected to support or protect agricultural, horticultural or forestry products’,<sup>295</sup> and
- ‘structures (other than underground structures constructed to enable access to minerals) to enable persons to gain access to places on which agricultural, horticultural, forestry, tourist or mining activities are being, or are to be, carried out.’<sup>296</sup>
- In the ACT Act, a notable departure from the NSW definition is the inclusion of the word ‘includes’ in each of the sections 7(1)(a)–(g), which suggests the included examples are non-exhaustive.

In Queensland and the ACT, the definition of ‘construction work’ also includes ‘building work’ within the meaning of the *Queensland Building and Construction Commission Act 1991* (Qld) and the *Building Act 2004* (ACT) respectively.<sup>297</sup>

### West Coast Model definition

In Western Australia and the Northern Territory, the respective definitions of ‘construction work’ are almost identical and while similar to the definition in the NSW Act are more extensive than the NSW definition. Notably, in Western Australia and the Northern Territory, the definition of ‘construction work’ includes ‘civil works’, which is further defined at section 4(1) and section 4 of the respective Acts and reflects the meaning of ‘construction work’ defined at section 5(1)(b) of the NSW Act.

Additional items of ‘construction work’ in the WA and NT Acts include:

- constructing structures that form or will form part of the seabed, and
- installing lifts, escalators, insulation, furniture or furnishings.

### Exclusions

Every security of payment Act contains an exclusion for mining activities from the definition of ‘construction work’. The mining exclusion is broadly defined along the same lines under the East Coast Model and excludes:

- a) the drilling for, or extraction of, oil or natural gas, and
- b) the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose.

While the WA and NT Acts include similar mining exclusions to the other jurisdictions, they cover a broader list of work that is **not** considered ‘construction work’, including constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance.

The WA Act also further specifies at section 4(3)(c) that ‘fabricating or assembling items of plant used for extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance’ is also excluded from the definition of ‘construction work’.

<sup>295</sup> Refer to s. 5(1)(b)(vi) of the Tasmanian Act.

<sup>296</sup> Refer to s. 5(1)(b)(vii) of the Tasmanian Act.

<sup>297</sup> Refer to s. 10(2) of the Queensland Act and s. 7(1)(g) of the ACT Act.

The NT Act excludes ‘wholly artistic’ works including sculptures, installations and murals.<sup>298</sup>

Both the WA and NT Acts also exclude the construction of watercraft.

### *Consideration of the mining exclusion in the East Coast Model*

In relation to the mining exclusion set out in point (b) above, the Queensland Court of Appeal in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor*<sup>299</sup> (*Thiess*) considered a narrow interpretation of that exclusion and unanimously determined that unless the work undertaken is physically ‘extracting’ the mineral, the mining exclusion contained in section 10(3) of the Queensland Act (and therefore the East Coast Model) will not apply.

*Thiess* also demonstrated that the courts will consider the nature of the work in context of the larger project, and that work which is performed for a collateral purpose and not directly involved in the primary mining activities may fall within the meaning of ‘construction work’. The approach in *Thiess* was affirmed in *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor*.<sup>300</sup>

The effect of the mining exclusion and its interpretation in the *Thiess* decision was considered by the Wallace Review, which concluded that ‘[t]he jurisdiction of the BCIPA should not be reduced or restricted to specifically exclude payment claims for some types of work other than those already provided.’<sup>301</sup>

### *Consideration of the mining exclusion in the West Coast Model*

The scope of the pre-2016 wording of the mining exclusion in section 4(3)(c) of the WA Act, which provided that construction work did not include ‘constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance’, was considered by the WA State Administrative Tribunal in *Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd*<sup>302</sup> (*Conneq*). The case centred on the construction of a desalination plant and whether the work involved ‘constructing any plant for the purposes of extracting or processing ... any mineral bearing or other substance’, within the meaning of the former section 4(3)(c).

The Tribunal determined that there must be a very close relationship between the relevant plant and the act of extraction or processing, in order to justify a finding that the plant was constructed ‘for the purpose of’ the extraction or processing of minerals. The Tribunal stated that:

The wording of the subsection does not suggest that its application was intended to be limited to constructing plant used for extracting or processing substances that were intended to be mined for profit; the application of the subsection turns on the purpose of constructing the plant rather than on the purpose of extracting or processing the substance concerned. In our view, the plain meaning of the language used in the subsection must prevail.<sup>303</sup>

The Tribunal held that the construction of the desalination plant came within the mining exclusion and was therefore not captured by the security of payment legislation.

The *Conneq* decision was considered by Evans during the review of the WA Act. Evans found that there was strong support among stakeholders to amend the WA Act so that the construction of such plant came within the definition of ‘construction work’:

<sup>298</sup> Refer to s. 6(2)(c) of the NT Act.

<sup>299</sup> [2012] QCA 276 (*Thiess*).

<sup>300</sup> [2012] QSC 4.

<sup>301</sup> Wallace Review, op cit, p. 50.

<sup>302</sup> [2012] WASAT 13.

<sup>303</sup> *Conneq*, [82].

... in favour of amending the [WA] Act to include among construction work generally, the constructing of any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance.<sup>304</sup>

Evans concluded that '[w]hen the objectives of the Act are considered (especially the principle of 'keeping the money flowing'), there is no strong objective reason for the current exclusion'. Evans subsequently recommended '[t]he wording of s. 4(3)(c) of the Act should be amended to bring the current excluded activities within the jurisdiction of the Act.'<sup>305</sup>

Following the decision in *Conneq* and the recommendations of the Evans Review, section 4(3) of the WA Act was subsequently amended by the Construction Contracts Amendment Bill 2016 (WA), to:

... make it clear that only the fabricating and assembling of items of plant used for extracting or processing oil, natural gas or other minerals is excluded from the definition of 'construction work' and that normal construction work associated with processing facilities is not excluded.<sup>306</sup>

### Responses from stakeholders

While there are some differences in the definition of 'construction work' across jurisdictions, this is generally not considered to be a significant issue. As such, there was very little in the way of stakeholder feedback on this definition. Where feedback was provided, it was focussed on the more contentious issue of the mining exclusion.

Whereas the wording of the mining exclusion within the definition of 'construction work' is broadly consistent under the East Coast Model, the provisions under the WA and NT Acts are different and, notwithstanding the amendments to section 4(3) of the WA Act (under the 2016 amendments), there remains confusion and uncertainty across industry.

This issue was highlighted in the submission of Baker McKenzie, where they noted that 'there are confusing differences across jurisdictions' and that 'further reform is needed in order to make the scope of the "mining exception" clear and allow people to understand their rights and obligations under SOP law'.<sup>307</sup>

Accordingly, Baker McKenzie recommended that 'the scope of the mining exclusion should be clearly defined and applied uniformly across all jurisdictions'.<sup>308</sup>

### Discussion and recommendation

Despite the differences in the definition of 'construction work' across the jurisdictions, a comparison of the various definitions and an assessment of the objects of the security of payment legislations indicates the laws are intended to apply to 'construction work' in the broadest term. Given this, it is critical that the definition of 'construction work' not only reflects the intent of the current legislation but also the broadest scope of construction work. Such an approach would be consistent with the sentiments expressed by the majority of the state and territory Ministers during their second reading speeches.

It therefore seems sensible that the definition of 'construction work' as set out in section 5 of the NSW Act achieves that objective and there is little to be achieved by tinkering with the current wording. Indeed, whatever differences there may be in the definition of that expression, it is clear that the intention of each of the legislatures that have adopted the East Coast Model was to cast the

<sup>304</sup> Evans Review, op cit, p. 54.

<sup>305</sup> Ibid.

<sup>306</sup> Western Australia, Parliamentary Debates, Assembly, 22 September 2016, p.1 (S K L'Estrange, Minister for Small Business.

<sup>307</sup> Baker McKenzie, written submission, p .9

<sup>308</sup> Ibid, p. 10; see also Annexure B.

definition in the widest possible manner. Further, the judiciary, for its part, has acknowledged the legislatures underlying intention, and this is clearly demonstrated in the approach that Philippides J adopted in *Thiess* when Her Honour, in deciding to give a narrow interpretation to the mining exception to the definition of ‘construction work’, said:

... I do not find anything in the purpose of the provision itself, or of the Act generally, which requires the words in s. 10(3)(b) to be given a broad meaning. Indeed, the contrary is the case. The beneficial purpose of the Act is directed at providing a speedy interim means of payment to those who undertake to carry out construction work or to supply related goods and services under a construction contract. It is difficult to see how that beneficial purpose is promoted by a wide interpretation of the exception in s. 10(3).<sup>309</sup>

Accordingly, I recommend that the definition of ‘construction work’ as set out in section 5 of the NSW Act be used as the basis for any security of payment legislative model.

#### **Recommendation 4:**

The legislation should include a definition of ‘construction work’, which should be drafted in the broadest terms.

The definition of ‘construction work’ in section 5 of the NSW Act provides a suitable model.

## **9.2 Definition of ‘related goods and services’**

The legislative scheme enables a party that has entered into a construction contract for the supply of ‘related goods and services’ to make a claim for a progress payment.

All security of payment Acts define ‘related good and services’ for the purposes of the Act. As with the definition of ‘construction work’, the definition of ‘related goods and services’ is generally consistent across all jurisdictions and typically means any of the following:

- a) materials and components that form part of any building, structure or work
- b) plant or materials (supplied by sale, hire or otherwise)
- c) the provision of labour, and
- d) the provision of services including architectural, design, surveying, quantity surveying, building, engineering, interior or exterior decoration or landscape advisory services.

All jurisdictions provide for additional goods and services to be included or excluded for the purposes of the Act by way of Regulations.

### **East Coast Model definitions**

The definition is almost identical across NSW, Victoria, Queensland, South Australia, Tasmania and the ACT, with only a few small differences, including:

- In Victoria and South Australia, the services at point (d) above include ‘technical’ as well as advisory services.
- In Tasmania, the description of services at point (d) above is much more expansive and also includes ‘inspection, reporting, or advisory, services provided in respect of buildings, building

<sup>309</sup> *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor* [2012] QCA 276, [62].

systems and services, energy and sustainability systems and services, geotechnical, engineering’.<sup>310</sup>

### West Coast Model definitions

In Western Australia and the Northern Territory, the definition of ‘goods and services related to construction work’ covers a similar range of goods and services to that defined under ‘related goods and services’ in the East Coast Model. However, WA and NT definitions are expressed in different terms and with several notable additions, in particular:

- The definition includes three subcategories of ‘Goods’, ‘Professional Services’ and ‘On-site services’ as opposed to the two subcategories of ‘Goods’ and ‘Services’ under the East Coast Model.
- ‘Goods’ specifically includes ‘Fittings’ referred to in the definition of ‘construction work’ in addition to ‘materials and components’ and applies to goods whether pre-fabricated or not.
- ‘Services’ are described as ‘Professional Services’, which includes ‘services that are provided by a profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds)’. However, examples of the range of services covered are similar to the East Coast Model and include ‘surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management, services’. Accounting, financial and legal services are also specifically excluded.
- ‘On-site services’ includes services other than ‘Professional Services’ that relate directly to construction work, including the provision of labour.

### Responses from stakeholders

The Review did not specifically seek stakeholder feedback on the appropriateness of the definition of ‘related goods and services’. However, all stakeholders were provided the opportunity to raise any additional concerns with the current legislative models. Despite this, the Review did not receive any additional comments on this matter.

Noting the above differences between the East and West Coast Models, the lack of feedback is likely due to the broad similarities across jurisdictions in respect of this definition and the fact that it is relatively non-contentious, is intentionally drafted in very broad terms and has not been the subject of extensive challenge or consideration by the courts.

Nonetheless, given that issues with the definition of ‘construction work’ were identified during consultations, it is prudent to also consider the complementary key definition of ‘related goods and services’.

### Discussion and recommendation

No stakeholders raised any concerns in respect to the expression ‘related goods and services’ as defined under any of the various legislations (other than urging for the adoption of a consistent approach across all jurisdictions). Given my earlier recommendation that the legislative model be broadly based on the East Coast Model,<sup>311</sup> I see no reason why a legislative model should not incorporate the definition as set out under section 6 of the NSW Act. Clearly all of the jurisdictions that have adopted the East Coast Model have embraced the thrust of the NSW definition by ensuring that (with the exception of some minor variations) the same wording has been adopted in their own legislation. The wide net cast by the definition ensures that the beneficial purpose of the legislation will extend to those who:

<sup>310</sup> Refer to s. 6(1)(b)(iii) of the Tasmanian Act.

<sup>311</sup> Refer to Recommendation 1 in Section 7.5 of this Report.

- (i) supply materials and components that form part of the building, structure or work arising from construction work (e.g. tiling, bricks etc.)
- (ii) supply plant or materials for use in connection with the carrying out of construction work (e.g. cranes, scaffolding etc.), and
- (iii) provide a range of services in relation to construction work (e.g. design, landscaping etc.).

#### Recommendation 5:

The legislation should include the definition of ‘related goods and services’, which should be drafted in the broadest terms.

The definition of ‘related goods and services’ in section 6 of the NSW Act provides a suitable model.

### 9.3 Definition of ‘construction contract’

The NSW, ACT, Queensland, South Australia, Tasmania and Victorian Acts all define ‘construction contract’ in similar terms with minor drafting differences:

‘Construction contract’ means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.<sup>312</sup>

The WA Act definition defines a ‘construction contract’ as meaning:

A contract or other agreement, whether in writing or not, under which a person has one or more of the following obligations:

- (a) to carry out construction work;
- (b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);
- (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);
- (d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b).<sup>313</sup>

Sections 5(1), (2) and (3) of the WA Act further define what ‘goods’, ‘professional services’ and ‘on-site services’ are related to ‘construction work’ for the purposes of the Act.

The NT Act definition is substantially the same as the WA Act definition, with the exception that it does not contain the phrases ‘or other agreement’ or ‘other arrangement’, meaning that the definition is much narrower in scope.<sup>314</sup>

The courts have found that the existence of a construction contract between the claimant and respondent within the meaning of the Act is a ‘basic and essential requirement’ to be met as a precondition to a valid adjudicator’s determination.<sup>315</sup> In other words, if there is no construction

<sup>312</sup> Section 4 of the NSW Act. See also s. 3 of the ACT Act, Sch. 2 to the Queensland Act, s. 4 of the SA Act, s. 4 of the Victorian Act and s. 4 of the Tasmanian Act.

<sup>313</sup> Section 3 of the WA Act.

<sup>314</sup> Section 5 of the NT Act.

<sup>315</sup> *Fifty Property Investments Pty Ltd v O’Mara* [2006] NSWSC 428 [17] (Brereton J). See also *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349.



contract in existence then a contractor will have no entitlement to make a payment claim under the Act.<sup>316</sup>

### Responses from stakeholders

Stakeholders were not asked specifically about the definition of ‘construction contract’. However, some stakeholders made submissions in relation to the definition. Adjudication Forum and Adjudicate Today<sup>317</sup> both submitted that the definition should be modified to address the decision in *Class Electrical Services v Go Electrical (Class Electrical)*.<sup>318</sup>

Adjudication Forum further submitted that the decision in *Class Electrical* prevented a party from enforcing multiple invoices under a standing order credit agreement in the same payment claim. Adjudication Forum submits that this effectively means that a party is required to make a claim for each and every purchase order and that such an outcome undermines the objective of the legislation providing for a cost-effective means of enforcing unpaid progress payment claims.

### Discussion and recommendation

#### *Can a credit arrangement constitute a single construction contract?*

In *Class Electrical*,<sup>319</sup> the claimant argued that the overarching credit arrangement covered all of the materials it provided as set out under the various purchase orders and that accordingly there was a single construction contract. McDougall J, however, held that there was nothing in the credit agreement that could be construed as an undertaking to supply related goods:

... there is nothing in the accepted application for commercial credit that sets out any of the usual indicia of a supply contract. The goods are not specified. Obviously enough, their price is not specified. The date and place of delivery are not specified ...<sup>320</sup>

Accordingly, as the payment claim in question sought payment in respect to the electrical components set out in a number of purchase orders, the claim did not relate to one construction contract but rather multiple construction contracts and therefore the claim fell outside the adjudicator’s jurisdiction. The supplier would therefore need to make a separate payment claim in respect to each of the purchase orders.<sup>321</sup>

#### *Should access to the legislation only relate to a written contract?*

In addition to the specific issue raised by Adjudicate Today and the Adjudication Forum as set out in the above paragraph, the Review noted the recommendation emanating from the Evans Report that construction contracts should be in writing for the purposes of the security of payment legislation and that there should be a pecuniary penalty for non-compliance.<sup>322</sup> The Wallace Review recommended that no changes be made to the definition of ‘construction contract’, which, in the context of the review, included both written and oral contracts as well as the phrase ‘other arrangements’.<sup>323</sup>

<sup>316</sup> *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 [53]; *Fifty Property Investments Pty Limited v Barry J O’Mara & Anor* [2006] NSWSC 428 [17] and *Olbourne v Excell Building Corp Pty Limited* [2009] NSWSC 349.

<sup>317</sup> Adjudication Forum, written submission, pp. 52–53 and Adjudicate Today, written submission, p. 75.

<sup>318</sup> [2013] NSWSC 363 (*Class Electrical*).

<sup>319</sup> [2013] NSWSC 363.

<sup>320</sup> *Class Electrical Services v Go Electrical* [2013] NSWSC 363 [36].

<sup>321</sup> Refer to *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 in relation to the issue of multiple construction contracts.

<sup>322</sup> Evans Review, op cit, pp. 88–89.

<sup>323</sup> Wallace Review, op cit, p. 56.

It will also be noted that a construction contract is defined to mean not only a contract but also an ‘other arrangement’ under which one party undertakes to carry out construction work (or to supply related goods and services) for another party. In *Okaroo Pty Limited v Vos Construction and Joinery Pty Limited and Anor (Okaroo)*,<sup>324</sup> Nicholas J had occasion to consider this expression and stated:

With regard to the authorities, and to its context in the Act, in my opinion the term ‘arrangement’ in the definition is a wide one, and encompasses transactions or relationships which are not legally enforceable agreements. The distinction in the definition between ‘a contract’ and ‘other arrangement’ is intended by the legislature to be one of substance so that under the Act construction contracts include agreements which are legally enforceable and transactions which are not. Thus in distinguishing between these relationships I understand the legislature intends that ‘contract’ is to be given its common law meaning and that ‘arrangement’ means a transaction or relationship which is not enforceable at law as a contract would be ...<sup>325</sup>

Accordingly, an oral statement by a representative of a principal that it would pay a subcontractor directly constituted an ‘arrangement’ under which the subcontractor had undertaken to carry out construction work for the principal and for which work the principal had agreed to pay.

Similarly, in *Machkevitch v Andrew Building Constructions (Machkevitch)*<sup>326</sup>, an oral statement given by a director of a development company prior to the execution of a building contract between the development company and the builder – to the effect that he would pay the builder if the company did not have sufficient funds – constituted an ‘arrangement’ under which the builder had undertaken to carry out construction work for the director of the development company and for which work the director had agreed to pay.

### *Should the contractor be required to hold a relevant builders licence?*

The Review also asked itself the question as to whether the benefits of the security of payment legislation should be available to a contractor who does not hold the relevant builders or trade licence. In various jurisdictions (such as Queensland and South Australia), separate legislation provides that a builder or trade contractor who enters into specific types of construction contracts must hold the requisite licence, the failure of which will result in that builder or trade contractor not being able to enforce payment.<sup>327</sup> The question then becomes how the policy consideration within two separate pieces of legislation are to be reconciled.

Interestingly, the courts have not adopted a consistent approach on this issue. According to the NSW Supreme Court of Appeal in *Brodyn*, a contractor’s failure to hold the requisite licence does not disentitle such a contractor from making a payment claim under the Act.<sup>328</sup> However, the Queensland Supreme Court of Appeal in *Cant Contracting P/L v Casella & Anor*<sup>329</sup>, and the South Australian Supreme Court in *Tagara Builders P/L v AP & L Services P/L & ORS (Tagara)*<sup>330</sup>, have held that if there is a contract in existence but other legislation disentitles an unlicensed contractor to payment of the contract price, then such a person will not have a contractual entitlement to a progress payment under the Act. In that sense, the Queensland and South Australian Supreme Courts required that a construction contract be ‘lawful’ before it can attract the provisions of the relevant Act.

<sup>324</sup> [2005] NSWSC 45 (*Okaroo*).

<sup>325</sup> *Okaroo Pty Limited v Vos Construction and Joinery Pty Limited and Anor* [2005] NSWSC 45 [41].

<sup>326</sup> [2012] NSWSC 546 (*Machkevitch*).

<sup>327</sup> See s. 42 of the *Queensland Building and Construction Commission Act 1991* (Qld) and s. 6(2) of the *Building Work Contractors Act 1995* (SA).

<sup>328</sup> *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 [82]–[83].

<sup>329</sup> [2006] QCA 538.

<sup>330</sup> [2015] SASC 30 (*Tagara*).

## Conclusion

When considering each of the above issues, I have arrived at the following conclusions:

- a) In respect to the submissions made by Adjudicate Today and the Adjudication Forum relating to the ramification said to have arisen from the decision of *Class Electrical*, I consider such concerns to be misplaced. McDougall J's reasoning in *Class Electrical* makes eminent sense and I see no reason for the legislature to intervene so as to circumvent the consequence of His Honour's decision. If specific goods and services are to be supplied from time to time pursuant to individual purchase orders, then it follows that a separate contract is created in respect of each performance of the relevant supply of such goods and services, and that in such circumstances separate payment claims would need to be made in respect to such contracts.
- b) I have strong reservations with the recommendation emanating from the Evans Report requiring the security of payment laws to only apply where the parties have entered into a written contract. Not only would the implementation of such a recommendation deny a party from receiving payment for the construction work it has carried out (even though the other party had obtained a clear benefit from such work), but it would also prevent a party from being able to receive payment from the oral statements made by the other party as had occurred in *Okaroo* and *Machkevitch*.
- c) I believe that there is merit if the legislation clarified the issue of whether a contractor who does not hold the requisite licence can avail itself of the statutory rights under the Act. It seems to me, that from a policy perspective, where separate legislation exists that requires a person carrying out various construction or trade work to be duly licenced, the security of payment law should **not** operate in a manner that undermines such policy. Accordingly, only a person who holds the requisite licence to carry out construction work that it has agreed to do under a construction contract should be able to avail itself of the statutory right set out in the Act. I therefore support the approach adopted by Blue J in *Tagara* as this will ensure the consistent implementation of sound public policy (i.e. discouraging unlicensed persons from carrying out construction work).

### Recommendation 6:

The legislation should include a definition of 'construction contract' which is drafted in broad terms. The definition of 'construction contract' in section 6 of the NSW Act provides a suitable model.

### Recommendation 7:

The definition of 'construction contract' should also clarify that a claimant contractor who undertakes to carry out construction work under a 'construction contract' must hold the requisite licence to carry out such construction work.

## 9.4 Definition of 'business day'

Currently, the various state and territory legislations do not contain a consistent definition of 'business day'. While in every jurisdiction the definition of 'business day' (or 'working day' in the Northern Territory) excludes Saturday, Sunday and public holidays, some jurisdictions provide that a number of additional days are also specifically excluded. **Table 3** shows the diversity in days excluded across jurisdictions.

**Table 3: Days excluded from the definition of ‘business day’ under security of payment laws**

Excluded days	NSW	Vic.	Qld	SA	Tas.	ACT	WA	NT <sup>331</sup>
Saturday and Sunday	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Public holiday	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
22–24 December	No	No	Yes	No	No	No	No	No
27–31 December	Yes	No	Yes	Yes	Yes	Yes	No	No
2–10 January	No	No	Yes	No	No	No	No	No
25 December – 7 January	No	No	No	No	No	No	Yes	No

As can be seen from Table 3, with the exception of Victoria and the Northern Territory, jurisdictions typically provide that a ‘business day’ for the purposes of the relevant security of payment Act does not include the Christmas/New Year period 27–31 December inclusive. Victoria and the Northern Territory do not prescribe any additional days outside of Saturday, Sunday and public holidays.

In Queensland, the period is further extended to cover the period 22 December to 10 January inclusive.<sup>332</sup> These dates were inserted by the 2014 amendments to the Queensland Act and followed the recommendations of the Wallace Review which found that:

... the definition of ‘business day’ in Schedule 2 of the Act does not adequately reflect what is traditionally an almost industry-wide shut down over the Christmas period. Whilst the provisions of the Act cater for the main holidays between 25 December and 1 January (inclusive), the evidence before the Review is that this minimalist approach results in significant resourcing issues for contracting parties who are expected to respond to payment claims and adjudication applications during this period.<sup>333</sup>

In 2016 the WA Act was amended in similar terms to the Queensland Act following a recommendation of the Evans Review.<sup>334</sup> However, the definition is more limited than the Queensland definition in that it only extends to the period 25 December–7 January inclusive.

In South Australia, the SA Review Amendment Bill<sup>335</sup> was introduced, which would have the effect of amending the current definition of business day to align with the definition used in Queensland. Pending passage of the Bill the new South Australian definition of ‘business day’ will read as follows:

business day means any day except –

- (a) Saturday, Sunday or a public holiday; or
- (b) any other day which falls between 22 December in any year and 10 January in the following year (inclusive)

This amendment stems from the Moss Review which recommended that ‘... consideration be given to enacting regulations clarifying critical definitions nominated by the [SA] SBC’,<sup>336</sup> and follow-up

<sup>331</sup> In the NT Act, the term ‘working day’ is used rather than ‘business day’.

<sup>332</sup> This was the result of Recommendation 22 of the Wallace Review.

<sup>333</sup> Wallace Review, op cit, p. 193.

<sup>334</sup> Evans Review, op cit, see section 4.4, pp. 72-73

<sup>335</sup> The Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) has now lapsed, but it remains the SA SBC’s position that the proposed changes will be re-recommended to the Government of the day post the March 2018 election.

<sup>336</sup> Moss Review, op cit, p. 18.

consultations by the SA SBC regarding a proposal to amend section 4 of the SA Act to clarify the Christmas shut-down period.<sup>337</sup>

### Responses from stakeholders

Stakeholders were not specifically asked to consider the definition of ‘business day’ during consultations. However, many stakeholders raised it as a concern when considering timeframes for respondents to respond to a payment claim. Those stakeholders noted the potential for abuse by some claimants who use ‘ambush’ tactics in lodging claims immediately before close-down periods in a bid to obtain a default judgement in their favour. As a result, most stakeholders that considered this issue suggested that the definition of ‘business day’ should be nationally aligned with the definition which was introduced by the 2014 amendments the Queensland Act because:

...this best reflects industry practice of shutting down sites over the summer holiday period. This reform would reduce the ability of parties to use ambush tactics which are contrary to the principle of fairness and the spirit of no surprises enshrined in contemporary case management and dispute resolution principles...<sup>338</sup>

This sentiment was echoed by MBA SA, which stated that:

Master Builders SA recommended to the Chapman Review that the definition of ‘business day’ in section 4 of the Act be amended to allow for the Christmas shutdown period. This period goes beyond New Year’s Day and is an accepted offset for the demands of long days to meet construction deadlines during the year. Most businesses shut offices and advise staff to take leave during this time.

Master Builders SA believes specifying dates for this shutdown period on an annual basis would officially recognise this practice and consequently prevent ‘ambush claims’ where extensive demands are lodged on Christmas Eve, forcing respondents to suffer high legal and personal costs to meet legislated response times. The shutdown period could either be defined annually by regulations or by adopting the Queensland approach of excluding specific days between December 22 and January 10 from the definition of ‘business days’ for the purposes of the Act. In addition to Saturdays, Sundays and public holidays, these dates are 22–24 December, 27–31 December and 2–10 January.

Although there are some concerns that a date spread might result in manipulation of the timing of claims for additional benefit, this proposal is broadly supported by head contractors, subcontractors and contract specialists.<sup>339</sup>

### Discussion and recommendation

In line with the feedback on this matter garnered by the Moss, Evans and Wallace Reviews, there was general consensus among stakeholders consulted as part of this Review that the definition of ‘business day’ should be amended to take into account the industry close-down over the Christmas/New Year period. Most stakeholders referred the Review to the definition in the Queensland Act as an appropriate model.

It is clear that there is strong support within the industry for the definition of ‘business day’ to specifically exclude the Christmas/New Year close-down period between 22 December and 10 January inclusive, which is typically observed by the construction industry.

I accordingly recommend that the definition of business day should be based on the definition as proposed in the SA Review Amendment Bill. The definition of ‘business day’ in that Bill is somewhat clearer in its drafting than the Queensland definition and would have the same practical effect.

<sup>337</sup> South Australia Small Business Commissioner (2016), *Proposed changes to the Building and Construction Industry Security of Payment Act 2009 and other initiatives to improve payment to subcontractors in the building and construction industry — Consultation Paper*, p. 7, [1.5].

<sup>338</sup> Baker McKenzie, written submission, p. 7.

<sup>339</sup> MBA SA, written submission, p. 15.

While it was not considered by stakeholders, the Wallace and Evans Reviews both considered whether the definition of ‘business day’ should also exclude additional days over the Easter period. Wallace concluded as follows:

I do not recommend any alteration to the definition of ‘business day’ to take into account any greater number of days over the Easter period. There is insufficient evidence to support the need for such amendments.<sup>340</sup>

Evans recommended that ‘[t]he periods between... Good Friday to Easter Monday should be excluded ...’<sup>341</sup>

A definition of business day along the lines of that proposed in South Australia would inherently exclude Good Friday and Easter Monday, as these dates are nationally recognised as public holidays, while Saturday and Sunday would also be excluded. I therefore do not see a need for the definition of ‘business day’ to specifically exclude these dates as proposed by Evans.

Based on the consultations undertaken for this Review, stakeholders were primarily focussed on the Christmas/New Year close-down period and did not raise any concerns with the Easter period or express a need for additional days to be excluded during that period. I must therefore agree with Wallace that at this time there is insufficient evidence to suggest a need to also specifically exclude additional days around the Easter period from the definition of ‘business day’.

#### **Recommendation 8:**

The legislation should include a definition of ‘business day’ which excludes:

- a) Saturday and Sunday
- b) public holidays, and
- c) the period between 22 December and 10 January inclusive.

The definition of ‘business day’ as set out in section 4 of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model.

<sup>340</sup> Wallace Review, op cit, p. 193.

<sup>341</sup> Evans Review, op cit, p. 6.

# Chapter 10: Application of the legislation

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## 10. Application of the legislation

### 10.1 General application

In general, all jurisdictions have a similar provision applying the security of payment legislation to 'construction contracts', whether written or oral or partly both.<sup>342</sup> All jurisdictions except for Western Australia and the Northern Territory provide that the security of payment legislation does not apply to construction contracts that form part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes to:

- lend money or to repay money lent, or
- guarantee payment of money owing or repayment of money lent, or
- provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.<sup>343</sup>

### Exclusions

Significantly, most of the legislatures that have adopted the East Coast Model include a provision that excludes the operation of the Act where there is a construction contract for the carrying out of residential building work on such part of any premises as the party, for whom the work is carried out, resides in or proposes to reside in.<sup>344</sup>

All jurisdictions also exclude construction contracts to the extent to which the contract contains provisions where a party undertakes to carry out construction work, or supply related goods and services, as an employee of the party for whom the work is to be carried out.<sup>345</sup> Section 7(3) of the NSW Act defines an employee by reference to the *Industrial Relations Act 1996* (NSW) which, in some cases, may capture subcontractors.<sup>346</sup>

NSW, Victoria, Queensland, South Australia and the ACT all exclude construction contracts to the extent to which the contract deals with construction work carried on outside the relevant state or territory.<sup>347</sup> In Western Australia and the Northern Territory related goods, such as construction materials prefabricated interstate, are able to be included in a payment claim, so long as such goods or materials have been supplied for construction work carried out on a site in that state or territory.<sup>348</sup> Similar to Western Australia and the Northern Territory, the Tasmanian Act provides that work carried on outside the state is excluded, but that any building or construction contract is covered in so far as the contract relates to the supply by a person in Tasmania of building or construction-related goods and services, even though the goods and services are supplied in respect of building work or construction work carried out outside Tasmania (unless a claim for payment has already been made under the law of another jurisdiction).<sup>349</sup>

<sup>342</sup> See s. 7 of the NSW Act, s. 9 of the ACT Act, s. 9 of the NT Act, s. 3 of the Qld Act, s. 7 of the SA Act, s. 7 of the Tasmanian Act, s. 7 of the Victorian Act and s. 7 of the WA Act.

<sup>343</sup> See s. 7(2)(a) NSW Act, s. 9(2) of the ACT Act, s. 3(2) of the Qld Act, s. 7(2) of the SA Act, s. 7(5) of the Tasmanian Act and s. 7(2) of the Victorian Act.

<sup>344</sup> See s. 7(2)(b) of the NSW Act, s. 7(2)(b) and 7(2)(ba) of the Victoria Act, s. 3(2)(b) of the Queensland Act, s. 7(2)(b) of the South Australia Act and s. 9(2)(b) of the ACT Act.

<sup>345</sup> See s. 7(3) of the NSW Act, s. 9(3) of the ACT Act, s. 3(3) of the Qld Act, s. 7(3) of the SA Act, s. 7(6) of the Tasmanian Act, s. 7(3) of the Victorian Act, s. 7(3) of the WA Act and s. 7(3) of the NT Act.

<sup>346</sup> See s. 5 of the *Industrial Relations Act 1996* (NSW).

<sup>347</sup> See s. 7(4) of the NSW Act, s. 9(4) of the ACT Act, s. 3(4) of the Qld Act, s. 7(4) of the SA Act and s. 7(4) of the Victorian Act.

<sup>348</sup> See s.5(1)(a) and (b) of the WA Act and s.7(1)(a) and (b) of the NT Act

<sup>349</sup> Sections 7(3) and 7(4) of the Tasmanian Act.



## Responses from stakeholders

Stakeholders were not specifically asked about the application provisions of the security of payment legislation. Where stakeholders provided feedback, the focus was on issues around carve-outs for domestic building construction, the exclusion of certain claims and the definitions that sit within the application provisions such as ‘construction contract’ and ‘construction work’.

Both the LCA and Baker McKenzie highlighted the tension between section 15(4)(b) of the NSW Act (and its equivalent Provisions in the jurisdictions that have adopted the East Coast Model) and section 553C of the *Corporations Act 2001* (Cth) (Corporations Act). Both referred to the decision of Vickery J in *Façade Treatment Engineering v Brookfield Multiplex*<sup>350</sup> (*Façade Treatment*) and the Court of Appeal’s decision.<sup>351</sup> That case made it clear that due to the interaction of section 553C and section 15(4)(b), a person who is in liquidation does not have an entitlement under Part 3 of the NSW Act to compel payment of a payment claim. The LCA accordingly recommend that a claimant in liquidation should be excluded from the Act.

## Discussion and recommendation

In general terms, I support an application provision modelled on the NSW Act, noting that it is substantially the same as most other jurisdictions with the exception of the extended extraterritorial application of the Tasmanian Act. Depending on the approach taken to national consistency, there may need to be flexibility for each state and territory to incorporate relevant definitions of ‘employee’ as per their own industrial legislation for non-national system employees.

Importantly however, I recommend that (subject to various safeguards to protect home owners) the legislation should **not** exclude a contractor from being able to make a payment claim under a construction contract for carrying out residential building work, irrespective of whether the other party resides in or intends to reside in the premises. I deal with how the legislation is to apply in circumstances of a construction contract entered into by a contractor and a home-owner in further detail in Section 10.3 of this Report.

In respect to the issue of whether the security of payment legislation should be available to a claimant in liquidation, I support the position advanced by the LCA and Baker McKenzie. Leaving aside the issue of whether the relevant provisions within the security of payment legislations (such as sections 15(4)(b) and 16(4)(b) of the NSW Act) are inconsistent with section 553C of the Corporations Act) and therefore, by reason of such conflict and section 109 of the *Commonwealth of Australia Constitution Act* (Cth), should accordingly ‘yield’ to the Corporations Act,<sup>352</sup> there are compelling policy considerations at play.

The prime objective of the security of payment legislation is to maintain the cash flow of a contractor throughout the duration of the construction project by providing a statutory entitlement to receive progress payments at regular intervals. That is why the legislation is predicated on a ‘pay-now-argue-later’ basis, enabling claimants to obtain payment on an interim basis but with the parties’ final rights preserved. That is also why the legislation enables a claimant to seek judgement for a claimed amount in circumstances where a respondent had failed to provide a payment schedule (section 15(2)(a)(i) of the NSW Act), and why the legislation prohibits a respondent in such circumstances from raising a cross claim or set-off (see, for example, section 15(4)(b)(i) of the NSW Act). However, if a claimant in liquidation were to rely on the provisions of section 15 of the NSW Act, any payment a respondent would be required to make to the claimant would not be

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<sup>350</sup> [2015] VSC 41

<sup>351</sup> *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (*Façade Treatment*).

<sup>352</sup> Refer to the decision of Vickery J in *Façade Treatment*, [81].

interim as intended by the legislation, but in effect final. This is because the respondent would not subsequently be able to sue for recovery of the interim payment it had made.

The purpose of a provision like section 15 of the NSW Act (and for that matter also section 16) is to allow a contractor to recover undisputed progress amounts quickly through an application for summary judgement and so maintain its cash flow. The legislation should not, however, be able to be used to benefit a claimant in liquidation which no longer relies upon that cash flow. This policy issue was succinctly set out by the Victorian Court of Appeal's decision in *Façade Treatment*:

As has been observed by the courts on numerous occasions, pt 3 of the BCISP Act (or its interstate equivalents) is intended to create an interim payment regime. Section 47(1) of the BCISP Act provides that the regime instituted by pt 3 does not affect the rights of the parties under the construction contract. Courts or tribunals deciding matters under the construction contract must allow for any amount paid pursuant to pt 3, and may make orders for the restitution of any such amount paid. The BCISP Act therefore envisages that a respondent making a payment pursuant to pt 3 may be entitled to claw back some or all of that payment in the future. However, as Multiplex submitted, in the case where the claimant is in liquidation, any payment made by the respondent pursuant to the BCISP Act would enter the general pool for distribution to the claimant's creditors. The respondent would be unlikely to see much if any of the amount returned, even if the respondent is vindicated in future legal proceedings. In that sense, if pt 3 of the BCISP Act was held to compel payment to a builder in liquidation, such a payment would become final in effect, rather than provisional as intended by the BCISP Act ...

In our view, therefore, s. 9(1) creates an entitlement to progress payments only for persons who have undertaken to, and continue to, carry out construction work or supply related goods and services. The term 'the claimant' used throughout pt 3 is commensurately limited. Consequently, the payment regime in pt 3 of the BCISP Act is not available to companies in liquidation, since such companies cannot carry out construction work or supply goods and services, and thus do not satisfy the requirements for 'a claimant'.<sup>353</sup>

A not too dissimilar conclusion was arrived at by Beech J in *Hamersley Iron Pty Ltd v James*:<sup>354</sup>

To my mind, to grant leave to enforce the determination in these circumstances would defeat the purpose and object of s. 553C. A grant of leave to enforce would mean that Forge would receive from Hamersley the full amount of the Adjudicated Sum, whereas Hamersley would be left to prove in the liquidation of Forge in respect of its counterclaim. Moreover, in circumstances where Forge as contractor is insolvent, and in liquidation, the object of the Construction Contracts Act – keeping the money flowing in the contracting chain by enforcing timely payment and sidelining protracted and complex disputes – does not demand the grant of leave to enforce the adjudication determination.<sup>355</sup>

I consider that the policy of the security of payment legislation is to maintain cash flow while a construction company remains solvent. In circumstances where such a company is in liquidation, I consider that the policy consideration for insolvent companies of the Corporations Act should apply. I accordingly recommend that the security of payment legislation should expressly state that it does not apply to a claimant corporation that is in liquidation.

<sup>353</sup> *Ibid*, [81]–[84].

<sup>354</sup> *Hamersley Iron Pty Ltd v James* [2015] WASC 10.

<sup>355</sup> *Ibid*, [171]

**Recommendation 9:**

The legislation should apply to any construction contract, whether written or oral, or partly both, but should not include construction contracts that form part of a loan agreement, a contract of guarantee or a contract of insurance or where the work is to be undertaken by an employee of the party for which the work is being done.

The 'application' provision in section 7 of the NSW Act provides a suitable model, other than the exception set out in section 7(2)(b) should not be included.

**Recommendation 10:**

The legislation should **not** apply to a claimant corporation in liquidation.

## 10.2 Exclusion of certain claims

Under the Victorian Act, certain claimed amounts, such as those relating to latent conditions, time related costs and a (defined) class of disputed variations, are treated as 'excluded amounts'.<sup>356</sup> The stated rationale for excluding these amounts from the Act is that it would enable non-complex matters to be dealt with in an expeditious manner. No other jurisdiction takes such an approach.

### Claim for variation work under Victorian Act

In particular, the Victorian Act treats in a unique manner a progress claim that includes a claim for variation work (see section 10A). Although the wording of section 10A of the Act has been described as 'tortuous',<sup>357</sup> the statutory mechanism seeks to distinguish a 'claimable variation' from a variation that is not claimable. A 'claimable variation' may be summarised as follows:

- a) If the parties agree on the claimed variation, then it is a claimable variation (referred to under section 10A(2) as a 'first class variation').
- b) However, if the variation is a disputed variation, then the variation is only claimable if:
  - i) the original contract value was \$5 million or less
  - ii) the original contract value was more than \$5 million but the contract does not provide a dispute resolution clause (section 10A(3))
  - iii) the contract contains a dispute resolution clause but the original contract sum is \$150 000 or less (section 10A(4)),
  - iv) the contract contains a dispute resolution clause and the original contract sum is more than \$150 000 but less than \$5 million, then, subject to the total value of all disputed variations not exceeding 10% of the original contract sum (see section 10A(4)).

The Victorian Act refers to the variations set out in points (b)(i) to (iv) above as 'second class variations'.<sup>358</sup>

The rationale for excluding variation claims where the value of the construction contract exceeds \$5 million and where the contract contains a method for resolving disputes was given by the then Minister for Consumer Affairs, the Hon. MR Thomson, in his Second Reading speech when introducing the 2006 amendments, as follows:

<sup>356</sup> Refer to ss. 10A and 10B of the Victorian Act.

<sup>357</sup> Refer to *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC631 (Vickery J).

<sup>358</sup> See s. 10A(3).

Disputed variations on large contracts, initiated by building owners and big contractors will be exempt from the scheme ... where the contract provides a mechanism for determining whether there is an entitlement to be paid for a variation and for determining the quantum and due date for such payment. These changes are aimed at avoiding uncertainties that have been experienced in other jurisdictions.<sup>359</sup>

Thus, where the parties have entered into a contract valued at more than \$5 million and where the contract includes a mechanism for the resolution of disputes – such as whether the claimed work constitutes a variation or what value is to be given to the claimed variation work – then such disputes are excluded from the Victorian Act. The parties are left to pursue such claims under the agreed mechanism set out under the contract (e.g. arbitration, expert determination etc.). However, if the contract does not include such a mechanism, then the claimant can refer the claim for adjudication under the Victorian Act. The default provision allowing a claimant to refer its disputed variation claim to adjudication in circumstances where the contract contains no mechanism for resolving disputes is intended to ensure that a claimant will not be allowed to fall through the cracks and left without a venue for having such a dispute being determined.

However, most construction contracts over \$5 million do include a dispute resolution mechanism and this may explain why the take-up of applications under the Victorian Act (relative to other jurisdictions) have been low.

There is, however, some concern that the exclusion of certain claims from the operation of the Victorian Act has placed subcontractors under financial stress because it is forcing them to pursue their claims for excluded amounts through processes other than the Act (such as litigation or arbitration).

### Responses from stakeholders

Stakeholders were asked to consider whether any types of claims should be excluded from coverage by security of payment laws. The overwhelming majority of stakeholders did not support certain claims being excluded or carved out from the Act.<sup>360</sup>

There was general consensus among stakeholders that the exclusion of certain claims would diminish the effectiveness of the overall scheme. For example, NECA and AMCA SA said they do not support the exclusion of any claims, noting that any attempt to carve out specific claims will undermine the underlying purpose of the security of payment legislation, which was to provide prompt payment for all construction work carried out.

In contrast, MBAV submitted that their members generally consider that the current Victorian Act operates as ‘a last resort’ with parties encouraged to resolve disputes early, and that complex claims, such as those related to delay costs and large variations, do not lend themselves to the making of interim decisions within a compressed timeframe anyway. However, the MBAV conceded that its subcontractor members would probably welcome an expansion of the claims available under the Victorian Act.

Adjudicate Today submits that:

The fundamental principle [of prompt payment] does not distinguish between the nature of the claim. The need to be paid on time does not distinguish between the nature of the claim. The threat of insolvency does not distinguish between the nature of the claim.

<sup>359</sup> Victoria, *Parliamentary Debates*, Legislative Council, 15 June 2006, 2420 (MR Thomson, Minister for Consumer Affairs).

<sup>360</sup> Including MBA NSW, MBA SA, NECA, NECA SA/NT, Subcontractors Alliance, MEA, MPAQ, QMBA, AMCA SA, MBT, HIA, CFMEU and AIB.

A number of stakeholders<sup>361</sup> said that in the event that the exclusion of certain claims was to be accepted by the Review, then the adoption of the Victorian model would not be appropriate. According to Adjudicate Today:

The provisions in the Victorian Act are tortuous and literally impossible for a non-legally qualified person to follow. Many adjudication applications that could have proceeded in other States have been held invalid because of the confusing Victorian provisions.

Similar to the viewpoints expressed by the majority of head contractor and subcontractor groups, most regulators, including South Australia and Tasmania, do not support certain claims being excluded or carved out from the legislation. For example, Tasmania considers that any carve-outs would only create additional complexity and be problematic for industry, while ACT officials suggested that carve-outs would go against the objective of the ACT Act. Despite exclusions and carve outs existing under the current Victorian Act, the Victorian Government indicated that it remains open to consider any evidence that exclusions are placing subcontractors under financial stress.<sup>362</sup>

### Discussion and recommendation

All of the jurisdictions that have adopted the East Coast Model, other than Victoria, contain a provision within their legislation which sets out how the amount of a progress payment is to be calculated. Thus section 9 of the NSW Act provides:

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

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

Section 10 of the NSW Act (and its equivalent provisions under the Queensland, South Australia, Tasmania and ACT Acts) sets out how construction work carried out and related goods and services supplied are to be valued. Thus, section 10(1) of the NSW Act reads as follows:

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

Section 10(2) deals in identical terms with how related goods and services are to be valued.

<sup>361</sup> Including QMBA, MPAQ and Adjudicate Today.

<sup>362</sup> Victorian Government, written submission, p. 4

It is therefore clear that if the construction contract agreed to by the parties provides for a contractor to include in its progress payment claims amounts relating to variations, time related costs and latent conditions, then such amounts can be included in claims made under the Act.<sup>363</sup> If, however, the construction contract does not enable claims for such items, then the contractor will not be able to include in its payment claim amounts relating to such items.

Under the Victorian Act, however, by reason of section 10, certain types of claims that may be able to be made under the construction contract are expressly excluded. Section 10 of the Victorian Act provides:

10 Amount of progress payment

- (1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be –
  - (a) the amount calculated in accordance with the terms of the contract; or
  - (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of –
    - (i) construction work carried out or undertaken to be carried out by the person under the contract; or
    - (ii) related goods and services supplied or undertaken to be supplied by the person under the contract – as the case requires.
- (2) Despite subsection (1) and anything to the contrary in the construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.
- (3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

Section 10A then sets out what constitutes ‘claimable variations’ and section 10B sets out what constitutes ‘excluded amounts’. Included within the definition of an ‘excluded amount’ is an amount that is not a ‘claimable variation’, as well as amounts relating to latent conditions, time related costs, changes in regulatory requirements and amounts claimed for damages for breach of contract.

It can therefore be seen that under the Victorian Act, even if the construction contract enables a contractor to include in its progress payment claims amounts for certain types of claims (such as, for example, claims for time-related costs), a claimant will not be able to include in a payment claim made under the Act, any amounts relating to such items. Any claims for such excluded items would have to be pursued either through arbitration, expert determination or litigation.

### *Should the legislation exclude agreed items?*

The question at issue here is why the legislation should expressly exclude a claimant from being able to include in a payment claim made under the Act claims for items which it would be able to make under the construction contract.

The answer to this question will very much depend as to what priority should be given to the following competing arguments:

<sup>363</sup> Such an interpretation was clearly stated in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd & Ors* [2005] NSWCA 228, [40]–[41].

- a) The sole focus of the legislation should be on ensuring that the party that has carried out construction work (or supplied related goods and services) is able to receive prompt payment. Claims for time-related costs, latent conditions and disputed variations, however, involve highly technical and complex legal issues and as such, are not suited to being dealt with under the compressed timeframe associated with rapid adjudication.
- b) When referred to adjudication, the technical and complex nature of claims relating to disputed variations, time-related costs and latent conditions do not provide respondents with sufficient time in which to provide a proper response. This raises issues of procedural fairness. It is unfair that a claimant should be allowed to have up to 12 months to prepare such a claim but to only provide a respondent with much less time to respond.
- c) The volume of documentation as well as the technical and complex nature of claims relating to disputed variations, time related costs and latent conditions do not lend themselves to adjudicators being able to arrive at informed decision within the timeframe prescribed in the legislation.
- d) The legislation should not interfere with the contractual agreement that the parties have made as to what type of claims can be included in a progress payment claim. Restricting a claimant only to claims for part of its contractual entitlement under the Act, and requiring the other items to be pursued through the more expensive and protracted routes of arbitration or litigation, does not promote cash flow and is therefore inconsistent with the objects of the legislation.
- e) Restricting a claimant's ability to refer certain claims, such as disputed variations, fails to have due regard to the high incidence of subcontractors being requested to carry out variation work and the large amounts associated with such work. Being paid promptly for carrying out a variation is as important to a contractor's cash flow as being paid promptly for carrying out work under the original contract.

### **Conclusion**

When considering each of the above arguments, I have come to the conclusion that, from a policy perspective, the notion of a carve-out should not be supported. It is not appropriate to restrict a contractor's access to the legislative scheme based on the premise claims being referred to adjudication should not be of a technical and complex nature. If, under the construction contract, the parties have agreed that amounts for variations, time-related costs and latent conditions are able to be included in a claim for progress payments, then claims involving such items should also be able to be made under the Act.

It is both illogical as well as unfair to only enable a contractor to make a claim under the Act for certain types of amounts and to require claims for other amounts to be pursued through the more expensive and protracted processes of arbitration and litigation. The restrictions on the type of variations that may be claimed under the Victorian Act operate against the object of the Act and have the potential to impose severe financial hardship on contractors. Similarly, to deny a contractor its contractual right to make a claim under the Act for the recovery of the costs relating to the extra time it claims it had spent on the project also has the potential to impose severe financial hardship. Also, to deny a contractor its contractual right to make a claim under the Act for the extra costs the contractor claims it incurred associated with the removal of a latent condition may similarly result in severe financial hardship for the contractor. In each of those instances, the contractor would contend that the other party had received the benefit of the contractor having carried out the additional work, or having spent more time on the project than originally contemplated, or having the contractor remove the latent condition, yet the contractor has been denied the right to pursue its contractual rights to be paid promptly via the legislative adjudication process.



I accept that there may be some (if not many) instances where claims relating to disputed variations, time-related costs or latent conditions are claims which, by their very nature, involve consideration of highly technical and complex issues. In such instances it may be difficult to deal with the claims within the compressed timeframe of the various current legislations. However, I consider that such concerns can be better dealt with by introducing greater flexibility to the existing process rather than excluding such claims from being able to be made under the legislative regime. I later deal with how such flexibility can be introduced to the legislative scheme but, for present purposes and from a policy perspective, I do not support the notion of security of payment legislation containing any carve outs.

#### **Recommendation 11:**

The legislation should **not** include the carve-out of amounts that a person is entitled to under a construction contract.

### **10.3 Adjudication for domestic construction**

As already outlined in Section 10.1 of this Report, the legislative regimes in NSW, Victoria, Queensland, South Australia and the ACT do not enable builders who carry out construction work in the residential sector to make a statutory payment claim against an owner-occupier, even though subcontractors who carry out work on the same project can make such claims against the builder.

With the exception of Tasmania, Western Australian and the Northern Territory, governments have been reluctant to extend the operation of the security of payments legislation to enable claims to be made against ‘mum-and-dad’ owner-occupiers.

Tasmania applies the security of payment legislation to domestic construction, with modified timeframes for responses to payment claims — domestic respondents have 20 business days to reply to a claim while commercial respondents have the standard 10 business days.<sup>364</sup>

Western Australia and the Northern Territory apply security of payment legislation to domestic construction without modification.

#### **Responses from stakeholders**

During the consultation process, stakeholders were asked to consider:

- a) whether the security of payment legislative regime should apply to the residential housing sector so as to enable a contractor or builder to make a progress payment claim against an owner-occupier, and
- b) if such a process could operate under the same rapid adjudication system as commercial adjudications.

#### ***Should security of payment extend to the housing sector?***

The majority of stakeholders<sup>365</sup> support the extension of the adjudication system to the residential housing sector.

HIA noted that one important difference among jurisdictions that have adopted the East Coast Model is the ability for builders in Tasmania to make claims against residential owners. Accordingly, HIA recommends that the relevant provisions within the Tasmanian Act be extended to those

<sup>364</sup> Section 19(3) of the Tasmanian Act.

<sup>365</sup> Including HIA, MBT, MBA NSW, MBA SA, AMCA SA, MPA NSW, NECA, NECA SA/NT, QMBA, HIA Qld, Subcontractors Alliance, MEA and AIB.



jurisdictions that have already adopted the East Coast Model, noting there needs to be a fast, effective way for residential builders to obtain prompt progress payments from clients. Similarly, MBT supports the Tasmanian security of payment regime continuing in its existing form, particularly because it enables home builders to invoke the Act to enforce their rights to prompt payment and has worked effectively in this area.

Some stakeholders<sup>366</sup> indicated the need to educate homeowners on the implications of security of payment laws, and the need to provide homeowners with assistance when they are responding to a claim under the legislation.

The Master Plumbers Association of NSW (MPA NSW) support the concept of the security of payment legislation extending to the residential housing sector, subject to a cap on the value of the project; however, MPA NSW were unable to express a view on what that cap should be.

MBAV did not support extending the current system to the housing sector noting that Domestic Building Dispute Resolution Victoria (DBDRV) agency, recently launched by the Victorian Government,<sup>367</sup> is intended to provide faster dispute resolution between parties in the domestic building process. MBAV suggested that payment disputes between owner-occupiers and builders that have been referred to the DBDRV should be monitored and that a review be undertaken within 12 months to determine whether the DBDRV adequately protects builders' interests. If the new mechanism fails to operate effectively, then consideration should be given to expanding the security of payment regime to cover owner-occupiers. Similarly, the Victorian Government does not support extension of the adjudication system to the housing sector, noting that the 2016 amendments to the *Domestic Building Contracts Act 1995* (Vic) introduced a new system for speedy, low cost resolution of domestic building disputes, and that the recent commencement of the DBDRV has established free, mandatory conciliation.<sup>368</sup>

The responses from other state and territory regulators and officials to this issue were mixed. Tasmania supported the extension of the adjudication system to the domestic construction sector, with Tasmania noting that recent legislative amendments in its state offer protection to builders as well as to consumers. South Australia had not formulated a position as to whether extending the adjudication system to include home owners would fit within its policy framework and therefore reserved its position.

Stakeholders<sup>369</sup> thought that the adjudication process for domestic construction could operate under the same rapid adjudication scheme that operates in the commercial sector of the construction industry. HIA submitted that amendments could be made to incorporate some additional consumer protections for the home-owner whilst retaining the key features of the existing security of payment schemes. HIA cited the case of Tasmania, which allows claims to be made against home-owners and that this has not had an adverse impact on the integrity of the legislation.

## Discussion and recommendation

I agree with the position advanced by HIA and the various MBAs (other than MBAV) that the beneficial interest of the legislative scheme should be extended to builders who have entered into a construction contract with residential owner-occupiers. Indeed, under the East Coast Model legislative scheme, residential builders (other than in Tasmania) are placed in an invidious position.

<sup>366</sup> Including AMCA SA and MBA SA.

<sup>367</sup> Consumer Affairs Victoria (2017), 'Domestic Building Dispute Resolution service now available', *News Alert*, 26 April 2017. See link: <<https://www.consumer.vic.gov.au/news-and-events/news-updates/domestic-building-dispute-resolution-victoria-service-now-available-news-alert>>.

<sup>368</sup> Victorian Government, written submission, p. 6.

<sup>369</sup> Including MBA NSW, MPA NSW, HIA Qld, QMBA, NECA, MBAV, MBA SA and AMCA SA.

There seems something inherently incongruous as to how a legislative scheme that has been designed to improve the payment practices within the industry will only permit one group of contractors to avail themselves of the benefits of the legislation, and yet on the same building project, another type of contractor would be deliberately shut out from the process. True, the relationship between a residential builder and a 'mum-and-dad' owner-occupier is of a different nature to that of a builder and subcontractor, but the fact remains that residential builders face similar cash flow issues to subcontractors when they do not receive prompt payment for building work carried out.

I accept that additional consumer protection safeguards will need to be built into the legislative scheme whenever a house builder makes a payment claim on a 'mum and dad' owner-occupier. However, as evidenced by the Tasmanian Act, this should not be a difficult hurdle.<sup>370</sup> I would in fact recommend that the legislation require the builder, whenever serving a payment claim on an owner-occupier, to annex an information document to the payment claim. The information document could be in a prescribed form approved by the Regulator and include details on how an owner-occupier respondent can reply to the payment claim and the time period within such a reply/payment schedule must be given. The feedback received during the consultation process, particularly from HIA, MBT and Tasmania, indicates that that part of the Tasmanian Act is working very well.

**Recommendation 12:**

The legislation should apply to the residential housing sector so as to enable a residential contractor/builder to make a progress payment claim against an owner-occupier.

**Recommendation 13:**

The legislation should prescribe that whenever a residential contractor/builder serves a payment claim on an owner-occupier, the payment claim must include:

- a) information on how the owner-occupier respondent can reply to the payment claim, and
- b) the time period within which the reply/payment schedule must be given.

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<sup>370</sup> Refer to the additional time given for an owner-occupier to respond to a payment claim under s. 19(3) of the Tasmanian Act.

# Chapter 11: Rights to progress payments

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## 11. Rights to progress payments

### 11.1 The right to progress payments

Section 8 of the NSW Act provides that a person who has undertaken to carry out construction work or to supply related goods and services under a construction contract has an entitlement to a progress payment 'on and from each reference date'. The expression 'reference date' is stated to mean either the date determined by, or in accordance with, the terms of the construction contract or, if the contract makes no express provision, then 'the last day of the named month in which the construction work was first carried out... under the contract and the last day of each subsequent month.' Section 21 of the *Interpretation Act 1987* (NSW) states that the expression 'named month' means each of the 12 months in a calendar year.

The South Australian, Tasmanian and ACT Acts contain a similar provision to that set out in the NSW Act.<sup>371</sup>

Section 9(2)(b) of the Victorian Act, however, provides that the meaning to be given to the expression 'reference date' where the contract makes no express provision is:

- ... the date occurring 20 business days after —
- (i) construction work was first carried out under the contract; or
  - (ii) related goods and services were first supplied under the contract.

The Victorian Act also includes the additional section 9(2)(c), which defines the reference date to be given if the contract makes no express provision in the case of a single/one-off payment, and section 9(2)(d), which defines the reference date to be given in the case of a final payment.

Section 12 of the Queensland Act states that a person is entitled to a progress payment not 'on and from each reference date' as stated in the NSW, Victorian, Tasmanian and ACT Acts, but 'from each reference date'. Further, the expression 'reference date' is stated in the Dictionary section of the Queensland Act to mean:

- (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
- (b) if the contract does not provide for the matter —
  - (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied under the contract; and
  - (ii) the last day of each later named month.

The requirement of a reference date, and the requirement elsewhere in the security of payment legislation that only one claim can be made in respect of each reference date,<sup>372</sup> is intended to prevent a party from abusing its right to make a payment claim, or, put alternatively, to protect a respondent against the administrative burden of dealing with multiple claims. However, by reason of the definition or meaning to be given to the expression 'reference date' — and by reason of the High

<sup>371</sup> In the case of the SA Act, see s. 8 as well as the definition of 'reference date' as set out in s. 4. In the case of the Tasmanian Act, refer to s. 12(1) and the definition of 'reference date' in s. 4. In the case of the ACT Act, refer to ss. 10(1) and 10(3).

<sup>372</sup> See, for example, s. 13(5) of the NSW Act.

Court decision in *Southern Han* — if the construction contract provides that following termination all future payments are suspended, there can be no date under the contract which a claim for a progress payment may be made and therefore no reference date. As the primary judge in *Southern Han* (Ball J) so succinctly stated:

It makes little sense for (the claimant) to have a continuing right to claim payment progressively under the contract when the contract is terminated and any obligation to perform the work under the contract has come to an end.<sup>373</sup>

Indeed, as the High Court emphasised, the provision within section 8(2)(a) of the NSW Act to a reference date being ‘a date determined by or in accordance with the terms of the contract’:

... is a date fixed by operation of one or more express provisions of the construction contract. The mention is not of a date that is determined independently of the operation of the contract merely having regard to the contractual terms.

The reference date for which section 8(2)(b) provides is applicable only where a construction contract contains no express provision for determining a date for making a contractual claim to be paid the whole or a relevant part of the contracted amount. Absent an express contractual provision for determining a reference date, s. 8(2)(b) operates of its own force to provide a reference date for the purpose of s. 8(1). In so applying, s. 8(2)(b) fulfils the statutory promise in s. 3(2) of granting a statutory entitlement to a progress payment regardless of whether the relevant construction contract makes provision for progress payments. The provision does not, however, alter the nature of a progress payment in respect of which a claim can be made.

### Responses from stakeholders

During the consultation process, stakeholders were asked to consider whether the legislation should be amended to allow a reference date to accrue following termination of the contract. The vast majority of stakeholders<sup>374</sup> agreed that following the recent High Court decision in *Southern Han*, the legislative regime (at least of those jurisdictions that have adopted the East Coast Model) should be amended to allow a reference date to accrue following termination of the contract.

In its written submission Contractor’s Debt Recovery advised that:

... it is now a common practice for Respondent’s to wait until the second the work is completed, and then terminate the contract before the Claimant can make its final claim. Some respondents are so adept at this practice that they short pay several invoices prior to the Termination, and then terminate the contract leaving the Claimant with months of work owing and no way of making a claim under the Act.<sup>375</sup>

Some stakeholders, such as Subcontractors Alliance, also suggested that this should apply to retention payments, as termination for convenience is currently being abused in the industry, and that such a provision should allow for claims for work done up until termination and a final payment claim for retention moneys.

MBAV thought the current legislation deals adequately with the accrual of payment entitlements and accordingly should be left alone. Other stakeholders, such as MBA NSW, were of the view that this was not a major issue but nonetheless supported the recommendations contained in the Wallace Review that the legislation should be amended to expressly provide for a claimant’s entitlement to serve a final payment claim is not extinguished post termination of the contract.<sup>376</sup>

<sup>373</sup> [2015] NSWSC 502, 50.

<sup>374</sup> Including LCA, NECA, NECA SA/NT, AMCA SA MPAQ, MBA SA, MBT, CFMEU and AIB

<sup>375</sup> Igra, A., email correspondence.

<sup>376</sup> Wallace Review, op cit, Recommendation 47, pp. 264-270

South Australia and the ACT agreed that legislation should be amended to allow a reference date to accrue following termination of a contract.

### Discussion and recommendation

It is abundantly clear that industry has found the concept of a reference date very confusing. In particular, claimants were unclear as to whether the Act enables a payment claim to be made after the termination of the contract and such uncertainty is understandable given the different viewpoints expressed on this issue by the Supreme Courts of NSW and Queensland. The differences on this issue expressed by the courts have now been emphatically resolved by the recent High Court decision of *Southern Han*, but nonetheless there remain other issues and concerns that industry has with the concept of reference dates.

For example, claimants are unclear whether a payment claim given before or after the specific date set out in the construction contract will be regarded as a valid payment claim. Such uncertainty is understandable given that:

- a) Not every jurisdiction that has adopted the East Coast Model has adopted the same wording as set out in section 8 of the NSW Act. Thus, for example, section 12 of the Queensland Act refers to a claimant's right to progress payment as arising 'from' each reference date rather than 'on and from' each reference date, and a reference date is defined as 'a date stated in, or worked out under, the contract' rather than (as stated in section 8 of the NSW Act) as 'a date determined by or in accordance with the terms of the contract'. On the other hand, the Victorian Act defines a reference date as:

... a date determined by or in accordance with the terms of the contract as —

- (i) a date on which a claim for a progress payment may be made; or
- (ii) a date by reference to which the amount of a progress payment is to be calculated in relation to a specific item of construction work carried out.<sup>377</sup>

- b) The approach adopted by the Victorian Act permits a claimant to submit a payment claim 'prematurely' (i.e. not '**on and from the date stated in the construction contract**' (e.g. the 28<sup>th</sup> day of each calendar month) but prior to that date (e.g. 27<sup>th</sup> day of the month, or earlier).<sup>378</sup> The courts in other jurisdictions have, however, determined that a payment claim issued prior to the specified contractual date is invalid.

### Approaches that undermine prompt payment

In addition to the confusion associated with the concept of a reference date, there is also concern that permitting a reference date to be determined or worked out by reference to the time period set out in a construction contract may, in certain circumstances, undermine the primary objective of promoting prompt payment. For example, a construction contract that provides for a subcontractor to make a progress payment claim on the last day of the subsequent month after the claimed work has been carried out (e.g. make a claim on 30 June for work completed during the month of May) can hardly be regarded as consistent with the objective of promoting prompt payment.

All this then leads one to ask the question of whether the trigger for the entitlement to a progress payment can be not only simplified but defined so as to operate in a manner consistent with the primary objective of the Act which is to promote cash flow. If the objective of prompt payment is to be achieved by enshrining the right of the party that has undertaken to carry out construction work

<sup>377</sup> Section 9(2)(a) of the Victorian Act.

<sup>378</sup> Refer to *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 426.

(or to supply related goods and services) to receive progress payments then the party that has engaged the contractor should not be able to delay the time when a payment claim can be made via contractual terms.

### *A simplified approach*

It therefore seems to me that if the legislation were to provide that a contractor/subcontractor who has undertaken to carry out construction work (or to supply related goods and services) is entitled to make a payment claim for every named month (i.e. each of the 12 months in a calendar year), or more frequently if provided for under the construction contract, then it would achieve the twin objective of clarifying the notion of what is meant by the entitlement to make a progress payment claim as well as the period for which such a claim can be made. The parties would still be able to agree for progress payment claims to be made for periods shorter than monthly (such as say, every 7 or 14 days) but in the overwhelming majority of cases, the parties will operate on progress payments being made monthly. By prescribing that progress payment claims are able to be made for every named month (or less, if agreed) the objective of prompt payment will be met. Such a provision will have the effect of removing the need to refer to the expression of 'reference date' and, of course, the removal of this expression would require consequential amendments elsewhere in the legislation where such expression is used.<sup>379</sup>

I also recommend that the legislation should include specific provisions dealing with single (one-off)/milestone and final payments in circumstances where a construction contract makes no express provision in relation to these matters. In this regard, I consider that the provisions set out in section 9(2)(c) and 9(2)(d) of the Victorian Act appropriately deal with these issues.

Finally, I recommend that the legislation include a provision to enable the claimant, where a contract has been terminated, to claim for work carried out (or related goods and services supplied) up to the date of termination. This will overcome the emerging practice (following the High Court decision in *Southern Han*) of some clients or head contractors strategically invoking the termination for convenience clauses in construction contracts prior to a reference date, thereby preventing a claimant from making a payment claim. In this regard, I note that section 67(2) of the Queensland Bill 2017 contains a specific provision that addresses this very issue:

- (2) However, if a construction contract is terminated and the contract does not provide for, or purports to prevent, a reference date surviving beyond termination, the final reference date for the contract is the date the contract is terminated.

#### **Recommendation 14:**

To avoid confusion within industry the use of the expression 'reference date' should be abandoned. The legislation should provide that a person who has undertaken to carry out construction work (or who has undertaken to supply related goods and services) under a construction contract is able to make a payment claim for every named month, or more frequently if so provided under the contract.

#### **Recommendation 15:**

The legislation should include specific provisions dealing with single (one-off)/milestone payments in circumstances where a construction contract makes no express provision in relation to these matters.

Section 9(2)(c) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the Victorian Act) provides a suitable model.

<sup>379</sup> For example, s. 13(5) of the NSW Act.

**Recommendation 16:**

The legislation should set out the manner in which the date relating to the making of a final payment claim can be identified.

Section 9(2)(d) of the Victorian Act provides a suitable model.

**Recommendation 17:**

The legislation should enable a claimant, where a construction contract has been terminated, to make a payment claim for construction work carried out (or related goods and services supplied) up to the date of termination.

Section 67(2) of the Building Industry Fairness (Security of Payment) Bill 2017 (Qld) provides a suitable model.

**11.2 Effect of ‘pay when paid’ provisions in relation to progress payments**

‘Pay when paid’ clauses in construction contracts operate to delay payment to a subcontractor until the head contractor has received payment from the principal. However, all the jurisdictions, irrespective of whether operating under the East Coast or West Coast Models, contain provisions that state that a ‘pay when paid’ clause in a construction contract has no effect.<sup>380</sup>

In each legislation, the ‘pay when paid’ provision has been drafted in sufficiently broad language to also void contract clauses that seek to limit the payment of a subcontractor to such amount as the head contractor may receive from the principal. For example, clauses which provide that if the principal does not pay the contractor, or only makes a partial payment, then the contractor is required to either not pay the subcontractor at all, or pay only part of the amount owed. Such clauses are sometimes known as ‘pay if paid’ clauses.

**Responses from stakeholders**

No comments were sought or received from stakeholders in relation to this matter as it is apparent that everyone within industry has accepted the rationale underpinning the inclusion of such provisions within the legislative regime.

**Discussion and recommendation**

There are sound policy reasons for prohibiting ‘pay when paid’ clauses, not the least of which is that they are inherently inequitable and unfair. There is also widespread acceptance among stakeholders that such clauses should be prohibited. Given this support and that all jurisdictions currently include provisions to prohibit ‘pay when paid’ clauses, it is clear that best practice security of payment legislation should contain a provision similar to section 12 of the NSW Act.

**Recommendation 18:**

The legislation should prohibit ‘pay-when-paid’ clauses in construction contracts. Section 12 of the NSW Act provides a suitable model.

**11.3 Due dates for payment of a progress payment**

There are major differences across jurisdictions as to when (in the absence of an express provision in the construction contract) a progress payment becomes due and payable.

<sup>380</sup> See s. 12 of the NSW Act; s. 13 of the Victorian Act; s. 16 of the Queensland Act; s. 12 of the SA Act; s. 14 of the ACT Act; s. 16 of the Tasmanian Act; s. 9 of the WA Act; and s. 12 of the NT Act.



Most jurisdictions that have adopted the East Coast Model (e.g. Queensland, ACT and Tasmania) provide a similar 'default' timeline for progress payments (i.e. 10 business days after the payment claim has been made). In South Australia the period is 15 business days.

However, amendments made to the NSW Act in 2014 provide that a progress payment to be made by a principal to a head contractor becomes due and payable on the date occurring 15 business days after a payment claim is made under the Act. Yet in the case of a progress payment to a subcontractor (other than a construction contract that is connected with an exempt residential construction contract), such payment becomes due and payable on the date occurring 30 business days after such a claim has been made.

The NSW amendments follow the recommendations of the Collins Inquiry for the creation of such a 'buffer' in the payment cycle. Collins QC said that such a buffer would:

... give additional time to the head contractor who, by reason of its position standing in the middle of the contractual relationship, will then be able to benefit from additional time to pay its subcontractors, thus improving its own 'cash flow' position ...

The buffer proposal is designed to deal with what the Inquiry has concluded is a wide spread practice of "robbing Peter to pay Paul". This juggling act commences when a head contractor finds that it does not have sufficient money from within the particular project pyramid in order to pay the subcontractors who have already done the work and submitted their progress payment claim to it. In that event what is commonplace in the industry is for the head contractor to look to other jobs by way of going to what some contractors call their "treasury" for the purposes of writing a cheque. This could have the effect of disadvantaging any of the subcontractors in other project pyramids.<sup>381</sup>

It must however be emphasised that Mr Collins's references to different due dates for payment, depending on whether the payments are to be made to a head contractor or subcontractor, were premised on the NSW Government implementing a statutory trust that would apply to all parties within the contractual chain. The NSW Government did not implement Mr Collins' recommendation relating to the introduction of a statutory trust, but it did implement the recommendations relating to setting out different due dates for payment for head contractors and subcontractors. It is not clear whether the NSW Government appreciated the interrelationship between a statutory trust and setting out different due dates for payment for head contractors and subcontractors. Absent implementation of a statutory trust, setting out different due dates for payment depending on whether payment is made to a head contractor or subcontractor makes no sense and is clearly contrary to the object of the security of payment law.

Also, relevant to this issue are the further recommendations made by Collins QC that the NSW Act should provide for contract terms to be void if payment to the head contractor is longer than 15 days, or if payment terms to subcontractors are longer than 28 days.<sup>382</sup>

In Western Australia, provisions requiring a progress payment to be made after 42 days are prohibited and any provision requiring payments later than 42 days after being claimed is deemed to require payment within 42 days of being claimed.<sup>383</sup> The Northern Territory adopts a similar approach; however, provisions requiring a progress payment to be made after 50 days are

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<sup>381</sup> Collins Inquiry, op cit, pp. 365–366.

<sup>382</sup> For example, refer to ss. 11(1A) and 11(1B) of the NSW Act. Also ss. 15(1)(a) and 15(1)(b) of the *Building and Construction Industry Payments Act 2004* (Qld), which in turn refers to ss. 67U and 67W of the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act). Section 67U of the QBCC Act makes payment terms of greater than 15 business days in any construction management contract void and s. 67W makes void in any commercial building contract payment terms greater than 15 business days.

<sup>383</sup> See s. 10 of the WA Act.

prohibited and any provision requiring payments later than 50 days after being claimed is deemed to require payment within 28 days of being claimed.<sup>384</sup>

### Responses from stakeholders

There were mixed views among stakeholders as to what the appropriate due date should be for payment of a progress payment.

#### *Appropriate due date for payment of progress payment*

As set out in the Issues Paper for this review,<sup>385</sup> most of the jurisdictions that have adopted the East Coast Model provide that the due date for payment is either the date referred to under the construction contract or, if the contract makes no express provision, then the (default) due date for payment will be 10 business days after a payment claim is made. The responses from stakeholders during the consultation process on this issue were generally supportive of the default provision that currently applies under most legislative regimes (other than in NSW).

For example, MPA NSW suggested the 10-business-day period is the most appropriate timeframe. NECA advocated a similar position, noting that this period would be beneficial in relation to cash flow for smaller subcontractors who do not always enter into formal construction contracts.

MBT contends that the due dates for payment should be standard and consistent across Australia, and advocates 10 business days for residential construction and 15 business days for commercial construction. Stakeholders in South Australia, such as AMCA SA, MBA SA and NECA SA/NT, indicated that the current South Australian framework of 15 business days has received wide industry support.

The national body of AMCA suggested that 15 business days would be a reasonable compromise, taking into account the differences across states. QMBA suggested a 15–20-day period would be adequate, noting however that the Queensland legislation deals with this issue different from most other jurisdictions that have adopted the East Coast Model.<sup>386</sup> MBAV said:

Currently in Victoria, the due date for payment is determined by the contract. However, in the absence of a contract provision, the SOP Act states that it must be 20 business days after the previous reference date, and 20 business days thereafter. We consider this allows a reasonable time to assess the claim and then to arrange for the payment of the claim.<sup>387</sup>

MBA NSW stated the 15-day period for payment by a principal to a head contractor is rarely adhered to and that the further 30-day period for payments from the head contractor to the subcontractor is too long. Accordingly MBA NSW recommended that a more appropriate, shorter timeframe should be considered. Further, MBA NSW suggested consideration be given to making it an offence to include contract payment clauses that extend beyond 30 business days.

HIA submitted that due dates should be set out in the contract, and that only where the contract is silent should due dates follow the default provisions set out in the Act.

Those government officials and regulators who responded supported the existing timeframes in their own jurisdiction.

<sup>384</sup> See s. 13 of the NT Act.

<sup>385</sup> Murray, J. (2017), *Review of Security of Payments laws: Issues Paper*, Department of Jobs and Small Business, Canberra, Australia, February 2017  
<[https://docs.jobs.gov.au/system/files/doc/other/review\\_of\\_security\\_of\\_payments\\_laws\\_-\\_issues\\_paper.pdf](https://docs.jobs.gov.au/system/files/doc/other/review_of_security_of_payments_laws_-_issues_paper.pdf)>

<sup>386</sup> See ss. 67U and 67W of the *Building and Construction Commission Act 1999* (Qld).

<sup>387</sup> MBAV, written submission, p. 2.

### *Different timeframes for head contractor versus subcontractor?*

Stakeholders were also asked their views as to whether the legislation should provide different timeframes for when a payment claim becomes due and payable to a head contractor as opposed to when a payment claim becomes due and payable to a subcontractor. Not surprisingly, stakeholders' views on this issue differed.

Several stakeholders, notably those representing head contractors,<sup>388</sup> supported the notion of different timeframes. MBA SA said that security of payment laws should not ignore commercial realities and that specifying different timeframes for head and subcontractors is sensible as it recognises the demands on business for processing receipts and transfers. MBA NSW indicated support for the provisions set out in the existing NSW legislation. QMBA preferred the existing timeframes outlined in the QBCC Act,<sup>389</sup> which provides for 15 business days for head contractors and 25 business days for subcontractors. MBAV suggested that the legislation should provide that payment to the head contractor becomes due and payable within 20 business days and 30 business days for the subcontractor, because this would provide a reasonable time for the contractor to assess the subcontractor's claim. In addition, such a differentiated timeframe would allow the contractor time to receive the payment under the head contract and provide sufficient time to make arrangements for the payment of the subcontractors' claims.

Other stakeholders, particularly those organisations representing subcontractors,<sup>390</sup> as well as the CFMEU and SA Government, said there should be no difference in the timeframes for contractors and subcontractors, and accordingly advocated for consistency across the contracting chain with respect to when payment claims become payable. For example, AMCA SA were of the view that payment times should be the same for head contractors and subcontractors, saying there is no valid argument for why the timeframes for a payment claim becoming due and payable should be different for head contractors and subcontractors. The CFMEU and MPAQ submitted that giving the head contractor payment before subcontractors only allows them to use the money on different projects.

The LCA also agreed that the imposition of extended periods for payment of subcontractors is inconsistent with the objectives of the respective security of payment regimes. Adjudicate Today submitted that the recent NSW amendments that differentiated head contractor and subcontractor payment times have had an adverse impact on subcontractors. Accordingly, Adjudicate Today propose that the previous default provisions in the NSW Act should be reintroduced so that where the contract makes no express provision for the due date for payment, then payment should be due and payable 10 business days after the payment claim has been served. Adjudicate Today noted that under the 2014 amendment to the NSW Act<sup>391</sup> the due date for payment to a subcontractor has been extended by 20 business days (i.e. from 10 business day to 30 business days) and that this outcome is inconsistent with the prime objective of the legislation of promoting the cash flow of small businesses.

### **Discussion and recommendation**

As outlined above, prior to the 2014 amendments, the NSW Act provided that a progress payment under a construction contract became due and payable:

- a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or

<sup>388</sup> Including MBA SA, MBA NSW, QMBA and MBAV.

<sup>389</sup> See ss. 67U and 67W of the QBCC Act.

<sup>390</sup> Including AMCA SA, NECA, NECA SA/NT, MPA NSW and MPAQ.

<sup>391</sup> See s. 11(1B) of the NSW Act.

- b) if the contract made no express provision with respect to the matter, then on the date occurring 10 business days after a payment claim had been made under the Act.

Accordingly, the parties were free to negotiate their own due date for payment and the Act would bind them to such agreement. If, however, the parties did not arrive at an agreement in relation to payment terms, then the default provisions of the Act would apply such that the due date for payment would be 10 business days after a payment claim had been made. Several of the other jurisdictions adopted a similar approach such as Victoria, Tasmania and the ACT. South Australia also adopted a similar approach, except that the default period set out under its Act is 15 business days. As outlined above, the NSW Act was amended in 2014 to now provide the due date for payment is 15 business days in the case of a contract entered into between a principal and a head contract, and 30 business days in the case of a payment to a subcontractor, unless the contract expressly provides for a shorter period.

The approach of jurisdictions that have adopted the West Coast Model is equally inconsistent. Under the Western Australia Act (as amended in 2016), any provision in a construction contract that purports to require payment to be made more than 42 days after payment is claimed is to be read as requiring the payment to be made within 42 days after it is claimed.<sup>392</sup> The NT Act, however, provides that any construction contract that purports to provide for payment to be made more than 50 days after payment is claimed is to be read as requiring payment to be made within 28 days after it is claimed.<sup>393</sup>

It can therefore be seen from the above that only the Victorian, South Australian and Tasmania Acts provide the parties with the unrestricted freedom to agree on their own contractual due date for payment. All the other jurisdictions seek to restrict, in varying degrees, the parties' freedom to agree on the date when a progress payment is to be made. Similarly, where the parties have not agreed on the due date of payment, the default period set out under the various legislations ranges from 10 business days (in South Australia, Victoria, Tasmania and the ACT) to 42 days (in Western Australia) but with the NSW Act providing for a different default period depending on whether the payment is to be made to a head contractor or subcontractor.

### *No justification for different approaches*

There is no logic to the differing approaches and timeframes that currently exist within the various jurisdictions and it is high time that a consistent policy approach is applied. In determining what should be the appropriate due date for payment, a balance needs to be struck between respecting the parties' freedom of contract whilst at the same time recognising the unequal bargaining powers of the parties.

To allow the parties an unfettered right to agree on payment terms would have the effect of undermining the underlying objective of the legislation which is to promote prompt payment and to facilitate a contractor's cash flow. It would not be appropriate for the legislature to allow the dominant party in a contractual relationship to impose payment terms on the other party if the effect of such terms were inconsistent with the legislature's prime objective of promoting prompt payment. Equally, the legislature should provide the parties with some scope to negotiate payment terms that reflect the specific nature of a particular project, but not to the extent of unduly delaying payment for the party that has the least bargaining power. Similarly, if the parties have not been able to or did not make any agreement on payment terms, then the default provisions should apply in a consistent manner across the entire contractual chain.

<sup>392</sup> See s. 10 of the WA Act.

<sup>393</sup> Section 13 of the NT Act.

Accordingly, and taking into account the above policy considerations, I consider that the legislation should provide that a progress payment under a construction contract becomes due and payable:

- a) on the date on which the payment is stated to be due and payable under the terms of the contract, subject to such payment term not exceeding 25 business days; or
- b) if the contract makes no express provision with respect to the matter, then on the date occurring 10 business days after the payment claim has been made.

I have arrived at the maximum contractual payment period of 25 business days because most of the industry generally operates on payment terms of 30 days.<sup>394</sup> I have arrived at the default period of 10 business days because that is the period that most of the jurisdictions that have adopted the East Coast Model (including NSW up to 2014) have been operating under for many years. I do not support the current NSW Act scheme that provides for a different due date for payment depending on whether the payment is made to a head contractor or subcontractor. There should be a consistent approach and prescription of payment periods across the entire contractual chain.

#### **Recommendation 19:**

The legislation should provide that the due date for when a progress payment is to be paid is:

- a) the date provided for under the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, or
- b) if the contract makes no express provision with respect to the matter, 10 business days after the payment claim has been made.

### **11.4 Amount of progress payment**

All of the jurisdictions that have adopted the East Coast Model, other than Victoria, contain a provision similar to section 9 of the NSW Act, which states:

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

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

Thus, consistent with the underlying philosophy of the East Coast Model, the amount of a progress payment is calculated in accordance with the terms of the contract. For example, if terms of the contract entitle a respondent to set-off amounts that are due to it from the amounts due to the claimant, then an adjudicator would be required to take into account the set-off amount in the calculation of a progress payment. Where, however, the contract makes no express provision as to how a progress payment is to be calculated, then the default provision will apply and the amount of a progress payment will be calculated on the basis of an assessment of the value of the construction work carried out or the value of the related goods and services supplied. Further, in such circumstances, an adjudicator, in calculating the progress payment amounts, will not be able to take into account the amount of any set-offs claimed by the respondent.<sup>395</sup>

<sup>394</sup> This period was confirmed by the results of the survey conducted by the Review.

<sup>395</sup> *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126, [57].

### Responses from stakeholders

Stakeholders were not asked to make specific comments relating to this issue. Various responses received during the consultation process did, however, indirectly deal with some of the aspects associated with this subject matter such as, for example, preferences for the East Coast Model; the structure that should underpin such a model; and whether specific amounts should be excluded from a progress payment.

### Discussion and recommendation

From a policy perspective, the scheme of the East Coast Model, insofar as it deals with this important issue, is eminently sensible. It allows the parties to agree on the manner in which a progress payment is calculated and the default provisions only apply where the contract contains no express terms on the matter. Leaving aside the issue of whether the legislation should include a carve out (which is dealt with separately in Section 10.2 of this Report), I see no reason why the wording set out in section 9 of the NSW Act should not be incorporated as best practice.

#### Recommendation 20:

The legislation should provide that the amount of a progress payment is to be calculated:

- a) in accordance with the terms of the contract, or
- b) if the contract does not make any such provision, on the basis of an assessment of the value of the construction work carried out, or goods and services provided.

Section 9 of the NSW Act provides a suitable model.

## 11.5 Valuation of construction work

The approach that the East Coast Model adopts as to how construction work and related goods and services are valued is identical to how a progress payment amount is calculated. In other words, all the jurisdictions that have adopted the East Coast Model (other than Victoria) provide for construction work and related goods and services to be valued in accordance with the terms of the contract, but, if the contract does not make an express provision with respect to the matter, then having regard to:

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

### Responses from stakeholders

As in the case relating to the calculation of the amount of a progress payment, stakeholders were not asked to make specific comments relating to the valuation of construction work and related goods and services. No specific comments were raised during the consultation process.

### Discussion and recommendation

It can be seen that the legislative scheme of the East Coast Model enables the parties to agree on the manner in which the construction work or related goods and services are valued and it is only where the parties have not made any express agreement on this matter that the default provisions apply. From a policy perspective, I consider this approach to be entirely appropriate. Further, from a drafting perspective, I see no reason why the provisions set out in section 10 of the NSW Act should

not be adopted as the benchmark. No stakeholder raised any concerns with the wording of section 10 of the NSW Act nor suggested that the provisions in any of the other jurisdictions that have adopted the East Coast Model should be preferred.

**Recommendation 21:**

The legislation should provide that construction work and related goods and services is to be valued:

- a) in accordance with the terms of the contract, or
- b) if the contract does not make an express provision with respect to the matter, then having regard to:
  - (i) the contract price for the work/goods and services
  - (ii) any other rates or prices set out in the contract
  - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
  - (iv) if any of the work/goods is defective, the estimated costs of rectifying the defect.

Section 10 of the NSW Act provides a suitable model.

# Chapter 12:

# Process for recovering

# progress payments

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## 12. Process for recovering progress payments

### 12.1 Making a payment claim

Most of the jurisdictions that have adopted the East Coast Model provide that a payment claim must:

- a) identify the construction work (or related goods and services) to which the payment claim relates
- b) indicate that the amount of the progress payment that the claimant claims to be due (the claimed amount), and
- c) state that it is a claim made under the relevant security of payment Act.

In NSW, and following the amendments to its Act in 2014, the requirement for the payment claim to be endorsed as a payment claim made under the Act was removed (except if the construction contract is connected with an exempt residential construction contract).

Sections 14(2)(a) and (b) of the Victorian Act provide that not only should the payment claim include the three requirements set out above, but that it should also:

- a) ... be in the relevant prescribed form (if any); and
- b) ...contain the prescribed information (if any) ...

There has, however, not been a prescribed form or prescribed information set out by the Victorian Regulator.

### Responses from stakeholders

Although stakeholders were not asked to provide specific comments on what details should be included in a payment claim, issues relating to this matter nonetheless emerged during the consultation process. For example, some stakeholders expressed concern with the lack of details in some payment claims and also on how to specifically reply to such a claim. Other stakeholders expressed the view that the legislative regime should not be overly prescriptive in stipulating the details required to be set out in a payment claim because such prescription might result in a claimant being unable to press for prompt payment for work carried out.

### Discussion and recommendation

#### *Courts have given the widest possible interpretation*

The question as to the degree of specificity, particularly in respect to the description of the claimed work, has been extensively considered by the courts. In *Protectvale Pty Ltd v K2K Pty Ltd*,<sup>396</sup> Finkelstein J stated the statutory requirements as set out under the relevant Victorian provision as follows:

The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context: *Multiplex Constructions* [2003] NSWSC 1140 at [76].

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<sup>396</sup> [2008] FCA 1248.

The manner in which compliance with s.14 is tested is not overly demanding: *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 at [54] citing *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20] ('[The requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner'); *Multiplex Constructions* [2003] NSWSC 1140 at [76] ('[A] payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves'); *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [20] ('The Act emphasises speed and informality. Accordingly, one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint').

Nonetheless a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule: *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462, 477; *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 at [18]–[21]. That is not an unreasonable price to pay to obtain the benefits of the statute.<sup>397</sup>

In *Gantley Pty Ltd & Ors v Phoenix International Group Pty Ltd & Anor*<sup>398</sup> (*Gantley*), Vickery J reinforced the observations of Finkelstein J:

What is necessary is an identification of the work which is sufficient to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is not an overly exacting exercise. It is to be tempered by what is reasonably necessary to be comprehensive to the recipient party when considered objectively, that is from the perspective of the reasonable party who is in the position of the recipient. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchange of information.<sup>399</sup>

It can therefore be seen that the courts have given the current requirements outlined in the legislation the widest possible interpretation, subject however to requiring a payment claim to satisfy the test of whether a reasonable party in the position of the recipient would have been able to understand the basis of the claim so as to be able to provide a meaningful payment schedule. There have been instances where the courts have quashed an adjudicator's decision because of a claimant's failure to identify the particular construction work the subject of the claim, or to state that the payment claim did not relate to construction work but was rather a contractual claim akin to a milestone payment (as in *Gantley*). This has caused Vickery J to recommend that the Victorian Regulator consider prescribing forms for payment claims:

Both counsel agreed that much of the difficulty presented for resolution under Ground 1 of these proceedings, would have been averted if there had been in place a facility of the type of s.14(2) of the ... Act.

The (CCF) has developed a payment claim form for use in Victoria ...

New Zealand also has in operation the *Construction Contracts Act 2002*, which is similar to the Victorian Act. Section 20 of the New Zealand Act is the equivalent of s. 14 of the Victorian Act. Section 20(2)(c) provides that a payment claim must, inter alia, 'identify the construction work and the relevant period to which the progress claim relates.'

<sup>397</sup> *Protectvale Pty Ltd v K2K Pty Ltd*, [10]–[12].

<sup>398</sup> [2010] VSC 106.

<sup>399</sup> *Ibid*, [51].

The New Zealand Subcontractors Federation Inc has also developed a ‘Payment Claim’ form which is said to comply with s.20 of the New Zealand Act. The form is in the public domain and is said to have received ‘general approval from all participants in the building industry ...’

The payment claim forms produced by the CCF and the form in use in New Zealand (with appropriate adaptations ...), have much to commend them. If one or other or a combination of these forms, or an appropriate adaptation thereof, had been used by the claimant in this case, it may well have averted the cost, expense and delay associated with the prosecution of Ground 1 and the claimant’s exposure to the allegation of invalidity of its payment claims and the subsequent adjudications upon them, at least on this ground.<sup>400</sup>

When a very experienced and highly respected judge on security of payment matters like Vickery J puts forward proposals that can enhance the effectiveness of the legislative regime, it behoves that proper attention be given to the proposals. Further, during the consultation process, various stakeholders expressed the view that it is not uncommon for respondents to receive payment claims which fail to detail the basis upon which the claim has been made or as to how the claimed amount has been arrived at. It therefore seems indubitable that a respondent would be better able to be apprised of the payment claim (and therefore better able to provide a meaningful payment schedule) if a payment claim were to be required to include the kind of details set out clause 5(2) of the Singaporean *Building and Construction Industry Security of Payment Regulations* (2006) (Singapore Regulations) as follows:

Every payment claim shall —

- a) be in writing;
- b) identify the contract to which the progress payment that is the subject of the payment claim relates; and
- c) contain details of the claimed amount, including —
  - (i) a breakdown of the items constituting the claimed amount;
  - (ii) a description of these items;
  - (iii) the quantity or quantum of each item; and
  - (iv) the calculations which show how the claimed amount is derived.

### ***Legislation should require claimant to give details***

It seems to me that if the legislation is to require a respondent to a payment claim to set out all of the reasons for withholding payment (or for scheduling an amount less than the amount claimed), and not permit any new reasons to be included in the adjudication response (which is what I recommend in Section 13.3 of this Report), then the claimant should be required to include more details in its payment claim. Requiring the claimant to identify in its payment claim the contract (or arrangement) on which the claim is based will not only assist the respondent in being better apprised as to the nature of the claim, but it will also require the adjudicator to base their decision on the contractual basis raised by the parties. Similarly, requiring the claimant to provide a breakdown of the items and provide a description, quantification and an outline as to how the claimed amount has been assessed will also assist the respondent in providing a meaningful payment schedule. It must be remembered that the purpose of submitting a payment claim is to provide the recipient with sufficient detail to enable it to understand what is being claimed and to enable the recipient to provide a payment schedule stating either that the claimed amount will be paid, but if not, then to state what amount is proposed to be paid and why the scheduled amount is less than the claimed amount.

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<sup>400</sup> Vickery J in *Gantley*, [135]—[139] and repeated in *Façade Treatment Engineering v Brookfield Multiplex Construction Pty Ltd* [2015] VSC 41, [26] and in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* (No 2) [2015] VSC 500, [151] (*Amasya*).

Accordingly, I recommend that the legislation incorporate the details set out in clause 5(2) of the Singapore Regulations. Alternatively, if it is considered that the details required to be included in the payment claim may be too onerous for claimants then I would recommend that the current provisions as set out in section 14(2)(a) and (b) of the Victorian Act be adopted, but with the responsible Regulator publishing the prescribed payment claim form.

### Recommendation 22:

The legislation should require a claimant to identify in its payment claim:

- a) the contract (or arrangement) on which the claim is based, and
- b) a breakdown of the items claimed, including:
  - (i) a description of the item
  - (ii) quantification of the item, and
  - (iii) an outline as to how the claimed amount has been assessed

Clause 5(2) of the Singaporean *Building and Construction Industry Security of Payment Regulations 2006* provides a suitable model.

## 12.2 Endorsement of payment claims

In 2014, the amendments to the NSW Act removed the requirement for a payment claim to be endorsed with a statement that the claim was a claim made under the Act. This has had the effect of making any claims (including a claim made under the contract) as a claim made under the Act, thereby requiring the recipient of such a claim to provide a payment schedule. It has also exposed claimants to the potential risk of inadvertently having been taken to have made a claim under the Act when in fact they only intended the claim to have been made under the contract and so potentially having served more than one payment claim for each reference date contrary to section 13(5) of the NSW Act. The service of more than one payment claim in respect of each reference date will have the effect of causing the second payment claim to be invalid.

As with NSW, the Queensland Bill 2017 will also remove the requirement for endorsement of payment claims.

### Responses from stakeholders

During the consultation process, stakeholders were asked whether all payment claims made under the Act should include the endorsement that 'this is a payment claim made under the Act'. Stakeholders were also asked whether there would be merit in the payment claim also including details relating to response times and the potential consequences of not providing a payment schedule within the prescribed time.

An overwhelming majority of stakeholders<sup>401</sup> support the inclusion of an endorsement in a payment claim. NECA stated the 2014 amendments to the NSW Act to remove the requirement to endorse a payment claim as a claim made under the Act should be repealed because it has created significant problems for both respondents and claimants. LCA, MBA NSW and HIA Qld also expressed the need for the endorsement to be clearly and prominently identified in the payment claim.

SoCLA, whilst preferring the West Coast Model and therefore considering the whole structure of statutory claims irrelevant, nonetheless submitted that if an East Coast Model were to be adopted nationally then the requirement for an endorsement is a necessary step to communicate the

<sup>401</sup> Including MBA NSW, NECA, QMBA, HIA, HIA Qld, Subcontractors Alliance, MEA, MNAV and MBA SA.

claimant's intention to the respondent and reduce the likelihood of a respondent inadvertently failing to provide a payment schedule.

Some stakeholders<sup>402</sup> expressed the view that requiring a payment claim to be endorsed as a claim made under the Act has the effect of increasing instances of intimidation and threats of retribution by the respondents.

Among regulators and officials, the ACT, South Australia and Victoria agreed that all payment claims should include such an endorsement. For example, the Victorian Government was of the view that regular use of security of payment endorsements on invoices may assist in ensuring that claims are made promptly and serve as a means of ensuring that contractors are not being discriminated against.<sup>403</sup> ACT officials noted that this was largely an education issue as some industry participants view these words as adversarial and often perceive this as a legal threat.

Stakeholders representing head contractors<sup>404</sup> indicated support for payment claims specifying the period in which a party is required to respond and setting out the potential consequences. MBAV and MBA SA both noted that the making of a payment claim under the Act is a serious legal step, and therefore agreed with the concept of requiring a payment claim to clearly identify the legal consequences of not responding within the timeframes.

MBA SA also suggested that education to support an industry-wide understanding of potential consequences is needed; however, stakeholders representing subcontractors did not support this position.<sup>405</sup>

### Discussion and recommendation

An endorsement of a payment claim discloses a clear intention of the claimant to engage the Act and serves to alert the recipient of the severe consequences if it fails to respond within the statutory timelines by way of a payment schedule. The endorsement therefore distinguishes a payment claim from a document that has been forwarded for some other purposes, such as, for example, a document that is forwarded as a draft solely for facilitating discussions between the parties.

It therefore follows that the removal of such endorsement would require a recipient to assume that any invoices or documents referring to a request for payment are to be treated as a payment claim made under the Act and consequently require a detailed analysis and response, even though the invoice or document may not have been intended to be a payment claim under the Act. As pointed out by NECA, the removal of the need to endorse a payment claim under the 2014 amendments to the NSW Act has 'created an administrative nightmare for businesses who are now obliged to expend substantial time and money preparing and serving payment schedules in response to every invoice received.'<sup>406</sup>

The removal of the endorsement of a payment claim can also serve to seriously prejudice a respondent who unwittingly had failed to appreciate that a document forwarded by a claimant was intended to be a payment claim made under the Act. Thus, for example, where under the NSW Act a respondent has failed to provide a payment schedule within the prescribed timeline and a claimant elects to seek judgement from a court for the claimed amount as a debt due to the claimant, the respondent is not permitted (by reason of section 15(4) of the NSW Act) to bring any cross claims or raise any defence in relation to matters arising under the construction contract. As submitted by Adjudicate Today:

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<sup>402</sup> Including NECA SA/NT and AMCA SA.

<sup>403</sup> Victorian Government, written submission, p. 6.

<sup>404</sup> Including MBA NSW, MBA SA, QMBA, HIA Qld, NECA SA/NT, MBAV, HIA and AIB.

<sup>405</sup> Including NECA and AMCA SA.

<sup>406</sup> NECA, written submission, p. 28.

In other words, the NSW Act, as it was amended, allows claimants ...to proceed directly to any court of competent jurisdiction without any warning whatsoever to the respondent. The application to court may be based on a payment claim never considered as such by the respondent who will face a legal proceeding in which they can't raise defences.<sup>407</sup>

Additionally, under all the legislations that have adopted the East Coast Model, a claimant is only permitted to serve one payment claim in respect of each reference date<sup>408</sup> and therefore the removal of the endorsement may operate to the prejudice of a claimant where the claimant may have inadvertently activated the Act. An example of where such an unintended outcome may arise was outlined by NECA:

Most accounting systems generate invoices as and when certain portions of the works are completed. These invoices are sent out during the course of the month. As the requirement for an endorsement on the face of the payment claim to state that it is under the Act has been removed under the current legislation, each invoice is a payment claim under the Act. The Act only provides for one payment claim to be served on each reference date. As each invoice is a payment claim, more than one payment claim is served on each reference date which renders all the invoices/payment claims served invalid. Effectively now, a claimant cannot send out any invoices or repeat invoices as these would invalidate any subsequent payment claim. NECA's members believe that this is very counterproductive and has severely complicated the system.<sup>409</sup>

I therefore consider that the Act should expressly require a payment claim to state that it is made under the security of payment Act if the claimant intends to seek recourse under the Act in the event that a dispute arises from the payment claim.

Further, there does not appear to be any valid reason why a payment claim should not also specify the period in which a response is due and the potential consequences for failing to do so. Not all respondents are necessarily sophisticated large head-contractor organisations. Indeed, it is not uncommon for a payment claim to be served by a sub-subcontractor on the party higher up the contractual chain who is also a subcontractor. In such circumstances, I consider that such an organisation would benefit by receiving a payment claim that was not only endorsed as a payment claim made under the Act but that also included an outline of the timeframe in which a payment schedule is to be provided and the potential consequences of not responding within such timeframe.

I have already outlined in Section 12.1 above as to the benefits that would flow if the legislation could adopt similar provisions to those currently set out under section 14(2)(a) and (b) of the Victorian Act and provide for a payment claim to be made in a 'prescribed form' and contain any of 'the prescribed information'. Such a provision would enable the Regulator to ensure that the prescribed form set out the precise wording of not only the endorsement to be included on a payment claim but also the timeframe within which a payment schedule is to be provided and the potential consequences in failing to provide such a payment schedule. As Vickery J has underscored in a number of his recent judgements,<sup>410</sup> a prescribed form would be of great assistance to many participants in the industry and will enhance the overall effectiveness of the legislative regime.

<sup>407</sup> Adjudicate Today, written submission, p. 60.

<sup>408</sup> See for example, s. 13 (5) of the NSW Act or s. 17 (4) of the Queensland Act.

<sup>409</sup> NECA, written submission, p.28.

<sup>410</sup> Vickery J in *Gantley Pty Ltd & Ors v Phoenix International Group Pty Ltd & Anor* [2010] VSC 106 and repeated in *Façade Treatment Engineering v Brookfield Multiplex Construction Pty Ltd* [2015] VSC 41 and in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500.



**Recommendation 23:**

The legislation should expressly require a payment claim to:

- a) state that it is a payment claim made under the Act
- b) provide the period for which a payment schedule is to be provided, and
- c) the potential consequences for failing to provide a payment schedule.

### 12.3 Appropriate period in which a payment claim may be served under the Act

The legislative scheme of the East Coast Model provides that a progress payment claim may be served only in accordance with the later of the period set out under the construction contract or within the prescribed period after the construction work or related goods and services (to which the claim relates) was last carried out or supplied. However, the prescribed period differs from jurisdiction to jurisdiction.

In NSW, Tasmania and the ACT the prescribed period is 12 months, but in South Australia and Queensland it is 6 months. In Victoria, the prescribed period is 3 months.

Additionally, in Victoria and Queensland, there are separate requirements where the payment claim relates to a final payment.

Under the Victorian Act, sections 14(4) and (5) provide:

- (4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within –
  - (a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or
  - (b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment – whichever is the later.
- (5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within –
  - (a) the period determined by or in accordance with the terms of the construction contract; or
  - (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

The relevant provisions of the Queensland Act are at sections 17A(3) and (4) and read as follows:

- (3) If the payment claim relates to a final payment, the claim must be served within the later of the following –
  - (a) the period, if any, worked out under the relevant construction contract;
  - (b) 28 days after the end of the last defects liability period, if any, worked out under the relevant construction contract;
  - (c) 6 months after the later of –

- (i) completion of all construction work to be carried out under the relevant construction contract; or
- (ii) complete supply of related goods and services to be supplied under the relevant construction contract.

(4) In this section –

**defects liability period**, for a construction contract, means the period, if any, worked out under the contract as being the period –

- (a) starting on the day the construction work is practically or substantially completed, or the related goods and services are supplied, under the contract; and
- (b) ending on the last day any omission or defect in the construction work or related goods or services may be required or directed to be rectified under the contract.

**final payment** means a progress payment that is the final payment for construction work carried out, or for related goods and services supplied, under a construction contract.

### Responses from stakeholders

During the consultation process stakeholders were asked for their views on what should be the appropriate period in which a payment claim may be served.

The overwhelming majority of industry groups<sup>411</sup> consider that a claimant should be allowed to make a payment claim up to 6 months after the construction work has been completed.

MBA NSW submitted that a timeframe of 12 months (as is the case in NSW and other jurisdictions) is too long, and that a timeframe of 3 months (as is the case in Victoria) is too short, and that therefore 6 months would be an appropriate period. MBA NSW also stated that where a payment claim relates to a final payment, the legislation should include a provision similar to section 17A(3) of the Queensland Act.

However, QMBA indicated a preference for 6 months compared to 12 months, as prescribed under the pre-2014 Queensland legislation, although it did observe that a 3-month period would be more consistent with the objective of a rapid adjudication scheme.

AMCA also supported the retention of the 6-month period set out in the SA Act. AMCA suggested that when setting timeframes relating to payment claims and the adjudication process, the following two guiding principles should be adopted:

- 1) The parties should have sufficient time to pursue a negotiated resolution.
- 2) The legislative scheme should provide procedural fairness to all parties.

Various stakeholders<sup>412</sup> however indicated their preference for a 3-month period, emphasising that the prime purpose of the security of payment laws should be to promote cash flow and so allowing a party a longer period to submit a payment claim would be inconsistent with that objective.

NECA advocated for a 12-month period and suggested that the time limit for making claims in respect of the return of retention moneys, bank guarantees and performance bonds should be extended beyond this 12-month limitation period.

<sup>411</sup> Including AIB, HIA, MBA NSW, NECA SA/NT, AMCA SA, MEA and MPAQ.

<sup>412</sup> Including MBAV, HIA Qld, MBT. and LCA.



Adjudicate Today supported the proposition that regardless of what timeline was to be adopted in respect to the making of a progress claim, special provision should be made for the recovery of retention moneys:

In order to secure a claimant's statutory right to recover retention moneys, it is desirable to draw the Victorian Act's distinction between a payment claim for performed work and a payment claim that is a final payment claim, so that the appropriate period for purposes of the final payment claim would run from either:

- a) the date when construction work was last carried out or related goods and services were supplied, or
- b) the date fixed by the contract.<sup>413</sup>

From the perspective of regulators, the Victorian Government regarded the 3-month period provided by the existing Victorian legislation as reasonable,<sup>414</sup> however the South Australian Regulator believes that the 6-month period set out in its legislation is appropriate.

### Discussion and recommendation

Identifying an appropriate period in which a payment claim may be served involves striking a balance between two competing considerations.

On the one hand, the legislation should provide a claimant with sufficient time to prepare the details of a payment claim for submission to the respondent, and to allow sufficient time for the parties to discuss and negotiate an agreed outcome without the need to refer the claim to adjudication. Sometimes the preparation of a claim is not straightforward and may require extensive time in identifying and compiling the documentation relevant to the claim. This is particularly the case where the claim includes multiple claims for variation work or relates to a claim for delay costs. In such instances, it is not uncommon for such claims to involve many meetings as the parties flesh out the details relating to the claim and, where further information is requested as part of the process, arrive at a negotiated outcome.

On the other hand, the legislation is designed to promote prompt payment and so to allow one party an inordinate period of time in which to submit a payment claim would not be consistent with the objective of promoting cash flow. Further, allowing a claimant a long period of time to prepare its claim, but giving the respondent only a compressed timeframe in which to respond, raises issues of procedural fairness and exposes respondents to being served with ambush claims.

Whereas the 3-month period set out under the Victorian legislation<sup>415</sup> is intended to encourage a claimant to pursue progress claims promptly (and thus facilitate cash flow), such a period does not provide the parties with sufficient time in which to explore a negotiated outcome. Indeed, the short timeframe may cause a claimant to immediately invoke the statutory regime rather than explore a negotiated resolution, and this may in turn place the parties' future commercial relationship under strain. There is virtue in ensuring that the legislation does not operate so as to discourage the parties from exploring a negotiated outcome.

However, the current legislative provisions set out in the NSW, Tasmania and ACT Acts – which allow a claimant a period of 12 months in which to give a payment claim whilst only allowing a respondent 10 business days in which to reply by way of a payment schedule – are patently unfair. This is particularly the case where the claimant's payment claim is for a large amount and in relation to matters that the claimant had not previously raised, and where the supporting documentation

<sup>413</sup> Adjudicate Today, written submission, p. 23.

<sup>414</sup> Victorian Government, written submission, p. 3.

<sup>415</sup> Section 14(4)(b) of the Victorian Act.

subsequently provided with the adjudication application involves thousands of pages. Further, allowing a claimant 12 months to prepare for a progress payment claim can hardly be regarded as consistent with the objective of promoting prompt payment.

Given the issues raised above, it seems sensible that allowing a claimant 6 months in which to serve a payment claim would strike the appropriate balance. Such a period would provide the parties with sufficient time to explore the prospects of a negotiated outcome, whilst at the same time significantly reducing the period within which a payment claim can be prepared from the current 12-month period set out under the NSW, Tasmanian and ACT Acts. A 6-month time period would be consistent with the object of the legislative regime, which is to allow payments to flow quickly down the contractual chain and thus maintain cash flow. It would also be consistent with the analysis and conclusion arrived at in the Wallace Review, which in turn led the Queensland legislature to amend the relevant provision within its Act from 12 months to 6 months,<sup>416</sup> and it is, of course, consistent also with the relevant provision set out in the SA Act.<sup>417</sup>

Additionally, (and as submitted by a number of parties during the consultation process), the legislation should distinguish between a payment claim for progress payment during the period when the work is being carried out, and a payment claim that is made as a final claim. This is because there is usually a 12-month maintenance period (or defects liability period) following the date of practical completion, during which minor outstanding work or repairs may be carried out. Theoretically what should then happen is that at the end of that period the remaining portion of the retention moneys should be released, or the bank guarantee returned. This, however, does not always occur (particularly in respect to the return of retention moneys to small subcontractors). It is therefore appropriate that the legislation should enable a claimant to make a final payment claim so as to be able to include a claim for the release of the remaining retention moneys or to request the release of a bank guarantee.<sup>418</sup>

In considering this issue, the Wallace Review noted the approach adopted under the Victorian Act and recommended that the Queensland Act be amended so as to distinguish between a progress payment claim and a final payment claim, but, unlike the Victorian Act, it was not considered

... necessary to provide a claimant with another 3 months to provide its final payment claim. It is likely that the claimant will have had 12 months to prepare the final payment claim. I see no reason why a claimant should not be restricted to serving such within 28 days after the completion of the defects liability period under the relevant construction contract, unless the contract provides a longer period. If the claimant has not got its house in order within 13 months after having completed the work, it is doubtful that it ever will.<sup>419</sup>

The (then) Queensland Government accepted that part of the Wallace Review and the Queensland Act was amended in 2014 so as to provide specific requirements for a final payment claim.<sup>420</sup>

In line with the Queensland Act I consider that where the payment claim is a final payment claim (including recovery of retention, or the return of alternative security) then such a claim should be required to be made either within the period worked out in accordance with the construction contract, or, if the construction contract does not so provide, then 28 days after the end of the

<sup>416</sup> Refer to s. 17A (2) of the Queensland Act.

<sup>417</sup> See s. 13 (4) (b) of the SA Act.

<sup>418</sup> This will in turn require the legislation to empower an adjudicator to make determinations for return of retention monies or release/discharge of bank guarantees or performance bonds, which is a matter dealt with in Section 15.5 of this Report.

<sup>419</sup> Wallace Review, op cit, p. 189.

<sup>420</sup> The relevant provisions of the Queensland Act are sections 17A(3) and (4).

defects liability period or 6 months after completion of all construction work had been carried out or related goods and services were supplied, whichever is the later.

#### **Recommendation 24:**

The legislation should require that, unless the construction contract provides for a longer period, a progress payment claim must be made within 6 months after the construction work was last carried out or the related goods and services were supplied.

#### **Recommendation 25:**

The legislation should provide that where a payment claim relates to a final payment (including recovery of retention, or the return of alternative security) the claim must be made:

- a) within the period specified in the construction contract, or
- b) if the construction contract does not so provide, the later of:
  - (i) 28 days after the end of the defects liability period, or
  - (ii) 6 months after completion of all construction work had been carried out or related goods and services were supplied.

Sections 17A(3) and (4) of the Queensland Act provide a suitable model.

## **12.4 Responding to a payment claim ('payment schedules')**

Section 14(1) of the NSW Act provides that the person on whom a payment claim has been served may reply by way of a payment schedule. A respondent's failure to provide a payment schedule to the claimant within the time required under the construction contract or, if the contract made no specific reference to the matter, within 10 business days after the payment claim is served, 'whichever time expires earlier',<sup>421</sup> results in the respondent automatically becoming liable to pay the claimed amount to the claimant on the due date.<sup>422</sup> Section 14(2) of the NSW Act provides that a payment schedule must:

- (a) Identify the payment claim to which it relates; and
- (b) Indicate the amount of the payment (if any) that the respondent proposes to make ('the scheduled amount').

If the scheduled amount is less than the claimed amount section 14(3) of the NSW Act requires that '... the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reasons) the respondent's reasons for withholding payment.'

In *Multiplex Constructions Pty Ltd v Luikens and Anor (Multiplex Constructions)*<sup>423</sup>, Palmer J noted that payment claims and payment schedules are given and received by parties:

... who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a

<sup>421</sup> Section 14(4) of the NSW Act.

<sup>422</sup> Ibid.

<sup>423</sup> [2003] NSWSC 1140 (*Multiplex Constructions*).

pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in dispute... section 14(3) of the Act, in requiring a respondent to 'indicate' its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word 'indicate' rather than 'state' or 'specify' or 'set out', conveys an impression that some want of precision and particularity is permissible **as long as the essence of 'the reason' for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication** [emphasis added].<sup>424</sup>

### East Coast Model approaches

All the jurisdictions that have adopted the East Coast Model contain some differences to the NSW Act, whether in the wording of some key terms or in the timelines within which a payment schedule is to be given.

#### South Australia

The SA Act is worded in identical language to the NSW Act, except that whereas the NSW Act requires a payment schedule to be served within 10 business days after the services of a payment claim, the SA Act provides for this to be served within 15 business days.<sup>425</sup>

#### Victoria

In Victoria, the equivalent provision of section 14(2) of the NSW Act, has been drafted so as to require the respondent to also identify any amount of the payment claim 'that the respondent alleges is an excluded amount'<sup>426</sup> as well as requiring a payment schedule to be in 'the relevant prescribed form (if any)'<sup>427</sup> or 'contain the prescribed information (if any)'.<sup>428</sup> The Victorian Regulator has however made no provision to prescribe any specific information to be included in a payment schedule over and above that set out in sections 15(2)(a), (b) and (c), nor has it prescribed a form for a payment schedule.<sup>429</sup>

#### Tasmania

In Tasmania, and because its Act enables a payment claim to be served on a 'mum and dad' owner of a residential structure, two different sets of timelines apply within which a respondent may provide a payment schedule. Thus, in the case of where a payment claim has been served by a contractor on a home owner, the Act provides that a payment schedule is required to be given within 20 business days after the service of the payment claim.<sup>430</sup> In all other instances, a payment schedule is required to be given within 10 business days after the service of the payment claim.<sup>431</sup> Further, where the scheduled amount is less than the claimed amount, the Tasmanian Act requires a respondent not to 'indicate' why the scheduled amount is less or why payment is being withheld (as provided for under section 14(3) of the NSW Act) but rather to 'specify' either why the amount is less or why payment is being withheld.<sup>432</sup>

<sup>424</sup> *Multiplex Constructions*, [76]–[78].

<sup>425</sup> Section 14(4)(b)(ii) of the SA Act.

<sup>426</sup> Section 15(2)(c) of the Victorian Act.

<sup>427</sup> Section 15(2)(d) of the Victorian Act.

<sup>428</sup> Section 15(2)(e) of the Victorian Act.

<sup>429</sup> A matter which Vickery J has made adverse comments on in various of his judgments — refer to *Gantley* at [133]–[139], *Façade Treatment* at [26] and *Amasya* at [151].

<sup>430</sup> Section 19(3)(a) of the Tasmanian Act.

<sup>431</sup> Section 19(3)(b) of the Tasmanian Act.

<sup>432</sup> Section 18(3) of the Tasmanian Act.

## ACT

Under the ACT Act, section 16(2)(b), unlike its equivalent provision in the NSW Act (i.e. section 14(2)(b)), requires a payment schedule not to 'indicate' the scheduled amount, but rather to 'state' such amounts. In all other respects, sections 16(1) to (4) of the ACT Act are identical to sections 14(1) to (4) of the NSW Act.

## Queensland

The provisions relating to giving a payment schedule under the Queensland Act are significantly different to any of the equivalent provisions under the NSW Act. Firstly (as is also the case under the equivalent provision under the ACT Act), section 18(2)(b) of the Queensland Act requires a payment schedule 'to state' the scheduled amount and the reasons why the scheduled amount is less than the claimed amount, rather than 'to indicate' such amount and reasons. The issue as to what meaning is to be given to the expression 'to state' has been considered on various occasions by the Queensland Supreme Court<sup>433</sup> and it would appear that the expression 'to state' would require some greater degree of precision than the requirement 'to indicate'. Thus, in *Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd*<sup>434</sup>, a document that said that the respondent would agree to pay the claimant a particular figure if the claimant agreed to various conditions, could not be construed as a statement that nothing would be paid nor that a particular amount would be paid, and accordingly could not be regarded as a payment schedule within the meaning of the Act.

Secondly, and following the 2014 amendments to the Queensland Act, where a payment claim is a standard payment claim, a payment schedule is required to be provided within the earlier of the time required (if any) under the relevant construction contract or within 10 business days after the payment claim is served.<sup>435</sup> However, if the respondent is served with a 'complex' payment claim then (unless the contract provides for an earlier time for the service) the respondent is required to give its payment schedule within:

- (i) 15 business days of service of the payment claim, if the claim was served within 90 days of the reference date, or
- (ii) 30 business days of service of the payment claim, if the claim was served more than 90 days after the reference date.<sup>436</sup>

## Responses from stakeholders

The provision of a payment schedule is generally considered a key issue relating to the security of payment legislative regime. In this context, stakeholders were asked to express views on what the appropriate timeframe should be for a respondent to provide a proper response to a claimant's payment claim and to provide a payment schedule.

The majority of stakeholders agreed that given the purpose of the security of payment regime, respondents should be required to provide their reply to a payment claim within a short timeframe. After all, the purpose behind legislating a respondent to provide a payment schedule is to inform the claimant of the status of the claim.

<sup>433</sup> *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333; *Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd* [2010] QSC 7; and *Gisley Investment Pty Ltd v Williams* [2010] QSC 178.

<sup>434</sup> [2010] QSC 7.

<sup>435</sup> Section 18A(2) of the Queensland Act.

<sup>436</sup> Section 18A(3) of the Queensland Act.

Some stakeholders<sup>437</sup> suggested that a respondent should have 10 business days to provide a payment schedule, while others were not uncomfortable with a slightly longer timeframe of, for example, 15 business days.

A large number of stakeholders recommended that the timeframe should be differentiated depending on whether it related to a 'standard' or 'complex' claim. For example, some stakeholders<sup>438</sup> suggested 10 business days as a suitable period for 'standard' claims, and a longer period of between 15 and 20 business days for 'complex' claims. Others, such as HIA Qld and QMBA, whilst agreeing that 10 business days is appropriate for 'standard' claims and that a longer timeframe is more suitable for 'complex' claims, were not able to specify what this longer timeframe should be. MPAQ submitted that 10 business days would be sufficient regardless of the size of the claim, while MBT suggested 10 business days for commercial projects and 20 business days for residential projects as appropriate timeframes.

AMCA suggested that as a 'compromise' solution, and in the interests of consistency, it would be appropriate to provide respondents with 15 days to reply to a payment schedule. AMCA suggested that such an approach would increase the time given in those jurisdictions where it is currently 10 days (i.e. VIC and NSW), and avoid reducing the time in states where it is currently 15 days, thereby avoiding potential opposition from states such as Queensland and South Australia. The LCA also supported a longer time period for giving a payment schedule.

Stakeholders were not specifically asked about the different terminology used in the various legislation requiring respondents to 'indicate', 'specify' or 'state' the scheduled amount and/or the reasons for withholding payment.

### Discussion and recommendation

Given that the purpose of the legislative regime is to provide for prompt payment of claims for progress payments it is not surprising that many stakeholders have argued that respondents should be expected to indicate their position regarding the payment claim within 10 business days of being served with the claim. Equally, however, it is quite understandable for respondents to feel disadvantaged when they are expected to reply within 10 business days to a payment claim for a large amount and which comprises many variation items or claims for delay costs that had not been previously presented.

The numerous different requirements across the jurisdictions for giving a payment schedule, as outlined above, is, however, totally unacceptable. Given the drastic consequences that may eventuate where a respondent fails to reply to a payment claim by way of a payment schedule, and given that the industry operates on a national basis, a clear and common approach should be adopted as to what information is required to be contained within a valid payment schedule and the timeframe within which such a document is to be provided. It makes no sense that various legislative regimes have adopted different expressions to describe the degree of particularity required of the scheduled amount and/or the reasons to be given for withholding payment. The requirements under the various legislation for a respondent 'to indicate', 'to specify' or 'to state' the scheduled amount and/or the reasons for withholding payment can only lead to an unwary respondent unwittingly failing to serve a valid payment schedule. Both Palmer J in *Multiplex Constructions*<sup>439</sup> and Chesterman J in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering*<sup>440</sup> emphasised that the approach to be adopted when considering whether a document satisfies the description of a

<sup>437</sup> Including MBA NSW, NECA, MPA NSW and HIA.

<sup>438</sup> Including MBA NSW, MPAV and AIB.

<sup>439</sup> *Multiplex Constructions*, [76].

<sup>440</sup> *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333, [20].



payment schedule should not be ‘unduly critical’<sup>441</sup> and that what matters is that the document given by the respondent should clearly set out the scheduled amount and the ‘essence’<sup>442</sup> of the reasons for withholding payment. However, it is nonetheless clear that the approach adopted by the NSW Supreme Court in interpreting sections 14(2)(b) and 14(3) of the NSW Act differs from that adopted by the Queensland Supreme Court in respect to the equivalent provisions under the Queensland Act.

### *Recommended consistent requirements*

#### **Respondent to provide detailed reasons**

I consider that the most sensible approach is to require a respondent to ‘state’ the scheduled amount and that if the scheduled amount is less than the claimed amount then the payment schedule should ‘indicate’ why the scheduled amount is less and why payment is being withheld.

I consider that requiring a respondent to ‘state’ the scheduled amount would minimise any uncertainty or ambiguity as to what amount the respondent proposes to pay. In relation to the degree of particularity required for the reasons for scheduling a lesser amount than that claimed, what matters is that such reasons be sufficiently clear as to enable a claimant to make a decision as to whether to pursue its disputed payment claim and to be apprised of the case it will have to meet in an adjudication.

Further, given that I consider that the legislation should **not** permit a respondent to include new reasons when lodging an adjudication response (refer to Section 13.3 of this Report), it follows that when a claimant is served with a payment schedule it should know of all of the respondent’s reasons for disputing the payment claim. Similarly, and unlike the case under the current Victorian and Queensland Acts, the respondent will know that the giving of a payment schedule will represent its **only** opportunity of setting out its reasons for scheduling a lesser amount than that claimed, or for withholding payment.

Further, and given my earlier recommendation that the information be to set out in a payment claim must contain more information or details than the various legislative regimes currently require,<sup>443</sup> the respondent ought to be in a better position to be apprised of the nature of the payment claim and therefore better able to set out its reasons for withholding payment.

#### **Regulator power to prescribe specific form**

Further (and as is currently the case under the Victorian Act), the legislation ought to include a provision giving the Regulator the power to prescribe the specific form that a payment schedule should take, as well as prescribing any additional information over and above the need to state the scheduled amount and to indicate the reasons for withholding payment. I agree with the sentiments expressed by Vickery J in *Gantley*<sup>444</sup> that prescribing a standard form of a payment schedule (as well as a payment claim) would improve the effectiveness of the legislation and eliminate or at least reduce the incidence of legal issues arising as to whether a particular document constitutes a payment schedule.

#### **Time period for payment schedule modelled on NSW Act**

Finally, in respect to the time period within which a respondent should be required to provide its payment schedule, I consider that this should be as currently set out under section 14(4) of the NSW Act (i.e. within the time required by the relevant construction contract, or within 10 business days after the payment claim is served, whichever time expires earlier). This is the timeframe that has

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<sup>441</sup> Ibid.

<sup>442</sup> *Multiplex Constructions*, [76].

<sup>443</sup> Refer to Recommendation 22 in Section 12.1 of this Report.

<sup>444</sup> And repeated in *Façade Treatment* and *Amasya*.

been adopted by most of the jurisdictions under the East Coast Model, except in the case of South Australia (which provides for 15 business days after service of a payment claim) and in Queensland (but only in respect of a complex claim). As outlined above, a respondent who has been served with a payment claim would be provided with additional details than what is currently required, and this should enable a respondent to provide a payment schedule within 10 business days of being served with a payment claim. Further, as I have rejected the notion of the legislation incorporating a two-tier system, there is no need to provide different timelines for giving a payment schedule where the payment claim represents a claim for a large amount and for construction work claimed to have been carried out over different time periods.

#### **Recommendation 26:**

The legislation should require a payment schedule to identify:

- a) the payment claim to which it relates
- b) the amount that the respondent proposes to pay (schedule amount), and
- c) if the schedule amount is less than the claimed amount, the respondent's reasons for withholding payment.

#### **Recommendation 27:**

The legislation should provide the Regulator with powers to prescribe:

- a) the form that a payment schedule must take, and
- b) additional information requirements.

#### **Recommendation 28:**

The legislation should require a payment schedule to be served by the respondent on the claimant within the earlier of:

- a) the time required by the relevant construction contract, or
- b) 10 business days after the payment claim was served.

## **12.5 Consequences of not paying claimed amount**

All of the jurisdictions that have adopted the East Coast Model (except in the case of Queensland following the 2014 amendments to the Queensland Act) detail the consequences of a respondent who has failed to provide a payment schedule within the prescribed timeframe and failed to pay the whole or part of the claimed amount by the due date of payment. Thus section 15(2) of the NSW Act provides that:

- (2) In those circumstances, the claimant:
  - (a) may:
    - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
    - (ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and
  - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.



Section 15(4) of the NSW Act then provides that:

- (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
  - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
  - (b) the respondent is not, in those proceedings, entitled:
    - (i) to bring any cross-claim against the claimant, or
    - (ii) to raise any defence in relation to matters arising under the construction contract.

The Wallace Review considered that there was an ‘anomaly’ in the (then) Queensland Act (which included an identical provision to sections 15(2) and (4) of the NSW Act (i.e. sections 19(2) and (4)) in that a claimant who elects to recover the unpaid portion of a payment claim via adjudication must first provide the respondent with a ‘second chance’ to provide a payment schedule but not if the claimant elects to bring an application to the court for summary judgement. Accordingly, Wallace went on to state:

I accept the submissions that for a claimant to be able to proceed to make an application for summary judgement to a court without first giving the respondent a ‘**second chance**’ to provide a payment schedule is unfair. Section 19 should be amended to provide the requirement that a claimant pursuant to s. 19(2)(a)(i) of the BCIPA, must first provide the respondent with a ‘**second chance**’ to provide a payment schedule.<sup>445</sup> [emphasis added]

Mr Wallace’s recommendations relating to this matter were accepted and as a result the 2014 amendments to the Queensland Act inserted sections 19(5) and 20A which read as follows:

19 Consequences of not paying claimant if no payment schedule ...

- (5) The claimant cannot start proceedings under subsection (3)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt unless –
  - (a) the claimant gives the respondent a notice under section 20A(2); and
  - (b) the five business days for the respondent to serve the payment schedule, as stated in the notice, has ended.

20A Notice required before starting particular proceedings

- (1) This section applies if a claimant serves a payment claim on a respondent and –
  - (a) the respondent –
    - (i) fails to serve a payment schedule on the claimant under this part; and
    - (ii) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates; and
  - (b) the claimant intends to –
    - (i) start proceedings to recover an unpaid portion of the claimed amount as a debt owing to the claimant; or
    - (ii) apply for adjudication of the payment claim.

<sup>445</sup> Wallace Review, op cit, p. 227.

- (2) Before taking the intended action mentioned in subsection (1)(b), the claimant must first give the respondent notice of the claimant's intention to take the action.
- (3) The notice must –
  - (a) be given to the respondent within 20 business days immediately following the due date for payment; and
  - (b) state that the respondent may serve a payment schedule on the claimant within five business days after receiving the notice; and
  - (c) state it is made under this Act.
- (4) However, this section does not apply if the claimant previously gave the respondent a notice under this section for the unpaid portion of the claimed amount.
- (5) The giving of a notice under subsection (2) does not –
  - (a) require the claimant to complete the action stated in the notice; or
  - (b) prevent the claimant from taking different action to that stated in the notice.

### Responses from stakeholders

Feedback received from stakeholders regarding this issue differed markedly. In meetings held with various members of SoCLA, the commonly held view was that the combined effect of sections 15(2)(a)(i) and 15(4) of the NSW Act operates in a fundamentally unfair manner because a respondent who missed a deadline due to an administrative error should not be locked out of advancing what may be perfectly valid reasons for non-payment. SoCLA accordingly support the measures introduced to the Queensland Act in 2014 to require a claimant to give to the respondent notice of electing to pursue the unpaid portion of its payment claim through the courts.

On the other hand, organisations representing the interests of subcontractors, and particularly the Subcontractors Alliance, argue that the provisions that currently apply in NSW (i.e. sections 15(2)(a)(i) and 15(4)) and in all other jurisdictions that have adopted the East Coast Model (except Queensland) are fundamental in enabling the legislative scheme to operate effectively. The Subcontractors Alliance submit that by providing the claimant with the option of recovering the unpaid portion as a debt and by not permitting a respondent to raise a defence in relation to matters arising under the construction contract, the legislation reinforces the importance for a respondent to promptly reply to a progress payment claim.<sup>446</sup> Indeed, the Subcontractors Alliance point out that as a result of the 2014 amendments to the Queensland Act, respondents now have no incentive to respond to payment claims because they know that under the Act they will have a 'second chance' to provide a payment schedule, no matter which option the claimant may pursue after the due date of payment.

### Discussion and recommendation

I consider that the legislation should incorporate similar provisions to that set out in section 15 of the NSW Act. A legislative scheme designed to promote prompt payment and maintain cash flow must incorporate an appropriate 'carrot and stick' approach. In other words, a claimant who serves a progress payment claim under the Act should be assured that the legislation will require a respondent, within a relatively quick period, to formally reply to such claim. The claimant should know that if the respondent does not reply by way of a payment schedule within the prescribed timeframe and if it has not paid the whole or any part of the claimed amount by the due date of

<sup>446</sup> Meeting with Subcontractors Alliance, February 2017.

payment, then the claimant may be able to recover the unpaid portion of the claimed amount as a debt from the courts.

Similarly, the respondent ought to be aware that if it fails to provide a payment schedule within the prescribed timeframe and if it fails to pay the whole or any part of the claimed amount by the due date of payment, then it will be exposed to the risk that the claimant will be able to recover the unpaid portion of the claimed amount as a debt through the courts without receiving further notice from the claimant and without being able to bring any defence in relation to matters arising under a construction contract. The combined effect of sections 14(4), 15(2)(a)(i) and 15(4) of the NSW Act is to serve as an incentive for a respondent to either pay the claimed amount, or provide a payment schedule within the prescribed timeframe. The 'carrot and stick' approach is clearly intended to change the payment behaviour of industry participants.

### *Claimants should have priority*

SoCLA contend that such a provision may operate unfairly against unwary respondents who, unwittingly and because of an administrative oversight, have failed to provide a payment schedule within the prescribed timeframe. Whilst such circumstances may well arise from time-to-time it is more likely that without such a provision a larger number of claimants would not be able to know of the status of their payment claim. Given the competing interests, I consider that it is more appropriate that the legislation give a higher priority to promoting the interests of claimants rather than providing more leeway to accommodate any administrative oversights of respondents. Clearly the legislative scheme should send a clear message to industry that when receiving a payment claim the recipient should either pay the claimed amount or provide a payment schedule within the prescribed timeframe. Not replying to a payment claim should be seen as a high-risk strategy and respondents should put appropriate systems and procedures in place to ensure that they are able to reply to a payment claim.

Indeed an assessment of the effectiveness of these provisions can be gauged by the comments received from key subcontractor organisations, but particularly the Subcontractors Alliance who advise that since the inclusion of sections 19(5) and 20A(2) as part of the 2014 amendments to the Queensland Act some respondents are strategically delaying communicating any response to a payment claim (particularly in the case of a standard claim) until the claimant has provided a notice under section 20A(2) and only then providing a payment schedule.

Whilst I have no evidence of the incidence of such practices, I nonetheless do accept the proposition that the requirement under the amended Queensland Act for a claimant to provide a notice before commencing court action and giving the respondent a 'second chance' to provide a payment schedule has removed the incentive for some respondents to reply promptly to a payment claim. In this respect therefore, it seems that that part of the 2014 amendments to the Queensland Act not only operate unfairly against claimants but are also inconsistent with one of the prime purposes of the legislative scheme which is to change the payment practices within the industry.

**Recommendation 29:**

The legislation should provide that where a respondent fails to provide a payment schedule within the prescribed timeframe or fails to pay the whole or part of the claimed amount by the due date of payment, the claimant may:

- a) make an application for adjudication, or
- b) recover the unpaid portion of the claimed amount as a debt from the courts.

Section 15 of the NSW Act provides a suitable model.

**Recommendation 30:**

The legislation should provide that where a claimant elects to recover the unpaid portion of a claimed amount as a debt from the courts, the respondent is not entitled to:

- a) bring a cross claim against the claimant, or
- b) raise any defence in relation to matters arising under the construction contract.

Section 15 of the NSW Act provides a suitable model.

## 12.6 Consequences of not paying claimant in accordance with payment schedule

This issue relates to the situation where a respondent, having served a payment schedule within the prescribed time period and having indicated the scheduled amount, fails to pay the whole or part of the scheduled amount by the due date of payment.

The consequences that flow to a respondent who fails to pay the scheduled amount in such circumstances are set out at section 16(2) the NSW Act (and its equivalent provision within the jurisdictions that have adopted the East Coast Model).<sup>447</sup> Section 16(2) of the NSW Act provides that subsequent to the due date of payment, a claimant:

- (a) may —
  - (i) recover the unpaid portion of the scheduled amount from the respondent, as a debt owing to the claimant in any court of competent jurisdiction; or
  - (ii) make an adjudication application under section 17(1)(b) in relation to the payment claim; and
- (b) may serve notice on the respondent of the claimant's intention to suspend under section 27, carrying out construction work or supplying related goods and services under the construction contract.

Likewise, as in the case of section 15(4) of the NSW Act (refer to Section 12.5 of this Report), section 16(4) of the NSW Act also provides that if the claimant commences proceedings under section 16(2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt:

- (a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

<sup>447</sup> See s. 17(2) of the Victorian Act; s. 16(2) of the SA Act; s. 20(2) of the Queensland Act; s. 20 (2) of the Tasmanian Act; and, s. 18(2) of the ACT Act.

- (b) the respondent is not, in those proceedings, entitled:
  - (i) to bring any cross-claim against the claimant, or
  - (ii) to raise any defence in relation to matters arising under the construction contract.<sup>448</sup>

### Responses from stakeholders

The Review did not specifically seek stakeholder feedback on the consequences of not paying a claimant in accordance with a payment schedule. However, all stakeholders were provided the opportunity to raise any additional concerns with the current legislative models. Despite this the Review did not receive any comments on this matter.

### Discussion and recommendation

It should be noted that all East Coast model jurisdictions have an identical provision to section 16 of the NSW Act in their legislation, except in the case of South Australia where its relevant provision refers to 15 business days rather than 10 business days.<sup>449</sup> In the case of Queensland, the relevant provision relating to this issue is worded in exactly the same language as under sections 16(1)–(4) of the NSW Act.<sup>450</sup> This means that where a claimant elects to commence court proceedings to recover the unpaid portion of the scheduled amount, it is not required to give the respondent any notice of its intention to take such a course of action, as provided for under section 19(5) and section 20A of the Queensland Act. That appears to be sensible as, unlike the circumstances under section 19 of the Queensland Act, which deals with the consequences of not providing a payment schedule, section 20 relates to circumstances where a respondent had already served a valid payment schedule but had failed to pay all of the scheduled amount. It would make no sense, in such circumstances, to provide a respondent with a second opportunity to provide a payment schedule.

Given that all jurisdictions have adopted the same position relating to this issue and given my earlier recommendation regarding the timeline within which a payment scheduled is to be provided (i.e. within 10 business days after service of a payment claim),<sup>451</sup> I recommend that the legislation should adopt similar provisions as set out under section 16 of the NSW Act.

#### Recommendation 31:

The legislation should provide that where a respondent has provided a payment schedule within the prescribed time period, but fails to pay the whole or part of the scheduled amount by the due date of payment, the claimant may:

- a) make an application for adjudication, or
- b) recover the unpaid portion of the claimed amount as a debt from the courts.

Section 16 of the NSW Act provides a suitable model.

## 12.7 Requirement for head contractors to provide a supporting statement

Recommendation 21 of the Collins Inquiry Final Report was as follows:

Contractors should be obliged to swear statutory declarations that subcontractors have been paid what is due and payable to them. An appropriate amendment to SoPA should be made.

<sup>448</sup> For the equivalent provision within those jurisdictions that have adopted the East Coast Model see s. 17(4) of the Victorian Act; s. 16(4) of the SA Act; s. 20(4) of the Queensland Act; s. 20(5) of the Tasmanian Act; and s. 18(4) of the ACT Act.

<sup>449</sup> Refer to s. 16(1)(b)(ii) of the SA Act.

<sup>450</sup> Section 20A(4) of the Queensland Act.

<sup>451</sup> Refer to Recommendation 28 in Section 12.4 of this Report.

Collins stated that the above recommendation was designed ‘...to address the situation in which there is presently no legal obligation to provide a statutory declaration to that effect. The requirement is presently to be found in Contract.’<sup>452</sup>

The 2014 amendments to the NSW Act resulted in the insertion of sections 13(7)–(9) which read as follows:

- (7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

Maximum penalty: 200 penalty units.

- (8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.

- (9) In this section:

**supporting statement** means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

The reference within section 13(9) to the prescribed form is a reference to the form set out in Schedule 1 of the *Building and Construction Industry Security of Payment Regulations 2008* (NSW) (as amended). It should also be noted that clauses 19(2) to (5) of these Regulations expand on the meaning to be given to various expressions referred to in sections 13(7) to (9) of the NSW Act and these read as follows:

19 Supporting statements

- (1) For the purposes of the definition of **supporting statement** in section 13 (9) of the Act, the form contained in Schedule 1 is prescribed.
- (2) A reference to an amount due and payable in a supporting statement does not include a reference to an amount in dispute between the head contractor and a subcontractor. Any subcontractors with whom an amount is in dispute with the head contractor must be separately identified in the attachment to the supporting statement.
- (3) A reference to an amount due and payable in a supporting statement includes a reference to a retention amount due and payable.
- (4) The requirement for a head contractor to provide a supporting statement under section 13 (7) of the Act relates only to those subcontractors or suppliers directly engaged by the head contractor.
- (5) Any payments referred to in a supporting statement that are due and payable and not in dispute must be paid in full before any declaration in the prescribed form is signed.

In his second reading speech introducing the Bill, the then Minister for Finance and Services gave the following reasons as to why the requirement for head contractors to provide a supporting statement to the principal were introduced:

<sup>452</sup> Collins Inquiry, op cit, p.136.

Proposed section 13(7) introduces a new requirement for head contractors. A payment claim submitted by a head contractor to a principal must be accompanied by a supporting statement that includes a declaration that all subcontractors and suppliers, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

This legal requirement will in effect replace the standard contractual requirement for a statutory declaration that includes a statement that all subcontractors have been paid what is due and owing to them to be provided by the head contractor to the principal with a payment claim. The provision addresses a key finding of the inquiry that statutory declarations made by head contractors under the Oaths Act for the purpose of securing a progress payment from a client are often false, not enforced and frequently amended to convey the appearance that what was due and owing to a subcontractor was no longer an amount owed by the head contractor.

Authorised officers from agencies such as the Department of Finance and Services will have powers to investigate and prosecute breaches of the provisions relating to supporting statements.<sup>453</sup>

A head contractor's failure to provide a supporting statement with its payment claim to the principal was held by McDougall J in *Kitchen Xchange v Formacon Building Services*<sup>454</sup> to constitute an invalid service, thereby resulting in the adjudicator lacking jurisdiction:

- [46] To my mind, the better view of subs (7) is not that it renders the payment claim invalid but, rather, that it invalidates or renders ineffective service of a payment claim that is not accompanied by the requisite statement. It seems to me that the subsection recognises that the payment claim exists in fact, and required it to be accompanied by a supporting statement. If it is no, it seems to me, the service is invalid...
- [48] In *Brodyn Pty Limited v Davenport* (2004) 61 NSWLR 421, Hodgson JA identified at [53] that his Honour considered to be the basic and essential requirements for these to be a valid adjudicator's determination. They included as the second requirement, '[t]he service by the claimant on the respondent of a payment claim'.
- [49] It has since been recognised that his Honour's statement of basic and essential requirements may be equated with essential preconditions for the exercise of jurisdiction by an adjudicator. See Basten JA in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [71]. See also my judgement, with which Basten JA generally agreed in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at, in particular, [148]).
- [50] In the present case, if the service was ineffective because it was not authorised by subs (7) and thus should not be taken to have been proper service, there would be no jurisdictional error for this reason also.
- [51] Because I have concluded that the intention of subs (7) is to prohibit the service of a payment claim that is not accompanied by the requisite statement, and that service of a payment claim which is not so accompanied is ineffective or invalid, it follows for this reason also that the adjudicator lacked jurisdiction.<sup>455</sup>

### Responses from stakeholders

In discussions with the Victorian Department of Environment, Land, Water and Planning, the issue of a false statutory declaration given by a head contractor to a principal in respect of payment to subcontractors was identified as a live issue. It was noted that under the NSW Act a head contractor must not serve a payment claim to a principal unless the claim is accompanied by a 'supporting

<sup>453</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2013, (Minister for Finance and Services).

<sup>454</sup> [2014] NSWSC 1602.

<sup>455</sup> *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602, [46], [48]–[51].



statement',<sup>456</sup> and that greater transparency could be achieved in Victoria by providing for a similar 'declaration process' that:

- a) deemed construction contracts to include a provision whereby in order to receive a progress payment for work that includes work performed by a subcontractor, a head contractor must provide to the principal a declaration in the prescribed form
- b) required the head contractor to provide a copy of the statement to each of the subcontractors named in such statement, and
- c) made it an offence and a ground for discipline of registered practitioners to make false or misleading statements in the declaration.

### Discussion and recommendation

I support the recent amendments to the NSW Act that require a head contractor to provide a supporting statement as it can only improve the payment practices within industry.

I also consider that this part of the statutory scheme would be further enhanced if the head contractor were required to provide a copy of such supporting statements to each of the subcontractors whose work has been included in the head contractor's payment claim. Such a measure would ensure that subcontractors would be aware of the status of the payment claims they submitted to the head contractors. Subcontractors would also become aware of whether the head contractor's supporting statement contained any false and misleading information – for example, stating that a subcontractor has been paid for work claimed when this has not occurred – in which case it can then be referred to the Regulator for investigation and prosecution.

#### Recommendation 32:

The legislation should include a requirement for a 'supporting statement' to be included in any payment claims submitted by a head contractor to the principal, and that a copy of the supporting statement be provided to each of the subcontractors whose work has been included in the head contractor's payment claim.

#### Recommendation 33:

A 'supporting statement' should include a declaration that all subcontractors have been paid the amounts due and payable to them for construction work done.

Sections 13(7)–(9) of the NSW Act, and Regulation 19 of the NSW Regulations provide suitable models.

#### Recommendation 34:

The legislation should provide that making a false or misleading 'supporting statement' constitutes an offence.

<sup>456</sup> Which includes a declaration to the effect that all subcontractors have been paid all amounts that have become due and payable and that the making of such a statement known to be false and misleading would be constitute an offence. See NSW Act, ss. 13(7)–(9).



# Chapter 13: Adjudication of disputes

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## 13. Adjudication of disputes

### 13.1 Timeframe for lodgement of an adjudication application

#### NSW

As noted in the SERC Inquiry report, the timeframes set out in the various state and territory legislations relating to lodging an adjudication application differ markedly from jurisdiction to jurisdiction.<sup>457</sup>

Using the NSW Act as the basis for discussing the various types of adjudication applications that may be made under the various jurisdictions that have adopted the East Coast Model, section 17(1)(a) provides that:

- (1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if:
  - (a) the respondent provides a payment schedule under Division 1 but:
    - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
    - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

Section 17(1)(b) of the NSW Act also enables a claimant to apply for the adjudication of a payment claim if the respondent fails to provide a payment schedule to the claimant and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount. Importantly, section 17(2) provides that an adjudication application under section 17(1)(b) cannot be made unless:

- (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
- (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within five business days after receiving the claimant's notice.

Adjudication applications made under section 17(1)(a)(i) in the NSW Act must be made within 10 business days after the claimant receives the payment schedule.<sup>458</sup>

Applications made under section 17(1)(a)(ii) must be made within 20 business days after the due date for payment.<sup>459</sup>

In relation to an application made under section 17(1)(b) of the NSW Act, such an application must be made within 10 business days after the end of the five-business-day period referred to in section 17(2)(b).<sup>460</sup>

The same timelines set out under the NSW Act apply also under the Queensland, Tasmanian and ACT Acts.<sup>461</sup>

<sup>457</sup> SERC Inquiry Report, Table 8.3, p. 129.

<sup>458</sup> Section 17(3)(c) of the NSW Act.

<sup>459</sup> Section 17(3)(d) of the NSW Act.

<sup>460</sup> Section 17(3)(e) of the NSW Act.

## South Australia

The SA Act, however, provides that in respect to its equivalent provision of section 17(1)(a)(i) of the NSW Act, the adjudication application must be made within 15 business days after the claimant has received the payment schedule.<sup>462</sup> In respect of an application made under section 17(1)(b) of the NSW Act, the equivalent provisions of the SA Act provide that an application must be made within 15 business days after the end of the five business day period referred to in section 17(2)(b) of the NSW Act.<sup>463</sup> The same timeframe as set out under the NSW Act in respect of an application made under section 17(1)(a)(ii) also applies under the SA Act.<sup>464</sup>

## Victoria

In Victoria, the equivalent provision to the section 17(2)(b) of the NSW Act relating to notice requires the notice to be given within 10 business days immediately following the due date of payment but with the respondent to be given an opportunity to provide a payment schedule within 2 business days after receiving the claimant's notice.<sup>465</sup> The same timeframe in respect to making an adjudication application under the equivalent provision of section 17(1)(a)(i) of the NSW Act also applies in Victoria.<sup>466</sup>

However, in respect to the equivalent provision of section 17(1)(a)(ii) of the NSW Act, The Victorian Act provides that an application must be made within 10 business days of receipt of the payment schedule.<sup>467</sup> Further, in the case of an application made under the equivalent provision of section 17(1)(b) of the NSW Act, the Victorian Act<sup>468</sup> provides that this must be made within 5 business days after the end of the 2 business day period referred to in section 18(2)(b) of that Act.

## Queensland

The Queensland Bill 2017 would remove the opportunity for the claimant to give the respondent a second chance to provide a payment schedule where a respondent had initially failed to provide a payment schedule within the prescribed timeframe and had failed to pay the whole of the claimed amount by the due date for payment. Given this, the process proposed by the Queensland Bill 2017 is simpler in that the claimant would now only be required to ensure that its adjudication application is lodged within the time period set out under section 79(2)(b)(i) of the Bill (i.e. 30 business days after the due date for payment). The current timeline set out in section 21(3)(c)(iii) of the Queensland Act would become nugatory. In other words, this change eliminates the need for the respondent to provide the claimant with a notice of its intention to either recover the unpaid portion of the claimed amount as a debt through the courts or by adjudication.

Where the respondent has provided a payment schedule but failed to pay the whole of the scheduled amount by the due date for payment, the claimant would be required to lodge its adjudication application within 40 business days after the due date. Finally, in the case of where the respondent has served a payment schedule and the scheduled amount is less than the claimed amount (i.e. the scenario contemplated under section 21(1)(a)(i) of the current Queensland Act), the Queensland Bill 2017 specifies that the claimant would be required to lodge its adjudication application within 30 business days after service of the payment schedule, rather than within 10 business days after it had been served with the payment schedule as is currently the case under

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<sup>461</sup> In the case of the Queensland Act, refer to ss. 21(3)(c)(i)–(iii); in the case of the Tasmanian Act, refer to s. 21 and in relation to the ACT Act, refer to ss. 19(3)(b), (c) and (d).

<sup>462</sup> Section 17(3)(c) of the SA Act.

<sup>463</sup> Section 17(1)(e) of the SA Act.

<sup>464</sup> Section 17(3)(d) of the SA Act.

<sup>465</sup> Section 18(2) of the Victorian Act.

<sup>466</sup> Section 18(3)(c) of the Victorian Act.

<sup>467</sup> Section 18(3)(d) of the Victorian Act.

<sup>468</sup> Section 18(3)(e) of the Victorian Act.

section 21(3)(c)(i) of the Queensland Act.<sup>469</sup> The timelines in Queensland will, by reason of the tabling of the Queensland Bill 2017, be very different from those applying in all other jurisdictions.

### Western Australia and the Northern Territory

The lodgement period given under the legislative regimes that have adopted the West Coast Model is significantly greater. Under the WA Act, and following the 2016 amendments, the time period within which a party can make an adjudication application is within 90 business days of a dispute arising, whereas under the NT Act the prescribed time is 90 days.<sup>470</sup>

### Responses from stakeholders

During the consultation process, stakeholders were asked for their views on what should be the appropriate timeframe for a claimant to lodge its adjudication application.

The majority of stakeholders recommended timeframes broadly consistent with those provisions that currently operate in their respective jurisdictions. For example, in South Australia NECA SA/NT, MBA SA and AMCA SA suggested that the current timeframe of 15–20 business days is sufficient. AMCA and MBA NSW's preference was for 10 and 20 business days, which is reflective of the timeframes provided for under the NSW and Queensland legislation, while MBAV proposed 10 business days, stating that such a timeframe meets the key objective of rapid adjudication. Master Electricians Association (MEA) suggested a timeframe of 21 business days, whereas SoCLA emphasised that the integrity of the legislative regime requires prompt attention and enforcement of rights consistent with the maintenance of cash flow and prevention of the 'banking' of claims commenting that 'an outer limit of approximately a month after the right accruing seems to require, on balance, all parties to proceed with diligence'.<sup>471</sup>

Regulators and officials supported the existing time periods applying in their respective states. ACT officials submitted 10 or 15 business days would be appropriate, depending on the complexity of the claim.

Stakeholders in Western Australia expressed differing views regarding the 2016 amendments to the WA Act, which extended the time periods for making an adjudication application from 28 days to 90 business days after the dispute has arisen. MBA WA contend that the new time period is 'inordinately too long', whereas the LCA claim that the amendment now provides the parties with sufficient time to negotiate a settlement prior to triggering the adjudication process.

### Discussion and recommendation

There are two issues to consider in relation to this matter. The first relates to the appropriate timeframe within which a claimant is to lodge an adjudication application in circumstances where the respondent had provided a payment schedule but where the scheduled amount is less than the claimed amount. The second issue relates to the scenario of where a respondent has failed to serve a payment schedule within the prescribed timeframe and this in turn involves consideration of whether, from a policy perspective, a respondent should receive the type of notice set out under section 17(1)(b) of the NSW Act, which includes giving the respondent a 'second chance' in which to provide a payment schedule. If the notion of providing a respondent with a 'second chance' is accepted, there is then the further issue of determining what should then be the appropriate timeframe for lodging an adjudication application.

<sup>469</sup> Building Industry Fairness (Security of Payment) Bill 2017 (Qld), s. 79(2)(b)(iii).

<sup>470</sup> See s. 26(1) of the WA Act and s. 28(1) of the NT Act.

<sup>471</sup> SoCLA, written submission, p. 5.

### *Timeframe for lodging application*

In considering the above issue, it is once again necessary to re-state the fundamental principles that should underpin the legislative regime. First and foremost, one should not lose sight of the prime purpose of the legislation which is to promote prompt payment and maintain the cash flow of contractors/subcontractors. Accordingly, this would then support the notion that a claimant should be required to pursue its payment claim in a diligent and timely manner. Given that the claimant would be keen to obtain payment and would be familiar with the nature of its claim it would not be unreasonable to require that it lodge its adjudication application within 10 business days of receiving the respondent's payment schedule. After all, if the claimant wishes to avail itself of the benefits of pursuing a payment claim made under the Act and if the legislative scheme is supported by the referral of a disputed payment claim to a rapid adjudication process then imposing an obligation upon a claimant to lodge its adjudication application within 10 business days of being served with a payment schedule appears not only reasonable, but also consistent with the underlying philosophy of the legislation. It is therefore difficult to reconcile a period of 30 business days for lodging an adjudication application as proposed under the Queensland Bill 2017 if the legislative scheme is said to be designed to provide for rapid adjudication. True, a claimant keen to pursue its payment claim can lodge its adjudication application well before the expiration of the 30 business day period set out under proposed clause 79(2)(b)(iii) of the Queensland Bill 2017. However, a respondent should not be left with the uncertainty of waiting for up to 30 business days after giving its payment schedule before knowing whether the claimant will refer the payment claim to adjudication.

It is therefore difficult to reconcile the procedural fairness of a legislative scheme that enables a claimant to have up to 6 months after completion of the works to submit a payment claim and then be provided with a further 30 business days after being served with a payment schedule in which to lodge its adjudication application. In contrast, (if the payment claim is a standard payment claim) the respondent is only given 10 business days in which to provide a payment schedule and 10 business days in which to provide its adjudication response.<sup>472</sup>

Following this reasoning, I consider that the time periods set out under the relevant sections of section 17(3) of the NSW Act should apply in relation to the following circumstances:

- a) In the case of an adjudication application where the amount set out in the payment schedule is less than the claimed amount, such an application must be made within 10 business days after the claimant received the payment schedule. I have already outlined above the policy considerations that should apply in such circumstances.<sup>473</sup>
- b) In the case of an adjudication application made where the respondent, having provided a payment schedule, has nonetheless failed to pay the whole or part of the scheduled amount by the due date for payment, such application must be made within 20 business days after the due date for payment.<sup>474</sup>
- c) In the case of an adjudication application where a respondent has failed to provide a payment schedule, but where the claimant sent a section 17(2) notice to the respondent, the application must be made within 10 business days after the end of the five business day period referred to in the notice.<sup>475</sup>

My reasons for preferring the timelines set out under the NSW Act to those set out under the Victorian Act in relation to the circumstances set out in points (b) and (c) above have already been

<sup>472</sup> Clause 83(1)(a) of the Building Industry Fairness (Security of Payment) Bill 2017 (Qld).

<sup>473</sup> See s. 17(3)(c) of the NSW Act.

<sup>474</sup> See s. 17(3)(d) of the NSW Act.

<sup>475</sup> See s. 17(3)(e) of the NSW Act.

discussed. It is however also worth noting that most of the stakeholders expressed a preference for the timelines set out in the NSW Act as these were considered to be more fair and reasonable than those set out under the Victorian Act.

### ***Requirement to provide notice of intention to refer payment claim to adjudication***

In regard to the questions as to whether, from a policy perspective, a claimant should be required to give the respondent notice of the claimant's intention to refer its payment claim to adjudication in circumstances where the respondent had not provided a payment schedule and had failed to pay the claimed amount by the due date for payment, I consider that the approach adopted under the NSW Act should be preferred. I say this because:

- a) If a claimant has elected to refer a payment claim to adjudication (pursuant to section 15 (2)(a)(ii) of the NSW Act) rather than pursue it through the courts (by electing to take the course outlined under section 15(2)(a)(i)), then it is reasonable for the respondent to not only receive advice of the claimant's intention but to also be provided with a 'second chance' to submit a payment schedule and to so participate in the foreshadowed adjudication process. After all, if the claimant has elected to trigger the adjudication process, then the respondent ought to be given the opportunity to engage in such process. The reduced timeframe in which a respondent is allowed to provide a payment schedule under this scenario strikes the appropriate balance between encouraging a respondent to promptly provide a payment schedule when being served with a payment claim and not excluding a respondent from participating in the adjudication process that the claimant has elected to pursue.
- b) The timeframes set out under the Victorian Act in relation to giving notice and for the opportunity for a respondent in such circumstances to provide a payment schedule are unduly restrictive. In the case of the claimant, the timeframe of 10 business days within which to provide a notice to the respondent is insufficient for the claimant to obtain advice and form a view as to which course of action it wishes to pursue (especially given that such notice is required to be made strictly in accordance with the timeframes set out under sections 17(2)(a) and (b)). In the case of the respondent, restricting its right to provide a payment schedule to 2 business days after receiving the notice is unrealistic and not sufficient to enable a proper payment schedule to be provided.
- c) The approach adopted under the Queensland Bill 2017, whereby giving notice and the 'second chance' for a respondent to provide a payment schedule has been removed, is unfair because it deprives the respondent of the opportunity to be engaged with the adjudication process that the claimant has elected to pursue. It is one thing to have a claimant commence proceedings before a court and pursue its claimed amount as a debt where the court will still need to be satisfied that the claimant had served a valid payment claim and has not received a payment schedule within the prescribed timeframe, but it is an entirely different matter for such critical issues to be considered by a non-judicial person like an adjudicator without the respondent having any opportunity to participate in the process.

**Recommendation 35:**

The legislation should provide the following timelines for lodging an adjudication application:

- a) Where the amount set out in the payment schedule is less than the claimed amount, the adjudication application must be lodged within 10 business days after the claimant received the payment schedule, or
- b) Where the respondent, having provided a payment schedule, has nonetheless failed to pay the whole or part of the scheduled amount by the due date for payment, the adjudication application must be lodged within 20 business days after the due date for payment, or
- c) Where:
  - (i) a respondent has failed to provide a payment schedule, and
  - (ii) a respondent has failed to pay the whole or part of the claimed amount, and
  - (iii) the claimant has notified the respondent of their intention to apply for adjudication,the adjudication application must be lodged within 10 business days after the end of the 5 business day period referred to in the claimant's notice.

Sections 17(3)(c), (d) and (e) of the NSW Act provide suitable models.

## 13.2 Process for appointment of adjudicators

In Victoria, NSW, South Australia, ACT and Tasmania, adjudicators are appointed by accredited authorised nominating authorities (ANAs), whereas in Queensland that role is carried out by the Queensland Building and Construction Commission (QBCC) Registrar.

In Western Australia and the Northern Territory, the parties are permitted to agree and nominate in the contract either the appointing body or an accredited adjudicator to which an adjudication application is to be submitted.

Concern has been expressed with the East Coast Model because it only allows the claimant to choose which ANA it will lodge its adjudication application with. Some believe that giving only the claimant the right to choose the ANA encourages a practice of 'adjudication shopping' (i.e. the claimant chooses an ANA whose panel of adjudicators is perceived to be 'claimant friendly'). A system that allows ANAs which are privately owned and run on a for-profit basis may create a perception that such bodies will appoint adjudicators who will favour claimants. An ANA that can establish a reputation of being the most claimant friendly (so it is contended) will be able to become a claimant's ANA of choice and so gain market leadership. In addition, there are allegations that some ANAs have established a close relationship with some claim preparers so as to 'encourage' the claim preparers to lodge adjudication applications with the ANA in return for directors or other persons associated with the claim preparers being appointed as adjudicators in other matters.

The Collins Inquiry recommended that the NSW Act be amended to remove 'the right of a claimant to choose its own adjudicator',<sup>476</sup> which presumably was intended to refer to the claimant's right to choose an ANA.

The Wallace Review expressed the view that in-sourcing the role of an ANA to the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA) Registrar would 'remove many, if not all of the perceptions of conflict of interest and apprehended bias'.<sup>477</sup> Mr Wallace's recommendation was

<sup>476</sup> Collins Inquiry, op cit, refer to last bullet point of Recommendation 39 at p. 369.

<sup>477</sup> Wallace Review, op cit, p. 164.



accepted when the Queensland Government made the 2014 amendments to the Queensland Act and abolished the role and functions of the ANAs.

The Moss Review, undertaken in South Australia, recommended that the Minister withdraw all authority from the current ANAs and appoint the SA SBC to be the sole person discharging the functions currently being carried out by the ANAs.<sup>478</sup>

In response to various criticisms, ANAs argue that any analysis of the statistical data does not support the allegations that they are biased towards claimants. ANAs also contend that they provide a valuable free advisory service to all parties involved in the adjudication process and that abolishing ANAs will severely disadvantage subcontractors. In this regard, ANAs refer to the sharp increase in the 'fall-over' rate of adjudication applications in Queensland since the introduction of the 2014 amendments to the Queensland Act.<sup>479</sup> ANAs contend that since the Registrar took over the function of the ANAs there has been a loss of confidence in the operation of the BCIPA, with the result that the number of applications in Queensland have declined significantly. The Queensland Registry disputes this.

### Responses from stakeholders

During the consultation process, stakeholders were invited to express views on what should be the appropriate process for appointing adjudicators.

Not surprisingly, stakeholder views regarding this issue differed markedly. Many of the stakeholders representing subcontractors support the current ANA model and consider it to be more user-friendly for subcontractors.<sup>480</sup> These stakeholders argue that the ANAs provide invaluable services and assistance to the parties in ensuring compliance with the prescriptive procedural provisions set out in the security of payment legislation.

On the other hand, the stakeholders who generally represent the interests of head contractors expressed the view that there is a perception that ANAs, and particularly the for-profit ANAs, are claimant friendly. These stakeholders prefer the adjudication appointment process to be performed by an independent government agency rather than ANAs and support the arrangements in Queensland that were introduced in the 2014 amendments to the Queensland Act.

NECA and AMCA point to the high incidence of adjudication applications that have had to be withdrawn ('the fall-over rate') since the Adjudication Registrar took over the functions previously carried out by the ANAs.<sup>481</sup>

NECA notes that in excess of 75% of adjudications have not proceeded to adjudications since the 2014 amendments to the Queensland Act came into effect (December 2014) and submit 'a fall over rate of this level obviously constitutes a major breakdown in the management of adjudication in Queensland.'<sup>482</sup>

NECA submit that under the previous legislative regime, ANAs provided a free advisory service to applicants involved in the adjudication process and that because such service has not been available since 2014, the fall over rate has risen significantly. AMCA have posited a similar explanation as to the cause of the spike in the fall over rate:

<sup>478</sup> Moss Review, op cit, see recommendations (a) and (b), p. 17.

<sup>479</sup> The reference to the 'fall-over' rate refers to those adjudication applications that are withdrawn because the claimant has made errors in drafting the payment claim and/or the adjudication application and therefore the application does not comply with the requirements of the BCIPA.

<sup>480</sup> Including NECA, AMCA and the Subcontractors Alliance.

<sup>481</sup> NECA written submission, p. 18 and ACMA written submission, p. 10.

<sup>482</sup> NECA written submission, p. 18.



One reason cited for this outcome is that those employed by the authority to process claims are primarily administrators without legal or dispute resolution backgrounds.<sup>483</sup>

Some organisations, like SoCLA and the Resolution Institute, emphasise that the perceptions that attach to for-profit ANAs have impacted on the integrity of the adjudication system.<sup>484</sup>

Most ANAs (other than Resolution Institute) contend that there is no evidence to support the allegations that the ANA model is claimant friendly, or that ANAs conduct themselves with bias towards claimants. The ANAs, and in particular Adjudicate Today, also argue that an analysis of the statistical data produced by the QBCC Registrar indicates that there has been a significant increase in the fall-over rates of adjudication applications in Queensland and that this reflects the failure of the Registry in being able to provide the free advice that the ANAs had previously provided to applicants.<sup>485</sup>

The CFMEU noted the importance of ANAs in providing advice and assistance to parties throughout the adjudication process but was also conscious of the perceived bias that can be attached to the for-profit business model of some ANAs. The CFMEU suggested that there needs to be a balance between the two competing views on the process for the appointment of adjudicators.<sup>486</sup>

Some organisations suggested that the parties should, at a time when the dispute arises, be provided an opportunity to agree on an adjudicator and that only in the absence of such agreement should an adjudicator be appointed (either by an ANA or by an independent government body).<sup>487</sup>

Regulators and officials provided mixed responses as to what the process for the appointment of adjudicators should be. The Victorian Government did not identify a need to change the process for appointment.<sup>488</sup> Similarly, the ACT said there was no suggestion there is a widespread problem with ANAs in the ACT.<sup>489</sup> Tasmania suggested the use of ANAs has been positive and brings independence to the system, and that transferring the appointment role to the Registrar would only complicate matters, especially where the Tasmanian Government was involved in a construction dispute.<sup>490</sup> South Australia and the Northern Territory indicated the ANA model had some deficiencies due to a perception of bias, with South Australia in particular referring to the findings set out in the Moss Review, which recommended the SA SBC take over the role of ANAs in referring adjudication applications to an adjudicator.<sup>491</sup>

## Discussion and recommendation

It may perhaps surprise an outside observer that the issue of adjudicator appointments should have generated so much controversy. An objective observer would have thought that the appointment process should be straight forward, and almost a mechanical exercise of matching the nature of the dispute with the skill sets and background of the most appropriate accredited adjudicator. Thus, for example, if the issues in dispute primarily relate to the valuation given to the claimed construction work, then it should be expected that the appointed adjudicator would have a professional background and experience in quantity surveying. If, however, the issues in dispute relate to a claim

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<sup>483</sup> ACMA written submission, p. 10.

<sup>484</sup> SoCLA, written submission, p. 70 and Resolution Institute, written submission, pp. 5–6.

<sup>485</sup> Adjudicate Today, written submission, p. 43.

<sup>486</sup> Consultations with the CFMEU, Sydney, 5 February 2017.

<sup>487</sup> Including HIA, MEA, MBA, NSW, MBAV, MBA WA and Baker McKenzie.

<sup>488</sup> Victorian Government, written submission, p. 3.

<sup>489</sup> ACT Environment, Planning and Sustainable Development Directorate, Consultation Minutes, p. 12.

<sup>490</sup> Tasmanian Government, Consultation Minutes, p. 2.

<sup>491</sup> South Australia Small Business Commissioner, Consultation Minutes, p. 12 and Moss Review p. 13

<[https://www.sasbc.sa.gov.au/files/542\\_review\\_of\\_building\\_and\\_construction\\_industry\\_security\\_of\\_payments\\_act\\_2009\\_prepared\\_by\\_alan\\_moss.pdf](https://www.sasbc.sa.gov.au/files/542_review_of_building_and_construction_industry_security_of_payments_act_2009_prepared_by_alan_moss.pdf)>.

for extra costs said to have arisen due to the discovery of latent conditions and which involve a consideration of detailed geotechnical reports, then such a matter might best be referred to an accredited adjudicator with a civil engineering background. Similarly, if the issues in dispute primarily relate to the interpretation of contract documentation, it may then be appropriate to appoint a person with a legal background and a strong familiarity with construction contracts. Clearly, a process that involves matching the nature of the dispute with the skill sets, background and expertise of an adjudicator is more likely to result in a credible decision within a compressed timeframe. Equally, any mismatch of the adjudicator's background with the issues in dispute is less likely to result in a credible decision being made in a timely and cost-effective manner.

Similarly (and as observed in various of the previous reviews),<sup>492</sup> the person or organisation carrying out the appointment of an accredited adjudicator should discharge this function in a totally independent manner, without any bias or perception of bias towards one of the parties. Parties should have confidence that the appointment process will not only result in the appointment of an appropriately accredited and competent adjudicator, but also that the organisation involved in the appointment of an adjudicator will apply an independent mind in the discharge of its functions.

### *Regulatory oversight of ANAs*

It needs to be emphasised that ANAs, whilst charged with the functions of receiving adjudication applications, appointing adjudicators and issuing adjudication certificates, are nonetheless subject to oversight by a relevant (state/territory based) government agency. The various legislatures that adopted the East Coast Model require the relevant government regulator to assess the financial and administrative capabilities of applicants wishing to become an ANA and upon being granted authorisation, to monitor the governance of the ANAs by ensuring that they adhere to the appropriate systems, procedures and reporting requirements and that any breach of good governance may result in the withdrawal of authorisation.<sup>493</sup> Immediate upon the enactment of the legislative regimes, various organisations applied for authorisation as an ANA. Some of the organisations are from for-profit companies like Adjudicate Today and Australian Solutions Centre. Other ANAs are not-for-profit organisations like Resolution Institute. At the time of the enactment of the various legislations it was thought that, by allowing the private sector to carry out these functions, significant costs to government would be avoided. Some (but not all) of the ANAs promote the principles and practices of security of payment by providing information for industry participants' forums for discussion, conferences, publications as well as offering general assistance (but not legal advice) to participants in respect of the adjudication process.<sup>494</sup> Some ANAs have not invested in establishing an infrastructure that would enable meaningful assistance to be provided to parties making enquiries regarding the adjudication process, preferring to confine their role primarily to the appointment of an adjudicator whenever they receive an adjudication application. Some ANAs have a large panel of accredited adjudicators with a diverse background and qualifications, whilst others have only a small number of accredited adjudicators on their panel. All of the ANAs require any person wishing to be included on their panel of adjudicators to successfully complete their training program and some of the ANAs' training programs are more rigorous than others. In most instances however, the content of the training program will require approval to be given by the relevant state/territory Regulator.

### *Development of different business models*

Over the years, the ANAs have competed for market share by adopting different business models. Some ANAs compete on price by offering a flat fee for adjudication applications where the amount claimed in a payment claim is below a certain dollar value. No doubt the competing ANAs have had

<sup>492</sup> Collins Inquiry, op cit, p. 369; Moss Review, op cit, p. 9; and Wallace Review, op cit, p. 165.

<sup>493</sup> See, for example, ss. 28(1) of the NSW Act.

<sup>494</sup> See, for example, the website of Adjudicate Today at <http://www.adjudicate.com.au/>.

to be mindful on the fees charged by adjudicators on their panel in order to gain or retain their market share. Other ANAs compete on the quality of the adjudicators on their panel, which in turn has no doubt placed pressure on all ANAs to ensure that the adjudicators on their panel are persons of high repute and standing. The advantages of an appointment process that allows the private sector, through the ANAs, to compete in the market place was not lost sight of by Mr Wallace when he observed:

I accept in principle the submission that the private sector is very often able to deliver better, more innovative services at less cost than its public sector counterparts. As stated in the Queensland Independent Commission of Audit — Final Report, Executive Summary (at page 7):

‘Generally, the history and culture of the public sector is less flexible and it does not promote entrepreneurial and commercial skills in the way that the private sector competitors promote and value it. This means private sector operators can move faster and with more agility to deal with emerging risks and exploit opportunities. Private investors who understand the risk of an enterprise can assess the risk/reward ratio and trade it for personal gain. Public sector investors (tax payers) are not in a position to make those decisions’.

It is acknowledged that a competitive environment amongst ANAs, provides stimulus to improve services and restrains costs, whilst providing an important educative and marketing roles to the industry ...<sup>495</sup>

Mr Wallace was greatly troubled, however, by the concerns that many stakeholders had expressed to him which he said cannot be ignored ‘for the sake of maintaining competition’.<sup>496</sup> The concerns that Mr Wallace was referring to were the alleged close relations between some ANAs and claims preparers:

The Review received evidence from a number of persons during the individual interviews where it was alleged that claims preparers have an understanding with some ANAs that particular adjudicators are or are not to be appointed to applications brought by them on behalf of their clients. If true, this is nothing less than blatant ‘adjudicator shopping’.

I am concerned about relationships which are alleged to have developed between ANAs and claims preparers. As if the existing appointment process were not subject to enough commercial pressures, the alleged undue influence that claims preparers are capable of exerting upon ANAs is unacceptable. A representative of one ANA advised the Review that it was fielding more and more inquiries from claims preparers who were unashamedly demanding the appointment of a particular adjudicator or conversely the non-appointment of particular adjudicators and if the ANA did not accede to their demands, they would simply go to an ANA that would ...<sup>497</sup>

Accordingly, Mr Wallace recommended that the process of ANAs appointing adjudicators be discontinued and that the function be carried out by the Adjudication Registrar of the QBCC.<sup>498</sup> The 2014 amendments to the Queensland Act implemented these recommendations by abolishing the role and functions of the ANAs and transferring these to the Adjudication Registrar.

### *Relationship between fall-over rates and appointment processes*

The ANAs and in particular, Adjudicate Today, argue that the abolition of the ANAs following the 2014 amendments to the Queensland Act and the transfer of the ANA functions to the QBCC Registry have proven to be a disaster. In particular, Adjudicate Today highlight the sharp increase in the fall over rates of adjudication application and, in strident terms, go on to make the following observations:

<sup>495</sup> Wallace Review, op cit, p. 162–3.

<sup>496</sup> Wallace Review, op cit, p. 163.

<sup>497</sup> Wallace Review, op cit, p. 148.

<sup>498</sup> Refer to Recommendations 17 and 18, Wallace Review, op cit, p. 165.

11.76. The performance of the Qld registry in managing the adjudication process when compared to that of ANAs generally, and Adjudicate Today in particular, is appalling.

11.77. ANAs act as the gatekeepers to adjudication. Prior to accepting adjudication applications, ANA staff check whether the application contains any obvious invalidity as to the process or coverage of the Act. Examples include failure to provide supporting documentation for an application, failure to sign the application form or provide proper contact information or ABN for any party, application is out of time, application relates to work which does not fall within the Act e.g. work performed for the owner of a house in which the owner resides or an application being made before the due date for payment.

11.78. ANA staff are trained to advise industry parties on these and many other potential deficiencies and bring to the attention of claimants any potential problem before an application is accepted and processed. This is entirely in line with the ANA CoAs [Conditions of Authorisation]. This gatekeeping role, which is not performed by Registry staff, is invaluable in assisting parties to make valid applications which comply with the strict and generally confusing requirements of the various Acts. ANA staff never provide advice as to the merit of the arguments presented in a submission.

11.79. Under the Qld appointment regime, all applications received must be accompanied by an application fee (\$50 to over \$3 000). Applications are scanned and processed without any vetting for invalidity or major deficiency. If registry staff identify an invalidity they continue to process the application, retain the application fee, and then may advise the claimant of the potential invalidity. The Registry describes this approach in their monthly statistics as 'a proactive approach'. That is untrue. It is a reactive approach which is most inimical to the interests of subcontractors and suppliers to the industry. This reactive approach is contrary to the fundamental principle.

11.80. As applications must be provided to respondents at the same time as presented to the Registry, invalid applications not only cost the claimant the lost application fee and time and cost to prepare but also allows the respondent an additional 4 weeks to prepare the adjudication response. In the meantime, the financial pressure on the subcontractor mounts to the point many become insolvent which might otherwise survive.

11.81. This public-sector approach of the registry represents a human disaster for many subcontractors.

11.82. The basis behind the fundamental principle is providing for parties to have an entitlement to be paid without delay. If claimants aren't making applications which comply with the Act because they don't receive proper advice, previously available from ANAs, then the process is a failure.

11.83. In Qld, the process is a failure. The Registrar's published statistics reveal the stark truth.

11.84. Since the December 2014 amendments, the ratio of decisions released to applications withdrawn (the fall over rate) has dramatically increased. The fall over rate is the acknowledged measure of the effectiveness and accuracy of advice to industry participants who seek to utilise security of payment acts to resolve their payment dispute. It is the ratio of adjudication decisions released to adjudication applications withdrawn.

11.85. The fall over rate is measured against decisions released and not applications made because a comparison of 'applications made' in Qld to the other jurisdictions would not be a comparison of like-with-like. Qld accept anything as an application. Most ANAs only process an application after it vetted for obvious invalidity. With such a major difference in what constitutes an 'application', it is inappropriate to use 'applications' as the measure.

11.86. Some applications are withdrawn because matters are settled or a claimant concludes their case is hopeless. Traditionally about 20% of applications fall within this category. Other applications are withdrawn because the claimant has made errors in drafting the payment claim and / or adjudication application, revealing a non-compliance with the statutory time frames of the Act or sometimes the application falls outside the ambit of the Act. This second category reflects the quality

of advice (efficiency and effectiveness of advice) provided by those staff assisting parties seeking to utilise the respective Act. The majority of withdrawals fall into the second category.

11.87. Adjudicate Today considers 25% an acceptable fall over rate for internal staff evaluation purpose. The Qld fall over rate for the 7 months of data in this financial year is 113.64% ...<sup>499</sup>

Adjudicate Today has (based on the statistical data published by the ABCC) produced the following **Table 4**, which sets out the fall over rate on a month-by-month basis from the period prior to the introduction of the 2014 amendments to the Queensland Act up to end of January 2017:

**Table 4: Fall-over statistic in Queensland for the period 14 July 2014 – 31 January 2017, standard claims**

Date	Decisions released	Applications withdrawn	Fall over rate (%)	Multiplier above 33.7% average fall-over rate applicable before 2014 amendments to the Queensland Act	Multiplier above 25% fall-over rate Adjudicate Today objective
<b>5-month period before 2014 amendments to the Queensland Act</b>					
Jul-14	41	14	34.15%	NA	NA
Aug-14	40	16	40.00%	NA	NA
Sep-14	39	11	28.21%	NA	NA
Oct-14	33	12	36.36%	NA	NA
Nov-14	28	8	28.57%	NA	NA
<b>Total</b>	<b>181</b>	<b>61</b>	NA	NA	NA
<b>Average %</b>	NA	NA	<b>33.70%</b>	NA	NA
<b>7-month period after 2014 amendments to the Queensland Act</b>					
Dec-14	33	31	93.94%	2.79	3.76
Jan-15	56	22	39.29%	1.17	1.57
Feb-15	24	27	112.50%	3.34	4.50
Mar-15	29	31	106.90%	3.17	4.28
Apr-15	Not published by adjudication registrar	Not published by adjudication registrar	Not published by adjudication registrar	NA	NA
May-15	Not published by adjudication registrar	Not published by adjudication registrar	Not published by adjudication registrar	NA	NA
Jun-15	27	20	74.07%	2.20	2.96
<b>Total</b>	<b>169</b>	<b>131</b>	NA	NA	NA

<sup>499</sup> Adjudicate Today written submission, pp. 46–47.

Date	Decisions released	Applications withdrawn	Fall over rate (%)	Multiplier above 33.7% average fall-over rate applicable before 2014 amendments to the Queensland Act	Multiplier above 25% fall-over rate Adjudicate Today objective
Average %	NA	NA	<b>77.51%</b>	<b>2.30</b>	<b>3.10</b>
<b>12-month period 1 July 2015 – 30 June 2016</b>					
Jul-15	39	40	102.56%	3.04	4.10
Aug-15	37	23	62.16%	1.84	2.49
Sep-15	8	16	200.00%	5.93	8.00
Oct-15	27	21	77.78%	2.31	3.11
Nov-15	32	30	93.75%	2.78	3.75
Dec-15	29	27	93.10%	2.76	3.72
Jan-16	13	32	246.15%	7.30	9.85
Feb-16	29	22	75.86%	2.25	3.03
Mar-16	25	31	124.00%	3.68	4.96
Apr-16	19	23	121.05%	3.59	4.84
May-16	30	31	103.33%	3.07	4.13
Jun-16	21	33	157.14%	4.66	6.29
<b>Total</b>	<b>309</b>	<b>329</b>	NA	NA	NA
<b>Average %</b>	NA	NA	<b>106.47%</b>	<b>3.16</b>	<b>4.26</b>
<b>7-month period 1 July 2016 – 31 January 2017</b>					
Jul-16	22	21	95.45%	2.83	3.82
Aug-16	24	18	75.00%	2.23	3.00
Sep-16	31	19	61.29%	1.82	2.45
Oct-16	27	20	74.07%	2.20	2.96
Nov-16	24	31	129.17%	3.83	5.17
Dec-16	15	31	206.67%	6.13	8.27
Jan-17	11	35	318.18%	9.44	12.73
<b>Total</b>	<b>154</b>	<b>175</b>	NA	NA	NA
<b>Average %</b>	NA	NA	<b>113.64%</b>	<b>3.37</b>	<b>4.55</b>

Source: Adjudicate Today, written submission, pp. 47–48

The Review has examined the statistical data published by the QBCC for the remainder of the months for financial year 2016/17, which resulted in the following fall over rates for that period:

**Table 5: Fall-over statistic in Queensland for the period February 2017 – June 2017, standard claims**

Period	Applications withdrawn
February 2017	125% (24/20)
March 2017	79.5% (31/39)
April 2017	125% (25/20)
May 2017	175% (28/16)
June 2017	117.4% (27/23)

Thus, the fall-over rate for the financial year 2016/17 was 108.8% (i.e. 310/285).

Clearly, based on the above analysis, it does appear that, since the function of processing adjudication applications has been transferred from the ANAs to the Queensland Adjudication Registry, there has been a significant increase in the fall over rates. This would support the proposition that, at least in respect of adjudication applications involving claims for smaller amounts, ANAs do, through their free advisory service to small subcontractor claimants, cause a lower fall over rate to occur than has been the case where the Queensland Adjudication Registry has processed adjudication applications. Perhaps the reason that the fall over rates for standard adjudications should be higher than in the case of applications involving a complex payment claim can be explained by the fact that claimants seeking adjudications for smaller payment claims are less likely to seek the advice of a legal firm or claims preparer. Where an adjudication application relates to a larger claimed amount, a claimant is more likely to obtain advice from either a legal firm or a specialist claims preparer and this is more likely to ensure the lodgement of a valid adjudication application (and therefore a lower fall over rate).

### *Allegations and perceptions of bias in the appointment process*

It does not, however, follow that a mere comparative analysis of the pre- and post-2014 fall over rates of adjudication applications involving non-complex payment claims in Queensland should lead to a conclusion that the process of appointing adjudicators should be carried out by the ANAs rather than an independent government agency. The model of competing ANAs may well result in valuable free advisory services being provided to small business claimants (and thereby reduce the incidence of invalid adjudication applications). However, this does not address the serious concerns raised in the Wallace Review relating to improper close relations with claims preparers nor the allegations that an appointment process based on only claimants being able to select the ANAs has resulted in a process that is biased towards claimants, or at the very least, a perception of such bias.

It is therefore necessary to consider the argument raised by various stakeholders that a model that allows for-profit ANAs to compete for lodgement of adjudication applications that only claimants can make will inevitably cause claimants to select those ANAs that they perceive will maximise their likelihood of success. The proponents that advance this argument contend that such a model in turn leads ANAs to project themselves as being more claimant-friendly than their competitors in order to gain market share. It is claimed that ANAs that have a reputation of being more claimant-friendly than others are more likely to attract adjudication applications from claimants who may have a less-than-strong basis of success but who nonetheless believe that by loading an 'ambit' claim they may have good prospects of obtaining an adjudication determination whereby some money will be awarded. The critics of this model also refer to the close relations that some ANAs appear to have established with some claim preparers, as referred to in the Wallace Review. These critics highlighted the symbiotic relationship that appears to exist between some claims preparers and

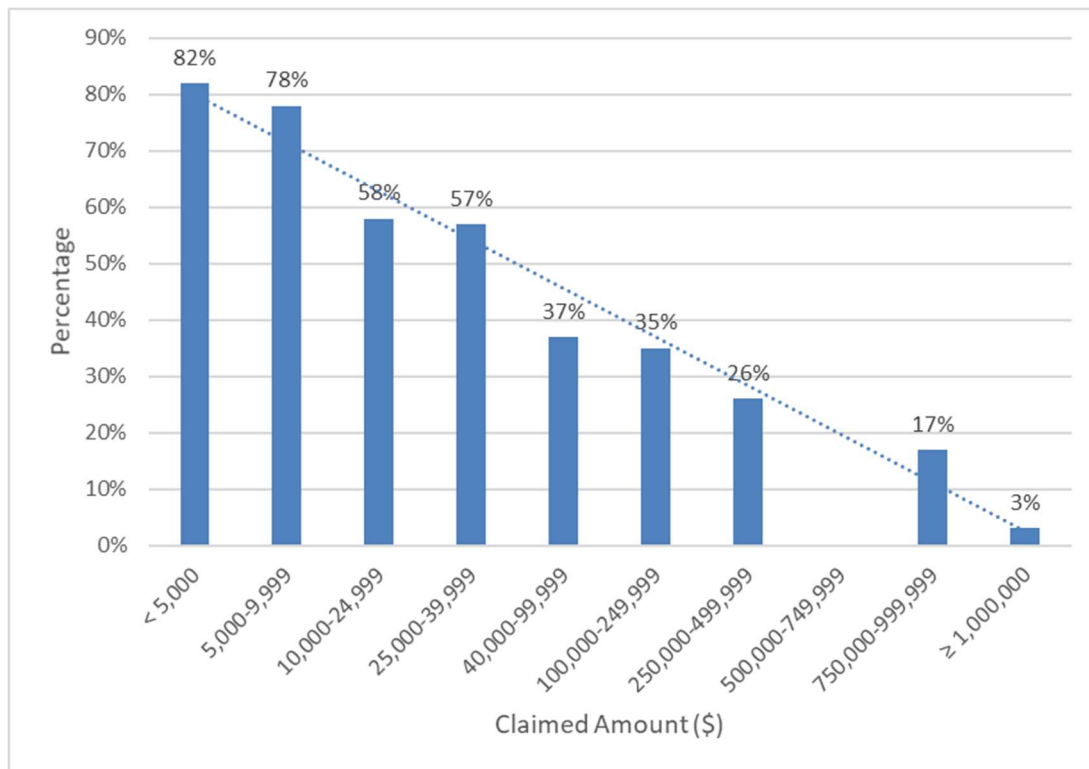


some ANAs, where the business model of the claims preparer is based on a success fee<sup>500</sup> and where most ANAs derive their profit based on deducting a percentage of the adjudicator’s fees and where such fees are not disclosed.

There has however been no credible evidence provided that would support the existence of the various allegations. Indeed, an analysis of the statistical data comparing the amounts claimed with the adjudicated amounts determined, discloses that a claimant’s success rate, expressed as a percentage of the claimed amount, is dependent on the degree to which the respondent has engaged itself in the adjudication process. In other words, where an adjudication application has been made in circumstances where a respondent has not provided a payment schedule, then the claimant is more likely to obtain an adjudication decision where the adjudication amount closely approximates the claimed amount. On the other hand, where an adjudication application has been made in circumstances where a respondent has provided a payment schedule (and subsequently an adjudication response) then the adjudicated amount expressed as a percentage of the claimed amount drops significantly. Further, the likelihood of a respondent providing a payment schedule is more likely to be greater as the value of the claimed amount increases.

The following chart (**Graph 1**) extracted from Table 1 of the NSW Adjudication Activity Annual Report 2015/16 demonstrates this relationship clearly:

**Graph 1: Percentage of claimants receiving the claimed amount, 2015/16**



**Source:** Table 1 of the NSW Adjudication Activity Annual Report 2015/16

Nonetheless, the fact that I have not been provided with any evidence that would lead me to conclude that an ANA adjudicator appointment process is biased should not be the end of the

<sup>500</sup> This is a compensation structure that the claimant agrees to pay to the claims preparer and is based on a percentage of the adjudicated amount determined in an adjudication.



matter. If ANAs are permitted to have a role within the adjudication process, the perception of bias cannot and should not be disregarded. It is undesirable that the integrity of the adjudication process be undermined by perceptions of bias. All participants should have confidence that the legislative regime that provides for disputed payment claims to be referred to adjudication will result in decisions that will not only be able to be made in a quick and cost-effective manner but that the process will, in all the circumstances, be seen to be fair.

Dismantling the role of the ANAs within the adjudication process would be equally undesirable because it would deprive participants (particularly small business subcontractors) of the free, but valuable, advisory service, that appears to be best delivered by the ANAs. The security of payment legislative regime is both complex and highly prescriptive and accordingly those owners of ANAs that are willing to invest their private capital in order to provide such services should, subject to key governance and regulatory oversight, be allowed to operate. No doubt the criteria upon which a particular ANA should be authorised to operate will be dependent on a range of factors, including the systems and procedures for processing adjudication applications and the size, experience and reputation of the adjudicators on their panel. However, one of the most critical factors should be their capacity to provide a meaningful advisory service to participants. I detail in Section 14.1 of this Report the regulatory overview that ought to be applied to ANAs and adjudicators.

To be clear, I consider that the process associated with the appointment of adjudicators should be significantly revised. I now set out how the process can be improved.

### **ANAs nominate adjudicators while Regulators make appointments**

First and foremost, whilst the legislation should continue to empower ANAs to receive adjudication applications from claimants, ANAs should no longer be involved in the actual appointment of an adjudicator.

As the description of their title indicates, ANAs should be confined to **nominating** suitable adjudicators for consideration by the Regulator. Accordingly, whenever an ANA receives an adjudication application it should be required to put forward the names of three persons from its panel of adjudicators which the ANA considers would be suitable and available to adjudicate on the matter. The actual **appointment** of the adjudicator should, however, be made by the **Regulator**.

More often than not, the Regulator may be expected to select one of the three persons nominated by the ANA, because, the task of matching the background and experience, the absence of any conflicts of interest and the availability of the nominated adjudicated persons will have already been carried out by the ANA. But this may not always be the case. There may be circumstances where the Regulator may wish the ANA to provide additional names prior to making an appointment.<sup>501</sup>

The point that needs to be underscored is that, under this proposal, the direct connection between an ANA receiving an adjudication application and then appointing an adjudicator would be broken. In this way, any potential perception of close relations between a claims preparer and an ANA would be removed. Similarly, the current perception that the business model of private sector ANAs being underpinned by the appointment of claimant friendly adjudicators loses much of its potency because the actual appointment of an adjudicator would now not be made by an ANA, but rather by the independent regulator.

While the ANA would be nominating persons from its panel for consideration by the Regulator, all participants (but particularly respondents) will have greater confidence in the integrity of the

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<sup>501</sup> For example, the Regulator may consider that, because one or more of the nominated persons have already been appointed to adjudicate on another matter, it would not be appropriate that they be considered for an additional appointment.

adjudication appointment process because of other governance-related oversight measures that I will be recommending in respect to the conduct of ANAs and accredited adjudicators (refer to Section 14.1 of this Report).

At the same time, the parties will have confidence that the person ultimately appointed as adjudicator will be both suitable and have the time to discharge their task on the disputed matter. This is because the ANA will have arrived at its nominations based on matching the specific background of the nominated persons with the nature of the dispute to be adjudicated, as well as satisfying itself as to the absence of any conflict of interests and that the nominated persons have the requisite time availability.

Further, there is no reason why introducing the recommended two-stage process for appointing an adjudicator should cause any delay much beyond the current period of 4 business days.<sup>502</sup> I consider that the legislation should require the ANA to submit the names of the three nominated persons to the Regulator within 2 business days of an adjudication application being lodged. The Regulator would then be required to advise the ANA of the appointed adjudicator no later than 2 business days after receiving the names of the nominated persons. Once the ANA has received advice from the Regulator it will be required to notify the parties within 2 business days. The increase of an additional 2 business days associated with the appointment process is a small price to pay for the enhancement of the overall integrity of the legislative scheme.

### *Parties may agree on an adjudicator subject to certain requirements*

The legislation should also allow parties, in certain circumstances, to agree on an accredited adjudicator to adjudicate on a disputed payment claim. Such an agreement should **only** be allowed to be made at the time that the dispute arises and only where the claimant has served a copy of its adjudication application on the respondent together with a notice of intention to refer the application to adjudication. However, such a notice would only be permissible where the amount claimed is greater than \$250 000.

When serving the notice, the claimant should be permitted to put forward the name of one or more persons it would be willing to agree to be the adjudicator. The respondent, by way of reply to the claimant's notice, could either agree to one of the persons put forward by the claimant to be adjudicator, or alternatively put forward the name(s) of an alternative person(s). However, in all cases the person put forward must be duly accredited and registered as an adjudicator by the Regulator.<sup>503</sup>

The opportunity for the parties to agree on their own adjudicator should only be available for 2 business days following the service of the claimant's notice. If the parties are unable to agree within that period, the claimant would then be required to forward its adjudication application to an adjudicator of its choice in order for the adjudication process outlined above to proceed.

If the parties are able to reach agreement on the person to adjudicate the dispute, the parties must notify the Regulator of such agreement and confirm that the agreed person is available to adjudicate the matter within the time period prescribed under the legislation. The Regulator would then require the agreed adjudicator to formally confirm the absence of any conflict of interests and that he/she will discharge their functions in accordance with the requirements set out under the Act,

<sup>502</sup> The four-business-day period is to be inferred by reason of ss. 26(1) of the NSW Act and the equivalent provision contained under the various other legislation that have adopted the East Coast model.

<sup>503</sup> It is proposed that the names, background and fees of all accredited adjudicators be published on the Regulator's website.

including providing a copy of the decision within 24 hours after the decision has been released to the parties by the adjudicator.

The reason for only providing parties with a narrow window for agreeing on an adjudicator is to ensure that the process of exploring the prospect of agreement should not be allowed to drag on unduly. True, the 2 business day period is very restrictive, but the reason for imposing such a tight timeframe is to focus the parties' attention to quickly identifying an accredited adjudicator who both parties would feel comfortable with to determine the disputed payment claim. If no such agreement is able to be reached within 2 business days, in order to proceed the claimant would be required to lodge its adjudication application to an ANA for the nomination and appointment process as outlined above.

Further, the reasons that the agreement is to be only available where the claimed amount is greater than \$250 000 is that disputes involving larger amounts are more likely to involve the consideration of technical, complex issues where the background and experience of a particular accredited adjudicator may be regarded by the parties as valuable. While such an option may be regarded as akin to an agreement for an expert determination, the fact remains that the person adjudicating the dispute will be required to discharge their task in accordance with the requirements of the legislation (and in particular within the prescribed timelines) and that the adjudicator's decision will be binding so that a respondent would be required to pay any adjudicated amount determined by the adjudicator.<sup>504</sup>

**Recommendation 36:**

The legislation should provide that a function of the Regulator is to appoint adjudicators (whether nominated by the authorised nominating authority, or otherwise) to determine an adjudication application.

**Recommendation 37:**

The legislation should provide for authorised nominating authorities to make nominations of accredited adjudicators to the Regulator for appointment to determine an adjudication application.

**Recommendation 38:**

The legislation should provide that the parties to a payment dispute may agree on an accredited adjudicator, but such agreement may only be made:

- a) at the time when the dispute arises
- b) within 2 business days of the claimant serving a notice of adjudication and a copy of the adjudication application on the respondent, and
- c) where the dispute relates to a payment claim of more than \$250 000.

### 13.3 Responding to an adjudication application

Most of the jurisdictions that have adopted the East Coast Model require a claimant to provide the respondent with a copy of the adjudication to the respondent. Under the ACT Act, the responsibility to provide a copy of the adjudication application rests with the adjudicator.<sup>505</sup>

<sup>504</sup> The further advantage is that, unlike an expert determination, it will be interim only, with the parties' civil and contractual rights preserved.

<sup>505</sup> See s. 21(2) of the ACT Act.

All jurisdictions then contain a specific provision detailing the timeframe within which a respondent may provide its response to the claimant's adjudication application (referred to as the 'adjudication response').

Under the NSW, Victorian and SA Acts, a respondent may give an adjudicator its adjudication response:

... at any time within

- (a) 5 business days after receiving a copy of the application, or
  - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application,
- whichever time expires later.<sup>506</sup>

Under the ACT Act, the prescribed time period is 7 business days after the respondent receives a copy of the adjudication application or 5 business days after the adjudicator's acceptance (whichever is the later),<sup>507</sup> whereas in Tasmania the equivalent time period is 10 and 5 business days respectively.<sup>508</sup>

However, under the Queensland Act two different sets of timeframes apply depending on whether the adjudication application relates to a standard or complex payment claim. Where the adjudication application relates to a standard payment claim, the respondent is required to give the adjudication response to the adjudicator:

...within the later of the following to end –

- (a) 10 business days after receiving a copy of the adjudication application;
- (b) 7 business days after receiving notice of the adjudicator's acceptance of the adjudication application.<sup>509</sup>

However, if the adjudication application relates to a complex payment claim, the time periods are 15 and 12 business days respectively. Further, a respondent may apply to the adjudicator for an extension of time of up to 15 additional business days to provide the adjudication response, but only if the application for extension complies with section 24A(6) which states:

- (6) The application must –
  - (a) be made within the later of the following to end –
    - (i) 5 business days after receiving a copy of the adjudication application;
    - (ii) 2 business days after receiving notice of the adjudicator's acceptance of the adjudication application; and
  - (b) be in writing; and
  - (c) include the reasons for requiring the extension of time.

Clearly, a respondent should have sufficient time to respond to material that claimants provide in support of the payment claim. As discussed above, the degree of specificity required to be set out in a payment claim is confined to such information as is necessary to enable the recipient to be

<sup>506</sup> See s. 20(1) of the NSW Act, s.21(1) of the Victorian Act and s. 20(1) of the SA Act.

<sup>507</sup> See s. 22(1) of the ACT Act.

<sup>508</sup> See s. 23(2) of the Tasmanian Act.

<sup>509</sup> See s. 24A(2) of the Queensland Act.

apprised of the amount and nature of the claim. It will, however, only be when the claimant has provided a copy of its adjudication application that the respondent will be in receipt of the details relating to the claim and this may, particularly in the case of a claim for a large amount, involve considerable documentation. Indeed, it is not uncommon for an adjudication application to comprise many hundreds of pages of supporting documentation, and this may include detailed expert reports and sworn affidavits from witnesses.

Most jurisdictions expressly prohibit a respondent from including reasons in its application response that have not previously been included in the payment schedule provided to the claimant.<sup>510</sup> However, some jurisdictions including Queensland and Victoria permit respondents to specify additional reasons for withholding payment in their adjudication response, which the respondent had not included in its payment schedule.

### Purpose of respondent's adjudication response

Clearly the concept of enabling a respondent to lodge an adjudication response within the adjudication process is primarily intended to serve the following dual purposes:

- a) Providing the respondent with the opportunity to include submissions and provide documentation **in support** of the reasons it gave in its payment schedule for withholding payment. That is why the legislation expressly provides for an adjudicator not to make their adjudication determination/decision until after the end of the period within which the respondent may lodge an adjudication response.<sup>511</sup>
- b) Providing the respondent with the opportunity to include within the submissions that accompany its adjudication response, **its response** to the claimant's submissions set out in the adjudication application as well as the respondent's comments on the various documentation that the claimant had included in its adjudication application.

The scheme of the legislative regime is such that the respondent's entitlement to provide an adjudication response is contingent on whether it had served a payment schedule.<sup>512</sup> That is why the Act provides that, amongst the only matters that an adjudicator may take into account in the making of their adjudication determination is:

...the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been **duly made** by the respondent in support of the schedule...<sup>513</sup> (emphasis added)

The reference to the expression 'duly made' is intended to refer to an adjudication response.<sup>514</sup>

Where, however, a respondent has provided a payment schedule, the question then becomes one of whether the respondent can include in its adjudication response additional reasons for withholding payment that had not been included in the payment schedule and the answer to that question varies between jurisdictions. Under the NSW Act, section 20(2B) expressly states that a respondent cannot include in its adjudication response 'any reasons for withholding payment unless those reasons have

<sup>510</sup> For example, see s. 20(2B) of the NSW Act.

<sup>511</sup> See s. 21(1) of the NSW Act; s. 22(1) of the Victorian Act; s. 25(2) of the Queensland Act; s. 21(1) of the SA Act; and s. 23(1) of the ACT Act.

<sup>512</sup> See s. 20(2A) of the NSW Act; s. 21(2A) of the Victorian Act; s. 24(1)(b) of the Queensland Act; s. 20(3) of the SA Act; s. 22(3) of the ACT Act; and s. 23(1) of the Tasmanian Act.

<sup>513</sup> Refer s. 22(2)(d) of the NSW Act; s. 23(2)(d) of the Victorian Act; s. 26(2)(d) of the Queensland Act; s. 22(2)(d) of the SA Act; section 24(2)(e) of the ACT Act; and s. 25(2)(d) of the Tasmanian Act.

<sup>514</sup> *Thiess Pty Ltd t/as Thiess John Holland v Civil Works Australia Pty Ltd* [2010] QSC 187.

already been included in the payment schedule provided to the claimant' and a similar prohibition is included in the South Australian, ACT and Tasmanian Acts.<sup>515</sup>

Section 21(2B) of the Victorian Act states that if an adjudication response includes any reasons for withholding payment that had not been included in the payment schedule then the adjudicator must serve on the claimant a notice:

- (a) setting out those reasons; and
- (b) stating that the claimant has two business days after being served with the notice to lodge a response to those reasons with the adjudicator.

The Victorian Act therefore imposes an obligation on the adjudicator to identify whether the adjudication response includes any new reasons, and this may well place an adjudicator under extreme time constraints if they were to only identify any new reasons towards the end of the time period within which the decision is required to be made (especially because the claimant would then be entitled to provide a reply to those new reasons within 2 business days and the adjudicator would then be required to take into consideration the claimant's reply to those new reasons in making their determination).

### Position under the Queensland Act

The position under the Queensland Act is very different to any of the other jurisdictions that have adopted the East Coast Model. In the Wallace Review, Mr Wallace expressed concern with the practice of many claimants endorsing all payment claims as claims made under the Act and that this has had the effect of imposing a significant administration burden upon respondents. Mr Wallace accordingly went on to make the following comments:

In these circumstances, it is difficult to accept from an equitable point of view that a respondent should be prevented from raising any reasons for non-payment in the adjudication response that were not identified in the payment schedule ...

To ensure that the claimant is afforded procedural fairness, the claimant must be permitted a reasonable time to reply to those reasons in the adjudication response that were not previously ventilated in the payment schedule ...<sup>516</sup>

The Queensland Government took on board Mr Wallace's comments and recommendations<sup>517</sup> and accordingly the 2014 amendments to the Queensland Act provided for a respondent, in the case of a complex payment claim, to include any reasons for withholding payment whether or not those reasons were included in the payment schedule.<sup>518</sup> The Act also provides the claimant with the opportunity to give a reply to any new reasons that have been included in the adjudication response.<sup>519</sup>

### Responses from stakeholders

During the consultation process, stakeholders were asked to express their views on what should be the appropriate timeframes for a respondent to prepare its response to a claimant's adjudication application. Responses from stakeholders varied, but many agreed that there should be different timeframes depending on whether the payment claim was 'standard' or 'complex'.

<sup>515</sup> See s. 20(4) of the SA Act; s. 22(4) of the ACT Act; and s. 23(4) of the Tasmanian Act.

<sup>516</sup> Wallace Review, op cit, p. 201.

<sup>517</sup> Wallace Review, op cit, see Recommendation 24, p. 205.

<sup>518</sup> See s. 24(5) of the Queensland Act.

<sup>519</sup> See s. 24B of the Queensland Act.



Only a few stakeholders, such as NECA, advocated for a short timeframe of just 5 business days in which to provide an adjudication response. On the other hand, MBAV considered the existing 5-day timeframe in Victoria as too short given the complexity of some claims and instead suggested 10 business days for 'standard' claims and 15 business days for 'complex' claims.

Both NECA SA/NT and MBA NSW suggested 10 business days seems reasonable for 'complex' claims and 7 business days for 'standard' claims, while MPA NSW and MPAQ were of the opinion that 10 days is sufficient. AMCA suggested 10 business days for 'standard' claims, with the provision of additional time for responses that related to more 'complex' claims. AMCA SA said that because the SA Act provides a respondent with more time within which to provide a payment schedule after being served with a payment claim,<sup>520</sup> the provisions relating to when an adjudication response is required to be lodged is both fair and reasonable.<sup>521</sup> QMBA suggested at least 20 business days for 'standard' claims, and 40 business days for 'complex' claims, with any shorter timeframe likely to create a perception of unfairness for respondents.

Several stakeholders<sup>522</sup> said the legislation should specifically provide rights for a respondent to seek additional time via application to the adjudicator, but that this additional time should be capped.

MBA SA supported the current laws in Queensland and Victoria, which allow respondents to include new reasons for withholding payments that had not been included in the payment schedule, arguing that such measures enhance procedural fairness and allow the full nature of the dispute to be aired. However, this concept was strongly opposed by subcontractor organisations such as Subcontractor Alliance.

Some jurisdictions, such as south Australia, considered their respective current timeframes to be appropriate.

## Discussion and recommendation

I have set out the two primary policy considerations associated with the legislative scheme of enabling a respondent to respond to the claimant's adjudication application. I have also emphasised that only when the respondent has received a copy of the adjudication application will it be fully apprised of the claimant's arguments and the documentation the claimant considers supports its claim.

Usually the claimant's arguments in support of its case are contained in a separate document entitled 'claimant's submissions', which forms part of the adjudication application. It is also common practice for a claimant to include documents that support their submission and, as indicated above, sometimes the volume of such supporting documentation can be extensive.

What matters to a respondent when it receives a copy of the adjudication application is whether it will have sufficient time to address each of the claimant's arguments as well as expanding on the reasons the respondent gives for withholding payment as set out in the payment schedule. The time period between when a respondent receives a copy of the adjudication application up to the time when the respondent must submit its adjudication response can be very stressful, particularly if the disputed payment claim relates to a large amount and if the adjudication application contains significant supporting documentation. Indeed, under the compressed time period within which an adjudication response is required to be given, a respondent may struggle to read all of the claimant's supporting documentation included in the adjudication application, let alone have sufficient time to write its response.

<sup>520</sup> See section 14(4) of the SA Act which provides that the default period within which a payment schedule is to be provided by a respondent is 15 business days after the payment claim had been served.

<sup>521</sup> See section 20(1) of the SA Act for the time period when an adjudication response is required to be given.

<sup>522</sup> Including AIB, AMCA, AMCA SA, MBAV, NECA SA/NT, MBA SA and MBA NSW.

Clearly, requiring a respondent to provide an adjudication response within a compressed timeframe of a maximum 5 business days after being provided a copy of the adjudication application can be challenging. This therefore raises potential issues of procedural fairness, particularly where the adjudication application relates to a payment claim for a large amount and includes significant supporting documentation. The timeframe may, however, be sufficient if the adjudication application relates to a payment claim for a small amount and the supporting documentation is minimal. After all, the object of the legislation is to provide for rapid adjudication so that any disputed progress payment claim can be quickly determined.

It is therefore, once again, a matter of arriving at a balance between two competing objectives. On the one hand the timeframe given to the respondent to reply to the claimant's adjudication application should be consistent with the objective of ensuring that the adjudication process retains its rapid nature. On the other hand, it would be unfair to impose an unreasonable timeframe on the respondent within which to respond to the claimant's adjudication application, because to do so would be to deny the respondent the right to properly prepare and submit its case.

It was the concern of ensuring that a respondent be provided with sufficient time in which to prepare its response to the claimant's adjudication application that led Mr Wallace to recommend that in the case of an adjudication application relating to a complex payment claim, the Queensland Act be amended to provide a respondent with a minimum of 15 business days and a maximum of up to 30 business days in which to provide its adjudication response. This significant increase in the timeframe coupled with the right for a respondent to now include new reasons in its adjudication response, which had not previously been included in the payment schedule, have had the effect of unduly elongating the adjudication process. Indeed, the adjudication process will inevitably be further elongated under the Queensland Act where, in the case of a complex claim, a claimant contends that the respondent's adjudication response contains new reasons. This is because section 24B of the Queensland Act provides that a claimant would then be entitled to provide a reply to the adjudication response, with such reply to be given within a minimum of 15 business days and a maximum of 30 business days. Clearly the elongated timeframes set out under the Queensland Act in respect to an adjudication response given in reply to a complex payment claim has compromised the legislative objective of providing for a rapid adjudication process.

### *Balancing competing objectives*

How then should one strike a balance between ensuring that the adjudication process is rapid in nature whilst ensuring a respondent is provided sufficient time in which to prepare its adjudication response? The difficulty in arriving at an appropriate balance is not made easier given the conclusion I have arrived at earlier to not support the notion of a legislative scheme that would contain separate timeframes for standard and complex claims. I rejected such a notion because I considered that it was important that the legislative scheme should not be unduly complex.

Therefore, when I consider all of the competing policy considerations, I have come to the conclusion that the best manner in which the legislation would be able to strike the appropriate balance would be to adopt the same timeframe as currently applies under the NSW, Victorian and SA Acts. That is, the adjudication response is to be provided within 5 business days after the respondent had received a copy of the claimant's adjudication application, or 2 business days after receiving notice of the adjudicator's acceptance, whichever is the later. However, the respondent should have the right to apply to the adjudicator for an extension of time of up to a further 10 business days to provide its adjudication response. Any such application by the respondent for an extension of time should be required to be made in writing within 2 business days of receiving a copy of the adjudication application and set out the reasons for requesting the extension. The request for an extension of time would then be a matter for the adjudicator to consider based on the circumstances of the particular case and whether or not the adjudicator accepts the respondent's



reasons for seeking the extension. The decision as to the period of extended time that a respondent is to be given would also be a matter for the adjudicator to determine, but it need not necessarily be the maximum of 10 additional days.

I believe that a properly trained adjudicator would be well placed to determine how such discretion is applied, but I believe an extension is more likely to be given if the adjudication application relates to a payment claim involving complex technical issues or includes extensive supporting documentation. Obviously if a request for an extension of time is made in relation to a straightforward matter or an adjudication application that involves a small amount and minimal supporting documentation an adjudicator would not be inclined to grant an extension of time. It will all depend on the circumstances relating to each case, but leaving the decision of whether to extend a respondent's time for giving an adjudication response to an adjudicator and capping such period to a maximum of 10 business days seems to be a sensible way of ensuring that an appropriate balance will be struck between the interests of preserving the rapid character of the adjudication process whilst also according procedural fairness to the respondent.

Given my earlier recommendation requiring a payment claim to include more information so as to better enable a respondent to be apprised of the nature of the claimant's claim,<sup>523</sup> I consider that a respondent should not be permitted to include reasons in its adjudication response that had not been set out in the respondent's payment schedule. To allow new reasons to be included in the adjudication response would only extend the adjudication process and, as the post-2014 amendments to the Queensland Act have demonstrated, would not serve the interests of the industry well.

**Recommendation 39:**

The legislation should require a respondent to provide an adjudication response within the later of:

- a) 5 business days after the respondent received a copy of the claimant's adjudication application, or
- b) 2 business days after the respondent received a copy of the adjudicator's acceptance of the claimant's adjudication application.

**Recommendation 40:**

The legislation should provide that a respondent may make a written application to the adjudicator to request an extension of time of up to 10 business days for giving an adjudication response, subject to that application:

- a) being made within 2 business days of the respondent having received a copy of the claimant's adjudication application, and
- b) setting out the respondent's reasons for requesting the extension.

**Recommendation 41:**

The legislation should prohibit a respondent from including in its adjudication response any reasons for withholding payment unless those reasons have already been included in a payment schedule provided to the claimant.

<sup>523</sup> Refer to Recommendation 22 in Section 12.1 of this Report.

## 13.4 Adjudicators' determinations

### Default period for an adjudicator to make a determination or decision

Under the East Coast Model, two different approaches have been adopted in respect of the time period within which an adjudicator must determine and application:

- a) In the case of NSW and Victoria, the adjudicator is required to determine the adjudication application as expeditiously as possible and, in any case, within 10 business days after the adjudicator's acceptance of appointment.<sup>524</sup>
- b) In the case of South Australia, ACT, Tasmania and Queensland (but only in respect of an adjudication application relating to a standard payment claim) the adjudicator is required to determine the adjudication application as expeditiously as possible, and in any case:
  - (i) within 10 business days after the respondent lodged its adjudication response; or
  - (ii) if the respondent was entitled to lodge an adjudication response, but did not do so within the prescribed time period, then 10 business days after the day on which the adjudication response was required to have been given; or
  - (iii) if the respondent was not entitled to lodge an adjudication response (because it had failed to provide a payment schedule within the prescribed time period) then 10 business days after the respondent received a copy of the adjudication application.<sup>525</sup>

Further, all of the legislative regimes provide for the above period to be extended, although even on this issue, no uniform approach has been adopted. In the case of NSW, South Australia, Tasmania, the ACT and Queensland (but only in respect of an adjudication relating to a standard payment claim) the time within which an adjudicator is required to make their decision can be extended by whatever time agreed to by the claimant and the respondent.

In the case of Victoria, the adjudicator's time is stated to be able to be extended beyond the 10 business days after the date on which the adjudicator had accepted appointment or '...within any further time, not exceeding 15 business days after that date, to which the claimant agrees.'<sup>526</sup> Section 22(4A) of the Victorian Act provides, however, that a claimant 'must not unreasonably withhold their agreement'.

### Victorian Act

There has been some uncertainty as to what meaning is to be given to the expression 'after that date' as that term is used in section 22(4)(b) of the Victorian Act. On one view, the words 'that date' could be interpreted as referring to the date on which acceptance of the application by the adjudicator takes effect under section 20(2) but the Victorian Building Authority (VBA) obtained advice from the Victorian Government Solicitor who expressed the following view:

The better view, based on a careful reading of the words used in s. 22(4)(b), is that the words 'that date' refer to the time limit created by s. 22(4)(a), being the date which is '10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2)'. The words 'within any further time' at the beginning of s. 22(4)(b), indicate a statutory intention to allow an adjudicator to extend time, subject to the claimant's agreement, beyond the ordinary time limit of 10 business days in s. 22(4)(a). The maximum period of this 'further time' is specified in s. 22(4) as being 15 days. If the alternative construction in paragraph 6 were adopted, it would be necessary to infer that the 'further time' provided for in s. 22(4)(b) was five days. In our

<sup>524</sup> Refer to s. 21(3)(a) of the NSW Act and s. 22(4)(a) of the Victorian Act.

<sup>525</sup> Section 21(3)(a) of the SA Act, ss. 23(3)(a) and (b) of the ACT Act, s. 24(1)(a) of the Tasmanian Act and ss. 25A(4)(a) and (b) of the Queensland Act.

<sup>526</sup> Section 22(4)(b) of the Victorian Act.

view, the proper construction of this subsection is a construction that gives effect to the time period explicitly created in s. 22(4)(b) rather than a construction that would require the time period to be inferred.

On this construction, s. 22(4)(b) provides for an additional 15 business days in addition to the 10 business day time limit, rather than providing an **alternative** time limit that commences from the day the adjudicator's acceptance of the application takes effect under s. 20(2). Accordingly, the maximum period of time for an adjudicator to determine an application under s. 22(4) is 25 business days after the date on which the adjudicator's acceptance of the application takes effect under s. 20(2). However, this maximum period is subject to the claimant's agreement, which cannot be unreasonably withheld under s. 22(4A).<sup>527</sup>

### Queensland Act

Further, under the Queensland Act (as amended in 2014) where an adjudication application relates to a complex payment claim, the deadline for deciding an adjudication application is 15 business days after:

- a) if the adjudicator was given an adjudication response — the day on which the adjudicator received the response; or
- b) otherwise, the last day on which the respondent could have given the adjudicator the response.

However, where the claimant provided the adjudicator with a reply to an adjudication response (because the adjudication response contained reasons that had not been included in the payment schedule) then the deadline for deciding the adjudication application is 15 business days after the claimant's reply or, 15 business days after the claimant could have given the adjudicator the reply.<sup>528</sup> Where in relation to a complex payment claim, the adjudicator requested more time to decide an adjudication, but the parties failed to agree to such request '[t]he adjudicator may, despite section 25A(5) or (6), decide the application within 5 business days after the time the adjudicator would otherwise have to decide the application under section 25A(5) or (6).'<sup>529</sup>

### Responses from stakeholders

During the consultation process, stakeholders were invited to express their views on what should be the default period within which an adjudicator is required to make a determination or decision.

Some stakeholders, such as MBAV, raised concerns that the current legislation does not differentiate a time period for adjudication decisions when the amount of money involved in a claim differs substantially. For example, an adjudicator is required to make a decision within the same time period, irrespective of whether the claim relates to an amount of \$1 000 or \$10 million. MBAV consider that more complex claims require the adjudicator to spend more time in order to properly consider the material and therefore the legislation should provide the adjudicator with such additional time.

Those stakeholders who supported the East Coast Model<sup>530</sup> also supported the current default period set out under the NSW Act of 10 business days, with the option for adjudicators to request that the parties extend the timeframe for making a decision.

In relation to complex claims, various stakeholders<sup>531</sup> suggested a default period of 15 business days, with the potential for a 5-day extension where needed, taking this up to 20 business days in total,

<sup>527</sup> Correspondence of the Victorian Government Solicitor's office to the Victorian Building Authority dated 17 October 2016, a copy of which was distributed to ANAs who in turn distributed the correspondence to all accredited adjudicators on their panels.

<sup>528</sup> Refer to ss. 25A(5) and (6) of the Queensland Act.

<sup>529</sup> Refer to s. 25B(2) of the Queensland Act.

<sup>530</sup> Including AIB, NECA, NECA SA/NT, AMCA SA, MPA NSW, MPAQ and AMCA.

where appropriate. Other stakeholders<sup>532</sup> suggested that the additional time period should be capped, with MBAV supporting adjudicators being given an extension of up to 5 days without the agreement of the parties and the right to an extension of more than 5 days only with agreement of both parties.

Views among regulators and officials were mixed. The Victorian Government supported the current timeframes under its Act.<sup>533</sup> Tasmania submitted that small claims should have shorter timeframes to enable such claims to be processed more quickly, while both South Australia and the ACT support an upper limit depending on the size of a claim or whether it relates to a complex payment claim. There was little consistency among regulators as to what the cap should be set at.

SoCLA submitted that this issue underscores the notion that a ‘one-size-fits-all’ approach is likely to produce poor results at one or both ends of the spectrum:

A small subcontractor seeking payment of a modest debt needs his money quickly. The issues are likely to be relatively straightforward, and there is no reason why the process should be protracted. On the other hand, large and very large claims almost always include considerable complexity, and whilst the claimant would no doubt like a prompt result, the practical reality is that all other alternatives are likely to be much more time-consuming. Although somewhat rough-and-ready, a sliding scale, whereby the time allowed to the adjudicator to make his decision depends upon the size of the claim, should see much more realistic timescales. We suggest that the existing timescale of 10 business days as per the East Coast Model should continue to apply for claims for less than \$10 000. According to the Queensland statistics, at the other end of the scale, we suggest a time limit of 40 business days for claims of more than \$10 million.<sup>534</sup>

## Discussion and recommendation

As highlighted many times above, the task of identifying the principles of best practice in relation to security of payment laws frequently involves striking a balance between competing policy considerations. In the case of identifying the period within which an adjudicator should be required to make a determination or decision, this will depend on identifying such a period that will ensure that a decision relating to a disputed payment claim can be made quickly whilst still providing the adjudicator with sufficient time to consider each of the parties’ submissions and provide written reasons as to how the decision has been arrived at.

Clearly where the adjudication requires an adjudicator to consider many disputed items within a payment claim and where the parties have made detailed and complex submissions and provided the adjudicator with extensive documentation, the adjudicator’s task can be expected to be more difficult and time consuming compared to what may be the case if the adjudication relates to a straightforward issue. It will therefore all depend on the circumstances relating to each individual adjudication. If timeframes are insufficient to properly consider the parties’ submissions and their supporting documentation, this will very likely result in a sub-standard adjudication decision. At the same time, the adjudication process contemplates an adjudicator who is experienced in the industry being able to quickly identify the issues in dispute and make a decision and provide the reason for arriving at their conclusions in a clear and succinct manner. The adjudication process is not intended to mimic the arbitration process where, because the tribunal will be making final decisions, there is an expectation that more fulsome and detailed reasons will be provided. Further, the adjudication process is intended to be not only rapid but also cost effective and this implies that the parties are prepared to accept that the adjudicator’s decision they will receive will capture the essence of the adjudicator’s reasoning and not necessarily include a detailed dissertation of the applicable law.

<sup>531</sup> Including QMBA, MBA NSW and MBA SA.

<sup>532</sup> Including MBAV, MBT, HIA and AIB.

<sup>533</sup> Victorian Government, written submission, p. 2.

<sup>534</sup> SoCLA, written submission, p. 29.

Having therefore identified the policy considerations relevant to this issue, I consider that the provision set out in the current South Australian, Tasmanian and ACT legislation (as well as the Queensland Act as it relates to a standard payment claim) strikes the appropriate balance. In other words, an adjudicator should be required to decide an adjudication application as expeditiously as possible and, in any case:

- a) within 10 business days after-
  - (i) the date on which the adjudication response is lodged with the adjudicator; or
  - (ii) if an adjudication response is not lodged with the adjudicator on or before the last date on which the response may be lodged with the adjudicator (as set out under the legislation), then that date; or
  - (iii) if the respondent is not entitled to lodge an adjudication response (because it did not provide a payment schedule), then the date on which the respondent received a copy of the adjudication application; or
- b) within any further time that the claimant and respondent may agree.

I also consider that an adjudicator should be provided with 10 clear business days after receiving the respondent's adjudication response, within which to make a decision. The problem with the relevant provision set out in the NSW Act (*vis*: section 21(3)) is that because an adjudicator is not permitted to determine an adjudication application until the end of the period within which the respondent may lodge an adjudication response (see section 21(1)), this frequently has the effect of reducing the adjudicator's time period. It is not uncommon for respondents to only discover that a claimant's payment claim had been referred to adjudication when it receives advice from the ANA of the appointed adjudicator's acceptance of the application, at which time immediate arrangements are made for a copy of the adjudication application to be forwarded to the respondent. However, because (under section 20(1) of the NSW Act) a respondent then has 5 business days to lodge its adjudication response, the time period within which an adjudicator may make a decision has effectively been more than halved. Such a scenario does not, however, arise under the legislative regime that provides that the 10-business-day time period commences from the time the adjudication response is lodged.

### *Cap on extension of time for making decision*

I would also however recommend that the legislation include a cap on the extension of time for an adjudicator to make a decision, irrespective of whether the parties may so agree. That cap should be set at 30 business days after the respondent has lodged its adjudication response. This should ensure the rapid nature of the adjudication process is not watered down and that an adjudicator is not able to apply any suasion on the parties to accept requests for an extension of time for making a decision.

In my view, an adjudicator is more likely to request an extension of time for making a decision if the adjudication application relates to a complex matter and involves extensive documentation. Such a matter will however be very likely to have been referred to a senior adjudicator and such an adjudicator should be able to quickly deal with issues and make a decision within a maximum of 30 business days (assuming that an adjudicator requested an extension of time beyond the 10-business-day period and that both parties agreed to extend the time to the maximum 30 business days).

**Recommendation 42:**

The legislation should provide that the timeframe for an adjudicator to make an adjudication decision is:

- a) 10 business days after the respondent has lodged an adjudication response, or
- b) such further time as agreed to by the parties, subject to the total timeframe for the adjudicator to make a decision being not more than 30 business days.

### 13.5 Review of adjudication decisions

Currently, of the jurisdictions that have adopted the East Coast Model, only Victoria and Singapore provide for an adjudication review, albeit that the bases for review are quite different.

#### Adjudication review under the Victorian Act

The Victorian Act provides a limited right for either the claimant or the respondent to apply for an adjudication review. Such a review is only concerned with the issue of whether the original adjudicator had erroneously included in an adjudication determination an 'excluded amount' or excluded an amount because of erroneously determining that amount to be an 'excluded amount'.<sup>535</sup>

#### *When respondent may make a review application*

Accordingly, in Victoria a **respondent** may only make a review application if each of the following preconditions apply:

- the adjudicated amount exceeds \$100 000<sup>536</sup>
- the respondent provided a payment schedule within 10 business days after receiving the payment claim or 2 business days after receiving the section 18(2) notice<sup>537</sup>
- the respondent claims that the original adjudicator wrongly included an excluded amount in the adjudicated amount<sup>538</sup>
- in the payment schedule or the adjudication response, the respondent identified that excluded amount as an excluded amount<sup>539</sup>
- the respondent has paid the claimant all the adjudicated amount except the alleged excluded amount<sup>540</sup>
- the respondent has paid the alleged excluded amount into a designated trust account<sup>541</sup>
- the respondent has given the claimant notice of that payment and particulars identifying the account and the recognised financial institution with which the account is kept,<sup>542</sup> and
- the application is accompanied by the application fee charged by the ANA.<sup>543</sup>

<sup>535</sup> Refer to Part 3 Division 2A of the Victorian Act, ss. 28A–28L.

<sup>536</sup> *Ibid*, s. 28A(a).

<sup>537</sup> *Ibid*, s. 28B(2).

<sup>538</sup> *Ibid*, s. 28B(3).

<sup>539</sup> *Ibid*, s. 28B(4).

<sup>540</sup> *Ibid*, s. 28B(5).

<sup>541</sup> *Ibid*, s. 28B(6).

<sup>542</sup> *Ibid*, s. 28F(1).

### *When a claimant may make a review application*

A claimant may only make a review application if:

- the adjudicated amount exceeds \$100 000<sup>544</sup>
- the claimant claims that the adjudicator failed to take into account a relevant amount because the adjudicator wrongly decided that it was an 'excluded amount',<sup>545</sup> and
- the application is accompanied by the application fee charged by the ANA.<sup>546</sup>

An adjudication review application can only be made by a party within 5 business days after that party receives a copy of the adjudication determination<sup>547</sup> and the application must be made to the ANA which nominated the original adjudicator.<sup>548</sup> The applicant for a review must serve a copy of the review application on the other party within one business day after the application has been lodged with the ANA<sup>549</sup> and the application must include the applicant's arguments for a review (if any). The other party then has 3 business days in which to make submissions in reply to the review adjudicator via the ANA.<sup>550</sup> The review adjudicator must deliver a decision within 5 business days after their appointment, although the applicant for review can extend this by a further 5 business days.<sup>551</sup>

### *Scope of adjudication review*

A review adjudicator may —

- a) substitute a new adjudication determination for the determination made by the original adjudicator, or
- b) confirm the determination made by the original adjudicator.<sup>552</sup>
- c) In determining an adjudication review, the review adjudicator must —
  - (i) specify if the review determination varies the original adjudication determination and if so, in what respect; and
  - (ii) specify any amounts paid to the claimant by the respondent in respect of the adjudication determination; and
  - (iii) determine any further amount that is to be paid by the respondent to the claimant; and
  - (iv) determine any amount that is to be paid by the claimant to the respondent; and
  - (v) determine any interest payable in accordance with section 12(2) in respect to the further amount referred to in (iii) above; and
  - (vi) specify the date on which the amount referred to in (iii), (iv) and (v) becomes payable.<sup>553</sup>

<sup>543</sup> Ibid, s. 28D(3)(c).

<sup>544</sup> Ibid, s. 28A(a).

<sup>545</sup> Ibid, s. 28(c)(2).

<sup>546</sup> Ibid, s. 28D(3)(c).

<sup>547</sup> Ibid, s. 28D(2).

<sup>548</sup> Ibid, s. 28D(1).

<sup>549</sup> Ibid, s. 28D(5).

<sup>550</sup> Ibid, s. 28E.

<sup>551</sup> Ibid, s.28I(10).

<sup>552</sup> Ibid, s. 28I(5).



### Adjudication Review under the Singapore Act

The Singapore Act and Regulations provide for a much broader entitlement for adjudication review. Specifically:

- a) Adjudication review is only available if the adjudicated amount exceeds the response amount by \$100 000 or more.<sup>554</sup>
- b) Only the respondent in an adjudication may apply for adjudication review.<sup>555</sup>
- c) The respondent must pay the adjudicated amount to the claimant before being entitled to apply for adjudication review.<sup>556</sup>
- d) The review adjudicator may:
  - (i) substitute the adjudication determination for any other determination as is considered appropriate,<sup>557</sup> or
  - (ii) dismiss the adjudication review application.<sup>558</sup>
- e) Where an adjudication review has substituted the original adjudication determination as per (d)(i) above, the review adjudicator shall determine:
  - (i) the adjudicated amount (if any) to be paid by the respondent to the claimant<sup>559</sup>
  - (ii) if the adjudicated amount is different from the amount that the respondent has paid to the claimant under s. 18 (3), the date on which the difference in amount is payable<sup>560</sup>
  - (iii) the interest payable on any such amount,<sup>561</sup> and
  - (iv) the proportion of the costs of the adjudication review payable by each party.<sup>562</sup>
- f) In conducting the adjudication review, the review adjudicator shall only have regard to the adjudication determination under review and the matters in sections 17(3)(a) to (h) of the Act, which are:
  - (i) the provisions of the Act
  - (ii) the provisions of the contract to which the application relates
  - (iii) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto
  - (iv) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto

<sup>553</sup> Ibid, s. 28(6).

<sup>554</sup> Refer to s. 18(1) of the Singapore Act, read in conjunction with regulation 10(1) of the Singapore Regulation.

<sup>555</sup> Refer to s. 18(2) of the Singapore Act.

<sup>556</sup> Ibid, s. 18(3).

<sup>557</sup> Ibid, s. 19(4)(a).

<sup>558</sup> Ibid, s.19(4)(b).

<sup>559</sup> Ibid, s.19(5)(a).

<sup>560</sup> Ibid, s.19(5)(b).

<sup>561</sup> Ibid, s.19(5)(c).

<sup>562</sup> Ibid, s.19(5)(d).

- (v) the results of any inspection carried out by the adjudicator of any matter to which the adjudication relates
- (vi) the report of any expert appointed to inquire on specific issues
- (vii) the submissions and responses of the parties to the adjudication and any other information or document provided at the request of the adjudicator in relation to the adjudication, and
- (viii) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.

### *Scope of Singapore Adjudication Review*

In *Ang Cheng Guan Construction Pty Ltd v Corporate Residence Pty Ltd*<sup>563</sup>, the Singapore High Court had occasion to consider the scope of an adjudication review. The respondent argued that an adjudication review is restricted to only the issues it had raised because, under the Act, only the respondent in an adjudication determination is entitled to apply for an adjudication review. Considering the scope of the legislative regime relating to adjudication review, His Honour, Lee Seiu Kin J, referred to the respondent's argument as the 'Narrow Interpretation' on the scope of the review adjudication provisions. On the other hand, the claimant submitted that an adjudicator in an adjudication review is entitled to review the entire determination. His Honour referred to the claimant's argument as the 'Broad Interpretation'.

His Honour held that an analysis of the relevant provisions of the Act supported the Broad Interpretation:

What is clear is that the Act does not state that an adjudication review is limited to the issues raised by the respondent; neither does it state that it is not limited to these issues. What it does state, in s. 19(6)(a) of the Act, is that the review adjudicator shall only have regard to the matters in s. 17(3)(a) to (h) of the Act and the adjudication determination under review ...

... This provision [i.e. s.17(3)] sets the boundaries of the matters that a review adjudicator can consider. If the Narrow Interpretation were intended, either ss. 17(3) or 19(6)(a) of the Act would have been an appropriate place to set that boundary marker. In other words, the draftsman could have easily inserted, in either provision, words to the effect that, in an adjudication review, only matters raised by the respondent may be considered. No such marker was set, and instead s. 19(6)(a) of the Act states the matters which a review adjudicator may have regard to, one of which is the adjudication determination under review. Furthermore, it is a reference to the adjudication determination, not a part of it. As for the matters in s. 17(3)(a) to (h) of the Act, these include the payment claim, the payment response and the submissions and responses of the parties to the adjudication. Again, these are not expressed in such a way that regard may only be had to part of these matters. There is therefore no indication in s. 19(6)(a) of the Act that an adjudication review is limited to the issues raised by the respondent and the language is broad enough to cover the entire adjudication determination. This is consistent with the Broad Interpretation

Another important indicia of the scope of an adjudication review is found in s. 19(5) of the Act. This states, in effect, that an adjudication review shall determine the adjudicated amount (if any) to be paid by the respondent to the claimant and, if this is different from that determined by the first instance adjudicator, the review adjudicator shall also determine 'the date on which the difference in amount is payable'. If the Narrow Interpretation were intended, it would be a simple matter to specify at this point that any difference is payable by the claimant. However, s. 19(5) of the Act does not expressly restrict a review adjudicator to simply maintaining or decreasing the adjudicated

<sup>563</sup> [2017] SGHC 9.

amount. Rather, the provision leaves it open to him to increase it. Once again, this is consistent with the Broad Interpretation.<sup>564</sup>

His Honour then considered whether the competing positions of the parties were in contradiction with the intended policy of the legislation:

[The Respondent] pointed out that the Broad Interpretation would mean that an aggrieved respondent could be liable to pay a higher sum upon an adjudication review even though he is the only party entitled to seek a review. CR [the Respondent] submitted that the adjudication review procedure was established to balance the potential unfairness suffered by a respondent in the adjudication process, given the fact that the claimant has the benefit of deciding the time to initiate the adjudication process and is therefore typically better prepared, as well as the potential risk to the respondent if an adjudication determination is found to be substantively wrong.

While [the Respondent's] submission may have some merit, the problem is that it does not appear to be supported by the manner in which the pertinent provisions of the Act are drafted. Further, for every good argument that CR [the Respondent] may make, there is a counter-argument that can be made for the other side. The Act was enacted to establish a quick and inexpensive regime for the resolution of disputes over payment claims that would facilitate cash flow in the construction industry. Adjudication determinations would have 'temporary finality' so that cash can flow quickly and smoothly, and parties are to finally resolve all disputes between them in arbitration or court proceedings after the construction works are completed. The introduction of an additional layer of review runs the risk of protracting proceedings further. If construction works are still in progress, this could be an unwelcome distraction for the parties. Hence, the legislature deemed it necessary to limit the right to apply for review to cases where the difference between the adjudicated amount and the response amount is large. Presently, this is set at \$100 000. It is also conceivable that the legislature deemed it necessary to place a further restraint in that once an adjudication review is set in motion, the entire adjudication determination is open for review and not just the parts that the respondent is dissatisfied with. It must be borne in mind that in many adjudication determinations, there will be parts where the adjudicator gets it right and parts where he gets it wrong. To permit a respondent to cherry-pick the parts which he is unhappy with, without a corresponding right on the part of the claimant to seek a review of the parts where the adjudicator may have gotten it wrong, could also be unfair. Indeed, the Narrow Interpretation would tend to encourage respondents to apply for an adjudication review as there would be nothing to lose, but everything to gain.

It can therefore be seen that the policy of the Act is ambivalent as to which interpretation is to be preferred. On an analysis of the relevant provisions of the Act, the Broad Interpretation is indicated. In view of the foregoing, I hold that the Broad Interpretation is the correct one. I therefore hold that in an adjudication review, the entire adjudication determination is liable to be reviewed by the review adjudicator.<sup>565</sup>

### *Scope under WA Act and NT Act*

The WA Act provides only a very narrow window for a party to review an adjudicator's decision. Under section 31(3) of the WA Act an appointed adjudicator must, within the prescribed time period either:

- (a) dismiss the application without making a determination of its merits if —
  - (i) the contract concerned is not a construction contract; or
  - (ii) the application has not been prepared and served in accordance with section 26; or
  - (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgement or other finding about the dispute that is the subject of the application; or

<sup>564</sup> *Ang Cheng Guan Construction Pty Ltd v Corporate Residence Pty Ltd* [2017] SGHC 9, [18]–[20].

<sup>565</sup> *Ibid*, [28] to [30].

- (iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;
- (b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so determine —
  - (i) the amount to be paid or returned and any interest payable on it under section 33; and
  - (ii) the date on or before which the amount is to be paid, or the security returned, as the case requires.

However, under section 46(1) of the WA Act ‘a person who is aggrieved by a decision under section 36(2)(a) may apply to the State Administrative Tribunal (SAT) for a review of the decision’ and if, on review, the SAT has set aside or reversed the adjudicator’s decision, the adjudicator is then required to make a determination under section 36(2)(b) within 14 days (or any extension to that time, as argued by the parties). Significantly, section 46(3) then goes on to provide that except ‘...as provided under section (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed’.

Thus, the scheme of the WA Act is different from that in Victoria and Singapore. Not only does the WA Act confine any review of an adjudicator’s decision to circumstances where the adjudicator had dismissed an adjudication application for any of the grounds set out under section 36(2)(a), but also only the SAT can review such a decision and if the SAT decides to either set aside or reverse the adjudicator’s decision, the matter is then referred back to the adjudicator for the purposes of requiring him or her to make a determination under section 36(2)(b). Further, insofar as section 46(3) provides that no decision or determination of an adjudicator is able to be appealed or reviewed other than as set out under section 46(1), it is clear that section 46(3) does not exclude judicial review of an adjudicator’s decision or determination, whether made under section 31(2)(a) or (b).<sup>566</sup> Indeed, section 46(3) has been construed to be referring to appeals or reviews by the SAT.<sup>567</sup>

The NT Act has a similar provision relating to a review of an adjudicator’s decision to dismiss an application as under the WA Act, except that such a review is to be made to the ‘Local Court’ rather than an administrative tribunal.<sup>568</sup>

### Responses from stakeholders

During the consultation process a number of parties raised the concept of the legislative regime providing an aggrieved party a limited right to apply for a review of an adjudicator’s decision. The rationale for this concept was expressed by Mr Samer Skaik, a leading academic in this field, as follows:

Statutory adjudication was introduced into the security of payment legislation as a fast-track payment dispute resolution process aiming to facilitate cash flow within the construction contractual chain. However, in recent years, courts have been more willing to intervene in adjudication process due to poor quality of adjudication outcome particularly in relation to large and/or complex payment claims. This situation has encouraged aggrieved parties to challenge adjudication determinations by way of judicial review resulting in numerous judicial review applications, particularly in Australia. This has eroded the original object of the security of payment legislation. The mission has been compromised particular in ensuring that contactors are paid quickly for the work they do on an interim basis. With that, some jurisdictions allow for an express limited right of aggrieved parties to apply for review

<sup>566</sup> Refer to *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, [7] and [119]–[126].

<sup>567</sup> *Ibid*, [123].

<sup>568</sup> See s. 48(1) of the NT Act.

against erroneous determinations as a way to remedy injustice caused by the speedy adjudication process...

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.<sup>569</sup>

### Discussion and recommendation

As set out by Lee Sein Kin J in *Ang Cheng Guan*, the introduction of adjudication review involves consideration of a number of competing policy issues. If the object of the security of payment laws is to enable cash to flow quickly within the construction industry, then allowing an adjudicator's decision to be reviewed would run the risk of protracting the process and so slow down the flow of cash. 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. In either case, the parties' confidence in the adjudication process will be diminished whenever an adjudication decision is perceived to have been contrary to law and/or contrary to supporting evidence.

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. This is particularly the case for the claimant who not only will have failed to obtain a valid adjudication decision (and therefore failed to obtain a progress payment), but be required to pay the costs associated with its aborted adjudication application, its own legal costs in defending the respondent's Supreme Court application, the respondent's legal costs (on a party-to-party basis), as well as the adjudicator's fees and expenses. 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.

At the same time, allowing for an adjudication review to occur without restraint would undermine the essence of the legislative scheme, as respondents with deep pockets will seek to invoke the review mechanism so as to defer payment of progress claims. As Lee Sein Kin J stated in *Ang Cheng Guan*, the legislative regime should enable adjudication decisions to have 'temporary finality', for otherwise the objective of the legislation would not be able to be achieved.

Therefore, whilst I accept Mr Skaik's proposition that an appropriately designed review mechanism can provide a pragmatic means of improving certainty, restoring disputants' confidence and reducing the instances of judicial intervention, much, however, will depend on the details. In particular, the key challenge will be to strike an appropriate balance between preserving the rapid and cost-effective nature of adjudication, whilst also providing an aggrieved party with an avenue to apply for review of an adjudication decision. The review adjudication procedure should have appropriate restraints so as to cause a dissatisfied party to carefully consider whether it wishes to

<sup>569</sup> Skaik, S., written submission, pp. 4 and 7.

pursue such option. It should be available to both parties, but only in respect to disputes involving larger payment claims. An adjudication review should only be lodged with the Regulator (rather than an ANA) and the Regulator should only appoint the most senior adjudicator available to carry out the review. Further, 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. I now set out the specific details relating to the adjudication review procedure.

### ***Threshold amount***

A party to an adjudication should be entitled to lodge an adjudication review where:

- a) the adjudicated amount is:
  - (i) equal to or greater than \$100 000 of the scheduled amount; or
  - (ii) lower than \$100 000 of the claimed amount; or
- b) the adjudicator has rejected the adjudication application.

The reason for prescribing a threshold amount is to confine adjudication reviews to where the amount in issue is not insignificant. The reason for landing on an amount of where the adjudicated amount is either lower or greater than the claimed or scheduled amount is because that is the amount which the legislature of both Victoria and Singapore have considered to be the marker to distinguish between those matters that should be referred for review and those that should not. Clearly a shortfall in the amount of \$100 000 from the amount claimed is a significant amount, as is also the case where the adjudicated amount is \$100 000 greater than the scheduled amount. The reasons that I consider that an adjudication review should be available to both the claimant and the respondent is because an adjudication decision which is claimed to be wrong can inflict an injustice on either party.

### ***Payment schedule a prerequisite for respondent***

A respondent is only entitled to apply for an adjudication review where it has lodged a payment schedule and cannot include in its adjudication review reasons as to why payment is being withheld unless those reasons have been included in the payment schedule. As the threshold amount in the case of a respondent's application for adjudication review can only be made where the adjudicated amount exceeds the scheduled amount by \$100 000, it follows that, absent a respondent lodging a payment scheduled, there can be no review. This is yet another reason for a respondent to ensure that it replies to a claimant's payment claim and to carefully consider the reasons that it sets out in the payment schedule for withholding payment. Also, if the legislative scheme does not allow a respondent to include in its adjudication response reasons for withholding payment that have not been set out in the payment schedule, it follows that the respondent should also similarly be disentitled to include any new reasons for withholding payment in its adjudication review. If it were otherwise, a respondent could abuse the adjudication review process so as to request that a fresh adjudication be conducted based on reasons that had not been referred to the original adjudicator.

### ***Respondent to pay adjudicated amount***

As set out under the Victorian Act and the Singapore Act,<sup>570</sup> where the respondent is required as a consequence of the adjudicator's decision, to pay an adjudicated amount to the claimant, the respondent shall not lodge any application for review of the decision unless it has paid the alleged excluded amounts into a designated trust account.<sup>571</sup> The reason for imposing this requirement is

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<sup>570</sup> See s. 18 (3) of the Singapore Act.

<sup>571</sup> See s. 28B(6) of the Victorian Act.



to ensure the fundamental feature of the legislative scheme, by protecting or securing the claimant's cash flow. If it were otherwise, the adjudication review process could be used by a respondent as a means of testing the commercial stamina of the claimant.

### *No adjudication review from adjudicator's decision agreed by parties*

I have recommended earlier in this Report (see Section 13.2) that the legislation provide a (narrow) window for the parties (in certain circumstances) to agree between themselves on a registered adjudicator to decide an application. It therefore seems to me that where the parties have in fact reached an agreement it would not be appropriate for the party that is dissatisfied with the such an adjudicator's decision to then avail itself of the adjudication review provisions. An adjudication review should only be available where the parties had not reached agreement on the adjudicator. Enabling the parties to agree on a registered adjudicator that both feel comfortable with and who both parties consider to be suitably qualified ought to result in the parties being more likely to accept the adjudicator's decision. Further, if the parties wish for a disputed payment claim involving a large amount to be decided quickly and without the risk of an adjudication review then it would be in both their interests to agree on an adjudicator and to not allow the adjudicated decision to be subject to adjudication review.

For those that might argue that such a process would advantage a respondent who, by not agreeing to an adjudicator, and then, when not satisfied with the appointed adjudicator's decision, applies for an adjudication review, I consider such an argument to be misconceived. Not only would the respondent be required to pay the adjudicated amount determined by the appointed adjudicator to the claimant, but the respondent would also take the risk that if its adjudication response were unsuccessful, it would then be incurring further costs. Restricting the adjudication reviews to apply where an externally appointed adjudicator makes an adjudication decision would serve to incentivise the parties to cooperatively explore reaching agreement on a suitable registered adjudicator to decide the application at first instance.

### *Adjudication review application to be lodged with Regulator only*

An application for an adjudication review must be lodged with the Regulator within 5 business days of the adjudication decision having been released and be accompanied with the applicable fee. The reason for requiring the aggrieved party to lodge its application for adjudication review within 5 business days is to ensure that the review process is not allowed to drag on for any extensive period and to give certainty to the other party as to whether the adjudication decision will be reviewed. The reason for requiring the aggrieved party to pay an application fee when lodging its adjudication review is to not only cover the additional administrative costs that the Regulator will incur, but also (depending on the quantum of the application fee) to not allow such option to be too easily available. The reason that the application for adjudication review is to be lodged with the Regulator rather than an ANA is that review applications will need to be referred to the most senior adjudicator available and obviously the Regulator would be best able to quickly identify such person. To require either party to lodge an application for adjudication review with an ANA and for the ANA to then identify suitable persons from its panel for nomination and referral to the Regulator would be unduly restrictive as its pool of adjudicators would obviously be smaller than the list of registered adjudicators that the Regulator could draw on. Also, the person appointed to conduct an adjudication review would need to be the most senior and experienced adjudicator available and capable of dealing with complex legal arguments within a very tight timeframe. It is likely that those persons would be retired members of the judiciary or senior and respected solicitors or barristers with a profound background in construction law.

### *Procedure relating to the conduct of an adjudication review*

The following sets out the suggested procedure relating to the conduct of an adjudication review:



1. An adjudication review application must be made in writing and within 5 business days after the release of the adjudication decision. Also, as indicated above, the application must be lodged with the Regulator. There may be merit if the application for an adjudication review could be in a prescribed form and, accordingly, the legislation could empower the Regulator to prepare and prescribe such a form. If a form is prescribed, then it could set out the information to be contained in the review application.
2. The applicant must give a copy of its adjudication review application to the other party within one business day after lodgement with the Regulator.
3. Upon receiving a copy of the adjudication review application, the Regulator must notify the adjudicator who had made the adjudication decision that their decision is now the subject of the review. If an ANA had been associated with that matter, then the Regulator is to also notify the ANA of the adjudication review application.
4. A party to an adjudication review may make a submission to the Regulator in response to the application for review within 5 business days after being given a copy of the adjudication application.
5. The Regulator must within 3 business days after receiving an application for review, appoint a review adjudicator to conduct the review. A review adjudicator must be a person registered as a senior adjudicator and must not be a person who has been involved directly or indirectly with the adjudication decision that is the subject of the adjudication review. The Regulator must give each party to the review written notice of the appointment of the review adjudicator.
6. The Regulator must provide the following information to the review adjudicator as soon as practicable after the appointment of the review adjudicator:
  - i) a copy of the adjudication review application; and
  - ii) a copy of any submission made by a party to the adjudication review in accordance with (4) above; and
  - iii) a copy of the adjudication decision that is the subject of the adjudication review; and
  - iv) a copy of the payment claim and payment schedule that relates to that adjudication decision; and
  - v) a copy of each submission considered by the adjudicator who made the adjudication decision. This would include the submissions that accompanied the adjudication application and adjudication response (if any), including supporting documentation; and
  - vi) any other information that the adjudicator who made the adjudication decision considered in making that decision.
7. In deciding an adjudication review application, the review adjudicator shall only have regard to the following matters:
  - i) the provisions of the Act and any regulations made under the Act; and
  - ii) the provisions of the construction contract from which the review application arose; and
  - iii) the information provided by the Regulator as set out in (6) above.
8. In relation to an adjudication review application, the review adjudicator may:

- i) substitute a new adjudication decision ('the review decision') for the decision that is the subject of the adjudication review; or
  - ii) confirm the decision that is the subject of the adjudication decision.
9. In deciding an adjudication decision, the review adjudicator must:
  - i) specify if the review decision varies the adjudication decision and how it varies the adjudication decision; and
  - ii) specify any amounts paid to the claimant by the respondent in respect of the adjudication decision; and
  - iii) decide any further amount that is to be paid by the respondent to the claimant; and
  - iv) decide any amount that is to be repaid by the claimant to the respondent; and
  - v) decide any interest payable on the amount referred to in (iii) above; and
  - vi) specify the date on which an amount under (iii), (iv) or (v) is payable.
10. A review decision must be in writing and set out the reasons for the review decision in that decision.
11. The date for payment referred to in (9)(vi) above, shall be 5 business days after the respondent or claimant (as the case requires) is given a copy of the review decision.
12. The review adjudicator must complete the adjudication review and provide a copy of the review decision to the Regulator:
  - i) within 10 business days after the end of the period within which any party to the adjudication review may make a submission in accordance with (d) above; or
  - ii) within any further time, not exceeding 15 business days after that appointment, to which the applicant agrees.

An applicant must not unreasonably withhold its agreement under (ii) above.
13. The review adjudicator shall decide the proportion of the costs payable by each party to the adjudication review and may, if he or she thinks it appropriate, include a statement in the review decision that in their opinion the application for the adjudication review was not made in good faith.
14. Once the review adjudicator has forwarded its review decision to the Regulator, the Regulator must not provide a copy of the review decisions unless the review adjudicator has confirmed that all their fees and expenses have been paid, or unless the review adjudicator otherwise agrees.
15. An applicant may withdraw an adjudication review application at any time before the review adjudicator has made a review decision by serving a notice of withdrawal on:
  - i) the review adjudicator;
  - ii) the Regulator;
  - iii) the other party to the adjudication review.

Despite the withdrawal of a review adjudication, the review adjudicator is nonetheless entitled to be paid fees for considering the review application up to the time that a copy of the notice of withdrawal has received.

16. A review adjudicator may correct a review determination in the same circumstances as set out under section 22(5) of the NSW Act (referred to as the 'slip rule').

**Recommendation 43:**

The legislation should provide that a party to an adjudication is entitled to make an application to the Regulator for a review of an adjudication decision if:

- a) the adjudicated amount is:
  - (i) equal to or greater than \$100 000 of the **scheduled** amount, or
  - (ii) lower than \$100 000 of the **claimed** amount, or
- b) the adjudicator has rejected the adjudication application.

**Recommendation 44:**

In making an application for adjudication review the legislation should provide that:

- a) the application must be made in writing to the Regulator within 5 business days of the adjudication decision being released to the disputing parties, and
- b) a copy of the application is to be provided to the other party within 1 business day of being lodged with the Regulator.

**Recommendation 45:**

The legislation should provide that a party to an adjudication is **not** entitled to make an application for a review of the adjudication decision if the parties had agreed the adjudicator in accordance with Recommendation 38.

**Recommendation 46:**

The legislation should further provide that, in relation to an application for adjudication review, a respondent:

- a) is not entitled to apply for an adjudication review unless it has lodged a payment schedule
- b) cannot include in its application for adjudication review reasons as to why payment is being withheld, unless those reasons have been included in the payment schedule, and
- c) must, when making an application for adjudication review, lodge with the Regulator's trust account any amount the respondent is required to pay to the claimant as a consequence of the adjudicator's decision.

**Recommendation 47:**

The legislation should set out the relevant procedure for the conduct of an adjudication review. A suggested procedure is provided in Section 13.5 of this Report.

**Recommendation 48:**

The legislation should require the Regulator to appoint the most senior registered adjudicator available to conduct the adjudication review.

## 13.6 Respondent to pay adjudicated amount

Most of the jurisdictions that have adopted the East Coast Model provide that a respondent must pay the adjudicated amount to the claimant ‘on or before the relevant date’.<sup>572</sup> The legislation then goes on to define ‘relevant date’ to mean:

- a) the date occurring five business days after the date on which the adjudicator’s determination is served on the respondent concerned; or
- b) if the adjudicator determines a later date ... that later date.<sup>573</sup>

Given that the Victorian Act enables a party to apply for an adjudication review, the relevant provision relating to the payment of an adjudicated amount and the recovery of that amount (in the event that a respondent were to be successful in an adjudication review) is obviously treated in a different manner.<sup>574</sup>

### Responses from stakeholders

No comments were sought or received from stakeholders in relation to this matter as this was not regarded as a controversial issue. Further, as the Issues Paper<sup>575</sup> did not raise the matter of an adjudication review, stakeholders were not provided with the opportunity of expressing any views as to whether a respondent who wishes to apply for a review of an adjudication decision should be required to pay the adjudication amount to the claimant or to a designated trust account.

### Discussion and recommendation

It is clear that the legislation should include an express provision requiring a respondent to pay the adjudicated amount to the claimant either within 5 business days after the date on which the adjudicator’s decision has been served on the respondent or such later date as the adjudicator may have determined in the adjudication decision. The inclusion of such a provision is consistent with the objective of ensuring that the claimant receives prompt payment of the amount determined by the adjudicator.

### *Where a party applies for adjudication review*

Given, however, that I have recommended that an aggrieved party may, in certain circumstances, apply for a review of an adjudication decision, a specific provision will need to be included in the legislation to deal with the scenario of a respondent making an application for an adjudication review. From a policy perspective, this issue raises at least two relevant considerations.

Firstly, and consistent with the policy of ensuring that payments are made promptly, a respondent should not be allowed to delay paying an adjudicated amount by applying for an adjudication review. In other words, a claimant who refers its disputed payment claim to adjudication and who is successful in obtaining a favourable decision should be entitled to either receive payment of the adjudicated amount determined by the adjudicator or at least to be assured that the amount has been secured by way of the respondent having lodged the adjudicated amount in a designated trust account.

Equally, however, a respondent aggrieved with an adjudication decision would not want to pay the adjudication amount only to then request for all or part of that amount to be refunded if it were to succeed in the adjudication review. It therefore seems obvious that the most sensible manner to deal with this scenario is to require the respondent to pay the adjudicated amount into the trust

<sup>572</sup> Section 23(2) of the NSW Act; s. 23(2) of the SA Act; s. 29(1) of the Queensland Act.

<sup>573</sup> Section 23(1) of the NSW Act, s. 23(1) of the SA Act; s. 29(2) of the Queensland Act; s. 25 of the ACT Act; s. 26(1) of the Tasmanian Act.

<sup>574</sup> See s. 28M as well as ss. 28B(5) and (6) and ss. 23N(1) and (2) of the Victorian Act.

<sup>575</sup> Murray, J. (2017), op cit

account administered by the Regulator. In the event that the adjudicator's decision is upheld by the adjudication review, then the amount held in the trust account can be released and forwarded to the claimant.

If the amount determined on review is greater than the amount determined by the adjudicator at first instance, then the amount held in the trust account would be released to the claimant and the respondent would be required to pay any additional amount over and above the adjudicated amount held in the trust account. Alternatively, if the adjudication review determined that the respondent was successful and that all or part of the adjudicated amount should be returned to the respondent, then that amount would be forwarded by the Regulator to the respondent.

Accordingly, I would recommend that payment of the adjudicated amount should be treated as follows:

1. Where in relation to an adjudicated amount, the adjudicator has determined that the respondent shall pay an adjudicated amount to the claimant, then except in case of an adjudication review, the respondent must pay that amount:
  - a) within 5 business days after the adjudication decision is served on the respondent; or
  - b) by the date at which the adjudicated amount is determined by the adjudicator to be payable.
2. Where for a party applies for the review of an adjudicator decision and the adjudication review decision differs from the adjudicator decision, the party required to make payment in consequence of the adjudication review decision shall do so:
  - a) within 5 business days after the adjudication decision is served on that party; or
  - b) if the review adjudicator has decided that payment may be made on a later date, then on or before that date.

#### **Recommendation 49:**

The legislation should provide that (except in case of an adjudication review) where an adjudicator has determined that the respondent is to pay an amount to the claimant, the respondent must pay that amount:

- a) within 5 business days after the adjudication decision is served on the respondent, or
- b) by the date at which the adjudicated amount is determined by the adjudicator to be payable.

#### **Recommendation 50:**

The legislation should provide that where an application for review of an adjudicator decision is made and the adjudication review decision differs from the original adjudicator decision, the party required to make payment as a result of the adjudication review decision must pay that amount:

- a) within 5 business days after the adjudication decision is served on that party, or
- b) if the review adjudicator has decided that payment may be made on a later date, then on or before that date.

### **13.7 Claimant's right to suspend construction work**

The jurisdictions that have adopted the East Coast Model enable a claimant to suspend construction work or the supply of related goods and services under a construction contract if:

- a) the respondent has not provided a payment schedule within the prescribed time period nor paid the whole or part of the claimed amount on or before the due date for payment to which the payment claim related,<sup>576</sup> or
- b) the respondent provided a payment schedule within the prescribed time period but failed to pay the whole or part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates,<sup>577</sup> or
- c) the respondent failed to pay the whole or any part of the adjudicated amount by the due date set out in the adjudicator's decision.<sup>578</sup>

Where a claimant wishes to exercise its right to suspend the work (or the supply of related goods and services) it must first give the respondent a notice of its intention to suspend and allow 2 business days to expire.<sup>579</sup> Under the Victorian Act however, a claimant is unable to suspend its works (or the supply of related goods and services) until at least 3 business days have passed since the service of its notice of intention.<sup>580</sup>

The claimant's right to suspend works exists until the end of the period of 3 business days after the claimant received payment. Further, if in exercising its right to suspend carrying out works (or supplying related goods and services) the claimant 'incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses'.<sup>581</sup> Similarly, the legislation indemnifies a claimant who suspends construction work (or the supply of related goods and services) 'for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of the suspension'.<sup>582</sup>

Under the West Coast Model, the right to suspend the works only accrues if a party fails to pay an amount as determined by the adjudicator.<sup>583</sup> Such a provision is not unexpected given that the West Coast Model, unlike the East Coast Model, does not contain a provision that deems the respondent as being liable for the claimed amount on the due date for payment if the respondent failed to provide a payment schedule.

Given that the Victorian Act includes a right to an adjudication review (albeit only in respect to the narrow issue of whether an adjudicator's determination had included an 'excluded amount'), a claimant is not able to give a notice of its intention to suspend the works in relation to a respondent's failure to pay the adjudicated amount '... until after the end of the period allowed for making an adjudication review application ...'.<sup>584</sup>

### Responses from stakeholders

The Review did not specifically seek stakeholder feedback on the claimant's right to suspend construction work in certain circumstances. However, all stakeholders were provided the opportunity to raise any additional concerns with the current legislative models. Despite this the Review did not receive any comments on this matter.

<sup>576</sup> See, for example, s. 15(2)(b) of the NSW Act.

<sup>577</sup> See, for example, s. 16(2)(b) of the NSW Act.

<sup>578</sup> See, for example, s. 24(1)(b) of the NSW Act.

<sup>579</sup> Refer, for example, to ss. 15(2)(b), 15(3), 16(2)(b), 16(3), 24(1)(b) and 24(2) of the NSW Act.

<sup>580</sup> Section 29(1) of the Victorian Act.

<sup>581</sup> Section 27(2A) of the NSW Act.

<sup>582</sup> Section 27(3) of the NSW Act.

<sup>583</sup> See s. 42(1) of the Western Australia Act and s. 44(1) of the NT Act.

<sup>584</sup> Section 280(3) of the Victorian Act.

## Discussion and recommendation

Given that I have recommended that an aggrieved party may, in certain circumstances, apply for a review of an adjudication decision, it follows that:

- a) the right of a claimant to serve a notice of suspension should not accrue until the period allowed for making an application for adjudication review has expired (i.e. 5 business days after a copy of the adjudication decision is served on the respondent), or
- b) if an adjudicator's decision has been referred for an adjudication review, then the claimant's right to serve a notice of suspension may accrue where a respondent has not paid the amount determined by the review adjudicator.

Other than including a provision relating to an adjudication review, I support the current provisions set out in the NSW Act relating to a claimant's right to suspend its works. From a policy perspective, giving a claimant the right to suspend its works where a respondent has failed to pay by the due date or (if a disputed payment claim had been referred to adjudication) by the date determined by an adjudicator, is a powerful tool for incentivising respondents to make prompt payment.

### Recommendation 51:

The legislation should provide that a claimant may suspend construction work (or the supply of related goods and services) for the respondent in certain circumstances, and subject to the provision of notice to the respondent of its intention to suspend work.

Section 27 of the NSW Act provides a suitable model.

### Recommendation 52:

The legislation should provide that where the parties have the right to apply for an adjudication review, a claimant's notice of intention to suspend work (or the supply of related goods and services) can only be made:

- a) after the end of the period allowed for completion of an application for adjudication review (i.e. 5 business days after a copy of the adjudication decision is served on the respondent), or
- b) if an adjudicator's decision has been referred for an adjudication review and the respondent has not paid the amount determined by the review adjudicator by the due date, after the due date for payment has passed.

## 13.8 Claimant's rights against principal contractor

A new Division 2A to Part 3 of the NSW Act was introduced in late 2010 and commenced in 2011. Section 26A of the NSW Act now provides that a subcontractor who has served an adjudication application on a head contractor can also serve a payment withholding request on the 'principal contractor', requiring it to withhold payment from the head contractor sufficient 'to cover the claim of money that is or becomes payable by the principal contractor to the respondent' (head contractor). A principal contractor who fails to comply with such request will become jointly and severally liable with the head contractor.<sup>585</sup> The obligation to retain the money:

... remains in force only until whichever of the following happens first:

- (a) the adjudication application for the payment claim is withdrawn;
- (b) the respondent pays to the claimant the amount claimed to be due under the payment claim;

<sup>585</sup> Section 26C(1) of the NSW Act.



- (c) the claimant serves a notice of claim on the principal contractor for the purposes of section 6 of the *Contractors Debts Act 1997* in respect of the payment claim;
- (d) a period of 20 business days elapses after a copy of the adjudicator's determination or the adjudication application is served on the principal contractor.<sup>586</sup>

No other East Coast Model jurisdiction contains an equivalent provision, although Division 4 of Part 3 of the Victorian Act allows a subcontractor (in limited circumstances) to secure a debt from a head contractor, by obtaining a right to be paid by the principal from moneys owed by the principal to the head contractor. In order for a subcontractor to avail itself of that right it must first serve a notice under section 32(2) of the Victorian Act,<sup>587</sup> but a claimant may only serve such a notice on the principal when all the following requirements are met:

- a) an adjudicator or review adjudicator has determined that an adjudicated amount is payable by a respondent to a claimant in respect of a construction contract; and
- b) on or before the relevant date the respondent failed to pay the whole or any part of the adjudicated amount to the claimant; and
- c) the claimant has received judgement for the adjudicated amount or part of the adjudicated amount as a debt in a court of competent jurisdiction.<sup>588</sup>

### Responses from stakeholders

The Review did not specifically seek stakeholder feedback on the rights of a claimant who has served an adjudication application on a head contractor to serve a payment withholding request on the 'principal contractor'. However, all stakeholders were provided the opportunity to raise any additional concerns with the current legislative models. Despite this, the Review did not receive any comments on this matter.

### Discussion and recommendation

From a policy perspective, providing a claimant who has made an adjudication application with the right to require a principal to withhold money owed to a head contractor/respondent is a powerful tool for ensuring that the subcontractor receives payment were it to be successful in any adjudication. There is therefore much to commend the inclusion of such a provision in the legislation. Of course, there would be little need for such a provision if the proposal to establish a (cascading) statutory trust, as recommended elsewhere in this Report, were to be implemented.

#### Recommendation 53:

Absent implementation of a statutory trust (see Recommendation 85), the legislation should provide that:

- a) a claimant may serve a payment withholding request on the 'principal contractor' to require it to withhold sufficient money from payment that is, or becomes, payable by the principal contractor to the respondent to cover the claimed amount, and
- b) a principal contractor who fails to comply with such a request will become jointly and severally liable with the head contractor.

Sections 26A–26F of the NSW Act provide a suitable model.

<sup>586</sup> Section 26B(3) of the NSW Act.

<sup>587</sup> Also see Regulation 7 (Form 2) of the *Building and Construction Industry Security of Payment Regulations 2013* (Vic)

<sup>588</sup> Section 30 of the Victorian Act.

### 13.9 Withdrawing and making a new adjudication application

All jurisdictions provide for a claimant to make a new application for adjudication in certain circumstances. However, the circumstances and timeframe in which a new application may be made vary between jurisdictions.

All jurisdictions that have adopted the East Coast Model provide for a claimant to withdraw their application in the following circumstances:<sup>589</sup>

- a) If the claimant does not receive a notice of acceptance of the adjudication application from an adjudicator within 4 business days after the application was made, or
- b) If the adjudicator who accepted the application fails to determine the application within the time allowed (see Section 13.4 of this Report).

In each of those circumstances, the applicant may, if it chooses, then proceed to make a new adjudication application.

In South Australia, in addition to the above circumstances, a claimant may make a new adjudication application where the adjudicator withdraws from the adjudication.<sup>590</sup>

In all cases, the new adjudication application must be made within 5 business days of the claimant becoming entitled to withdraw the previous application.

The Queensland Bill 2017 will remove the ability for a claimant to withdraw and remake an adjudication application in circumstances where it has not yet received a notice of acceptance from an adjudicator within 4 business days after the application was made. A claimant will still retain its ability to withdraw and remake an adjudication application in the event that an adjudicator fails to determine the application within the time allowed. However, rather than make a new application, the claimant may also ask the registrar to refer the current application to another adjudicator at no cost.

In Western Australia and the Northern Territory, a claimant can make a new adjudication application if the application is taken to have been dismissed by the adjudicator because the application had not been formally dismissed or determined by the adjudicator within the prescribed time (in other words, the timeframe for making a decision or dismissing the application had lapsed).<sup>591</sup> In such circumstances, Western Australian claimants must make the new application within 20 business days of the previous application being taken to be dismissed, while Northern Territory claimants have 28 calendar days.<sup>592</sup>

Western Australia and the Northern Territory also provide that a claimant may make a new application for adjudication where the adjudicator has been disqualified from adjudicating the dispute due to a conflict of interest.<sup>593</sup> In such circumstances, the initial 90 business days (WA) and 90 days (NT) period for making an adjudication application still applies to the new adjudication application. However, the period commencing on the date the adjudicator was served the application for adjudication, and ending on and including the date when the adjudicator notifies the parties of their disqualification, does not count.<sup>594</sup> The Northern Territory further provides that if the

<sup>589</sup> See s.26 of the NSW Act; s.28 of the ACT Act; s.32 of the Queensland Act; s.26 of the SA Act; s.28 of the Tasmanian Act; and s.28 of the Victorian Act.

<sup>590</sup> See ss. 26(1)(c) and 26(3) of the SA Act.

<sup>591</sup> See s.37(2) of the WA Act; and s.39(2) of the NT Act.

<sup>592</sup> Ibid

<sup>593</sup> See s. 29(2)(c) of the WA Act and s.31(6A) of the NT Act.

<sup>594</sup> Ibid

applicant does not have at least 14 days remaining to make the further application, the further application may be made within 14 days after the date on which the adjudicator's appointment ends.<sup>595</sup>

**Table 6** and **Table 7** below show a comparison of the circumstances when a new adjudication application may be made and the timeframe for doing so across all jurisdictions.

**Table 6: Circumstance when new application can be made, by jurisdiction**

Circumstance	NSW	Vic.	Qld	SA	WA	Tas.	ACT	NT
Claimant does not receive notice of adjudicator's acceptance of application in time	Yes	Yes	Yes	Yes	No	Yes	Yes	No
Determination not made in time	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Adjudicator withdraws from adjudication	No	No	No	Yes	No	No	No	No
Adjudicator is disqualified for a conflict of interest	No	No	No	No	Yes	No	No	Yes

**Table 7: Timeframe in which a new application must be made, by jurisdiction**

Jurisdiction	NSW	Vic.	Qld	SA	WA	Tas.	ACT	NT
<b>Timeframe</b>	5 bus. days	5 bus. days	5 bus. days	5 bus. days	20 bus. Days or the remaining period of the initial 90 bus. days	5 bus. days	5 bus. days	28 days or the remaining period of the initial 90 days or 14 days

In addition to the circumstances above where a claimant may withdraw and make a new adjudication application, the Queensland, SA, WA, Tasmanian, and NT Acts<sup>596</sup> also specifically

<sup>595</sup> See s.31(6B) of the NT Act.

<sup>596</sup> See s. 35B of the Queensland Act; s. 27 of the SA Act; s. 31(2)(a)(ia) of the WA Act; s. 21(8) of the Tasmanian Act; and s. 28A of the NT Act.

provide for a claimant to simply withdraw its adjudication application. This can be done by serving notice on the ANA (where relevant), adjudicator and respondent.

Section 28K of the Victorian Act similarly allows an applicant for adjudication review to withdraw that application by serving notice on the ANA, review adjudicator and other party to the adjudication review.

The Queensland Act also provides that an adjudication application is taken to have been withdrawn if the “... respondent has paid the claimed amount the subject of the adjudication application to the claimant.”<sup>597</sup>

The NT Act is unique in that section 28A(3) provides that an adjudicator must refuse a withdrawal if:

- (a) a party to the contract objects to the withdrawal; and
- (b) in the opinion of the adjudicator, the party objecting to the withdrawal has a legitimate interest in obtaining a determination of the application.

### Responses from stakeholders

The Review did not specifically seek stakeholder feedback in regard to whether a claimant should be able to make a new adjudication application in certain circumstances. However, all stakeholders were provided the opportunity to raise any additional concerns with the current legislative models. Despite this the Review did not receive any comments on this matter.

### Discussion and recommendation

Few would argue with the requirement that an adjudicator formally advise the parties of the acceptance of appointment as soon as possible and most certainly no later than 4 business days after the claimant lodges its adjudication application. Similarly, few would disagree that a claimant should be entitled to withdraw its application and make a fresh application in circumstances where an adjudicator failed to carry out their statutory task by making a decision with the prescribed time period.

There may, however, be a range of reasons as to why an adjudicator fails to make a decision within the prescribed timeframe including ill health, death of a close family member or because of other unexpected work commitments. It therefore seems to me that rather than have a claimant wait until the adjudicator’s time expires only to discover that the adjudicator failed to make a decision before the claimant can make a fresh application, it would be preferable for the legislation to include a provision similar to section 26(1)(c) of the SA Act. This would then enable an adjudicator to withdraw from the application before the time period expires for making a decision and enable a claimant to immediately make a new application.

It should be noted that there may also be a range of reasons as to why a claimant may wish to withdraw its adjudication application, including the fact that it had resolved its disputed payment claim through a negotiated agreement with the respondent. I therefore see no reason why the legislation should not enable a claimant to withdraw its application by issuing a notice of discontinuance. Providing for such an entitlement would ensure that an adjudicator’s work on the adjudication application would come to an end and result in the parties not incurring any further adjudication fees past that point.

I would therefore recommend that the legislation incorporate the provisions set out in section 26 of the SA Act as well as the inclusion of an additional provision similar to section 35B of the Queensland Act.

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<sup>597</sup> See s. 35B(b) of the Queensland Act.

**Recommendation 54:**

The legislation should provide that a claimant may withdraw its adjudication application and make a new application if:

- a) the claimant has not received notice that an adjudicator has accepted its application within 4 business days after the application was lodged, or
- b) an adjudicator has accepted the claimant's application but failed to decide the application within the prescribed timeframe; or
- c) the adjudicator has given notice of their withdrawal from the adjudication.

Section 26 of the SA Act provides a suitable model.

**Recommendation 55:**

The legislation should specifically provide that an adjudicator who has accepted an adjudication application may withdraw from the adjudication by giving notice to the parties.

**Recommendation 56:**

The legislation should provide that a claimant is taken to have withdrawn its application if:

- a) it serves a notice of discontinuance on the adjudicator and the respondent, or
- b) the respondent pays the claimed amount, which is the subject of the adjudication application, to the claimant.

Section 35B of the Queensland Act provides a suitable model.

### 13.10 Court's power to sever and remit

Where a party has instituted proceedings in the Supreme Court challenging the validity of an adjudicator's decision and the court has determined that a part of the adjudicator's decision is affected by jurisdictional error, there is a question of whether the jurisdictional error has infected the entire decision, or whether the unaffected part can be severed and confirmed as enforceable.

In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd and Ors*,<sup>598</sup> Applegarth J considered this issue and found that the adjudicator exceeded his jurisdiction by including termination costs in the adjudicated amount. His Honour ordered that the claimant repay that part of the adjudication amount that had been affected by jurisdictional error but allowed the claimant to retain the balance of the adjudicated amount. His Honour's reasoning was that the adoption of such a course 'advances the policy of the Act'.<sup>599</sup> However, on appeal, the Queensland Supreme Court of Appeal disagreed:

There is nothing in the Act which would support the denial to a respondent to a payment claim of its rights and entitlements under the Act except to the extent that the Act expressly or implicitly so provided. Nor is there any principle identified which would authorise a court to deny a litigant a legal right or remedy on the grounds that the policy of the Act would thereby be advanced...

His Honour had erred in finding in his ...reasons that the adjudication decision, which he held to be affected by jurisdictional error, retained effect until he exercised his discretion to grant a declaration or making an order quashing or setting aside the decision.<sup>600</sup>

<sup>598</sup> [2013] QSC 67.

<sup>599</sup> *Ibid*, [48].

<sup>600</sup> [2013] QCA 394, [76]-[77].

The Queensland Supreme Court of Appeal's view was consistent with the earlier decision of McDougall J in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd*,<sup>601</sup> although in that case His Honour dealt with the question of whether an adjudication decision can be severed when the decision involved a substantial denial of natural justice.

On the issue of whether a quashed adjudication decision should be remitted to the adjudicator for further determination, McDougall J considered various cases where this occurred<sup>602</sup> in *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd*<sup>603</sup> and made the following observation:

It is, with respect, undoubtedly correct to say that in many cases where certiorari is granted (or where an order in the nature of certiorari is made), so that the decision of the inferior court or tribunal is quashed, the superior court will remit the matter to the inferior court or tribunal to be decided in accordance with law. That would normally be done where, for example, the error that supported the making of the order was non-jurisdictional.

The point is illustrated by the actual decisions of Vickery J in *Maxtra* and Emmett AJA in *Probuild*. In the former case, Vickery J proposed to remit the matter to the adjudicator so that the plaintiff could be given an opportunity to be heard on the point on which it had earlier been denied that opportunity. In *Probuild*, the error of law being non-jurisdictional, Emmett AJA concluded that the adjudicator should reconsider the matter but on the basis of the correct interpretation of the contract.

However, where relief is granted in this Court (or an equivalent superior court of record) on the basis that the inferior court or tribunal lacked jurisdiction to deal with the matter, the only necessary order is that the decision be quashed. There is no point in remitting the matter, because the outcome is necessarily determined by the quashing order.<sup>604</sup>

In the Wallace Review the author recommended that the Queensland Act be amended to expressly allow the Court, where appropriate, to sever part of an adjudication decision that is affected by jurisdictional error, and in the process, confirm that the balance of the adjudication decision remains enforceable. In Mr Wallace's words:

The parties may have already expended significant costs on the adjudication and court processes. If the court is able to sever the affected part of the adjudication decision then there will be significant advantages in doing so.<sup>605</sup>

The Queensland Government accepted that part of the Wallace Review and as a result section 100(4) was inserted in the Queensland Act:

If, in any proceedings before the court in relation to any matter arising under a construction contract, the court finds that only a part of an adjudicator's decision under Part 3 is affected by jurisdictional error, the court may —

- (a) Identify the part affected by the error; and
- (b) Allow the part of the decision not affected by the error to remain binding on the parties to the proceedings.<sup>606</sup>

<sup>601</sup> [2010] NSWSC 347.

<sup>602</sup> *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd (No. 2)* [2010] VSC 199; *Maxtra Constructions Pty Ltd v Joseph Gilbert* [2013] VSC 243; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSW 770.

<sup>603</sup> [2016] NSW 1229.

<sup>604</sup> *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd* [2016] NSW 1229 [71]–[73].

<sup>605</sup> Wallace Review, op cit, p. 224.

<sup>606</sup> See s. 100(4) of the Queensland Act.

## Responses from stakeholders

During the consultation process, stakeholders were invited to express their views on whether there should be legislation enabling the court to sever that part of the adjudicator's decision that was affected by jurisdictional error and confirm the remainder of the decision as binding.

The overwhelming majority of stakeholders<sup>607</sup> support legislation which would give courts the power to sever that part of an adjudicator's decision that is declared void but preserve the validity of the remainder.

Similar to industry stakeholder groups, regulators and officials in Victoria, South Australia, Tasmania and the ACT also supported courts being given clear power to sever that part of the adjudicator's decision that is declared void, but with the balance to remain an enforceable decision. Tasmania also submitted that consideration should be given to a mechanism to review decisions where an adjudication determination is incorrect.<sup>608</sup>

## Discussion and recommendation

It is difficult not to support the analysis and recommendation set out in the Wallace Review relating to this matter and I accordingly recommend that the legislation should include a provision similar to section 100(4) of the Queensland Act. All the stakeholders support such a position.

In regard to whether the legislation should also enable a court to remit a matter back to the adjudicator rather than finally decide the issue itself, I (like Mr Wallace) agree with the observation of Applegarth J in *BM Alliance*:

I have not been persuaded that in enacting 25 of the Act the Parliament intended to govern the time within which an adjudication decision can be made in a case in which the original adjudication decision is set aside months or years later by a Court.<sup>609</sup>

### Recommendation 57:

The legislation should expressly provide that, where an adjudicator has committed jurisdictional error of law in a part of the adjudication decision which does not affect the whole of the decision, a court with the power to sever that affected part of the decision may do so and allow the remainder of the decision to be enforceable.

Section 100(4) of the Queensland Act provides a suitable model.

## 13.11 Effect on civil proceedings

Most of the East Coast Model jurisdictions include a provision within the legislation similar to section 32 of the NSW Act, which reads as follows:

- 32 Effect of Part on civil proceedings
- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
- (a) may have under the contract, or
  - (b) may have under Part 2 in respect of the contract, or

<sup>607</sup> Including MBA NSW, MBA SA, NECA, NECA SA/NT, AMCA, AMCA SA, MPAQ, QMBA, HIA Qld, MBAV, MBA WA and MBT.

<sup>608</sup> See also the discussion on 'Review of Adjudication Decisions' in Section 13.5 of this Report.

<sup>609</sup> *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd and Ors* [2013] QSC 67, [45].



- (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
  - (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
  - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.<sup>610</sup>

The jurisdictions that have adopted the West Coast Model approach this issue in a very different manner. The WA and NT Acts both include the following provision:

#### Effect of this Part on civil proceedings

- (1) This Part does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.
- (2) If other such proceedings are instituted in relation to a payment dispute that is being adjudicated under this Part, the adjudication is to proceed despite those proceedings unless all of the parties, in writing, require the appointed adjudicator to discontinue the adjudication.
- (3) Evidence of anything said or done in an adjudication is not admissible before an arbitrator or other person or a court or other body, except for the purposes of an application made under section 29(3) or an appeal made under section 46.
- (4) An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract –
  - (a) must, in making any award, judgment or order, allow for any amount that has been or is to be paid to a party under a determination of a payment dispute arising under the contract; and
  - (b) may make orders for the restitution of any amount so paid, and any other appropriate orders as to such a determination.<sup>611</sup>

## Responses from stakeholders

The Review did not specifically seek stakeholder feedback on this issue. However, all stakeholders were provided the opportunity to raise any additional concerns with the current legislative models. Despite this, the Review did not receive any comments on this matter.

<sup>610</sup> Note, the reference to section 34 relates to ‘no contracting out’. That provision states that the legislation has effect despite any provision to the contrary in any contract and that any provision within a contract that excludes, modifies or restricts the operation of the legislation, or purports to, or that may reasonably be construed as an attempt to deter a person from taking action under that legislation, is void.

<sup>611</sup> See s. 45 of the WA Act and s.47 of the NT Act.

## Discussion and recommendation

The ‘effect on civil proceedings’ provision serves to underscore the interim nature of an adjudication decision. It also recognises that an adjudicator’s decision has been arrived at not only within a compressed timeframe, but also essentially on a document-only basis without the hearing of oral testimony, nor the testing of that testimony by way of cross examination. As McDougall J said in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales*:<sup>612</sup>

The legislature intended the process of dealing with progress claims to be speedy. In many human activities, speed and error are natural companions. Section 32 is the legislative recognition of the potential application of that truism to the scheme of adjudication of disputes.

A similar observation was made by Barrett J in *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd*:

... But it seems sometimes to be not sufficiently appreciated that, although a judgment in debt may result from the adjudication process, there is no curtailing of contractual and other rights arising in relation to the performance of the relevant work. This is made clear by s. 32. Thus, if the principal has a claim for defective work or can show that work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator...<sup>613</sup>

Indeed, in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*, the NSW Supreme Court of Appeal viewed an adjudicator’s decision akin to a provisional judgement:

Subsection 1 provides that Part 3 of the Act (ss. 13–32), does not affect the rights of any party under a construction contract. Subsection 2 is particularly important because it relevantly provides that nothing done under, or for the purposes of Part 3, affects any civil proceedings arising under a construction contract. Finally, sub-s. 3(b) makes a judgment entered under s. 25 on an adjudication certificate provisional only, both in what it grants and in what it refuses. A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder’s right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid.<sup>614</sup>

Given that I have recommended that security of payment legislation be based on the East Coast Model, it follows that a provision akin to section 32 of the NSW Act is essential in underscoring the interim nature of an adjudicator’s decision and preserving the parties’ contractual and civil rights. It is therefore not surprising that the East Coast Model legislations contain a similar provision.<sup>615</sup>

### Recommendation 58:

The legislation should provide that where a claim is made under the security of payment legislation, a party’s contractual and other civil rights under the construction contract are preserved.

Section 32 of the NSW Act provides a suitable model.

## 13.12 Enforcement of adjudicator’s determination

Under the NSW Act, section 23 provides that where an adjudicator determines that a respondent must pay an adjudication amount, that amount is to be paid either 5 business days after the adjudicator’s decision is served on the respondent or on the date determined by the adjudicator when such amount became or becomes payable, whichever is the later.

<sup>612</sup> [2006] NSWSC 874, [37].

<sup>613</sup> [2005] NSWSC 1152, [37].

<sup>614</sup> [2005] NSWCA 49, [21].

<sup>615</sup> See s. 100 of the Qld Act, s.32 of the SA Act, s.47 of the Victorian Act, ss. 9 and 10 of the Tasmanian Act and s. 38 of the ACT Act.

If the respondent has failed to pay the whole or any part of the adjudication amount to the claimant in accordance with the date set out in section 23, the claimant can request the relevant ANA to provide an adjudication certificate. An adjudication certificate must specify the:

- name of the claimant
- name of the respondent who is liable to pay the adjudicated amount
- adjudicated amount, and
- date on which payment of the adjudicated amount was due to be paid to the claimant.

In addition, if any amount of interest is due and payable on the adjudicated amount, or if the claimant has paid the respondent's share of the adjudication fee but not been reimbursed by the respondent, the claimant can request the ANA specify the amount of interest and/or the unpaid amount of the share of the fees on the adjudication certificate.<sup>616</sup>

Section 25(1) of the NSW Act provides that the claimant can then file the adjudication certificate 'as a judgment for a debt in any court of competent jurisdiction and it is enforceable accordingly'. However, an adjudication certificate cannot be filed unless it is accompanied by an affidavit deposed to by the claimant stating that the whole or any part of the adjudication amount has not been paid at the time the certificate is filed.<sup>617</sup> If the affidavit indicates that part of the adjudicated amount has been paid, judgement is for the unpaid part of the amount only.<sup>618</sup>

Section 25(4) of the NSW Act provides:

- (4) If the respondent commences proceedings to have the judgment set aside, the respondent:
  - (a) is not, in those proceedings, entitled:
    - (i) to bring any cross-claim against the claimant, or
    - (ii) to raise any defence in relation to matters arising under the construction contract, or
    - (iii) to challenge the adjudicator's determination, and
  - (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

Of those jurisdictions that have adopted the East Coast Model, Queensland, South Australia, Tasmania and the ACT have similar provisions in their legislation.

However, section 28R(1) of the Victorian Act provides that where a claimant has obtained an adjudication certificate from the relevant ANA, the claimant 'may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable'.

The West Coast Model jurisdictions provide that once a party obtains a certificate from the relevant Regulator stating that a determination has been made by a registered adjudicator, the party can

<sup>616</sup> See ss. 24(4) and (5) of the NSW Act.

<sup>617</sup> See s. 25(2) of the NSW Act.

<sup>618</sup> See s. 25(3) of the NSW Act.

then, with leave of a court of competent jurisdictions, enforce the determination in the same manner as a judgement of the court.<sup>619</sup>

### Responses from stakeholders

During the consultation phase of the Review, some stakeholders highlighted that unlike section 25(1) of the NSW Act, the Victorian Act does not treat filing of an adjudication certificate as a judgement for a debt and ‘enforceable accordingly’, but requires the claimant to incur additional costs in obtaining the requisite court order.

### Discussion and recommendation

I consider that the approach adopted under the NSW Act for enforcing an adjudicator’s decision is to be preferred rather than the approach adopted under the Victorian Act. Where a claimant has been successful in an adjudication it should not be required to then incur further unnecessary costs to enforce the decision and obtain payment to maintain its cash flow. A claimant has already incurred the costs associated with the adjudication application (including payment of the adjudicator’s fees) and the costs for obtaining an adjudication certificate from the ANA. Requiring a claimant to incur the further expense associated with obtaining a court order to confirm the certified amount as a debt is unnecessary and inconsistent, given that the object of the Act is to provide a quick and cost-effective means of enforcing a progress payment.

However, if my recommendation to allow the parties to agree an adjudicator is adopted,<sup>620</sup> it would be necessary to include a provision to specifically cater for circumstances where the parties had agreed on an adjudicator and where an ANA was not involved in the adjudication process. In such circumstances, the legislation should provide for an adjudication certificate to be issued by the Regulator.

#### **Recommendation 59:**

The legislation should provide that if an authorised nominating authority or Regulator issues an adjudication certificate, the claimant can file the certificate as a judgement debt in any court of competent jurisdiction.

Section 25 of the NSW legislation offers a suitable model.

<sup>619</sup> See s. 43 of the WA Act and s. 45 of the NT Act

<sup>620</sup> Refer to Recommendation 38 in Section 13.2 of this Report.

# **Chapter 14:**

# **General provisions**

# **relating to adjudicators**

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## 14. General provisions relating to adjudicators

### 14.1 Authorised nominating authorities (ANAs)

All the jurisdictions that have adopted the East Coast Model (other than Queensland) provide for ANAs to be responsible managing the adjudication process. Thus, the ANAs have the responsibility of receiving adjudication applications and appointing adjudicators to adjudicate on disputed payment claims. In discharging this primary function, ANAs interface with the parties involved in disputes and provide general advice on the adjudication process.

In addition, ANAs have established their own requirements regarding training, assessing and grading adjudicators to be on their adjudicator panels. The ANAs have also established a procedure for appointing adjudicators from their panel whose experience best fits with the specific nature of a disputed claim.

This legislative model is however, underpinned by a regulator overseeing the conduct and activities of the ANAs. Not only does an organisation wishing to become an ANA need to make an application to the Regulator substantiating its credentials, but once authorised an ANA will be obliged to comply with the requirements and/or conditions of its authorisation. This will include providing details of its adjudication process as well as forwarding copies of every adjudication decision made by its appointed adjudicators.

There is however, no uniformity regarding the degree of regulatory oversight of ANAs. Some regulators exercise their oversight of the ANAs in a more robust manner than others. Further, the legislative provisions detailing the regulatory oversight of the ANAs differ from jurisdiction to jurisdiction.

For the main, the legislation in all East Coast Model jurisdictions, other than Queensland, contains provisions relating to the authorisation of an ANA<sup>621</sup> and for the ANAs to:

- provide the requisite information relating to the discharge of their activities<sup>622</sup>
- charge a fee for services provided<sup>623</sup> and that each party is liable to contribute to the payment of any such fee in equal proportions, or in such proportions as the relevant adjudicator may determine.<sup>624</sup>

The Victorian and Tasmanian Acts are the only legislations that specifically provide for the regulator to impose conditions on an ANA's authorisation.<sup>625</sup> In the case of Victoria, any conditions imposed on an ANA must be in accordance with Ministerial Guidelines issued under section 44 of the Victorian Act. Section 44(2)(f) of the Victorian Act provides that the Ministerial Guidelines may provide for:

- (f) the conditions that may be imposed on an authority, including conditions relating to the processes to be followed by an authorised nominating authority in nominating adjudicators for the purposes of this Act.

<sup>621</sup> See s. 28(1) and (2) of the NSW Act; s. 42(1) and (2) of the Victorian Act; ss. 29(1)–(3) of the SA Act; ss. 31–33A of the ACT Act; and s. 31 of the Tasmanian Act

<sup>622</sup> See s. 28(5) of the NSW Act; s. 43B of the Victorian Act; s. 29(7) of the SA Act; s. 35 of the ACT Act; and s. 33 of the Tasmanian Act.

<sup>623</sup> See s.2 8(3) of the NSW Act; s.43C of the Victorian Act; s. 29(4) of the SA Act; s. 34(2) of the ACT Act; and ss. 32(1) and (2) of the Tasmanian Act.

<sup>624</sup> See s. 28(4) of the NSW Act; s.2 9(6) of the SA Act; s. 34(3) of the ACT Act; and s. 32(3) of the Tasmanian Act.

<sup>625</sup> See s. 43 of the Victorian Act and ss. 31(4) and (5) of the Tasmanian. Act.

The Victorian Act is the only legislation that details the functions of the ANAs. Thus, section 43A of the Victorian Act states:

**43A Functions of an authorised nominating authority**

The functions of an authorised nominating authority are –

- (a) to nominate adjudicators for the purposes of this Act; and
- (b) to receive and refer adjudication applications to adjudicators; and
- (c) to receive adjudication review applications and submissions in response to those applications and to appoint review adjudicators; and
- (d) to serve copies of adjudication determinations, adjudication review applications and review determinations on certain persons; and
- (e) to provide information to review adjudicators; and
- (f) to provide adjudication certificates; and
- (g) to provide information to the Authority in accordance with this Division; and
- (h) to generally carry out any other function or duty given to an authority, or imposed on an authority, by this Act.

Further, in respect to detailing the information that an ANA is to provide to the Regulator, section 43B(2) of the Victorian Act sets out that such information may include:

- (2) Information requested under subsection (1) may include information regarding –
  - (a) the nomination of adjudicators and appointment of review adjudicators; and
  - (b) the assessment of the eligibility of persons to be adjudicators; and
  - (c) the fees charged by the authorised nominating authority; and
  - (d) the fees charged by adjudicators.

Section 44 of the Victorian Act further provides for the issuing of Ministerial guidelines relating to ‘the giving, variation or withdrawal of authorities [granted under Part 3, Division 5 of the Act]’ and ‘appropriate fees that may be charged by an authorised nominating authority, an adjudicator or a review adjudicator’.

Other than in Victoria, ANAs also enjoy a statutory indemnity with respect to anything done or omitted to be done in the exercise of their functions, subject to having discharged such functions in good faith.<sup>626</sup>

As indicated in Section 4.3 of this Report, the 2014 amendments to the Queensland Act abolished the ANAs and that function was transferred to the Adjudication Registry. Accordingly, Part 4, Division 1 of the Queensland Act relates to matters in respect of the administration, functions and powers of the Registry.

The jurisdictions that have adopted the West Coast Model provide that where the parties have not been able to agree on an adjudicator then a prescribed appointer may then appoint a registered

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<sup>626</sup> See s. 30(2) of the NSW Act; s. 31(2) of the SA Act; s. 37(2) of the ACT Act; and s. 39(2) of the Tasmanian Act.



adjudicator.<sup>627</sup> A prescribed appointer is ‘a person prescribed as such by the regulations’<sup>628</sup> and the regulations list the prescribed appointers.<sup>629</sup>

### Responses from stakeholders

I have, when dealing with the adjudication process in Section 13.2 of this Report, outlined stakeholders’ divergent points of view regarding the function and effectiveness of the ANAs. In summary, those views differed markedly. Many stakeholders representing subcontractors supported the current ANA model because they view it as providing invaluable services and assistance to the parties in ensuring compliance with the various prescriptive procedural provisions set out in the security of payment legislation.

Other stakeholders, who generally represent the interests of head contractors, noted that there is a perception that ANAs, and particularly the for-profit ANAs, are claimant-friendly and, on that basis, prefer adjudication appointments to be performed by an independent government agency rather than ANAs, as is the case in Queensland.

### Discussion and recommendation

#### *Provisions for granting, renewing and withdrawing authorisations*

Given that I have accepted the proposition advanced by subcontractor organisations that, for the main, ANAs provide a valuable support and advisory service to parties in relation to the adjudication procedure, it follows that the legislation should include provisions relating to the granting, renewal and withdrawal of authorisation of ANAs.

It is however important that I emphasise that insofar as the legislation may provide for the Regulator to have oversight of the conduct and practices of the ANAs, it is just as important that the Regulator actively carries out its regulatory oversight function. This would include ensuring an ANA complies with the conditions of authorisation and that any breaches of such conditions and/or allegations of inappropriate conduct are investigated and, where necessary, appropriate action taken. It would also include, where appropriate, not only the service of a show cause notice as to why authorisation should not be withdrawn but also (again where appropriate) the referral of any improper conduct to the relevant authorities (such as police or anti-corruption bodies). It seems that many of the allegations by stakeholders relating to improper conduct by some ANAs could have been dealt with by a vigilant and active regulator (assuming however, that such allegations had in fact been brought to the Regulator’s attention).

Accordingly, in relation to the granting, renewal and withdrawal of authorisation, I consider that the provisions set out in Part 3, Division 5 of the Victorian Act are to be preferred. The provisions set out in that Part of the Victorian Act would enable the Regulator, on an application made by any person, to authorise the organisation to nominate (but not appoint) adjudicators and, in exercising that power, the Regulator would be required to take into account the Ministerial guidelines that had been issued (and published). Sections 44(2)(a) to (f) of the Victorian Act list some of the areas that the guidelines may cover. These provisions are deliberately intended to deal with a range of broad areas, but it is important that they also ensure an applicant is required to demonstrate its credentials regarding its capacity to provide the requisite support and advisory services rather than merely become a vehicle for the nomination of adjudicators. Specifically, an applicant should be required to demonstrate the depth of its capacity to provide the support and advisory services, and this should encompass something more than the mere referral of parties to a website containing general information on the adjudication process.

<sup>627</sup> See s. 28 of the WA Act; and s. 30 of the NT Act.

<sup>628</sup> See s. 3 of the WA Act; and s.4 of the NT Act.

<sup>629</sup> See clause 11 of the WA Regulations and clause 5 of the NT Regulations.

### *Minimum requirements for ANAs*

Given that an ANA would now no longer be able to appoint an adjudicator, but rather refer a list of three registered adjudicators from its panel for appointment by the Regulator, it would follow that an ANA should be able to demonstrate that it will have a panel of registered adjudicators of diverse backgrounds and relative seniority sufficient to provide a stream of suitable nominations.

Further, any registered adjudicator nominated by an ANA should not include persons associated with the running of the ANA (whether a director or through family relations). An ANA should also be required to demonstrate that it has established appropriate systems and procedures that address the concerns that stakeholders had expressed in regard to improper relations with claims preparers.

Insofar as an aggrieved applicant wishes to contest a decision made by the Regulator refusing an application for authorisation or renewal of an authorisation, the imposition of conditions relating to authorisation or the withdrawal of authorisation, then such challenges/appeals should be made to the relevant Administrative Tribunal or other such appeals body.

Finally, ANAs should be able to charge fees for any services they provide, but such fees or charges should be disclosed. Further, the statutory indemnity extended ANAs, as currently provided under the various legislative regimes, should continue.

#### **Recommendation 60:**

The legislation should contain provisions regulating the oversight of authorised nominating authorities, including in relation to:

- a) granting, renewing and withdrawing authorisations
- b) the appeals process regarding decisions in respect of the granting, renewal and withdrawal of authorisation
- c) the functions of authorised nominating authorities
- d) requiring authorised nominating authorities to provide information to the Regulator in relation to its activities
- e) authorising the fees that authorised nominating authorities may charge, and
- f) statutory indemnity of authorised nominating authorities.

## **14.2 The statutory requirements for adjudicators**

All the legislative schemes that have adopted the East Coast Model contain consistent provisions that set out the procedures relating to the adjudication of an adjudication application and the specific matters that the adjudicator is only permitted to consider in making an adjudication decision. Accordingly, the legislative regimes require an adjudicator:

- a) Not to determine an adjudication application until the end of the period within which the respondent may lodge an adjudication response.<sup>630</sup>
- b) To specifically determine:
  - i) the amount of progress payment (if any) to be paid by the respondent to the claimant (i.e. the adjudicated amount), and
  - ii) the date on which any such amount became or becomes payable, and

<sup>630</sup> See, for example, s. 21(1) of the NSW Act, or s. 22(1) of the Victorian Act.

- iii) the rate of interest payable on any such amount.<sup>631</sup>
- c) In determining an adjudication application, to consider the following matters only:
  - i) the provisions of the (relevant) legislation
  - ii) the provisions of the construction contract from which the application arose
  - iii) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly submitted by the claimant in support of the claim)
  - iv) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation that has been duly submitted by the respondent in support of the schedule), and
  - v) the result of any inspection carried out by the adjudicator of any matter to which the claim relates.<sup>632</sup>
- d) To ensure that the adjudication determination/decision is in writing and includes reasons (unless both parties have requested the adjudicator not to include reasons).<sup>633</sup>
- e) In determining the adjudicated amount, the adjudicator is to value the construction work and related goods and services. The relevant provisions of the Act provide for construction work carried out, or related goods and services supplied, to be valued in accordance with the terms of the construction contract.<sup>634</sup> If the contract does not contain any express provision relating to this matter, the valuation assessment is then required to be made by having regard to:
  - i) the contract price for the work or the goods and services
  - ii) any other rates set out in the contract
  - iii) any variation agreed by the parties to the contract by which the contract price or any other rate or price set out in the contract, is to be adjusted as a result of the variation, and
  - iv) if the work or goods and services are defective, the estimated cost of rectifying the defect.<sup>635</sup>
- f) If, in the valuation of construction work carried out or related goods and services supplied, a previous adjudicator **has determined the value of the:**
  - i) **construction work** carried out under a construction contract, or
  - ii) **related goods and services** supplied under a construction contract,

then the adjudicator is, in any subsequent adjudication application that involves the determination of the value of that work (or of those goods and services), to give that work (or the related goods and services) the same value as previously determined, unless either party

<sup>631</sup> See, for example, ss. 22(1)(a), (b) and (c) of the NSW Act, or ss. 26(1)(a)(b) and (c) of the Queensland Act.

<sup>632</sup> See, for example, s. 22(2)(a)–(e) of the NSW Act or ss. 23(2)(a)–(e) of the Victorian Act.

<sup>633</sup> See, for example, s. 22(3) of the NSW Act, or s. 26(3) of the Queensland Act.

<sup>634</sup> See, for example, ss. 10(1)(a) and 10(2)(a) of the NSW Act, or ss. 11(1)(a) and 11(2)(a) of the Victorian Act.

<sup>635</sup> See, for example ss. 10(1)(b) and 10(2)(b) of the NSW Act

has satisfied the adjudicator that the value of the work (or the goods and services) has changed since the previous adjudication.<sup>636</sup>

All of the jurisdictions that have adopted the East Coast Model also empower an adjudicator, for the purposes of determining an adjudication application, to:

- a) request further written submissions from either party but with the other party being given an opportunity to comment on those submissions
- b) set deadlines for further submissions and comments by the parties
- c) call a conference of the parties
- d) carry out an inspection of any matter to which the claim relates.<sup>637</sup>

In relation to how an adjudicator is required to deal with issues of conflict of interest, in most jurisdictions that have adopted the East Coast Model, an adjudicator, prior to being appointed, is required to sign a conflict of interest form declaring that there is no conflict of interest in respect to an adjudication application that an ANA (or, in the case of Queensland, the QBCC Adjudication Registrar) proposes to appoint them to.

However, in Tasmania and those jurisdictions that have adopted the West Coast Model, the respective legislation includes a specific provision dealing with the issues of conflict of interest.<sup>638</sup> These provisions state that an adjudicator who has a “material interest” in the disputed payment claim is disqualified from adjudicating the matter.

Clause 80 of the Queensland Bill 2017 would also establish a provision specifically dealing with conflict of interest. That section of the Bill reads as follows:

**80 When adjudicator ineligible to adjudicate**

An adjudicator is not eligible to adjudicate an adjudication application if the adjudicator—

- (a) is a party to the construction contract to which the application relates; or
- (b) has a conflict of interest as prescribed by regulation.

Clearly Clause 80 (b) of the Queensland Bill 2017 provides the legislature with a more efficient means of prescribing the circumstances of where a conflict of interest may arise.

### Responses from stakeholders

Although no specific comments were sought or received from stakeholders regarding the adequacy or otherwise of the current statutory requirements relating to adjudicator’s powers and functions, many stakeholders expressed views regarding the quality (or lack thereof) of some decisions made by adjudicators.

<sup>636</sup> See, for example, s. 22(4) of the NSW Act, or s. 27 of the Queensland Act or s. 23(4) of the Victorian Act.

<sup>637</sup> See s. 21(4)(a)–(d) of the NSW Act; s.25(3)(b) to (e) of the Queensland Act; s.22(5)(a)– (d) of the Victorian Act; s.21(4)(a)–(d) of the SA Act; s. 23(4)(a)–(e) of the ACT Act; and ss. 24(2), (4), (5) and (6) of the Tasmanian Act.

<sup>638</sup> See s. 29 of the WA Act, s. 31 of the NT Act and s. 35 of the Tasmanian Act.

## Discussion and recommendation

### General observations

Given that the legislative regimes require an adjudicator to make the determination/decision within a tight and compressed timeframe, most adjudicators arrive at a determination/decision on a document-only basis. The legislative regime does however provide an adjudicator with the power to request the parties to provide further written submissions<sup>639</sup> or to convene an informal conference<sup>640</sup> or carry out an inspection.<sup>641</sup>

As outlined above, an adjudicator is required to consider not only the payment claim and the payment schedule (if any) to which the adjudication application relates, but also the parties' documentation and submissions 'duly made' in support of the payment claim and payment schedule, as well as the provisions of the construction contract and the legislation. Accordingly, it has been held that '[in] a "contested adjudication", the adjudicator need consider only those provisions of the Act and of the contract that are relevant to the issues ... in the [parties'] submissions'.<sup>642</sup>

However, in the situation of an undefended adjudication, which is analogous to a plaintiff seeking a judgement in default in court, the legislation requires the adjudicator to address 'in good faith' the issues appearing on the face of the payment claim, the adjudication application and any supporting material.<sup>643</sup>

Similarly, the standard of reasons expected of an adjudicator will depend on whether the adjudication is contested or not:

The extent to which an adjudicator must give reasons for the determination in accordance with s. 22(3)(b) reflects the extent of his or her duty to give consideration to the matters required by s. 22(2). In a fully contested adjudication in which several issues have been raised, the adjudicator's reasons should demonstrate that he or she has endeavoured in good faith to consider these issues, in compliance with s. 22(2)(c) and (d).

On the other hand, when the payment claim is undefended in the adjudication process so that no issues have been raised and contested, the adjudicator's reasons may, permissibly, be quite brief. They should show in general terms that the adjudicator has considered the payment claim and the contract.<sup>644</sup>

The court has acknowledged the significant time pressures under which adjudicators are required to discharge their functions<sup>645</sup> but 'nonetheless, the reasons must indicate why it was that the adjudicator arrived at his determination'.<sup>646</sup> Thus where an adjudication determination contained the following statement:

I see no reason for not accepting the claimant's estimates [in the payment claim] of the percentage to which works are complete. I accept the claimant's valuation of the work at the reference date. I am

<sup>639</sup> See, for example, ss. 22(5)(a) of the Victorian Act.

<sup>640</sup> See, for example, s. 21(4)(c) of the NSW Act, but note that under s. 21(4A), if such a conference is called, the parties are not entitled to legal representation. The Victorian Act contains a similar provision enabling the adjudicator to convene an informal conference — see s. 22(5)(c), but, under s. 22(5A), the parties are not entitled to be legally represented 'unless this is permitted by the adjudicator'.

<sup>641</sup> See, for example, s. 21(4)(d) of the NSW Act, or s. 22(5)(d) of the Victorian Act.

<sup>642</sup> *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [63].

<sup>643</sup> *Ibid*, [63]–[64].

<sup>644</sup> *Ibid*, [66]–[67].

<sup>645</sup> *Bauen Constructions v Westwood Interiors* [2010] VSC 631, [99].

<sup>646</sup> *Ibid*, [23].

satisfied that the claimant is entitled to the whole of the progress payment claimed in the progress claim.<sup>647</sup>

McDougall J held that such a statement demonstrates:

...no intellectual justification for the decision that was made. It does not involve any process of consideration or reasoning; it is, in my view, an abdication of the obligation to reason ... In those circumstances, it seems to me, this is again a case of jurisdictional error, because on the face of the reasons ... the adjudicator did not perform his statutory function ...<sup>648</sup>

Similarly, a decision that is based on illogical reasoning will also be treated as a failure to perform the statutory function:

It is true, [as the claimant submitted], that the adjudicator (at [37]) identifies clauses 21.4, 18, 19 and 40 as being (to his understanding) the clauses of the contract relevant to the dispute. However, the adjudicator does no more than that. After reading the clauses of the contract identified by the adjudicator, one is left in a state of bewilderment, as the clauses (apart from clause 40) bear no apparent relevance to the issue at hand. This is not an instance where an adjudicator has grappled reasonably with the relevant provisions of the contract and arrived at an erroneous result within jurisdiction, rather it is an instance where there is no reasoning process at all, and no attempt at one.<sup>649</sup>

Nor can an adjudicator clothe their purported reasoning process by stating their propensity to 'believe the claimant rather than the respondent'.<sup>650</sup> Similarly, an adjudicator's attempt to justify his decision on the basis that he considers one party's submission to be more 'reasonable' than the other without providing any further explanation why he prefers that party's submission, will not:

... cure the deficiencies (or absence) of reasoning in the adjudication determination... in my view the reasoning process is so deficient that it amounts to a failure on the part of the adjudicator to exercise the jurisdiction given to him under the Act.<sup>651</sup>

The courts have also held that the legislature intended that an adjudicator address the specific matters referred to in the Act in a *bona fide* manner.<sup>652</sup> Thus, where it is apparent from the adjudicator's determination that the adjudicator had not dealt with the submissions of one of the parties, the court has held that the adjudicator had failed to 'have regard to' something he was required to consider in the making of his determination and therefore did not attempt to exercise his statutory function.<sup>653</sup>

It is also clear that an adjudicator is not permitted to delegate their statutory function, whether to seek the assistance of another person to prepare a draft decision, or otherwise. Thus, in *St Hilliers Property Pty Limited v ACT Projects Pty Ltd and Simon Wilson*, Walmsley AJ held that:

... the job of adjudicator is personal to the person who agrees to adjudicate.

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<sup>647</sup> Ibid, [12].

<sup>648</sup> Ibid, [40]–[41].

<sup>649</sup> *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879, [126].

<sup>650</sup> *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32, [27] (Giles JA).

<sup>651</sup> *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879 at [129]–[130] (Sackar J).

<sup>652</sup> *Brodyn* at [56] and also *The Minister for Commerce v Contrax Plumbing* [2005] NSWSC 142, [149].

<sup>653</sup> *Timwin Construction Pty Ltd v Façade Innovation Pty Ltd* [2005] NSWSC 548.

I do not consider s. 24 (2) requires that an adjudicator work alone, with no clerical assistance. In the end whether the assistance amounts to a usurpation of the task of adjudication must be a matter of degree.<sup>654</sup>

Clearly an adjudicator engaging another person to prepare a draft adjudication determination constituted assistance beyond what could properly be characterised as ‘clerical’. The task associated with the making of an adjudication decision requires the adjudicator to personally ‘consider’ the specific matters expressly set out under the Act and in this regard, Walmsley JA referred to (with approval) the following observation made by McDougall J in *Laing O’Rourke Australia Construction v H + M Engineering and Construction*<sup>655</sup>:

In my view, the obligation to consider various matters imposed by s. 22 (2) of the Act should be read in the same way: namely as requiring an active process of intellectual engagement. It may be thought that this imposes a substantial burden on adjudicators. That may be so; but there are at least two reasons why, even if that is correct, it does not justify reading down the statutory obligation ‘to consider’. The first is that adjudicators are not forced to accept nomination. They may decline nomination; or they may accept only on condition that they are given working days to produce their determination. The second reason is that the outcome of the adjudicator’s consideration may have very significant consequences. In this case, the three delay claims total, in round figures, \$7.5 million – a little under 75% of the total of the payment claim. Having regard both to the limited ability for adjudicator’s determinations to be reviewed and to the nature of estoppels that they create, the parties to an adjudication are entitled to have the adjudicator’s consideration, in the sense that I have explained, of the case that each of them brings.

### *Determining jurisdiction*

In relation to whether an adjudicator is able to determine their own jurisdiction, it is clear that following the High Court decisions in *Kirk v Industrial Relations Commission of NSW*<sup>656</sup> and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*<sup>657</sup> (*Chase Oyster Bar*), the law as previously applied<sup>658</sup> has now been clarified such that an adjudicator cannot be the final arbiter. This (recast) position was expressed by Vickery J as follows:

For the purposes of s. 18 of the Victorian Act, it appears to me that elements of the section which confer jurisdiction on an adjudicator to make a valid determination of the Act, do not permit the adjudicator to finally determine the validity of the adjudication application. If there be any challenge to the jurisdiction assumed by the adjudicator it must finally be determined on the basis of facts found by the Court on judicial review, in the course of determining whether a jurisdictional error has been exposed which calls for the exercise of the Court’s discretion to grant relief in the nature of certiorari and, if necessary, mandamus. The Court may grant relief on such relevant evidence as may be adduced before it, whether or not such evidence was before the adjudicator at first instance. Further, the Court may grant such relief without regard to any determination which may have been made on the issue of jurisdiction by the adjudicator. The Court is obliged to arrive at its own conclusion as to jurisdiction based on the law and on the facts as found by it.

This is not to say that an adjudicator should not make any finding of fact or rulings of law if a question of jurisdiction is raised in the course of determining an adjudication application. Clearly if an adjudicator is presented with material or submissions which bring into question the jurisdiction of the adjudicator, he or she should determine the question and give reasons for the findings of fact or the rulings on law. If, however, the adjudicator’s decision on jurisdiction is challenged in Court on judicial

<sup>654</sup> [2017] ACTSC 117, [117]–[118]. The equivalent provision to s. 24(2) in the NSW Act is s. 22(2) of the ACT Act.

<sup>655</sup> [2010] NSWSC 818, [39].

<sup>656</sup> [2010] 239 CLR 531.

<sup>657</sup> [2010] 78 NSWLR 393.

<sup>658</sup> See *Brodyn* at [51] and *Grocon Construction v Planit Coccianti Joint Venture* [2009] VSC 339 at [6].



review, the Court may deal with the matter a fresh and receive additional evidence on the matter if the additional evidence is relevant to the determination of the question.

To the extent that anything inconsistent with this conclusion appears in paragraphs [115] — [116] of Grocon, in the light of the later reasoning of the High Court in *Kirk* and the NSW Court of Appeal which followed it in *Chase Oyster Bar*, I do not follow my earlier ruling.<sup>659</sup>

In Queensland and following Recommendation 31 of the Wallace Review, the Queensland Act was amended such as to require an adjudicator to decide whether he/she has jurisdiction.<sup>660</sup>

### *Adjudicators and conflict of interest*

Most persons would expect an adjudicator to be totally independent and not have any conflict of interest in respect to any of the issues in dispute. There are various circumstances where an adjudicator may have a conflict of interest, including a connection with:

- the construction contract which is the subject of an adjudication application
- either of the parties the subject of an adjudication application, whether be reason of employment, business, shareholding, social or family relationship, or
- a person who has assisted either of the parties in the preparation of any documentation, or has provided any advice to a party which is the subject of the adjudication application.

Recently, the NSW Supreme Court had occasion to specifically consider the circumstances of where a person had inappropriately accepted appointment as an adjudicator. In *Quickway Construction Pty Limited v Paul J Hick*<sup>661</sup>, Hammerschlag J held that where a party has applied to the courts challenging an adjudicator's decision (on various grounds, including that it has been denied natural justice), an adjudicator is disqualified from adjudicating on a subsequent adjudication application involving the same parties. His Honour, in arriving at his conclusion applied the same test that the courts apply in determining whether a judge is disqualified by reason of the appearance of bias<sup>662</sup> (i.e. whether a fair minded lay observer might reasonably apprehend that the adjudicator might not bring an impartial and unprejudiced mind to the adjudication of the application referred to them).

A good summary of an adjudicator's responsibilities (but in the context of the Victorian Act) was set out by Vickery J in *SSC Plenty Road v Construction Engineering (Aust) & Anor (SSC Plenty)*.<sup>663</sup>

### *Conclusions on key issues*

To some extent many of the issues outlined above highlight the need for more rigorous training and assessment of persons wishing to become accredited or registered as adjudicators. At the very least, being able to clearly articulate the basis upon which key conclusions have been arrived at should be a basic and essential prerequisite for a person carrying out the statutory function of adjudication.

Similarly, the express requirement for an adjudicator 'to consider' the parties' submissions ought to be understood as an obligation to turn one's mind to each of the party's arguments and to then clearly outline why one party's arguments are preferred over the other. Indeed, the very nature of adjudication involves making a considered conclusion on two competing arguments and the parties are entitled to expect that the decision-maker will approach that task in good faith. I deal with the issue of training and competence further in Section 14.3 of this Report when considering the approach that should be adopted in relation to adjudicator's criteria and qualifications.

<sup>659</sup> *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 at [113]–[115].

<sup>660</sup> See s. 25(3)(a) of the Queensland Act.

<sup>661</sup> [2017] NSWSC 830.

<sup>662</sup> Refer to the decision of the High Court in *Michael Wilson & Partners Limited v Nicholls* [2011] CLR 427, [31],

<sup>663</sup> [2015] VSC 631, [101].

Nonetheless, in respect to several key issues outlined above, I have arrived at the following conclusions.

### **Conflict of interest**

In respect to the eligibility of an adjudicator, the legislation should clearly spell out the circumstances when as adjudicator will be disqualified due to conflict of interest as well as a process enabling a party to seek a declaration from the Regulator on these issues and, where an adjudicator is disqualified, the process for the appointment of a replacement adjudicator.

A conflict of interest may become apparent when an adjudication application is proposed to be referred to an accredited adjudicator. In such circumstances, a proposed adjudicator ought to be able to declare whether or not he or she has a material personal interest in the matter, or with any party associated with the construction contract. Sometimes however an adjudicator, or one of the parties, may only become aware of a potential conflict of interest subsequent to the adjudicator having accepted appointment, in which case the legislation should set out a procedure for the adjudicator to disqualify themselves, or, if an application is made by one of the parties, for the Regulator to decide whether the adjudicator is disqualified.

Accordingly, I consider that the legislation should incorporate an approach similar to clause 80 of the Queensland Bill 2017, but also include similar provisions to those of the Tasmanian, WA and NT Acts that would enable a party to refer the issue of an adjudicator's eligibility to the Regulator and for a replacement adjudicator to be promptly appointed.

Such a provision could therefore read as follows:

- a) An adjudicator is disqualified from adjudicating an adjudication application if the adjudicator:
  - i) is a party to the construction contract to which the application relates; or
  - ii) has a conflict of interest as prescribed by regulation.
- b) If an appointed adjudicator is disqualified, the adjudicator must give written notice to the parties and the Regulator of the disqualification and the reasons for it.
- c) Either the claimant or the respondent may apply to the Regulator, and the Regulator may make a declaration that the appointed adjudicator is disqualified under (a) from adjudicating the application.
- d) If a notice of disqualification is given by an adjudicator under (b) above or by the Regulator under (c) above, the adjudicator's appointment shall end immediate upon the date of the disqualification notice.
- e) Where the appointment of an appointed adjudicator ends under (d) above, the claimant may within 4 business days of the disqualification notice, request the Regulator to appoint another adjudicator to adjudicate on the adjudication application.

The inclusion of a provision similar to clause 80 of the Queensland Bill 2017 would necessitate further supporting regulations detailing the circumstances where a conflict of interest may arise.

### **Adjudicator to decide jurisdiction**

Even though it is now settled that the court is the arbiter on whether the adjudicator has jurisdiction to make a determination on the validity of an adjudication application, it is nonetheless appropriate for legislation to require an adjudicator to consider and make a decision on this issue. The practice of some adjudicators deliberately not addressing this issue is to be discouraged and I agree with the

following observations made in the Wallace Review that dealing with the issue of jurisdiction is an essential part of an adjudicator's responsibility:

... An adjudicator is appointed to determine a payment dispute. Part of his or her role must be to consider whether the claimant is entitled to bring the payment claim and the adjudication application and whether they themselves have been properly appointed under the (Act). These are jurisdictional issues which go to the very core of whether the adjudicator is seized of power to decide the matter...

In my view, an adjudicator must not abdicate their responsibilities to make a decision under the Act to allow another adjudicator to possibly reach a contrary view. If the adjudicator after carefully considering the parties' submissions and the laws, reaches a conclusion that they have no jurisdiction, then that should be considered as much a decision made under the (Act) as one that decides an adjudicated amount, the date it was due to be paid and the interest payable. Such was the view of the Court in *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* ([2010] QSC 159 at [12] — [19]). In such circumstances, an adjudicator would be entitled to his or her usual reasonable fees.<sup>664</sup>

I accordingly support the inclusion of a provision similar to section 25(3) of the Queensland Act expressly requiring adjudicators to decide if they have jurisdiction to adjudicate the application.

I note and support the common approach that the various jurisdictions have adopted in respect to the three specific matters that an adjudicator is to determine (i.e. the adjudicated amount, the date any such amount became or becomes payable and the rate of interest payable on any such amount).<sup>665</sup> Clearly, the referral of a disputed payment claim to adjudication requires the adjudicator to not only determine the adjudicated amount that the respondent is to pay to the claimant, but also the date on which the amount became or becomes payable and the applicable rate of interest payable on such amount. The only additional matter that the adjudicator should be required to determine is the threshold issue of jurisdiction (see above).

#### *What is an adjudicator required to determine and how?*

I also note and support the common approach that the various jurisdictions have adopted in relation to the prescribed matters, that an adjudicator is to only consider in determining an adjudication matter (see, for example, section 22(2) (a) to (e) of the NSW Act), as well as how the valuation of construction work/related goods and services are to be treated in a subsequent adjudication (see, for example, section 22(4) of the NSW Act).

In relation to the powers given to an adjudicator to assist in the process of determining an adjudication application, I again note that all of the jurisdictions have adopted a common approach, other than where an adjudicator convenes a conference. On this point all jurisdictions, other than Victoria, do not permit the attendance of the parties' legal representatives. Whilst I recognise the legislations intention of ensuring that any conferences called by an adjudicator are conducted informally, I nonetheless consider that there is merit in the flexibility provided under the Victorian Act which would permit an adjudicator in circumstances they consider appropriate to allow the parties' legal representatives to attend.

For example, a particular adjudication may involve complex jurisdictional issues and so an adjudicator may consider that the calling of a conference where the parties' legal representatives are in attendance may enable them to gain a better understanding of the parties' respective arguments. To my knowledge the power of convening a conference is not commonly used by adjudicators, but if in particular circumstances an adjudicator considers that the convening of a conference may assist in the determination of key issues in dispute, then the legislation should not preclude the parties being represented at the conference by their lawyers. A competent adjudicator

<sup>664</sup> Wallace Review, op cit, p. 246.

<sup>665</sup> See for example, s. 22(1)(a) to (c) of the NSW Act

should be able to conduct an informal conference even with the attendance (and participation) of the parties' legal representatives.

### **Adjudicator's function is personal and non-delegable**

Finally, and in order to underscore the fact that the adjudicator's task of making a determination is of a personal nature and not able to be delegated to another person, I recommend that the legislation include an express provision to that effect. This does not mean that an adjudicator is unable to obtain assistance in the form of editing and minor clerical tasks but the practice of some current adjudicators (without the parties' current knowledge) of engaging other persons, to assist in the making of an adjudication decision is both improper and inappropriate.

The parties are entitled to know that the registered adjudicator who has been appointed to determine the disputed payment claim will personally and diligently carry out that task. It is upon that basis that the adjudicator has been appointed. If work or personal circumstances do not permit a registered adjudicator to personally carry out their statutory task, then that person should decline to accept the offer of appointment.

ANAs and the Regulator should ensure that they do not nominate/appoint an adjudicator who has already been appointed on another matter. The proposition put forward by some adjudicators that they are able to adjudicate on more than one matter at the same time should be viewed with some scepticism. More often than not an adjudicator's acceptance of more than one matter inevitably leads to the adjudicator requesting the parties to extend the time for the making of their decision(s). The object of this exercise is to ensure that adjudication decisions are made as quickly as possible and therefore appointing an adjudicator to more than one matter risks overloading the adjudicator with work. If an adjudicator claims they are able to make two decisions within 10 business days, then they should be told that they must first complete a matter before being in a position to accept another.

#### **Recommendation 61:**

In determining an adjudication application, the legislation should include provisions setting out:

- a) the procedures an adjudicator may follow in proceedings
- b) what an adjudicator is to determine
- c) the matters the adjudicator is to consider
- d) the format and information that the determination is to include, and
- e) that the adjudicator may, on their own initiative, correct errors, defects etc. in the determination.

Sections 21(4) and (4A), and sections 22(1)–(5) of the NSW Act offer a suitable model.

#### **Recommendation 62:**

The legislation should include specific provisions dealing with an adjudicator's disqualification due to conflict of interest. A suggested provision is provided in Section 14.2 of this Report.

#### **Recommendation 63:**

The legislation should include specific provisions requiring an adjudicator to decide jurisdiction.

#### **Recommendation 64:**

The legislation should provide that an adjudicator's function (other than in respect to minor clerical tasks) is personal and non-delegable.

### 14.3 Adjudicators' qualifications and eligibility criteria

The approach adopted in relation to an adjudicator's eligibility criteria and qualifications differs across jurisdictions.

Section 18(1) of the NSW Act states that a person is eligible to be an adjudicator if the person is a 'natural person' and '[i]f the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section'. There are however no regulations prescribing the requisite qualifications. Accordingly, with the *Authorised Nominating Authority Code of Practice* (NSW Code) the ANAs are given the discretion to determine '... the necessary core competencies of adjudicators required to undertake the adjudication process under the Act'. The NSW Code is given effect through the administrative process of authorisation of an ANA (rather than legislation) whereby compliance by an ANA with the code of practice is made a criterion for authorisation.

Thus, Schedule 1 of the NSW Code requires ANAs to:

1. Determine the necessary core competencies of adjudicators required to undertake the adjudication process under the Act;
2. Select, train and monitor on a continuous basis:
  - (a) adjudicator compliance with the Act; and
  - (b) adjudicator performance with the view to maintaining high levels of competency of adjudicators and their adjudication determinations
3. Monitor and report any instance of non-compliance and unsatisfactory adjudicator performance including details on remediation actions to ensure such issues do not arise again. Such notification is to be submitted with the next scheduled quarterly report.
4. Establish and maintain a training, accreditation and pre-qualification scheme where necessary;
5. Establish and maintain effective ANA services including but not limited to the numbers and type of adjudicators necessary to cater for all such adjudication;
6. Maintain a suitable quality system that supports consistent and reliable adjudicator selection, training and monitoring

Schedule 1 of the ACT *Authorisation Nominating Authority Code of Practice* is almost identical to Schedule 1 of the NSW Code and a similar process operates in the ACT, although the ACT Act includes the additional requirement that the eligible person 'has successfully completed a relevant training course'.<sup>666</sup>

Section 19(1) of the Victorian Act<sup>667</sup> is similar to section 18(1) of the NSW Act and likewise prescribes the expertise, qualifications and experience of an eligible person through the ANA authorisation process.

As outlined earlier in Section 14.1 of this Report, section 43 of the Victorian Act allows the VBA to impose conditions on ANAs authorised under section 42 of that Act. Before authorising an ANA under section 42 the VBA must have regard to any Guidelines issued by the Minister under section 44 of the Act. Ministerial Guidelines<sup>668</sup> and the *Authorised Nominating Authorities Conditions*

<sup>666</sup> See s. 20 of the ACT Act.

<sup>667</sup> See s. 19(1) of the Victorian Act.

<sup>668</sup> See the *Building and Construction Industry Security of Payment Act 2002 Ministerial Guidelines*, Special Gazette No. S 69, 30 March 2007.

*of Authorisation* (Conditions of Authorisation) have been issued pursuant to those sections. The Conditions of Authorisation require ANAs to ‘... establish and maintain a quality assurance system that supports consistent and reliable adjudicator selection, training and monitoring’, and to ensure that all nominated adjudicators meet the adjudicator core competencies set out at Appendix 2 of the Conditions of Authorisation. Those conditions are as follows:

#### **Recognised qualifications**

1. At least one of the following –
  - 1.1. A degree from a university or other tertiary institution in Australia, or an equivalent qualification from outside Australia, in one of the following disciplines:
    - Architecture
    - Building
    - Engineering
    - Construction
    - Quantity surveying
    - Building surveying
    - Law
    - Project management, or
  - 1.2. Eligibility for registration as a builder under the Building Act 1993 in the class of commercial builder (unlimited) or domestic builder (unlimited), or
  - 1.3. 10 or more years’ experience in the administration, management and supervision of construction contracts or in dispute resolution relating to construction contracts.

#### **Relevant experience**

2. At least five years’ experience in the administration, management and supervision of construction contracts or in dispute resolution relating to construction contracts.

#### **Adjudication training**

3. Successful completion of an adjudication qualification that attests to the adjudicator possessing the essential skills and knowledge set out below:
  - 3.1. Overview of the SOP Act
  - 3.2. Scope and purpose of adjudication under the SOP Act
  - 3.3. Regulatory framework
  - 3.4. Role and functions of adjudicators under the SOP Act
  - 3.5. Appointment of adjudicators
  - 3.6. Adjudication process
  - 3.7. Standards of conduct
  - 3.8. Conduct of the adjudication

- 3.9. Preparing the determination
- 3.10. Adjudication review
- 3.11. Adjudication Certificates
- 3.12. Complaint handling.

In Tasmania, section 22(2) of the Tasmanian Act states that '[a] person is a qualified adjudicator if the person is a natural person with the qualifications, expertise and experience if any determined by the Security of Payment Official to be required.'

As with the Victorian process, the Tasmanian Act also provides for the issuing of Ministerial Guidelines and Conditions of Authorisation for ANAs. Ministerial Guidelines regarding the authorisation of nominating authorities appear to have been issued in February 2010 by the then Minister for Workplace Relations, the Hon. Lisa Singh.<sup>669</sup> However, it is not apparent whether the Ministerial Guidelines remain current or whether the Security of Payment Official has subsequently issued any Conditions of Authorisation specifying the requisite criteria and/or qualifications.

In Queensland, adjudicators must be registered by the Queensland Registrar. Section 60(1) of the Queensland Act provides that a person is not suitable to be a registered adjudicator unless the person holds an adjudication qualification or another qualification that the registrar considers to be equivalent. In determining whether a person is suitable under that section, section 60(2) provides that the Registrar may have regard to the following matters:

- (a) whether the person has a conviction for a relevant offence, other than a spent conviction;
- (b) whether the person –
  - (i) held a registration under this division, or a licence or registration under a corresponding law, that was suspended or cancelled; or
  - (ii) has been refused registration under this division or a licence or registration under a corresponding law;
- (c) the experience and qualifications of the person;
- (d) the matters stated in the application for registration under section 57;
- (e) anything else relevant to the person's ability to carry out the person's functions as an adjudicator.

Section 111(2)(b) of the Queensland Act also provides that a regulation may:

for the adjudication qualification, prescribe the following:

- (i) the name of the qualification;
- (ii) the bodies that may issue the qualification;
- (iii) the name of the adjudication competency to be achieved to gain the qualification;
- (iv) the elements that must be successfully completed to achieve the competency.

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<sup>669</sup> *Building and Construction Industry Security of Payments Act 2009 Ministerial Guidelines No. 1/10* issued on 11 February 2010:

[http://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/0006/342285/Ministerial\\_Guidelines\\_2010.pdf](http://www.justice.tas.gov.au/_data/assets/pdf_file/0006/342285/Ministerial_Guidelines_2010.pdf)



Consequently, Clause 3 of the *Building and Construction Industry Payment Regulation 2004* (Qld) (Queensland Regulation) (as amended) prescribes the following:

- (a) the name of the qualification is Certificate in Adjudication;
- (b) a body mentioned in Schedule 1A, Part 1 may issue the qualification;
- (c) the name of the adjudication competency to be achieved is Building and Construction Industry Payments Adjudication;
- (d) the elements that must be successfully completed are the elements mentioned in Schedule 1A, Part 2.

The reference in Clause 3(b) of the Queensland Regulations refers to a private sector company, Contract Administration Group Limited, and the reference in Clause 3(d) refers to the following elements or modules:

1. Role and function of an adjudicator
2. Role and function of the Adjudication Registry
3. Analysis of the Queensland Act
4. Practical Aspects of Adjudication
5. Ethics, Natural Justice and Good Faith
6. Decision Making and Decision Writing
7. Legal Concepts for Adjudicators
8. Technical Concepts for Adjudicators
9. Assessment — Examination
10. Assessment 2 — Assignment: Mock Adjudication Decision.

Sections 64 and 65 of the Queensland Act further specify the term of the registration and provide that the Queensland Registrar may impose conditions on the registration of an adjudicator.

In South Australia, section 18(1) of the SA Act is identical to the equivalent provision of the NSW Act, except that in South Australia regulations have been enacted that deal with the issue of qualifications, expertise and experience. Clause 6 of the *Building and Construction Industry Security of Payment Regulations 2011* (SA) reads as follows:

#### **6 Eligibility criteria for adjudicators**

Pursuant to section 18(1)(b) of the Act, a natural person is eligible to be an adjudicator in relation to a construction contract if –

- (a) the person has successfully completed a formal course of training of at least 2 days duration in adjudication of payment disputes in the building and construction industry that required the person to pass a written examination; and
- (b) the person –
  - (i) holds a degree, diploma or other qualification in –
    - (A) architecture; or

- (B) building surveying; or
  - (C) building; or
  - (D) construction; or
  - (E) law; or
  - (F) project management; or
  - (G) quantity surveying, from a university; or
- (ii) is, or is eligible to be, a member (other than a student member) of any 1 or more of the following professional bodies:
- (A) The Royal Australian Institute of Architects;
  - (B) Engineers Australia;
  - (C) Australian Institute of Building Surveyors;
  - (D) The Institute of Arbitrators and Mediators Australia;
  - (E) The Australian Institute of Building;
  - (F) Australian Institute of Project Management; or
- (iii) holds registration as a building work supervisor under the *Building Work Contractors Act 1995* that authorises the person to supervise construction work of a kind carried out, or to be carried out, under the construction contract.

In Western Australia, section 48(1) of the WA Act provides that a person is eligible to be a registered adjudicator if he or she has the qualifications and experience prescribed by the regulations. Clause 9 of the *Construction Contracts Regulations 2004* (WA) (WA Regulations) provides:

#### 9 Qualifications of registered adjudicators

- (1) For the purposes of section 48(1) of the Act, an individual must have the qualifications and experience set out in Subregulations (2), (3) and (4) to be eligible to be a registered adjudicator.
- (2) The individual must –
- (a) have a degree, from a university or other tertiary institution in Australia, in a course listed in the Table to this paragraph, or an equivalent qualification from an overseas university or tertiary institution;

**Table**

Architecture	Building
Engineering	Construction
Quantity surveying	Law
Building surveying	Project management

or

- (b) be eligible for membership of a professional institution listed in the Table to this paragraph;

**Table**

The Royal Australian Institute of Architects  
 Institution of Engineers Australia  
 Australian Institute of Quantity Surveyors  
 Australian Institute of Building Surveyors  
 The Australian Institute of Building  
 The Institute of Arbitrators and Mediators of Australia  
 Australian Institute of Project Management

or

- (c) be a builder registered under the *Builders' Registration Act 1939*.
- (3) The individual must have had at least five years' experience in –
- (a) administering construction contracts; or
- (b) dispute resolution relating to construction contracts.
- (4) The individual must have successfully completed an appropriate training course which qualifies the person for the performance of the functions of an adjudicator under the Act.
- (5) For the purposes of subregulation (2)(a), a qualification is equivalent to another if the course of study for the first qualification covers approximately the same matters as does the course of study for the second.

Finally, in the Northern Territory, section 52 of the NT Act is identical to the equivalent provision of the WA Act. Also, Clause 11 of the *Construction Contracts (Security of Payments) Regulations (NT)* is similar to Clause 9 of the WA Regulations, except that it includes the following additional requirements:

- (6) The person is a disqualified person if the person:
- (a) is an undischarged bankrupt; or
- (b) has applied to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
- (c) has compounded with creditors or made an assignment of the person's remuneration for their benefit; or
- (d) is disqualified from registration under a law of a State or Territory in a profession mentioned in subregulation (3)(a); or
- (e) is unsuitable to conduct adjudications under Part 3 of the Act.
- (7) For subregulation (6)(e), in deciding whether the person is unsuitable to conduct adjudications, the Registrar must have regard to the criminal history check obtained in relation to the person as mentioned in regulation 12(2).
- (8) Subregulation (7) does not limit the matters to which the Registrar may have regard in deciding whether a person is unsuitable to conduct adjudications.

The Queensland, WA and NT Acts are the only legislations that specifically deal with the circumstances relating to the cancellation of an adjudicator's accreditation.<sup>670</sup> In addition to cancellation, the Queensland Act also provides for the suspension of an adjudicator's registration.<sup>671</sup> The Queensland and NT Acts further provide for a review of decisions related to the refusal to register an adjudicator or to cancel an adjudicator's registration,<sup>672</sup> however WA Act is silent on this.

In addition, the Queensland Act is the only legislation that also specifically provides for the renewal and amendment of an adjudicator's registration.<sup>673</sup>

In all other jurisdictions such functions are delegated to the ANA, but with the requirement that the ANA advise the relevant Regulator of any decision relating to the cancellation of an adjudicator's accreditation.

### Responses from stakeholders

Stakeholders were invited to express viewpoints on:

- a) the quality of adjudication decisions, and
- b) whether minimum requirements should be specified for persons to be eligible for appointment as adjudicators.

To a large extent, the answers given to (a) influenced the answers given to (b).

### *Experience regarding adjudicators' decisions*

Stakeholders reported mixed experiences with the quality of adjudication decisions and responses tended to vary from state to state.

Organisations representing subcontractors, such as Subcontractors WA, reported instances where the adjudication decisions were of a substandard quality, while the HIA said the 'quick and dirty' nature of rapid adjudication meant that adjudicators' decisions are naturally susceptible to errors. QMBA said the adjudication decisions in Queensland are generally of poor quality, but it noted that the QBCC had tried to put in place an internal review of adjudication decisions, which QMBA believe should be included in a best practice model.

In Victoria, some stakeholders, such as AMCA, commented that the quality of adjudicators' decisions were highly variable, with some decisions being well reasoned and presented, whereas others were highly questionable. MBAV suggested that compared to Queensland and NSW, the relatively low number of adjudication decisions that were quashed by the Victorian Supreme Court does not support the view that adjudication decisions made in Victoria were of a substandard quality.

In South Australia, AMCA SA and MBA SA indicated no significant concerns regarding the quality of adjudication decisions and suggested that this was due to the SA Act setting out specific requirements relating to the education and industry experience for an adjudicator.

In NSW, MBA NSW said the quality of adjudicators is generally good. Similarly, NECA submitted that the system of independent ANAs that oversee the quality of adjudicators and adjudication decisions has delivered good outcomes. In contrast, MPA NSW stated that adjudicators' decisions are not always reliable and recommended that a system of quality audits of ANAs and adjudicators be introduced.

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<sup>670</sup> See Part 4, Division 6 of the Queensland Act; s. 48(5) of the WA Act and ss. 52(5) and (7) of the NT Act.

<sup>671</sup> See Part 4, Division 6 of the Queensland Act.

<sup>672</sup> See Part 5 of the Queensland Act and s. 53 of the NT Act

<sup>673</sup> See Part 4, Divisions 4 and 5 of the Queensland Act.

In Western Australia, MBA WA suggested that, based on the low rate of appeals and the number of adjudicators' decisions upheld on appeal, the quality of adjudication decisions is of a high standard.

The LCA submitted that the quality of adjudicator decisions is generally 'unpredictable' and that this may cause the parties to incur additional expenses, delays and uncertainty in contested court proceedings challenging such decision. SoCLA 's submission referred to its analysis of the 197 court challenges made up to the end of 2013 and that the result of such analysis was 'not encouraging':

... as time has gone by, the courts have seen more and more cases where the quality of the adjudication decision making process has been so poor that the courts have been increasingly willing to intervene.<sup>674</sup>

Responses from regulators also varied. The Northern Territory Regulator observed that decisions are often of poor quality and that this has prompted the legal profession to call for quality control. The South Australian Regulator submitted that they have had a good experience with the quality of adjudication decisions, noting that few adjudication decisions have been overturned by the courts. The Tasmanian and Victorian Governments both observed that the quality of adjudication decisions can vary. The Victorian Government also noted that ANAs are required to establish and maintain a quality assurance system ensuring that all nominated adjudicators are monitored to ensure compliance with the relevant legislation, meet core competencies and continually update their adjudication skills and knowledge.<sup>675</sup>

### *Minimum eligibility requirements for adjudicators*

Most stakeholders<sup>676</sup> agreed that the legislation should clearly stipulate the minimum eligibility requirements for a person to become an adjudicator. In particular, stakeholders said that adjudicators should, at the very least, be required to have:

- a) relevant industry knowledge and experience
- b) familiarity with key contract law issues and concepts, and
- c) the ability to make evidence-based decisions.

Most stakeholders believed that the combination of skills and experience as minimum requirements would ensure a base-line of quality and consistency of adjudicators' decisions. Some stakeholders<sup>677</sup> also suggested that adjudicators should be formally assessed and accredited by a professional body and subject to continuing professional development (CPD) training requirements to maintain accreditation. Only a few stakeholders<sup>678</sup> opposed introducing an operative set of minimum eligibility requirements for adjudicators in the legislation, citing that this could create more problems.

Many stakeholders<sup>679</sup> proposed that a sound framework would be the legislative minimum requirements for eligibility to become an adjudicator as prescribed in South Australia. Many stakeholders, including Dr Jeremy Coggins, also specifically supported the South Australian 'red card, yellow card' approach – whereby an adjudicator who within the last five years has had their

<sup>674</sup> SoCLA, written submission, p. 32.

<sup>675</sup> Victorian Government, written submission, p. 3.

<sup>676</sup> Including CFMEU, MBA SA, MPA NSW, QMBA, MEA, AMCA SA, NECA SA/NT, HIA Qld, MPAQ, AMCA, HIA, MBT, MBA WA and MBAV.

<sup>677</sup> Including MPA NSW and MBA WA.

<sup>678</sup> Including MBA NSW and AIB.

<sup>679</sup> Including AMCA SA, SoCLA and CCA.

determinations quashed in two instances for bad faith and/or substantial denial of natural justice is suspended from the adjudication register.<sup>680</sup>

Adjudicate Today submitted that the quality of decisions would be improved by ensuring that all adjudicators have a professional industry background, hold professional qualifications, pass an appropriate training course and undergo an extensive mentoring program. Adjudicate Today further submitted that each ANA should establish a peer review committee of senior adjudicators to assess the quality of decisions and that:

...[all] adjudicators should be registered by the ABCC or relevant Commonwealth body with responsibility for oversight of the Act, which would interpret these general terms in a real-world situation when considering an application for registration.<sup>681</sup>

The majority of regulators supported legislation setting out minimum eligibility requirements to become an adjudicator, such as legal expertise and attendance at mandatory CPD training. Regulators and officials from South Australia and Victoria noted that their state legislation already sets out the eligibility criteria for adjudicators, while the ACT said they have tried to deal with this issue through a Code of Practice. The Northern Territory Regulator said its legislation requires adjudicators to be qualified, although the meaning of 'qualified' can vary from a relevant degree or equivalent tertiary qualification to a trade affiliation, have relevant experience and to undertake an appropriate course as identified by the Regulator. The Queensland Registrar referred to a change it introduced requiring adjudicators to attend CPD training, but that a recent decision of QCAT had constrained the Registrar's (current) powers in this regard.

### Discussion and recommendation

There is a compelling case to be made for adopting a uniform approach regarding the eligibility of adjudicators. Parties involved in an adjudication have every right to expect that an adjudicator will be able to identify the relevant law and apply it to the circumstances of the case. Further, the very nature of the dispute and the parties' competing submissions implies that the person appointed as adjudicator will have the requisite industry background and experience and be able to deliver a well-reasoned adjudication decision within a compressed timeframe. As far as possible, the assessment of an adjudicator's attributes and qualifications should be undertaken by the Regulator as opposed to the ANAs and made on a common, well recognised and consistent set of criteria.

Clearly, the arrangements currently in place in NSW, Victoria, Tasmania and the ACT, where there are no regulations prescribing the requisite eligibility criteria and qualifications, are unsatisfactory. Leaving the training and accreditation of persons eligible to carry out the statutory function of adjudication to the ANAs is not conducive to producing the requisite and consistent high standard of competency expected by industry. No doubt some ANAs conduct rigorous training programs and may have a robust assessment process, but a legislative regime that produces variable and inconsistent outcomes is clearly suboptimal.

The South Australian regulations, whilst clearly outlining the requisite eligibility criteria,<sup>682</sup> nonetheless leave the training component to be provided by ANAs and are therefore susceptible to the same variability as is likely to occur in NSW, Victoria, ACT and Tasmania.

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<sup>680</sup> See the South Australia Small Business Commissioner *Code of Conduct for Authorised Nominating Authorities*, April 2017: [https://www.sasbc.sa.gov.au/files/908\\_ana\\_code\\_of\\_conduct.pdf](https://www.sasbc.sa.gov.au/files/908_ana_code_of_conduct.pdf).

<sup>681</sup> Adjudicate Today, written submission, p. 54.

<sup>682</sup> The eligibility criteria set out under the South Australian legislative regime have been enforced by the South Australian Supreme Court where in *Kennett Pty Ltd v Janssen* [2013] SASC 20 the decision of a person who failed to meet the prescribed criteria was declared void.

The arrangements set out in the respective regulations in Western Australia and the Northern Territory are more comprehensive and robust (particularly, in the case of the Northern Territory), but it is unclear as to the content of the training required to be undertaken and as to who will deliver such training.

The arrangements that are in place in Queensland in Part 4, Division 3 of the Queensland Act and clause 3 of the Queensland Regulation, however, provide an excellent outline of the registration process, conditions of registration and training elements as well as identifying the organisation or body that has been approved as delivering the training and assessing whether a person has satisfactorily passed the course. Further, Division 3 of the Queensland Act prescribes not only the information a person is required to provide to the Registrar but also empowers the Registrar to request further information to determine a person's qualification and eligibility to be registered as an adjudicator and apply further conditions on registration. Accordingly, I recommend the inclusion of registration and eligibility requirements for adjudicators similar to those outlined in Part 4, Division 3 of the Queensland Act and clause 3 of the Queensland Regulation.

Further, every adjudicator should be graded based on seniority and skill sets. This in turn will require the Regulator to set out the criteria relating to the various grades as well as the process associated with such grading.

In addition, there is merit in requiring persons who have successfully completed an adjudication training course to also successfully complete a mentoring programme prior to being registered as an adjudicator. Some ANAs (such as Adjudicate Today) currently conduct such a programme as does the QBCC Registry. Mentoring provides not only valuable practical feedback to persons aspiring to become adjudicators but it also provides a further basis for the Regulator to assess the competence of such persons.

I also recommend the inclusion of a requirement that all adjudicators be required to apply for renewal of their registration every three years. Such a requirement, coupled with legislation empowering the Regulator to suspend, cancel, or amend the registration of an adjudicator, would provide an effective mechanism for the ongoing monitoring of an adjudicator's performance. Such a legislative mechanism exists under Divisions 4, 5 and 6 of Part 4 of the Queensland Act.

To ensure procedural fairness, the legislation should also provide for a process of review of decisions associated with adjudicator registrations (including applications for registration, cancellation, suspension, amendment etc) as per Part 5 of the Queensland Act.

There is, however, one further aspect relating to this issue which requires comment. As outlined in Chapter 5 of this Report, there have been many instances where a court has quashed an adjudicator's decision or declared it void because of jurisdictional error, breach of natural justice, failure to apply their mind in good faith or provide adequate reasons. Whenever an adjudicator's decision is quashed or declared void by the courts through no fault of the parties, the integrity of the adjudication system is undermined. Parties should have confidence that an adjudicator will not only be competent but be able to apply a diligent and independent mind to the issues in dispute and be able to articulate reasons for arriving at a decision in a clear and comprehensive manner. This is, after all, why persons wishing to be accredited as adjudicators are first required to not only substantiate their credentials relating to qualifications and industry experience, but to also successfully complete an approved training course. Yet, it is evident from the large number of successful court challenges that there remains the need for continued monitoring of an adjudicator's performance. In this regard, I note that under the *Code of Conduct for Authorised Nominating Authorities* issued by the SA SBC, the following requirement has been imposed on an ANA:



An ANA must not nominate an adjudicator that has been found, by a court in Australia, to have made technical errors unless the ANA is satisfied that the cause of the error has been resolved.

The making of unbiased decisions is of utmost importance and so an ANA must not, without the written approval of the Minister for Small Business, appoint a person as an adjudicator if that person has been found to have acted not in good faith, twice or more, by a Court in Australia within the last five years in relation to adjudication duties.<sup>683</sup>

The above provision serves as a salutary reminder to accredited adjudicators in South Australia that they should discharge their statutory function in a careful and responsible manner. I accordingly recommend similar arrangements should be put in place across all other jurisdictions.

#### **Recommendation 65:**

Legislation should provide for:

- a) the registration and renewal of adjudicators and for the suspension, cancellation or amendment of adjudicators' registrations, and
- b) a process for reviewing decisions associated with adjudicators' registrations.

The provisions relating to the regulation of adjudicators as set out in Part 4, Divisions 3, 4, 5 and 6, and Part 5 of the Queensland Act and clause 3 of the Queensland Regulation provide a suitable model.

#### **Recommendation 66:**

Adjudicators should be registered and graded by the Regulator.

#### **Recommendation 67:**

Where an adjudicator has been found, by a court in Australia, to have made technical errors in performing adjudications, an ANA must not nominate the adjudicator unless it is satisfied that the cause of the error has been resolved.

#### **Recommendation 68:**

Where an adjudicator has been found by a court in Australia to have acted not in good faith twice or more within the last 5 years in relation to adjudication duties, an authorised nominating authority must not nominate the adjudicator for adjudication and the Regulator must not appoint such person as an adjudicator.

## **14.4 Adjudicators' fees**

All jurisdictions' security of payment legislation includes provisions that specifically deal with the issue of adjudicator's fees.

Section 29 of the NSW Act provides that:

- 1) An adjudicator has an entitlement to be paid for adjudicating an adjudication application and that such amount is either:
  - a) the fees and expenses as agreed between the adjudicator and the parties, or

<sup>683</sup> South Australia Small Business Commissioner, *Code of Conduct for Authorised Nominating Authorities*, pp.3–4:

[https://www.sasbc.sa.gov.au/security\\_of\\_payment/authorised\\_nominating\\_authorities/become\\_an\\_authorised\\_nominating\\_authority](https://www.sasbc.sa.gov.au/security_of_payment/authorised_nominating_authorities/become_an_authorised_nominating_authority).

- b) if no such amount is agreed, then such amount as is reasonable having regard to the work done and the expenses incurred by the adjudicator.
- 2) Each party is jointly and severally liable to pay the adjudicator's fees and expenses.
- 3) Each party is liable to contribute to the payment of the adjudicator's fees and expenses in equal proportion, or in such proportions as the adjudicator may determine.
- 4) An adjudicator is not entitled to be paid if he/she has failed to make a decision on the adjudication application (otherwise than because the application is withdrawn or the dispute between the parties has been resolved) within the prescribed time period. An adjudicator may however refuse to communicate his/her decision until the relevant fees have been paid.<sup>684</sup>

Most of the jurisdictions that have adopted the East Coast Model, except Queensland, contain similar provisions to those in NSW within their legislation.<sup>685</sup> However, section 35A of the Queensland Act sets out a list of matters that an adjudicator may consider when deciding the apportionment of their fees and expenses:

- (2) In making the decision, the adjudicator may consider the following matters –
  - (a) the relative success of the claimant or respondent in the adjudication;
  - (b) whether the claimant or respondent commenced or participated in the adjudication for an improper purpose;
  - (c) whether the claimant or respondent commenced or participated in the adjudication without reasonable prospects of success;
  - (d) whether the claimant or respondent has acted unreasonably leading up to the adjudication;
  - (e) whether the claimant or respondent has acted unreasonably in the conduct of the adjudication;
  - (f) the reasons given by the respondent for not making the progress payment the subject of the adjudication application;
  - (g) whether the respondent included additional reasons for withholding payment in the adjudication response that were not included in the payment schedule served on the claimant;
  - (h) whether an adjudication application is withdrawn;
  - (i) the services provided by the adjudicator in adjudicating the adjudication application, including the amount of time taken to consider discrete aspects of the amount claimed;
  - (j) another matter the adjudicator considers relevant in making the decision.

The WA Act provides that each party will bear their own costs in relation to any adjudication,<sup>686</sup> although if an adjudicator is satisfied that a party to a payment dispute:

<sup>684</sup> The court decided in *Alucity Architectural Product Supply Pty Ltd v Australian Solutions Centre and Paul J Hick* [2016] NSWSC 608 that where an adjudicator has decided that they have no jurisdiction to decide an adjudication application, the adjudicator is still entitled to be paid their fees and expenses.

<sup>685</sup> See s. 30 of the SA Act; s. 45 of the Victorian Act; s. 37 of the Tasmanian Act; s. 36 of the ACT Act.

<sup>686</sup> See s. 34(1) of the WA Act.

'... incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.'<sup>687</sup>

However, the adjudicator is required to give reasons setting out the basis on which they have arrived at such a decision.<sup>688</sup> The WA Act also provides that an adjudicator is also entitled to be paid for their work associated with either the making of the decision or the dismissal of an adjudication application (subject to such decision or dismissal having been made within the prescribed timeframe:

- (i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate, if any, prescribed by the regulations; or
- (ii) if a rate was not agreed, at the rate published under section 51 in respect of the adjudicator.<sup>689</sup>

Further, under the WA Act, where an adjudicator has been disqualified because of a conflict of interest (including where a party has applied to the State Administrative Tribunal for a declaration to that effect),<sup>690</sup> the adjudicator remains entitled to their costs in respect of any adjudication work done before the disqualification had been notified to the parties.<sup>691</sup> Importantly, the WA Act also provides that the rates charged by an adjudicator are to be 'published in the manner approved by the Building Commissioner',<sup>692</sup> although this does not prevent the parties from agreeing the rate to be charged by the adjudicator.<sup>693</sup> Finally, the WA Act enables an adjudicator to request one or both of the parties to provide a reasonable deposit of security for the anticipated costs of the adjudication.<sup>694</sup>

The NT Act contains similar provisions to the WA Act.<sup>695</sup>

### Responses from stakeholders

The Review did not specifically seek stakeholder feedback on the appropriateness of adjudicator's fees, although some stakeholders noted that the adjudication process can sometimes be expensive and that it was not always clear how much of the fees were taken as a 'cut' by the ANA.

### Discussion and recommendation

There are several questions that arise when considering this matter, including:

1. Should the registered adjudicator's fees be published on the Regulator's website?
2. Should the Regulator prescribe the fees that registered adjudicators can charge?
3. Should the legislation include a provision setting out the range of matters that an adjudicator is to consider whenever deciding how the payment of the adjudicator's fees are to be apportioned between the parties?

Once again there are competing policy considerations that come into play when considering whether an adjudicator's fees are to be prescribed and/or published. On the one hand the object of

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<sup>687</sup> See s. 34(2) of the WA Act.

<sup>688</sup> See s. 34(3) of the WA Act.

<sup>689</sup> See s. 44(2) of the WA Act.

<sup>690</sup> See s. 29(2) of the WA Act.

<sup>691</sup> See s. 44(3) of the WA Act.

<sup>692</sup> See s. 51(1) of the WA Act.

<sup>693</sup> See s. 51(3) of the WA Act.

<sup>694</sup> See s. 44(8) of the WA Act.

<sup>695</sup> See ss. 36, 46 and 55 of the NT Act.

the adjudication process is to provide a cost-effective method of resolving disputed payment claims and this would therefore support the notion for the regulation of the adjudicator's fees.

At the same time, however, the integrity of the adjudication system would be undermined if it is unable to attract highly competent persons with extensive industry experience who would be willing to carry out the function of an adjudicator. Accordingly, prescribing fees or hourly rates that are too low would not incentivise senior, competent and highly regarded persons to agree to become adjudicators. If such persons cannot be attracted to the system then there is a risk that disputed payment claims will be adjudicated by less capable and less senior persons, which in turn may result in the making of substandard decisions.

Further, given that I have recommended that ANAs continue to process adjudication applications and be able to nominate registered adjudicators from their panel (for appointment by the Regulator), there may be merit if ANAs were to be encouraged to continue to compete for receiving adjudication applications based on the fees that their adjudicator's may charge, or on the basis of the quality of the registered adjudicators on their panels. This would then enable a claimant to select the ANA that it believes is able to offer the most competitive rates or highly credentialed adjudicators. Thus, allowing market forces to determine the rates to be charged on the quality of adjudication panels may ensure that the overall rates charged by the adjudicators on the ANA panels remain competitive and that the quality of the adjudicators on the different panels are of an appropriate standard. In other words, an ANA that allows its adjudicators' fees to be too high risks losing market share and thereby becoming commercially unviable. Similarly, if an ANA has a panel of adjudicators who are not necessarily well-regarded, it risks not being able to attract claimants and will thereby be less likely to prosper in the market.

However, all of this needs to be balanced with the need to recognise that some form of market regulation is necessary if the key objectives of the legislative regime (such as providing a cost effective and credible adjudication process) are to be achieved. There is also the need for transparency so that the relevant information about the adjudication process is readily available so as to enable applicants to make informed choices.

Furthermore, as I have recommended that parties ought to be provided, in certain circumstances, with the opportunity to agree on their own adjudicator, it is important that the Regulator's website identify all registered adjudicators and their appropriate grading. This is because not every registered adjudicator may wish to align themselves with an ANA but may, depending on the nature of the dispute and the fees that they are able to charge, agree to accept the parties' agreement for them to adjudicate the dispute.

Given all of the above considerations, I have arrived at the following conclusions:

1. Payment claims **up to and including \$25 000:**

An adjudicator should carry out the adjudication function at a fixed fee, with that fee being prescribed and published by the Regulator. The prime policy consideration driving this arrangement is ensuring that the majority of disputed payment claims can be dealt with in a cost-effective manner. It is very likely, but not necessarily mandatory, that the adjudicator who will adjudicate such an application will only have a junior grading. Additionally, most ANAs already have fixed fees for applications up to \$25 000, therefore this would not be a significant departure from what is already common practice within the industry.

2. Payment claims **over \$25 000:**

The rate should not be greater than cap rates prescribed and published by the Regulator **unless** expressly agreed by the parties. This would enable the ANAs to compete, if they so wish, by

having their adjudicator's charge fees at a rate lower than the Regulator's capped rate. It would also enable the parties to agree to pay the adjudicator (who they have agreed to adjudicate the dispute) at a fee higher than the capped rate. This would then ensure that very senior and highly experienced persons (such as retired judges and senior counsels) can be attracted to become adjudicators.

### 3. Fees for review adjudicators

Review adjudicators<sup>696</sup> fees (who would be appointed by the Regulator) should also be prescribed by the Regulator. As these adjudicators will be required to carry out their functions in an even more compressed timeframe it is very likely that these rates would be higher than those prescribed for normal adjudications. Nonetheless, in the interest of transparency, such rates should be published so that a party wishing to avail itself of this course of action would be apprised of the associated charges.

### 4. Apportioning fees

Finally, I see no harm in a provision similar to section 35A of the Queensland Act setting out a (non-exhaustive) list of matters that an adjudicator may take into consideration when apportioning fees. I believe that the inclusion of such a provision serves to not only draw a party's attention to the risks of making unmeritorious claims and submissions, but also to the consequences of frivolous and vexatious conduct. It, of course, also serves to ensure that adjudicator's reasons on the important issue of apportioning adjudication fees are clearly structured.

#### **Recommendation 69:**

The legislation should provide that in the case of adjudication applications involving payment claims of **up and including to \$25 000**, the fees that an adjudicator may charge should be fixed at a rate prescribed by the Regulator.

#### **Recommendation 70:**

The legislation should provide that in the case of adjudication applications involving payment claims of **over \$25 000**, the fees that an adjudicator may charge should not exceed a capped rate prescribed by the Regulator, unless otherwise agreed by the parties.

#### **Recommendation 71:**

The legislation should provide that in the case of applications for adjudication review, the fees that a review adjudicator may charge should be prescribed and published by the Regulator.

#### **Recommendation 72:**

The legislation should provide that a claimant and respondent are equally liable for payment of the adjudicators' fees, unless the adjudicator determines otherwise, and set out the matters an adjudicator may consider when deciding the apportionment of their fees and expenses.

Section 35A of the Queensland Act provides a suitable model.

## **14.5 Publication of adjudicators' determinations**

Currently, Queensland is the only jurisdiction using the East Coast Model that publishes adjudicators' decisions unredacted. Under the Queensland Act, the QBCC is obliged 'to keep records of decisions

<sup>696</sup> Section 13.5 of this report discusses a proposal for the review of adjudicator's decisions.

by adjudicators and to publish the decisions in a way approved by the commissioner.<sup>697</sup> Accordingly, Queensland adjudication decisions are currently published online via the Adjudication Registry System.<sup>698</sup> This requirement would be retained under the proposed Queensland Bill 2017.<sup>699</sup>

The South Australian Government is also proposing to publish adjudicator's decisions, with this requirement forming part of the SA Review Amendment Bill. New section 7B(b) of that Bill will require the SA SBC to publish 'determinations of adjudicators in relation to adjudication applications in a manner determined by the Commissioner.'

The Victorian Act provides that the Regulator **may** publish information in an adjudicator's determination if the information does not identify the parties to the determination or disclose the address or location of the parties and the identity, address or location of the parties cannot reasonably be determined from the information.<sup>700</sup> However the Victorian Regulator does not publish adjudicators decisions in full. Instead the Victorian Regulator publishes annual adjudication statistics of a general nature.

Similar to the Victorian Act, the WA Act<sup>701</sup> and the NT Act<sup>702</sup> also provide for the Regulator to make publicly available the result, or a report of the decisions of adjudicators. Further, the published information must not identify the parties to the adjudication or any other information considered to be 'confidential'. However, only the Northern Territory has elected to utilise this provision and publish adjudicator's determinations in full. The Western Australian Regulator has to date elected not to publish adjudicators determinations.

The SERC Inquiry Report noted that the QBCC publishes adjudicator decisions and that it 'does not name the parties. Instead, it distinguishes by class of building, whether the respondent is a head contractor or subcontractor, what was paid and what was claimed.'<sup>703</sup> The SERC Inquiry Report considered that cultural change through greater transparency and self-regulation could be achieved through publication of adjudicators decisions and went on to recommend that:

...that each state and territory government department or agency responsible for the relevant security of payments act should follow the example in Queensland and publish publicly available, de-identified information concerning the outcome of payment disputes.<sup>704</sup>

However, it must be noted that during the intervening period between the conclusion of the SERC Inquiry and the commencement of this Review, the QBCC continued with its past practice of publishing the non-redacted details of an adjudicator's decision, which, of course, includes the identities of the parties.

## Responses from stakeholders

During the consultation process, stakeholders' views were sought on whether an adjudicator's decision should be published. Responses from stakeholders on this question were mixed. Many stakeholders<sup>705</sup> did not support an adjudicator's decision being published online. Some<sup>706</sup> cited the

<sup>697</sup> See s. 38(2)(e) of the Queensland Act.

<sup>698</sup> See <<http://www.qbcc.qld.gov.au/decision-search>>.

<sup>699</sup> See s. 154(2)(e).

<sup>700</sup> See s. 47C of the Victorian Act.

<sup>701</sup> See s. 50(1) and (2) of the WA Act.

<sup>702</sup> See s. 54(1) and (2) of the NT Act.

<sup>703</sup> SERC Inquiry Report, op cit, p. 137.

<sup>704</sup> SERC Inquiry Report, op cit, pp. 138–139, Recommendation 23.

<sup>705</sup> Including LCA, MBAV, MBA NSW, MPA NSW, NECA, QMBA, HIA Qld, Subcontractors Alliance, MBT, CFMEU and AIB.

<sup>706</sup> Including HIA Qld and QMBA.

fact that the adjudicator's decision is interim only and has no binding influence, and there would therefore be little merit in publishing such decisions.

Some stakeholders<sup>707</sup> were opposed to publication unless details identifying the parties were redacted, because decisions containing such information are considered to be commercial-in-confidence. The CFMEU, MBA NSW and MPA NSW were of the view that the information found in adjudicator's decisions could result in threats or acts of intimidation and retribution against subcontractors or be used inappropriately by head contractors to identify and target subcontractors who utilise the security of payment process and then deny those subcontractors access to future projects.

Those stakeholders<sup>708</sup> that supported the publication of an adjudicator's decision cited transparency and providing greater visibility of 'serial pest' head contractors or subcontractors as the main rationale for adopting such a policy position. MEA suggested that publishing decisions would have a deterrent effect and encourage parties to resolve the dispute before going to adjudication.

Jurisdictions who responded to this question agreed that an adjudicator's decision should be published online for the purposes of transparency. For example, the South Australian Regulator underscored the importance of transparency within the system. The Victorian Government noted that the VBA is already able to publish information in a determination under s. 47C of the Victorian Act provided the information does not identify a person or organisation, and believes this provision reasonably balances the considerations of transparency and commercial privacy.<sup>709</sup> Despite this, the VBA does not currently publish adjudicators determinations in full. The Northern Territory Regulator agreed that publication of adjudicators decisions could serve as a useful deterrent mechanism and indicated s. 54 of the NT Act requires them to publish a report on the quality of adjudication decisions and that this can involve redaction where contractual relationships may be apparent. The ACT does not publish any information online regarding an adjudicator's decision but acknowledged that some data may be useful to publish provided an individual's privacy and any information that is commercial-in-confidence is protected.

### Discussion and recommendation

There are two views regarding the publishing of an adjudicator's decision/determination. Some argue that the publication increases transparency, whilst others argue that the publication of what is essentially a commercial dispute between two parties should be kept private — much like decisions made by arbitrators or under an expert determination. I, for my part, struggle to understand the merit of publishing an adjudicator's decision that is of an interim nature and that has been made within a compressed timeframe and essentially on a document-only basis.

The argument that publishing an adjudicator's decision will enhance transparency is unpersuasive, as the reader would not have any appreciation of the documentation or the quality of the parties' submissions upon which basis the adjudicator's decision has been arrived at. This may cause a reader to reach a critical assessment of an adjudicator's decision when in fact the adjudicator's conclusion has been based on the quality of the documentation and the parties' submissions.

Insofar as an adjudicator's decision may outline the basis upon which an assessment has been arrived at, then there is a risk that it may result in the disclosure of information that is commercial-in-confidence (e.g. a contractor's margin) and this would only be of interest to a reader who may be in competition with one of the parties. Again, it is important to emphasise that an adjudicator's decision is interim only and relates to a commercial dispute between two parties who have an

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<sup>707</sup> Including Subcontractors Alliance, QMBA and MPA NSW.

<sup>708</sup> Including MEA, MPAQ, MBA SA, NECA SE, AMCA SA, HIA and SoCLA.

<sup>709</sup> Victorian Government, written submission, p. 6.



entitlement to privacy. Further, as the parties' civil rights are preserved, it may well be that a final decision will subsequently be made based on more comprehensive evidence (such as sworn oral testimony and the testing of that testimony by way of oral examination) that will reverse the effect of the adjudicator's decision, yet that interim decision will have been published.

Insofar as the identity of the parties and other information of a commercial or confidential nature may be able to be redacted when published, the time and costs associated with such an exercise would not be insignificant and unlikely to outweigh whatever marginal benefits may be said to flow from the publication of such a redacted decision.

Further, whilst it may be said that published decisions assist industry in forming a view on an adjudicator's predisposition on key issues, such a view would be misplaced because it has been formed without an appreciation of the parties' submissions and documentation upon which the adjudicator's decision has been reached. It is important to emphasise that an adjudicator's decisions have no binding or precedent value in any subsequent separate adjudication application.

Finally, while it may be argued that published decisions provide guidance to junior adjudicators and may therefore have an educative value, then this reason should not outweigh consideration of other more relevant reasons, particularly the parties' right to privacy. A better way to educate junior adjudicators would be to implement a program of mentoring, similar to what I posited earlier in Section 14.3 of this report.

Thus, for all the above reasons, I do not support the proposition that an adjudicator's decision should be published.

### **Recommendation 73:**

The legislation should **not** require adjudicators' decisions to be published.

## **14.6 Protection of adjudicators and ANAs from liability**

Section 30(1) of the NSW Act provides that 'an adjudicator is not personally liable for anything done or omitted to be done in good faith:

- (a) In exercising the adjudicator's function under the Act, or
- (b) In the reasonable belief that the thing was done or omitted to be done in the adjudicator's function under the Act.'

The legislations in all other jurisdictions have similar provisions.<sup>710</sup> Section 37(1) of the ACT Act states that the statutory indemnity applies for 'anything done or omitted to be done honestly and without recklessness'. Yet again, the reason why one legislature has chosen to describe the scope of the statutory indemnity differently from the expression adopted in all other jurisdictions (and whether such protection is intended to have a narrower scope) is unclear. Section 46 of the Victorian Act provides an indemnity for adjudicators and review adjudicators, but (unlike section 30 of the NSW Act), no indemnity is provided to an ANA.

### **Responses from stakeholders**

As with a number of other matters identified during this Review, stakeholders were not specifically asked about the protections from liability afforded to adjudicators and ANAs. I believe that this issue is in the scheme of things non-contentious and unlikely to be the subject of any significant debate

<sup>710</sup> See s. 46 of the Victorian Act; s. 107 of the Queensland Act; s. 31 (1) of the SA Act; s. 39 (3) of the Tasmanian Act; s. 37(1) of the ACT Act; s. 54 of the WA Act; and s. 56 of the NT Act.

amongst stakeholders. Notably, despite stakeholders being able to raise additional issues to those outlined in the Issues Paper,<sup>711</sup> none raised any concerns on this topic.

### Discussion and recommendation

There are sound policy reasons for providing a person who discharges a statutory function in good faith with protection from personal liability. Clearly appropriately qualified persons would be disinclined to take on the function of adjudicator absent such statutory indemnity.

Given that I have recommended in Section 13.5 that the legislation should enable a party, in certain circumstances, to request a review of an adjudicator's decision, it follows that the statutory indemnity should also be extended to include a review adjudicator.

#### **Recommendation 74:**

The legislation should provide protection from liability for adjudicators.

The protections set out in section 46 of the Victorian Act provide a suitable model.

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<sup>711</sup> Murray, J. (2017), op cit

# Chapter 15:

# Miscellaneous issues

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## 15. Miscellaneous issues

This chapter deals with various issues not already discussed in previous chapters, namely:

1. Service of notices
2. Acts of intimidation and bullying
3. Data collection and reporting
4. Special mechanisms for small business
5. Retentions and bank guarantees, and
6. Trade credit insurance.

### 15.1 Service of notices

Provisions for the service of notices are relatively uniform across the jurisdictions, with the exceptions of Western Australia and the Northern Territory which do not prescribe method(s) of service in the security of payment legislation.

Most jurisdictions provide for the default service of documents by personal delivery, post and facsimile. Four jurisdictions (NSW, Queensland, Victoria and South Australia) expressly provide that the construction contract may set out the method of service. Only three jurisdictions (NSW, ACT and Tasmania) explicitly provide for the service of documents via email. **Table 8** below summarises the various requirements across jurisdictions.

**Table 8: Service of notice requirements, by jurisdiction**

Type of Service	NSW	Qld*	Vic	ACT <sup>#</sup>	SA	Tas	WA	NT
Deliver personally to the person	Yes s.31(1)(a)	Yes s.39(1)(a) (i) of the <i>Acts Interpretation Act 1954 (Qld)</i>	Yes s.50(1)(a)	Yes s.247(1) (a) <i>Legislation Act 2001</i>	Yes s.34(1)(a)	Yes s.40(a)(i)	Not specified — serve on each other party — s.26(1)(b)	Not specified — serve on each other party — s.28(1)(b)
Lodge during normal office hours at person's place of business	Yes s.31(1)(b)	Yes — 'leave at or send by post, telex facsimile or similar facility' s.39(1)(a) (ii) of the <i>Acts Interpretation Act 1954 (Qld)</i>	Yes s.50(1)(b)	Yes s.247(1) (e)	Yes s.34(1)(b)	Yes s.40(a)(ii)	N/A	N/A

Type of Service	NSW	Qld*	Vic	ACT#	SA	Tas	WA	NT
Deliver or send by post/fax to person's place of business	Yes s.31(1)(b) and (c)	Yes service on body corporate — s.39(1)(b) of the <i>Acts Interpretation Act 1954 (Qld)</i>	Yes s.50(1)(c)	Yes s. 247(1)(b) and (c)	Yes s.34(1)(c)	Yes s.40(a)(ii) and (iii)	N/A	N/A
Send by email	Yes s.31(1)(d)	Not specified	Not specified	Yes s.247(1)(d)	Not specified	Yes s.40(a)(iv)	N/A	N/A
As provided in construction contract	Yes s.31(1)(e)	Yes s.103(1)	Yes s.50(1)(e)	Not specified	Yes s.34(1)(e)	Not specified	Not specified	Not specified
Other method prescribed	Yes s.31(1)(d1)	N/A	N/A	Service of docs on body corporate s.248	Yes s.34(1)(d)	By another agreed electronic method — s.40(a)(v)	N/A	N/A
Other referenced legislation <sup>^</sup>	N/A	s.103(2) refers to <i>Acts Interpretation Act 1954</i>	N/A	s.15(1) — Payment Claim— refers to <i>Legislation Act 2001</i>	N/A	N/A	N/A	N/A

\* Service of notices requirements under the Queensland Act operate in conjunction with the *Acts Interpretation Act 1954 (Qld)*.

# Service of notices requirements under the ACT Act operate in conjunction with the *Legislation Act 2001 (ACT)*.

<sup>^</sup> **Note:** This table is not exhaustive and simply highlights other laws specifically referenced in the security of payment legislation for the purpose of service of notices. Other relevant laws, such as 'Acts Interpretation' and 'Electronic Transactions' Acts, may exist in each jurisdiction but are not referenced in the security of payment legislation.

### Service of documents by email

In addition to the security of payment laws, legislation relating to electronic transactions may also apply to service of documents by email. For example, in NSW, section 13A of the *Electronic Transactions Act 2000 (NSW)* applies to determine when an electronic communication is deemed as being received by the recipient.<sup>712</sup> The NSW Supreme Court considered the possible application of section 13A in *Reed v Eire*.<sup>713</sup> The plaintiff challenged the adjudicator's decision on the basis that he wrongly held that service of the payment claim by email was effected on 7 November 2008 (when the email was opened by the defendant) instead of 6 November 2008 (when the email was sent by

<sup>712</sup> Section 13A(1)(a) of the *Electronic Transactions Act 2000 (NSW)* provides that the time of receipt of an electronic communication 'is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.' However, the adjudicator in *Reed v Eire* [2009] NSWSC 678 was not provided with any evidence as to whether the email had reached the email server.

<sup>713</sup> [2009] NSWSC 678.

the plaintiff). If service had occurred on 6 November 2008, it would have resulted in the defendant's payment schedule being served outside of the 10-business-day timeframe. While noting that the adjudicator had not considered the application of section 13A, Macready AsJ held that the adjudicator's finding that service occurred on 7 November 2008 could not be challenged because even if it was erroneous, it was *bona fide* and in accordance with the rules of natural justice.<sup>714</sup> Nonetheless, the case illustrates that where a contractual term or the relevant legislation provides for service of documents via email, the issue of the precise time of service of documents will continue to arise.

### Other forms of electronic service

The use of other emerging technologies has also presented issues regarding service of documents. In *Conveyor & General Engineering v Basetec (Conveyor & General Engineering)*<sup>715</sup>, Basetec served an adjudication application by emailing Conveyor & General Engineering's (CGE) solicitors two links to Dropbox files which contained Basetec's written submissions in support of the applications.<sup>716</sup> Despite the fact that CGE did not access the Dropbox files and read the submissions until the time for response had passed, the adjudicator accepted the application and found in favour of Basetec. On appeal to the Supreme Court of Queensland, McMurdo J found that the adjudication application had not been properly served and the adjudicator's decision was of no effect.<sup>717</sup> McMurdo J considered the relevant provisions of the Queensland Act, the *Acts Interpretation Act 1954* and the *Electronic Transactions (Queensland) Act 2001* (ETQA) and found that although the parties had previously exchanged documents via Dropbox, CGE had not consented to service of an adjudication application by Dropbox and that Dropbox is not an 'electronic communication' within the definition of the ETQA.

McMurdo J acknowledged that the actual service does not require the recipient to read the document, but:

... it does require something in the nature of a receipt of the document. A document can be served in this sense although it is in electronic form. But it was insufficient for the document and its whereabouts to be identified absent something in the nature of its receipt. The purported service by the use of the Dropbox facility may have been a practical and convenient way for CGE to be directed to and to use the documents. But at least until 2 September 2013 (when Mr How became aware of the contents of the Dropboxes), it did not result 'in the person to be served becoming aware of the contents of the document.'<sup>718</sup>

Delivery of an adjudication application that was saved on a USB and enclosed under a covering letter was also held not to constitute effective service in *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd t/as Total Concept Group* [2017] NSWSC 194. The reasoning of Hammerschlag J is worth considering in detail:

Section 17(3)(a) requires an adjudication application to be in writing. Section 17(5) requires copy of it to be served on the respondent. It is plain that what is served on the respondent must itself be in writing.

The significant issue is whether delivery alone of a USB stick constitutes service of something in writing for the purpose of s17(5).

<sup>714</sup> Macready AsJ followed the reasoning of Rein J in *JAR Developments Pty Ltd v Castleplex Pty Ltd* [2007] NSWSC 737.

<sup>715</sup> [2014] QSC 30.

<sup>716</sup> Dropbox is one of many Internet facilities that allows users to upload files to an online folder and share access to the folder with other user(s). It obviates issues associated with emailing large electronic files.

<sup>717</sup> *Conveyor & General Engineering v Basetec* [2014] QSC 30, [33], [38].

<sup>718</sup> *Conveyor & General Engineering v Basetec* [2014] QSC 30, [37].

Section 21 of the Interpretation Act 1987 (NSW) provides, relevantly:

(1) In any Act or instrument:

‘writing’ includes printing, photography, photocopying, lithography, typewriting and any other mode of representing or reproducing words in visible form.

In my opinion, service (that is, delivery) of the USB stick is not to be equated with service of writing stored on it. Additionally, whatever it is that was served by its delivery, it was not in writing within the meaning of s17(5), as affected by s21(1) of the Interpretation Act.

Absent some relevant statutory expansion or limitation of the notion (and there is none here), a document will, in the ordinary meaning of the word, be served if the efforts of the person who is required to serve it have resulted in the person to be served becoming aware of the contents of the document: *Capper v Thorpe* (1998) 194 CLR 342 at 352. In the case of an email transmission, or where documents are uploaded to a site such as Hightail, it cannot be said that they have been served until they have been accessed: *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1Qd R 265 at 271 [32]–[34].

A fortiori, delivery of a USB stick will not suffice.

It does not represent or reproduce words in visible form in the way s21 of the Interpretation Act has in mind. Looking at it, one sees only a small piece of plastic, perhaps with some circuitry on it. It is a device which, if actioned, is capable of representing or reproducing what is stored on it in visible form.

In order to access what is stored on it, the recipient must take the step of accessing, opening and viewing the files stored on it. To take delivery of a USB stick as service of an instrument stored on it in writing, is as untenable as it would be to take delivery of a compact disc, cassette or vinyl record as itself constituting aural transmission of what is recorded on it.

To access information on a USB stick, the recipient must have compatible technology. This cannot be regarded as an inevitability, even today.

I conclude that delivery alone of a USB stick is not service of a copy in writing for the purposes of s17(5).<sup>719</sup>

## Responses from stakeholders

The Review did not specifically seek stakeholder feedback on the manner in which notices should be served. However, all stakeholders were provided the opportunity to raise any additional concerns with the current legislative models. Despite this, the Review did not receive any comments on this matter.

## Discussion and recommendation

There are two competing policy considerations at play here. On the one hand, is the court’s emphasis on receipt of documents in writing outdated given the practices of modern commerce and in particular the increasing use of electronic communication? How does such emphasis sit with *McMurdo J’s* observation in *Conveyor & General Engineering*<sup>720</sup> that actual service does not require the recipient to read the document?

On the other hand – given the prescriptive nature of the security of payment legislation and in particular the requirement that the service of the various prescribed notices and documentation be strictly complied with in relation to the specified timeframes – is it not appropriate for the law to

<sup>719</sup> *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd t/as Total Concept Group* [2017] NSWSC 194, [72]–[81].

<sup>720</sup> *Conveyor & General Engineering v Basetec* [2014] QSC 30



continue to require that service is only affected once the recipient becomes aware of the content of the document?

Given these different policy considerations, I believe that it would be preferable for the law to continue to adopt a conservative approach on this issue by requiring that the person serving a document ensure that the recipient becomes aware of the document. This does not mean that a document forwarded by deposit in a document exchange box cannot constitute actual receipt,<sup>721</sup> but as seen in *Conveyor & General Engineering* there can be a delay on when the document is accessed. Accordingly, the safest method of effecting service is to deliver the printed documents, whether to the recipient personally or to the recipient's ordinary place of business. Whereas section 31 of the NSW Act also permits the sending of any notices by post and facsimile,<sup>722</sup> reliance on prompt postal delivery can be problematic as can be the transmission of large volumes of documentation by facsimile. Importantly, however, the current legislation enables the parties to agree in their construction contract as to the manner in which service of notices are to be made and I believe this practice should continue.<sup>723</sup> In the circumstances and notwithstanding potential issues associated with service of notices by post and facsimile, I consider that the various methods of service as set out under section 31 of the NSW Act remains a suitable model.

#### **Recommendation 75:**

The legislation should provide for a notice to be served on a person by:

- a) personal delivery
- b) post
- c) facsimile
- d) email, or
- e) any other method as provided in the construction contract or by regulations.

Section 31 of the NSW Act provides a suitable model.

## **15.2 Acts of intimidation and retribution**

Various previous reviews have considered the anecdotal evidence of coercive and threatening conduct by principal contractors against subcontractors that if they invoke, or proposes to invoke, their statutory rights to make a payment claim they will face retribution (i.e. not be engaged for a project or not receive further work).<sup>724</sup>

Averting threats of retribution was one of the key arguments by Collins when recommending the abolition of the requirement that progress payment claims be endorsed with the words required under the previous Section 13(2)(c) of the NSW Act. The Wallace Review, however, in examining the same issue recommend against amendment of the legislation as the changes suggested would not reduce the harassment and intimidation experienced by the subcontractor.

<sup>721</sup> Refer to *Howship Holdings P/L v Leslie and Anor* [1996] NSWSC 314.

<sup>722</sup> Most of the other legislations contain an equivalent provision — for example, see s. 50(1)(c) of the Victorian Act (but note that a facsimile received after 4pm is to be treated as having been received on the next day); s. 103 of the Queensland Act; and s. 34 of the SA Act.

<sup>723</sup> See, for example, s. 31(1)(e) of the NSW Act.

<sup>724</sup> See for example the Collins Review, Wallace Review, Moss Review and Senate Committee Report.

The SERC Inquiry noted the concerns submitted by industry participants and accordingly recommended that the security of payment laws be amended so as to make it a criminal offence to intimidate subcontractors from exercising their statutory rights.<sup>725</sup>

Despite the various reviews identifying instances of intimidation and retribution against subcontractors who use or seek to use security of payment laws, such actions do not currently constitute an offence and are not subject to criminal or civil penalties under any security of payment law.

However, on 5 July 2017, the South Australian Government introduced the SA Review Bill 2017 which would make it an offence to assault, threaten or intimidate a person in relation to payment claims made under the SA Act.<sup>726</sup> The new offence provision is as follows:

32A – Offence relating to assault etc. in relation to progress payments

A person must not directly or indirectly assault, threaten or intimidate, or attempt to assault, threaten or intimidate, a person in relation to an entitlement to, or claim for, a progress payment under this Act.

Maximum penalty:

- (a) in the case of an individual – \$50 000 or imprisonment for 2 years or both;
- (b) in the case of a body corporate – \$250 000.

This amendment follows from the Moss Review which noted anecdotal evidence of retribution within the South Australian construction industry against subcontractors who invoke the SA Act. While Mr Moss did not make any recommendation regarding retribution, a follow-up review by the SA SBC formed the view that ‘... this behaviour is far more widespread than the industry admits’ and that ‘[i]n light of this, the [SA] SBC believes a legislative provision carrying penalties is required to deal with this issue’.<sup>727</sup>

Notably, the proposed offense for assault etc. in relation to progress payments under the SA Review Bill 2017 only applies in relation to ‘an entitlement to, or claim for, a progress payment under this Act’. Therefore, it must first be established that there is a ‘construction contract’ in place between the parties and that the plaintiff is entitled to a progress payment and/or has made a claim for a progress payment. That is, it appears that the offence would only apply to current subcontractors and not prospective subcontractors.

## Responses from stakeholders

During the consultation process, stakeholders were invited to express views on how acts of intimidation and retribution in relation to the use of the security of payment legislation should be handled. The majority of industry stakeholders<sup>728</sup> agreed that intimidation and retribution against subcontractors who use security of payment legislation is a live issue in the construction industry and needs to be urgently addressed.

<sup>725</sup> SERC Inquiry Report, op cit, p.142, paras 9.34–9.35.

<sup>726</sup> The Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) has now lapsed, but it remains the SA SBC’s position that the proposed changes will be re-recommended to the Government of the day post the March 2018 election.

<sup>727</sup> South Australia Small Business Commissioner (2016), *Proposed changes to the Building and Construction Industry Security of Payment Act 2009 and other initiatives to improve payment to subcontractors in the building and construction industry: Consultation Paper*, June 2016, p. 10.

[https://www.sasbc.sa.gov.au/files/540\\_consultation\\_paper\\_2016\\_06\\_17.pdf](https://www.sasbc.sa.gov.au/files/540_consultation_paper_2016_06_17.pdf)

<sup>728</sup> Including CFMEU, MPA NSW, MEA, AMCA, AMCA SA and AIB.

During consultations, particularly with subcontractor representatives, I heard of several experiences where threats and intimidation had been used against subcontractors to prevent them from exercising their rights under security of payment legislation. As would be expected, none of these experiences can be attributed first hand for fear of reprisal, however as noted by NECA:

Subcontractors have reported cases where they have been asked during contract negotiations whether they intend on using SOP procedures, with an implicit understanding that such an intention would result in the insertion of more onerous payment terms within the contract. Firms may be similarly discouraged by thinly veiled threats of being blacklisted from future tenders.

However, there were quite different views about what should be done to address this issue. Some stakeholders, such as AMCA, suggested that the inclusion within legislation of civil penalties for acts of intimidation and retribution would serve as a deterrent for such conduct, while others, including Adjudicate Today and Subcontractors WA advocated for criminal penalties.

Yet many stakeholders<sup>729</sup> also noted that legislating to outlaw such conduct, or making such conduct a criminal offence, would be a difficult exercise, particularly in respect to setting out the necessary evidentiary requirements. As recorded by MBA SA during a meeting of the Master Builders SA Subcontractors Committee, one subcontractor was quoted as saying, '[h]ow the hell are you going to prove it? He's not going to use words to that effect and send it to you in an email.'

Others, such as the CFMEU, also noted that making acts of intimidation and retribution a criminal offence would also increase the burden of proof thereby making prosecutions more difficult, and accordingly advocated for the lower burden of proof under civil proceedings.

Some subcontractor organisations, such as NECA, advised that their members are '... hesitant to utilise the security of payment legislation to recover moneys owed due to concerns about losing future work and damaging relationships', but such fears are different from members experiencing threats of intimidation or retribution.

Others, including MBA NSW, submitted that there may be a number of legitimate reasons as to why a head contractor may not engage with a particular subcontractor on future construction projects and that it would be unreasonable to compel a head contractor to give further work to a subcontractor in such circumstances. As noted by Stockland, it is not easy to distinguish between acts of intimidation and a party's right to choose its own subcontractors based on a working relationship.<sup>730</sup>

While SoCLA agreed that all construction industry participants should be able to access their legal rights, they were concerned that:

... as a matter of practicality, the use of a statutory offence is unlikely to provide an efficient mechanism to respond to such conduct ...

The Society is of the view that there are significant practical and legal difficulties with framing the proposed offence to enable it to operate fairly and evenly for all parties.

Absent objective evidence enabling the drafting a proper legal criterion for any remedy, the Society supports the use of existing legal remedies for acts of intimidation and retribution but not the creation of additional regulatory burden on the construction industry.<sup>731</sup>

<sup>729</sup> Including CFMEU, NECA, NECA SA/NT, MBA NSW, MBA SA, QMBA, MEA, HIA Qld and the Law Council of Australia.

<sup>730</sup> Stockland, written submission, p. 6.

<sup>731</sup> SoCLA, written submission, p. 15.

Several stakeholders<sup>732</sup> suggested that acts of intimidation and retribution could be dealt with either by the ABCC and/or through the Building Code. For example, NECA suggest the Australian Government should consider granting the ABCC power to sanction or exclude from Australian Government contracts those head contractors who have repeatedly failed to make payments or return retention money within a specified time to subcontractors.

Regulators' responses were mixed about acts of intimidation and retribution in relation to the use of security of payment legislation. The South Australian Regulator was of the view that such acts should be treated similar to a criminal offence, and, as already noted, legislation which does this was introduced to the South Australian Parliament. ACT officials noted that the Criminal Code can be used against blackmail, unconscionable conduct, and false and misleading conduct. The Tasmanian Regulator said that this is not really an issue because of the size of the industry within its jurisdiction, and that where such acts occur they would generally be resolved by the market.

The Victorian Government agreed that claimants should not suffer detriment by virtue of having exercised their rights under security of payment laws, but acknowledged that successfully establishing the necessary evidence can be a difficult task.<sup>733</sup> Notably, the Victorian Government suggested that better models may be the protections contained in Chapter 3 of the *Fair Work Act 2009* (Cth) (Fair Work Act) or the prohibitions on discriminatory conduct in section 78A–E of *Victoria's Occupational Health and Safety Act 2004*.

Both the Resolution Institute WA Chapter and the LCA supported dealing with threats and intimidation through a model similar to that provided in the Fair Work Act. On this the LCA stated:

The imbalance of power between head contractor and subcontractor is not unique to the construction industry. Where a subcontractor's enforcement of its statutory rights results in criminal charges against the head contractor for intimidation, there is a risk that the subcontractor will receive an unfair reputation and be denied further work from various other head contractors within the industry.

Such discrepancies in power are also dealt with by the Fair Work Commission between an employer and employee. In these instances, a compulsory confidential conciliation is conducted prior to arbitration. Little or no formal evidence is required to be provided to the conciliator at this stage. If the matter is settled during the conciliation, the parties are required to sign a settlement deed containing confidentiality provisions. These provisions ensure that the employee is able to search for further work without its future employer knowing that an Unfair Dismissal Application was ever filed.

A similar procedure may be appropriate for the construction industry where the parties can elect to go to a confidential conciliation after a payment claim and payment schedule have been served. The conciliation can be conducted over the phone and the matters kept confidential.

The Resolution Institute WA Chapter made the following observation:

... [the Fair Work adverse action provisions] impose on an employer the obligation of proving that it has not taken adverse action against an employee for a prohibited reason. It is noted that the exercise of rights under these provisions of the Fair Work Act contemplate conciliation by Fair Work before proceedings can be commenced. There should be safeguards around the possibility of frivolous allegations of adverse action by principals.

Stakeholders references to the Fair Work Act are intended to refer to Part 3.1 of that Act, which provides protections for employees against 'adverse action'. Under the Fair Work Act, disputes are dealt with by the Fair Work Commission as follows:

<sup>732</sup> Including MBA NSW, HIA Qld, NECA and MBAV.

<sup>733</sup> Victorian Government, written submission, p. 7.

- Dismissal disputes — If a dispute involves a dismissal, the Commission **must** convene a private conference to deal with the dismissal.
- Non-dismissal disputes — If a dispute does not involve a dismissal, the Commission will convene a private conference to deal with the dispute if both parties agree to participate. If one or both of the parties do not agree to participate in the conference, the applicant can choose to make an application to a court to deal with the matter.

Part 6 of the *Model Work Health and Safety Act (2011)* (Model WHS Act) provides similar protections for employees against ‘discriminatory, coercive and misleading conduct’. Indeed, the work health and safety (WHS) model is based on the Fair Work Act model; however, WHS offences are prosecuted through the courts.

The Fair Work Act uses civil remedies only (i.e. they are not criminal offences). However, the Model WHS Act allows for both civil and criminal proceedings with a corresponding higher burden of proof for criminal cases.

Both models make it an offense to engage in, or threaten to engage in, adverse action or discriminatory, coercive and misleading conduct against both **current** and **prospective** employees, although in the case of prospective employees the case would arguably be significantly more difficult to prove.

As previously noted, the SA Review Bill 2017 appears to only apply to circumstances where a principal contractor has threatened or intimidated a current subcontractor regarding their rights under the security of payment legislation. Arguably this does not address a key stakeholder concern where acts of intimidation and retribution are made prior to engagement for a project and/or in relation to future work. As noted in the Second Reading speech for the SA Review Bill 2017:

... the Bill inserts penalty provisions against ‘persons’ (natural or corporate) utilising harassment, intimidation, coercion or otherwise applying undue influence or pressure to **a person that is seeking payment under these laws** [emphasis added].<sup>734</sup>

### Discussion and recommendation

From my lifelong experience in the construction industry, I know that this is a live issue and very much reflects the imbalance of power between the contractors and subcontractors. Nonetheless, there is a difference between a head contractor threatening a subcontractor that unless it withdraws its progress payment claim – made under the security of payment legislation – it will not receive any future work; and a head contractor conveying to a subcontractor that its pattern of repeatedly submitting statutory claims is not conducive to the maintenance of an ongoing commercial relationship. Clearly, conduct of the former nature is unacceptable, whereas conduct of the latter might well be regarded as not unreasonable. Sometimes a subcontractor who inundates a head contractor with numerous notices and questionable claims may be regarded as a ‘high-maintenance’ person and not a party that the head contractor would feel comfortable in partnering with on future projects. Commercial judgements based on such dealings are quite understandable and communicating such sentiments to a subcontractor should not be considered an act of intimidation or retribution.

The suggestion that this issue could be approached in a manner similar to that adopted under Part 3.1 of the Fair Work Act, which provides protections for employees against ‘adverse action’, is not helpful in the context of a relationship between two commercial parties. The notion of a private conference dealing with the parties in dispute is not practical. This is because a payment dispute

<sup>734</sup> South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2017 (The Hon. MLJ Hamilton-Smith, Minister for Small Business).

may involve complex contractual and legal issues and the mechanism that the security of payment laws have adopted is to process such disputes through rapid adjudication where the adjudicator is a person having extensive industry background.

Yet, as outlined above, there is no doubt that acts of intimidation and retributive conduct exist within the industry and that such conduct needs to be addressed. Not to do so would be to disregard the dilemma that subcontractors regularly face – to either not pursue its claims for progress payment for the work it has carried out, or to pursue such claim but face uncertainty in respect to future work. That is why I endorse the inclusion of a provision in the SA Review Bill 2017 making such conduct an offence. True, the task of successfully prosecuting a party that has breached the statutory offence will not be easy but, at the very least, the codification of such an offence ought to improve industry conduct. Such a provision should therefore form part of the security of payment legislation.

I should also observe that the SA Bill has been drafted so as to specifically deal with threats “in relation to an entitlement to, or a claim for a progress payment under the Act” and that this implies the existence of a construction contract and the exclusion of a prospective contractual relationship. Clearly the Bill recognises the difficulty of establishing the necessary evidence associated with allegations by a party that it had been deprived of prospective contracts because it had previously made a payment claim under the Act.

#### **Recommendation 76:**

The legislation should make it an offence to use coercive and threatening conduct, whether directly or indirectly, in relation to a person’s statutory rights to, or claim for, a progress payment under the legislation.

Clause 32A of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model.

## **15.3 Data collection and reporting**

### **Data collection**

The security of payment legislation in each jurisdiction provides for the collection of data relating to making adjudication applications. Typically, this occurs through a requirement for the adjudicator or ANA to provide any relevant information requested. Depending on the jurisdiction, this request can be made by the relevant Minister, the Regulator or other specified office holder.

With the exception of Queensland and Western Australia, all jurisdictions provide that additional information may also be requested.<sup>735</sup> For example, section 28(5) of the NSW Act provides that:

An authorised nominating authority must provide the Minister with such information as may be requested by the Minister in relation to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).

The Victorian, South Australian, Tasmanian and ACT Acts all include provisions that allow for similar information to be requested, although section 43B of the Victorian Act also includes a list of examples as to what information may be requested:

<sup>735</sup> See s. 35 of the ACT Act; s. 28(5) of the NSW Act; s. 43B of the Victorian Act; s. 38(2)(e) and (g) of the Queensland Act; s. 36(g) of the WA Act; s. 29(7) of the SA Act; s. 33 of the Tasmanian Act; and s. 53A of the NT Act.



- (1) An authorised nominating authority must provide the Authority with such non-identifying information as may be reasonably requested by the Authority in relation to the activities of the authority under this Act.
- (2) Information requested under subsection (1) may include information regarding –
  - (a) the nomination of adjudicators and appointment of review adjudicators; and
  - (b) the assessment of the eligibility of persons to be adjudicators; and
  - (c) the fees charged by the authorised nominating authority; and
  - (d) the fees charged by adjudicators.<sup>736</sup>

However, it should be noted that the Victorian Act further requires that such information be de-identified.

In the Northern Territory, section 53A provides that ‘the adjudicator must, in accordance with the Regulations, give the Registrar information prescribed by the Regulations’. The Construction Contracts (Security of Payments) Regulations (NT) prescribe a further 12 items of information that adjudicators are required to give to the Registrar.

### Data reporting

Most regulators publish reports on the data they collect through adjudicators’ decisions or otherwise. NSW, Victoria and South Australia do not currently have any legislated requirements for the Regulator to report on the operation of the security of payment legislation. Despite this, NSW, Victoria and South Australia each publish annual data on adjudication decisions. In the case of NSW and Victoria, this reporting is quite extensive and covers the number of adjudication applications by value range and region, claimed versus adjudicated amounts by value range, breakdowns of claimant and respondent types (e.g. subcontractor, head contractor etc.), and adjudication fees. The South Australian information is less detailed and focusses mainly on the number of applications, adjudicated versus claimed amounts and the number of adjudications.

The WA and NT Acts both require annual reports on the ‘operation and effectiveness’ of the Act for each financial year.<sup>737</sup> In the case of Western Australia, such annual reports are similarly detailed to those in NSW and Victoria, while in the Northern Territory the published data is restricted to the numbers of adjudication applications, determinations and withdrawals and the number of adjudicators registered during the period.

Queensland is the only jurisdiction which specifically provides that a function of the Regulator is ‘to collect statistical data and other information relevant to the administration of the registry for the Commissioner’s report to the Minister under section 41’. Section 41 requires that the QBC Commissioner must, at the end of each financial year, give to the Minister a report which must contain:

- a) a review of the operation of this Act and the registry during the preceding financial year; and
- b) proposals for improving the operation of, and forecasts of the workload of, the registry in the present financial year.<sup>738</sup>

The annual report under section 41 of the Queensland Act may be published in the QBCC Annual Report or provided in a separate annual report but is in either case publicly released. In practice,

<sup>736</sup> See s. 43B of the Victorian Act.

<sup>737</sup> See s. 52 of the WA Act and s. 63(1) of the NT Act.

<sup>738</sup> See s. 41(1) of the Queensland Act.



Queensland adjudication data is published by the QBCC in a series of monthly and annual statistical reports as well as in the QBCC Annual Report. The Queensland Bill 2017 retains these reporting requirements.

The Tasmanian legislation requires the Regulator (the Security of Payments Official) to submit to the Director of Building Control an annual report consisting of:

- a) a report in respect of the operation of the Act in the previous calendar year; and
- b) details of the fees and expenses paid to adjudicators during the calendar year; and
- c) the recommendations, if any, of the Official, as to how this Act, or operations under this Act, could be improved.<sup>739</sup>

However, it appears that such annual reports are not published by the Tasmanian Government.

Similar to Tasmania, in the ACT section 35 of the ACT Act provides that:

- (1) An authorised nominating authority must provide a report to the Minister on request.
- (2) A report must include information about –
  - (a) the activities of the authorised nominating authority under the Act; and
  - (b) costs and expenses charged by the authority for any service provided by the authority in relation to an adjudication application made to the authority.

Despite this provision, it seems that the ACT Government also does not publish any such data.

### Responses from stakeholders

Stakeholders were not specifically asked for feedback on this matter but were provided the opportunity to comment on aspects of the security of payment legislation they identified as requiring further intervention or amendment. No stakeholders raised any direct concerns with the relevant provision of information sections in the various legislatures. However, it was often noted by stakeholders during the consultations that there were aspects of the legislation that were difficult to compare across jurisdictions because of differences in data and reporting.

### Discussion and recommendation

The requirement for ANAs and adjudicators to provide adjudication decisions to the Regulator is necessary for the good governance of the security of payment system and I see no need to for any change in this regard. I am also of the view that with the exception of the Northern Territory, the relevant provisions in each jurisdictions' legislation currently provide the necessary flexibility for the Regulator or other authorised person to request other relevant information. The approach in the NT to prescribe detailed information requirements in the regulations removes the flexibility for the Minister, Regulator or other office holder to request other information not already listed.

Further, it is clear that adjudicators' determinations provide much of the data that is currently used by jurisdictions to review and report on the operation of the security of payment legislation, including the claimed and adjudicated amounts and the types of parties involved (e.g. head contractor, subcontractor etc.) However, other information such as the adjudicator's fees may not form part of that documentation. Hence, some jurisdictions specify that information required to be provided to the Regulator by the ANA or adjudicator to the Regulator/Minister includes information as to the fees charged by the ANA/adjudicator.

<sup>739</sup> See s. 38(3) of the Tasmanian Act.

Compared to other jurisdictions, I find that the approach in section 43B of the Victorian Act, which incorporates a non-exhaustive list of examples of the types of information that may be requested, provides a more balanced and flexible approach and as such should form the basis for a provision regarding the submission of information by ANA's/adjudicators. Whilst the Victorian provision requires any information to be provided in a 'non-identifying' format, it is noteworthy that that this requirement does not appear to have restricted the VBA's capacity to publish detailed information on the operation of the Act and adjudicators' decisions. Indeed, such reports are substantially similar to those produced in NSW. If additional guidance as to what information ANAs/adjudicators are required to provide becomes necessary, this is probably better dealt with administratively rather than through legislation.

As per the Victorian Act, it seems reasonable that the information should also be able to be requested by the Regulator rather than the Minister or other office-holder. While in practice such information is likely requested by the Regulator, provisions that provide for the information to be requested by the Minister unnecessarily complicate the matter.

Although not all jurisdictions publish annual data on adjudications made under the security of payment legislation, it is clear that the majority do and that this is intended to not only provide transparency in the operation of the legislation but also to assist in assessing its overall effectiveness. For this reason, I see benefit in the security of payment legislation including a provision similar to section 52 of the WA Act to require an annual report detailing the operation and effectiveness of the legislation to be provided to the Minister. Other reporting requirements, such as recommendations or proposals for how the legislation can be improved as appear in the Queensland and Tasmanian Acts, would seem unnecessary given that this would typically fall within the functions of the relevant Minister to request without specific legislative impetus. However, the security of payment legislation should also require such annual reports to be published.

During the course of this Review it has also become clear that there is some inconsistency in how the various jurisdictions report on data regarding the performance of their security of payment regimes. For example, there is some variation in the value ranges used when reporting on the number of adjudication applications made. Some jurisdictions also report adjudication fees as a percentage of the average claimed amount for different value ranges, while others simply state the overall mean, median, minimum and maximum fees charged. There are also differences in the reporting period with some jurisdictions reporting on financial years and others on calendar years (e.g. Tasmania). This inconsistency makes it difficult to make meaningful comparisons across jurisdictions.

Access to consistent and reliable data on the operation and effectiveness of the legislation in each jurisdiction would greatly assist in the development and implementation of policies to address the security of payment problem at a national level. While there has been some improvement recently in the consistency of reporting across jurisdictions (e.g. NSW, Victoria, Queensland and Western Australia), there is still room for improvement.

Therefore, with a view to ensuring that the recommendations of this Review result in improved consistency in the security of payment legislation between jurisdictions, I recommend that the jurisdictions cooperate to develop a consistent set of data collection and reporting standards which will enable cross-jurisdictional comparisons of the annual performance of the security of payment legislation in each jurisdiction. Such standards should be based on the NSW form of reporting.

**Recommendation 77:**

The 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.

Section 43B of the Victorian Act provides a suitable model.

**Recommendation 78:**

The legislation should require the Regulator to publish an annual report on the operation and effectiveness of the legislation.

**Recommendation 79:**

The jurisdictions should cooperate to develop a consistent set of standards for reporting data collected from authorised nominating authorities/adjudicators about the use of security of payment legislation. The reporting of such information should be based on the NSW format and published annually.

## 15.4 Special mechanisms for small business

Whereas all jurisdictions have enacted security of payment legislation to enable contractors to refer disputed payment claims to rapid adjudication, the question is often asked whether a separate mechanism should be established to better deal with payment disputes involving small businesses.

The 2014 Evans Review specifically considered this issue and concluded that the objectives of the WA Act would not be significantly improved by amendments to the Act, or associated legislation, which create separate dispute resolution services provided by the WA Building Commission.<sup>740</sup>

### Responses from stakeholders

During the consultation phase, stakeholders were invited to express views as to whether the current security of payment laws should be enhanced so as to provide small business with other dispute resolution mechanisms.

Only a few stakeholders<sup>741</sup> supported a special mechanism for small business. For example, AMCA say that several of their smaller members have cited the complexity of the existing system as a barrier to use.

Many stakeholders<sup>742</sup> did not support a special mechanism for small business because this would add higher complexity and confusion for industry participants. QMBA and HIA Qld noted that there is already a mechanism for small business claims under the Queensland Act. MEA and MPAQ referred to the Queensland Civil and Administrative Tribunal as an effective mechanism for the resolution of small claims.

Some stakeholders<sup>743</sup> consider that the current security of payment laws provide an effective mechanism for addressing small claims. Others<sup>744</sup> disagree, saying the legislative regime has become overly complicated and prescriptive. AMCA contend that the security of payment laws require a level of legal understanding that is beyond many smaller industry participants, and that some of its

<sup>740</sup> Evans Review, op cit, see section 3.6, pp. 35-38.

<sup>741</sup> Including MBA NSW, MPA NSW, AMCA and AIB.

<sup>742</sup> Including NECA, QMBA, HIA Qld, Subcontractors Alliance, MPAV, MBA SA, AMCA SA, HIA and MBT.

<sup>743</sup> Including NECA, AMCA SA, HIA Qld, MPAV and HIA.

<sup>744</sup> Including MBA NSW, MPA NSW, Subcontractors Alliance and AMCA.

members have even said, based on past experience, that they are disinclined to use the process again, especially for smaller claims.

Similarly, regulators held differing views, referring to the existing laws in their respective jurisdiction. For example, the SA SBC believes that technical experts could assist in resolving disputes and highlighted the Commissioner's existing powers to compel people to come to the table and resolve disputes with a skilled mediator. The Northern Territory also agreed security of payment laws could be enhanced to provide small business with other dispute resolution mechanisms, noting that it already has a small-claims scheme intended for use by small business, whereby a person is trained in alternative dispute resolution under the *Community Justice Centre Act 2005* (NT). NSW said that mediation is not suitable for a fast-track system as it slows down the process.

Stakeholders were also asked whether the costs associated with adjudications deter applications from small parties. The majority of stakeholders<sup>745</sup> agreed that the cost associated with the adjudication process does in fact deter smaller parties from making claims under the security of payment legislation. Some stakeholders<sup>746</sup> suggest capping fees, at least for small claims, as this would provide parties with a greater level of certainty as to the costs that would be associated with the making of claims.

In contrast, some stakeholders, including MBAV and NECA, were of the view that the current fees in their own jurisdiction are fair and reasonable, and do not act as a deterrent for small claims. However, NECA said the 2014 amendments to the Queensland Act have made the system more costly through the charging of application fees and for the need for parties to seek legal advice in order to ensure their adjudication applications are valid.

Among those jurisdictions that responded, the ACT and Northern Territory agreed that costs associated with adjudications tend to deter applications from small parties, with the ACT suggesting a fixed fee for small claims could avoid any deterrence issues. NSW said it could be difficult to prescribe fees given the different types of claims, but that it could potentially work for smaller claims.

### Discussion and recommendation

The largest ANA's website, Adjudicate Today, discloses that it does not charge an application fee but that the adjudicators on its panel offer fixed price adjudication for small claims:

- Up to \$15 000 — fixed fee of \$1 089
- From \$15 001 to \$25 000 — fixed fee of \$2 178
- From \$25 001 to \$40 000 — fixed fee of \$3 300.

Given that ANAs are in competition, it is not surprising that other ANAs have a similar fee arrangement. It is unlikely that alternative dispute mechanisms would be able to offer a more cost-effective means of arriving at a binding decision. True, compulsory mediation or conciliation may facilitate the resolution of a dispute, but it cannot be the basis upon which a binding decision will be able to be reached on every occasion. Insofar as government may offer such services free of charge, then this in turn raises issues of whether it is appropriate to expect the community to subsidise the costs for providing a mechanism to resolve a private commercial dispute.

It should also be borne in mind that disputed payment claims for (relatively) small amounts are not necessarily straightforward and can involve complex issues and may therefore require expending

<sup>745</sup> Including MBA NSW, QMBA, Subcontractors Alliance, HIA Qld, AMCA, HIA and AIB.

<sup>746</sup> Including AMCA, HIA and AIB.

some time to arrive at a proper, well-reasoned written decision. Further, if a claimant has been successful, then more often than not an adjudicator will apportion adjudication fees to be paid by the respondent. Accordingly, a well-prepared claimant who submits a progress payment claim may not necessarily be required to meet the adjudicator's fees.

I have already recommended that in respect of an adjudication application for a disputed payment claim of up to and including \$25 000, the Regulator should prescribe a fixed capped fee.<sup>747</sup> If my recommendation were to be accepted there would not be anything to prevent ANAs offering adjudication fees for such small payment claims at a rate below the capped fee. Accordingly, it seems that a legislative regime that enables ANAs to provide parties with not only free advisory services, but also the benefit of price competition amongst ANAs, would offer the best of all worlds – a service delivered by the private sector but at fees capped at rates set by the Regulator. From my experience, it is unlikely that an alternative dispute mechanism would provide a small business claimant with a more rapid and cost-effective means of delivering a binding decision.

### **Recommendation 80:**

There should **not** be a separate mechanism besides the security of payment legislation to specifically deal with the enforcement of disputed progress payment claims.

## **15.5 Retentions and bank guarantees**

Many stakeholders representing the interests of subcontractors have conveyed the difficulties associated with the recovery of retention moneys held by head contractors or the release of bank guarantees.

It has been put to the Review that towards the end of a construction project it is not uncommon for a head contractor to raise dubious issues relating to alleged defects or delays said to have been attributable to the subcontractor's slow progress. Head contractors will then advise subcontractors that the retention moneys that have been withheld will need to be applied to meet the costs of rectifying the debts or for payment of liquidated damages and/or other contractual set-offs. Subcontractors have stated that the fact that such issues only emerge at the end of the project reflects a deliberate strategy of testing the commercial stamina of subcontractors and of their resolve at pursuing the return of the withheld retention moneys.

More often than not, when confronted with claims for defective work and liquidated damages from head contractors, subcontractors consider the costs associated with the recovery of retention moneys makes it not worth their while to pursue retention moneys. This is notwithstanding that the withheld retention moneys may represent the subcontractor's profit margin. Some subcontractors may be able to avoid such issues by providing a bank guarantee in lieu of cash retention, but in order to provide such an instrument, a subcontractor will need to provide security to the bank, which many small-sized subcontractors are unable to do (unless the security provided is their family home). In any event, not being able to get a head contractor to release a bank guarantee means that a subcontractor will continue having to pay the bank charges associated with the bank guarantee as well as limiting the subcontractor's capacity to provide a similar security when chasing new work.

<sup>747</sup> Refer to Recommendation 69 in Section 14.4 of this Report.

### Outcomes on retention moneys from other reviews

The Collins Review also highlighted the extraneous use of retention funds by head contractors.<sup>748</sup> It was in order to address the misuse of the retention moneys designated for subcontractors that Collins recommended that:

- (a) all retention moneys are to be deposited into a trust fund;
- (b) upon agreement between the principal and the head contractor and/or the head contractor and the subcontractor, as the case may be, the funds be paid out;
- (c) retention moneys cannot be used by the holder of those moneys for any purpose, other than the reasons afforded to it under the contract; and
- (d) the security of payment legislation deals with disputes relating to bank guarantee and retention moneys.<sup>749</sup>

In 2013 the NSW Act was amended by the inclusion of section 12A which enables regulations to be made requiring retention moneys be held in trust for a subcontractor and requiring the head contractor who holds retention money to pay the money into a retention money trust account. In 2015, the *Building Industry Security of Payment Regulation* was amended to require head contractors to pay retention moneys into a trust account for construction projects over \$20 million.

It should also be noted that the Collins Inquiry recommended that the NSW Act be amended so as to expand an adjudicator's powers to:

- decide, on an interim basis, disputes concerning bank guarantees and whether or not a party was entitled to cash a bank guarantee, and
- decide on disputes relating to the entitlement, or otherwise, to retain retention sums.<sup>750</sup>

The Wallace Review also recommended that retention and other forms of security be held under a Construction Retention Bond Scheme for all contracts of \$100 000 or greater and that the scheme be administered by the Queensland Building Services Authority (now the QBCC).<sup>751</sup> Mr Wallace opined (correctly, in my view) that the security of payment legislation does entitle a claimant to refer to adjudication a claim to recover retention moneys.<sup>752</sup> Nonetheless, Mr Wallace went on to recommend that the Queensland Act be amended to expressly provide that an adjudicator is able to decide (where applicable) the 'retention amount and/or security to be returned and the date on or before which it is to be returned'.<sup>753</sup> Mr Wallace's recommendation on retention trusts was not implemented by the Queensland Government.<sup>754</sup>

<sup>748</sup> 'The Inquiry has found that many head contractors and builders are using subcontractor retention funds for activities that include:

- paying off the tail end of a previous project
- investing in other business ventures
- paying business overheads and head office wages
- investing funds on the short-term money market
- discretionary personal purchases.

Of course, at the end of the day, in the event of insolvency of the head contractor, as one witness said, 'When they retain the money and they go bust, the retention money goes with them.' Collins Review, p. 113.

<sup>749</sup> Collins Inquiry, op cit, p. 120.

<sup>750</sup> Collins Inquiry, op cit, Recommendation 39.

<sup>751</sup> Wallace Review, op cit, see Recommendation 11.

<sup>752</sup> Wallace Review, op cit, p. 108.

<sup>753</sup> Ibid, p. 109.

<sup>754</sup> Note that section 34 of the Queensland Bill 2017 would require retention amounts to be held in trust.

Significantly, under the WA Act, a payment dispute may include a payment dispute that arises ‘if by the time when any security held, a party under the contract is due to be returned under the contract (and the security has not been returned).’ Further, under section 31(2) of the WA Act, an adjudicator must...

- (a) otherwise, determine, on the balance of probabilities, whether any party to the payment dispute is liable to make a payment or to return any security and, if so...
- (ii) the date on or before which the amount is to be paid, or the security is to be returned, as the case requires (emphasis added).

A similar provision is also included in the NT Act.<sup>755</sup>

### Responses from stakeholders

Differing views were expressed as to whether claims for the release of bank guarantees should be brought within the adjudicator’s jurisdiction. Organisations representing subcontractors favour the adjudicator being able to deal with such claims whereas others disagree.

Stockland contends that the effect of an adjudicator’s decision that a bank guarantee be released would likely cause the respondent to incur significant costs in forcing a contractor to remedy defective work in the absence of holding security’.<sup>756</sup>

Baker McKenzie submitted that ‘so long as unconditional undertakings remain outside an adjudicator’s reach, parties are more likely to prefer to use this form of security as distinct from cash retention’.<sup>757</sup> Baker McKenzie cautioned that if the legislation were to allow claims for release of bank guarantees then this would affect not only the building and construction industry but also the interests of banks and insurers.

### Discussion and recommendation

#### *Treatment of retention moneys*

In Chapter 17 of this Report I recommend that a statutory trust be established in respect of all payments received from a party higher up the contractual chain insofar as such payment is in respect of any work done, or materials supplied, by any subcontractor, sub-subcontractor or supplier. Like Collins, I consider that all retention moneys, whether between a principal and head contractor, or subcontractor and sub-subcontractor, should also be held in trust with such moneys to be paid out of that account in accordance with the terms of the contract. Where there is a dispute in relation to a party’s entitlement to the release or use of such moneys, then the dispute should be able to be referred to adjudication.

#### *Adjudicator’s power to release bank guarantee*

I also consider, like Collins and Wallace, that the security of payment legislation should empower the adjudicator to make a decision in relation to claims for release of a bank guarantee. I am not persuaded that extending the powers of an adjudicator to enable decisions to be made about releasing bank guarantees would result in principals and head contractors preferring security to be provided in the form of cash rather than bank guarantees. Such a view fails to recognise my above recommendation that all cash retentions would need to be held in trust and that any dispute relating to those funds being used to meet any contractual entitlement (e.g. to meet the costs of rectifying alleged defective work) could also be referred to adjudication. Thus, where there is a dispute on whether the retention funds or a bank guarantee can be used or called on to meet the costs of

<sup>755</sup> See ss. 8(c) and 33(1)(b) of the NT Act.

<sup>756</sup> Stockland, written submission, p. 5.

<sup>757</sup> Baker McKenzie, written submission, p. 10.



rectifying alleged defects, then in either case, the parties will be bound by the adjudicator's decision. A respondent wishing to draw on the retention funds or the bank guarantee in order to meet the costs of rectifying the claimant's defects will have to persuade an adjudicator not only that the claimant's works are defective but also as to the costs associated with the rectification of the defects are reasonable and that the retention moneys / bank guarantee is necessary to meet those costs. I consider that a dispute relating to the use / release of retention moneys / bank guarantee is no different than any other payment dispute, as the retention moneys or the costs relating to the bank guarantee represents part of a claimant's price for carrying out its construction work.

The policy considerations that apply in respect to disputes about releasing retention moneys are equally valid in relation to disputes about releasing a bank guarantee. Just as the release of retention moneys is of critical importance to a subcontractor's cash flow, so also is releasing a bank guarantee. Being able to resolve a dispute about releasing a bank guarantee is of critical importance to a subcontractor because the resolution of that dispute will relieve it from continuing to pay fees to its bank and may also enable it to be able to obtain a similar security from the bank when contracting for new work.

#### **Recommendation 81:**

The legislation should provide that all cash retentions are to be held on trust:

- 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.

#### **Recommendation 82:**

The legislation should expressly provide for an adjudicator to be able to decide whether a retention amount and/or security is to be returned, and the date on which it is to be returned.

## **15.6 Trade credit insurance**

During the consultation process the Master Builders movement<sup>758</sup> suggested that if contractors and subcontractors protected their business through trade credit insurance then losses due to credit risks, such as insolvency or protracted default, could be more effectively addressed. MBA contends that such arrangements would be more effective because the credit insurance company will be assisting the insured party in the implementation of appropriate systems and procedures designed to minimise credit risks. Presumably this would require the insured party to formulate an appropriate written credit policy and risk management strategies in order to make a claim. The trade credit insurance available by Master Builders Insurance provides for claims being payable '30 days from the Insurer's receipt of confirmation of debt from the insolvency practitioner in charge of the failed debtor'.<sup>759</sup>

### **Responses from stakeholders**

MBA NT submitted that as an alternative to the establishment of PBAs or statutory trusts consideration should be given to the concept of Trade Credit Insurance. MBA Insurance Services argue that such insurance would provide cover for non-payment of trade debts following the

<sup>758</sup> Particularly via discussions with MBA Northern Territory and MBA Victoria.

<sup>759</sup> Master Builders Queensland Insurance Services, *Insurance Fact Sheet — Trade Credit Insurance — Who needs it?* See [https://www.mbqld.com.au/\\_data/assets/pdf\\_file/0006/525795/Trade-Credit-insurance-fact-sheet\\_LATEST-VERSION.pdf](https://www.mbqld.com.au/_data/assets/pdf_file/0006/525795/Trade-Credit-insurance-fact-sheet_LATEST-VERSION.pdf).

debtor's liquidation or bankruptcy.<sup>760</sup> Organisations representing subcontractors contend that such a proposal would produce a sub-optimal outcome when compared to PBAs/statutory trusts and would also require subcontractors to incur the high costs associated with obtaining such insurance.

### Discussion and recommendation

I have no doubt that trade credit insurance would assist a contractor or subcontractor being paid for work carried out or for goods and services supplied, particularly in circumstances where the other contractual party has become insolvent. I also accept the proposition that the requirement for the insured party to implement good risk management practices will undoubtedly assist that party in being better able to identify potential credit risks. There are however costs associated with such insurance, including establishment fees, premiums and the deductible that the insured party is required to bear whenever making a claim.<sup>761</sup>

Accordingly, such insurance can no doubt be a useful means to complement a contractor or subcontractor's statutory entitlement under the security of payment legislation. It is not, however, to be regarded as an alternative to the statutory regime which exists to enshrine the right of a contractor/subcontractor to receive progress payments for construction work carried out or for related goods and services supplied and to provide for a rapid adjudication system for determining disputed progress payment claims. If a subcontractor wishes to take out specific insurance to cover the risk of its contracting party becoming insolvent, then it can elect to take out trade credit insurance. However, trade credit insurance should not be regarded as a viable alternative to the statutory regime underpinned by the security of payment legislation, nor is it the place of government to mandate that industry participants take out such insurance.

This concept was in fact first advanced by various head contractor organisations in the 1990s but had been opposed by subcontractor organisations and has not since gained market traction. The concept may have some merit but unless mandated by government it will not have universal coverage within industry. It had not been enthusiastically viewed in the various inquiries previously conducted and it very much seems that the debate relating to this issue has been overtaken by the security of payment laws that every state and territory government has enacted over the past 15 years. Indeed, the following observation in the Collins Inquiry is worth highlighting:

The Inquiry firmly believes however that any mandatory insurance scheme that operates to secure payments to subcontractors does not directly address the issues at hand. Insurance provides little or no incentive to avoid behaviour that could bring about insolvency or financial stress and could in fact provide a perverse incentive for some subcontractors to take disproportionate risks, knowing that should their business fail, they will not bear personal responsibility for the repayment of their debts. The insurance company picks up the tab and the industry pays the price.<sup>762</sup>

### Recommendation 83:

Trade credit insurance should **not** be made a legislative requirement. It is noted that while trade credit insurance can provide useful additional protection it is not a viable alternative to security of payment laws.

<sup>760</sup> MBA Insurance Services correspondence dated 19 June 2017.

<sup>761</sup> For example, under the MBA Trade Credit Insurance a subcontractor with a turnover of \$8 million would incur an 'indicative premium of \$20 000 plus an establishment fee of \$3 000 with the deductible being 10%.'

<sup>762</sup> Collins Inquiry, op cit, p. 45.

# Chapter 16:

# Unfair contract

# terms

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## 16. Unfair contract terms

### 16.1 Power imbalance in contracts

#### Back-to-back contracting

As outlined previously, the construction industry operates on a pyramid structure, with the client at the top who enters into a head contract with the head contractor, and with the head contractor subsequently entering into a series of subcontracts with subcontractors. In turn (and in many instances) the subcontractors then further subcontract aspects of their work to their sub-subcontractors and so on. Further, because of the pyramidal structure, the bargaining power between the parties becomes more imbalanced the further one goes down the contractual chain.

Thus, the principal in its contract negotiations with its preferred head contractor will press hard and insist that the head contractor agree on contractual terms that will minimise the risks associated with the proposed construction works. The principal may table its own version of the contract documentation and this may include a set of special conditions that significantly amend the general conditions of standard form industry contracts so as to transfer all risks on key issues to the head contractor. It is not uncommon for a head contractor to accept such contract terms because it knows that if it does not, then it is probable that the project will be awarded to one of its competitors who would be prepared to accept the principal's terms. More importantly, the head contractor knows that it will be able to pass on its onerous contractual terms to its subcontractors by insisting that subcontractors execute a back-to-back subcontract (i.e. where the subcontract incorporates the same terms as the head contract).

Similarly, as in the case of the head contractor, the subcontractor will agree to sign the subcontract document presented by the head contractor because it too knows that it can pass on the unfair terms to its sub-subcontractors, again by way of a back-to-back sub-subcontract agreement. In this way, unfair contract terms and risks are transferred down the contractual chain with the sub-subcontractors at the base of the pyramid not only having the least capacity to bear the financial risks associated with the project but also being the least able to negotiate a set of more reasonable and balanced terms. In all instances, the party higher up the contractual chain will present its contract documentation on a 'take-it-or-leave-it' basis.

This imbalance of bargaining power within the construction industry has had a devastating impact on the most vulnerable parties. Not only has the pyramidal structure caused the party at the lower end of the hierarchical chain to assume the risk of insolvency of the party higher up the pyramid, but it has also resulted in significant injustice, particularly where, as a result of the unfair contract conditions, the party who has carried out construction work has been unable to obtain payment for such work.

It is because of this imbalance of power that the legislatures in the various jurisdictions have felt it necessary to intervene and to provide assistance to the more vulnerable party. The security of payment laws are an example of such legislative intervention where provisions in construction contracts such as pay when-paid and pay-if-paid clauses have now been prohibited.<sup>763</sup> The issue that has emerged over the past few years is whether further legislative intervention is warranted and this in turn raises the question of whether an appropriate balance can be struck between preserving the principle of freedom on contract whilst protecting a vulnerable party from unfair contract terms.

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<sup>763</sup> See s. 12 of the NSW Act; s. 13 of the Victorian Act; s. 16 of the Queensland Act; s. 12 of the SA Act; s. 14 of the ACT Act; s. 16 of the Tasmanian Act; s. 9 of the WA Act; and s. 12 of the NT Act.

## Traditional freedom of contract

The traditional theory of contract law is underpinned by the concept that the parties should be allowed to be free to structure their commercial affairs as they see fit. Thus, if a party has agreed to a bad bargain then that was its choice and it is not the role of the courts to rescue that party from the consequences that flow from the choice it made. This concept was expounded by Jessel MR in *Printing and Numerical Registering Co v Sampson*<sup>764</sup> as follows:

... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice.<sup>765</sup>

That was the classic *laissez-faire* dictum of the nineteenth century, but it was not long before the courts began to feel uncomfortable applying that concept where there was an imbalance of power between the parties. In his very last judgement, Lord Denning MR, made the following observation regarding the notion of 'freedom of contract':

None of you nowadays will remember the trouble we had — when I was called to the Bar — with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said 'Take it or leave it'. The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time...

It was a bleak winter for our law of contract...

Faced with this abuse of power — by the strong against the weak ... the judges did what they could to put a curb upon it. They still had before them the ideal 'freedom of contract'. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. The weapon was called 'the true construction of the contract'. They used it so as to depart from the natural meaning of the words of the exempt clause and to put upon them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability; or that in the circumstances the big concern was not entitled to rely on the exemption clause ...<sup>766</sup>

## 16.2 Evolution of contract forms in the construction industry

In the construction industry, the formulation of construction contracts evolved in its own unique fashion. Standard forms of construction contracts were initially prepared and published by industry associations to assist its members. They were prepared for the purposes of ensuring that they contained coverage of all the key issue relevant between contract parties such as payment, practical completion, extension of time, variations, final completion and termination. Progressively, the various industry and professional associations saw merit in working cooperatively and through a consensus approach arrived at a set of head contract and subcontract documentation that would not only be commercially effective but be fair to all parties. The suite of construction contracts prepared and published by Standards Australia have come to be accepted as setting the industry benchmark.

<sup>764</sup> (1875) LCR 19

<sup>765</sup> *Ibid*, e.g. [462] - [465]

<sup>766</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297 (Lord Denning MR).

Nonetheless, the usage of the contract forms published by Standards Australia has not been universally embraced by industry participants. Sometimes the unique nature of the proposed construction project necessitates the incorporation of amendments to the standard form contract, or even the drafting of a bespoke contract. It is, however, not uncommon for the party initiating the project, namely the principal, to request its legal advisers to formulate a set of terms and conditions that not only best protect the interests of the principal but also transfer most of the risks associated with the project to the head contractor. In some respects, such a position makes perfect commercial sense, especially where a principal calls for tenders from a list of contractors based on the same set of contract terms and conditions. The theory is that each tenderer would assess the project and its attendant risks and submit its price. In arriving at its price, the head contractor would request its preferred subcontractors to submit their prices on the various key trade components and that these prices, together with the advice of its in-house estimators and its external quality surveyor consultant, would enable the head contractor to arrive at a carefully considered tender price.

It is not difficult to respect the logic of such an approach, especially in an industry where market competition is still prevalent. Thus, if the tender terms and conditions are seen as harsh or too difficult to price then a tenderer could either decline to submit a price, or submit an alternative or 'qualified' tender price based on a different set of contract conditions. Accordingly, through a series of negotiations the parties will eventually arrive at an agreed set of terms and conditions. Left to their own, a commercial outcome would thereby be able to be achieved and, in the interest of certainty it is important that the legal system ensure that the agreed bargain be enforced.

In practice, however, such a theoretical philosophical approach is very much divorced from reality. The negotiations between the principal and the head contractor are not always extensive and it is not uncommon for a head contractor to agree on the principal's terms in the interest of securing the contract, no matter how one-sided such terms may be. It is however when these one-sided terms are imposed by the head contractor on its subcontractors by way of a back-to-back contract on a take it or leave it basis, that such contracts become unfair. Thus, when it comes to making of payment, everyone wants to defer payment to the party down the contractual chain for as long as possible. Indeed, it is now not uncommon for a contract between a head contractor and a subcontractor to require payment to be made on the 'end of the month following the month in which the claim is made', effectively meaning that, if a payment claim is made early in the month of January, payment will be required to be made at the end of February. Little wonder then that some of the security of payment laws now prescribe for maximum payment terms.<sup>767</sup> Here then is an example of the legislature intervening in order to (as Lord Denning put it) protect the weak from the strong.

### 16.3 Courts' attempts at redressing power imbalance

There are other examples where it might be said that the imbalance of parties' bargaining power have produced contract terms that may be considered unfair, including the following:

- variation clauses which allow one party to direct the other party to execute variations to the original scope of work

<sup>767</sup> For example, s. 11(1A) of the NSW Act provides that a progress payment is to be made by a principal to a head contractor on the date occurring 15 business days after a payment claim has been made under the Act, unless the contract provides for an earlier date, and under s. 11(1B) a progress payment is to be made by a head contractor to a subcontractor within 30 business days after a payment claim is made under the Act, unless the contract entered into between the head contractor and the subcontractor provides for a shorter period. Similarly, s. 10 of the Western Australia Act prohibits a provision in a construction contract that purports to require payment to be made under any construction contract for a period greater than 42 calendar days.

- termination for convenience clauses that only allow for one party to terminate the contract
- novation clauses which confer power to one party to novate the contract without the other party's consent
- time bars which limit the time within which certain contractual rights (such as claiming for extra costs said to have been incurred due to encountering latent conditions or a claim for extension of time) can be enforced, and
- clauses which entitle one party to make unilateral determinations (such as, for example, determining whether a contractor/subcontractor is entitled to an extension of time).

It does not however follow that any of the above provisions are unfair in all circumstances and that as such, should be prohibited. Thus, for example, it is perfectly reasonable for a construction contract involving, say, a government department as a client (such as Defence) to contain a termination for convenience clause to allow for termination where there has been a subsequent change in government policy, or where there has been a significant costs-overrun associated with the project. Similarly, there is nothing inherently unreasonable with a construction contract requiring a contractor/subcontractor to give timely notice when intending to make a claim for extra costs. As McDougall J pointed out in *John Goss*.<sup>768</sup>

Where (the subcontractor) wishes to claim an amount over and above the Contract Amount (for example for a variation or for delay or disruption costs), it is required, as a precondition to such a claim, to give notice under, and comply with the terms of clause 45. It is obvious why a head contractor... might stipulate for such notices. Firstly, it will enable the claim to be investigated promptly (and, perhaps, before any work comprised in it is rebuilt, or built over). Secondly, it will enable (the head contractor) to monitor its overall exposure to the subcontractor. Thirdly, it will enable (the head contractor) to assess its own position vis-à-vis its principal. No doubt there are other reasons for stipulations of the kind found in clause 45.

Therefore, the question of whether a particular provision ought to be construed as unfair, even though unreasonable or harsh, will very much depend on the circumstances. Where such provisions are construed as unfair then, as set out in the above quotation of Lord Denning, the courts have developed various 'weapons' to provide relief to the vulnerable party.

### Unreasonably onerous time-barring provisions

When conducting a detailed interview with one of the leading lawyers specialising in this field, Mr Fenwick-Elliott, the issue of unreasonably onerous time-barring provision was discussed. Mr Fenwick-Elliott referred me to his website where, under the article *Queen of Hearts in the Dock*, he sets out the following synopsis of the range of 'arsenals' or principles that the courts have developed to relieve a contractor from the harsh consequences of failing to give a required notice:

- That the giving of notice is not a condition precedent, such that a failure to give notice does not deprive the contractor the right to the relief in question, but merely renders him liable for the damages (if any) which flow from lateness of the notice;
- That a requirement may not be a condition precedent, even if expressly stated to be so, if that result would be commercial nonsense;<sup>769</sup>
- That the notice is to be read *contra proferentem*, or otherwise read down;<sup>770</sup>

<sup>768</sup> *John Goss Projects Pty Ltd v Leighton Contractors* [2006] NSWSC 798 at [80].

<sup>769</sup> *Koch Hightex GMBH v New Millennium Experience Company Ltd* [1999] EWCA Civ 983.

<sup>770</sup> *Tersons Ltd v Stevenage Development Corporation* [1962] 2 Lloyds Rep. 333.



- That the requirement for notice may not be relief on unless it has been expressly pleaded;<sup>771</sup>
- That the requirement for notice may be loosely construed, such that even documents such as day work sheets may satisfy the notice requirements;<sup>772</sup>
- That the notice requirement applies only to the contractual entitlement and not to any parallel entitlement by way of damages;<sup>773</sup>
- The Doug Jones Principle applies;<sup>774</sup>
- That the effect of absence of notice may be to set time at large;<sup>775</sup>
- That the owner who has prevented compliant with the clause may not rely on it;<sup>776</sup>
- That the requirement to give notice may have been waived, or negated by estoppel

... In addition, it has been suggested that further avenues to the same effect might in some circumstances be available:

- That the notice provision is penal;
- That the notice provision might be construed as a forfeiture clause, such that the courts are empowered to grant relief from forfeiture;
- That reliance of the notice provision by the owner is unconscionable;
- That the notice provision forms part of a contractual mechanism that has broken down;
- That the contractual provision is insufficiently clear as to the nature of the notice that is required;
- That the notice provision offends against a statutory control of unfair contract clauses.<sup>777</sup>

Mr Fenwick-Elliott advocates that the construction industry would benefit if a statutory benchmark were to be provided to guide the courts, arbitrators and adjudicators rather than allow them to continue to apply the above 'weapons' and presents a draft clause to address the issue.<sup>778</sup>

<sup>771</sup> *Blissgrange v John McGregor (Contractors)* 1987 GWD 19–707.

<sup>772</sup> *Mooney v Henry Boot Construction Ltd* 80 BLR 66.

<sup>773</sup> *Décor Ceilings Pty Ltd v Cox Construction Pty Ltd* ([2006] SASC 85).

<sup>774</sup> A paper presented by Professor Doug Jones to the Society of Construction Law and Technology and Construction Bar Association in London on 17 September 2008. The relevant principle was stated as: 'It is suggested that a proper approach to interpreting (time bar) provisions is that they are intended to only deal with delay risks for which the contractor is responsible. If those provisions are to go on and do the additional work of making the contractor liable for owners' delays, absent requisite notice, and thus fundamentally alter the risk of the owner's acts of prevention, they can and should expressly say so'.

<sup>775</sup> *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (1991) NTSC 143.

<sup>776</sup> *Koch Hightex GMBH v New Millennium Experience Company Ltd* [1999] EWCA Civ 983.

<sup>777</sup> *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegam PVBA* [1978] 2 Lloyd's Rep 109 (House of Lords) at M13 and 130.

<sup>778</sup> Elliott, R. Fenwick (2017), *Queens of Hearts in the Dock*, online article 6/6/2017. Refer to <https://feconslaw.wordpress.com/2017/06/06/queens-of-hearts-in-the-dock/>

## 16.4 Relief for small business under the Australian Consumer Law

Recently the legislature has seen fit to intervene particularly where unfair terms contained in 'standard form' contracts are entered into with 'small business'. As from November 2016, the unfair contract terms in the *Australian Consumer Law* (ACL) and the *Australian Securities and Investment Commission Act 2001* (ASIC Act) were extended, enabling small businesses to challenge a term which is 'unfair' in the same manner that consumers have been able to for some years.

Contracts for the supply of goods and services will constitute a 'small business contract' if, at the time of entering into the contract:

- the counterparty is a business employing fewer than 20 people, and
- the upfront price payable does not exceed \$300 000, or the contract period is over 12 months and the upfront price does not exceed \$1 million.

Section 24 of the ACL defines that a contract term will be 'unfair', if:

- it will cause a significant imbalance in the parties' rights and obligations
- it is not reasonably necessary to protect the interests of the party who would be advantaged by the term, and
- the term would cause financial or another detriment to a party.

Whereas the legislation does not define the expression 'standard form contract', the courts, when determining whether a contract is 'standard form', must take into account whether:

- one of the parties has all or most of the bargaining power relating to the transaction
- the contract was prepared by one party before any negotiations relating to the transaction occurred between the parties
- the contract was given on a take-it-or-leave-it basis
- the terms of the contract took into account the specific nature of the transaction.

It may be that a standard form of contract prepared by, say, an organisation like Standards Australia, even if presented by one party to the other on a take-it-or-leave-it basis, does not contain an unfair term because the general conditions were arrived at by consensus and with input of key industry stakeholders, but this is far from clear. It is however more likely that where the standard form document prepared and published by Standards Australia has been so extensively amended as to deliberately advantage one party to the detriment of the other, and where it is presented by that party to the other on a take-it-or-leave-it basis, such a contract could well be construed as a standard form contract containing unfair terms. However, given that the ACL only applies to 'small businesses' as that term is defined,<sup>779</sup> the scope of that legislation will not necessarily have a wide application in the construction industry.

It is also far from clear whether an adjudicator has jurisdiction to determine whether a particular construction contract constitutes a 'standard form' and if it does, whether the contract contains 'unfair' terms such that a respondent is unable to rely on them as a reason for withholding payment. There appear to be two conflicting views regarding this issue. On the one hand, some may argue

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<sup>779</sup> For the purposes of the ACL a small business is a business that employs less than 20 people, including casual employees employed on a regular and systematic basis.

that because the ACL states that only a ‘court’ can decide if a term is unfair, this effectively would mean that an adjudicator is unable to decide such issues. The alternative view is that adjudicators are frequently required to determine whether a particular claimant holds the requisite license prescribed under a particular legislation<sup>780</sup> and therefore the task of requiring an adjudicator to determine whether the construction contract contains an unfair term under the ACL is no different. No doubt, at some stage in the near future, the issue of whether an adjudicator has jurisdiction on this area will be referred to the courts to determine.

## 16.5 How current security of payment laws deal with unfair contract provisions

The legislative scheme of the East Coast Model reflects an attempt at striking a balance between the parties’ freedom to negotiate their own contractual regime with enshrining a contractor’s right to receive progress payments regardless of whether the contract makes provision for progress payments. Whenever possible, the East Coast Model seeks to give primary effect to the terms agreed by the parties. Thus, under the NSW Act, for example, section 8(1) states that a party’s right to a progress payment accrues on and from each reference date and section 8(2) defines the reference date to mean ‘a date determined by or in accordance with the terms of the contract as the date on which a claim for progress payment may be made...’. It is only if the contract makes no express provision with respect to the matter that section 8(2)(b) provides for a default provision.

Similarly, section 9(a) of the NSW Act provides that the amount of a progress payment to which a person is entitled is ‘the amount calculated in accordance with the terms of the contract’ and it is only if the contract makes no provision with respect to the matter that section 9(b) sets a default provision as to how that amount is to be calculated. Similarly, sections 10(1)(a) and 10(2)(a) of the NSW Act state that the valuation of the construction work carried out, or the related goods and services supplied, is to be determined in accordance with the terms of the contract. It is only if the contract makes no express provision in respect to this matter that sections 10(1)(b) and 10(2)(b) set out a default mechanism for the valuing of the construction work or related goods and services. All these provisions clearly demonstrate that the NSW Act is not intended to displace the contractual provisions agreed to by the parties.

Nonetheless the legislative scheme does not countenance the parties having an unfettered freedom to negotiate their contractual terms. Section 12 of the NSW Act prohibits a ‘pay when paid’ provision and section 34, under the heading ‘No contracting out’ provides that terms in agreements which exclude, modify or restrict the operation of the Act, or may reasonably be construed as an attempt to deter a person from taking action under the Act, are void.

### Court decisions on void contractual terms

There have been various court decisions that have interpreted section 34 of the NSW Act. Thus, in *Minister for Commerce v Contrax Plumbing*<sup>781</sup> (*Minister for Commerce v Contrax Plumbing*) McDougall J concluded that the relevant contractual provisions contravened section 34 of the NSW Act because they ‘inordinately’ deferred the statutory entitlement given by section 8(1) to be paid from a reference date for construction work carried out prior to that reference date. On appeal, Hodgson JA expressed the view that it was ‘strongly arguable’ that section 34 operated in the manner stated by McDougall J.<sup>782</sup>

<sup>780</sup> In the case of the Queensland Act, a contractor must hold the requisite licence as set out under the QBCC Act and a claimant who does not hold such license is unable to avail itself of the rights set out under the Queensland Act — see *Cant Contracting Pty Ltd v Casella* [2006] QSC 242.

<sup>781</sup> [2004] NSWSC 823, [43].

<sup>782</sup> *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd & Ors* [2005] NSWCA 142, [51].

However, in *John Goss*<sup>783</sup>, the court dealt with the issue of whether a contractual provision requiring notification of a claim within a specified time of the events that gave rise to the claim was inconsistent with the right given by section 13(4) of the NSW Act to bring a payment claim within 12 months after the cessation of the works. McDougall J held that the contractual provisions were not rendered void by section 34 because the contractual provision did not say anything about the time when a payment claim might be made but instead limited the entitlement to work that might be comprised in a payment claim whenever it was made: 'Provided notice was given in accordance with the clause, the work that was the subject of the notice may be included in a payment claim made at any time'.<sup>784</sup> Interestingly, His Honour observed that the claimant did not argue that the time limit set out in the contract clause was one with which it could not possibly or reasonably comply with.<sup>785</sup>

In *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd & Anor (Lean Field)*<sup>786</sup> Applegarth J observed that in determining whether a contract provision contravened the equivalent 'no contracting out' provision in the Queensland Act, a useful inquiry might be whether the particular contract clause facilitates or impedes the purpose of the Act. A provision which has the purpose of regulating contractual rights to progress payments may not be appropriate to condition a statutory right to a progress payment. The condition is likely to be contrary to the Act or unjustifiably change the effect of the Act's provisions 'where it does not facilitate a statutory entitlement to progress payments, or the resolution of payment claims made under the Act'.<sup>787</sup> In *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors (BRB Modular)*<sup>788</sup> Applegarth J suggested that considerations as to the consequences of non-compliance of a contract condition, and as to whether such consequences would be 'disproportionate and extreme',<sup>789</sup> may be relevant as would considerations as to whether the particular contract provision served any 'utility' in terms of the Act.<sup>790</sup>

In *Hutchinson Pty Ltd v Glavcom Pty Ltd (Hutchinson v Glavcom)*<sup>791</sup> Ball J referred to *Lean Field* and found that while sections of the NSW Act permit a contract to provide a method for fixing a reference date, that section 'cannot be interpreted as permitting other conditions to be attached to the occurrence of a reference date or a right to receive a progress payment. Any provision that purported to do so would be a provision that sought to modify or to restrict the circumstances in which a person was entitled to a progress payment and would therefore be void under section 34' of the NSW Act.<sup>792</sup> Thus, a contract provision that required the subcontractor to submit a statutory declaration as to payment of its employees and of payment of all workers' compensation premiums before a reference date arose, and before the subcontractor was entitled to make a payment claim, contravened section 34 of the NSW Act.

The above cases, and particularly the decision in *Hutchinson v Glavcom*, highlight the tension between the security of payment laws, which give contractors a statutory right to recover progress payments for construction work carried out, and provisions included in a construction contract that seek to protect the other party from liability from contractors defaulting under workers' compensation, payroll tax and industrial relations legislation. The consequence of the decision in *Hutchinson v Glavcom* indicates that a contract provision that states that a reference date will not

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<sup>783</sup> *John Goss Projects Pty Ltd v Leighton Contractors* [2006] NSWSC 798.

<sup>784</sup> *Ibid* [82].

<sup>785</sup> *Ibid* [83].

<sup>786</sup> [2014] QSC 293 (*Lean Field*).

<sup>787</sup> *Ibid* [75].

<sup>788</sup> [2015] QSC 218 (*BRB Modular*).

<sup>789</sup> *Ibid* [54].

<sup>790</sup> *Ibid* [56]–[58].

<sup>791</sup> [2016] NSWSC 126 (*Hutchinson v Glavcom*).

<sup>792</sup> *Ibid* [26].

arise until the contractor has provided documentation confirming compliance with other key legislation would however contravene the no contracting out provision of the security of payment legislation.

This tension between contractual freedom and the statutory right to recover progress payments has been at times difficult to reconcile. It must however be emphasised that the scheme of the security of payment laws is not intended to override the contractual regime, but rather to ‘underwrite’ such a regime.<sup>793</sup> If it were otherwise then provisions like sections 8(2)(a), 9(a), 10(1)(a) and 10(2)(a) of the NSW Act (and equivalent provisions in the other state and territory legislation) would serve no purpose. At the same time, to allow contractual provisions to prevail in such a manner as to water down a contractor’s right to a prompt interim payment would defeat the fundamental objective of the security of payment laws. Section 34 of the NSW Act should therefore be seen as ‘a bulwark against provisions attempting to eradicate or limit rights established by the Act’.<sup>794</sup> When section 34 of the NSW Act is considered from this perspective, the approach adopted by McDougall J in *Minister for Commerce v Contrax Plumbing*<sup>795</sup> and *John Goss*<sup>796</sup> and Applegarth J in *Lean Field*<sup>797</sup> and *BRB Modular*<sup>798</sup> makes perfect sense as it seeks to describe the basis upon which the competing tension between contractual freedom and the statutory right to progress payments can be resolved.

Indeed, this notion of viewing a contractual provision from the prism of whether it is ‘unduly onerous’; or the consequence of non-compliance would be ‘disproportionate’; or whether it serves any ‘commercial utility’ (being the approach adopted in *BRB Modular* by Applegarth J) provides a helpful guide when considering whether a contractual provision not only contravenes the no contracting out provision of the security of payment legislation but also whether the provision should be prohibited. This is particularly relevant when considering various time-bar clauses, especially given that in *John Goss*, McDougall J held that a contract clause that required a party to give notice as a precondition to the making of a claim does not, per se, contravene section 34 of the NSW Act. McDougall J did however leave open the question as to whether he would have arrived at a different conclusion had the claimant argued that the time limit set out in the particular contract clause was one with which it could not possibly or reasonably have complied.<sup>799</sup>

As so succinctly expressed by McDougall J in *John Goss*, a contract provision requiring notice to be given before making a claim can serve a useful commercial purpose. However, there are equally circumstances where the time limit prescribed in a contract provision could not possibly or reasonably be complied with and as such operates to deprive a contractor from receiving payment for the carrying out of construction work. In the context of an industry where it is not uncommon for one party to present a contract document to the other party on a take-it-or-leave-it basis, contracts containing onerous time-barring provisions have emerged as a major issue. It was this issue that was specifically raised with stakeholders.

## 16.6 Consideration of unfair contract terms

### Responses from stakeholders

During consultations, stakeholders were asked the following questions relating to this issue:

<sup>793</sup> *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 [21] (Barrett J).

<sup>794</sup> Obtained from a paper delivered by His Honour, Mr Robert McDougall, to the Institute of Arbitrators and Mediators Australia National Conference, 27 May 2006, entitled ‘*Prohibition of Contracting Out of the Building and Construction Industry Security of Payment Act 1999 (NSW)*’, p. 9.

<sup>795</sup> Op cit

<sup>796</sup> Op cit

<sup>797</sup> Op cit

<sup>798</sup> Op cit

<sup>799</sup> *John Goss Projects Pty Ltd v Leighton Contractors* [2006] NSWSC 798.

- Should time bars that operate to exclude a contractor/subcontractor's right to claim for an extension of time ('EOT'), delay costs and/or variations be codified? If so how? For example, should contractual terms which set an unreasonable timeframe for notification of EOT or for notification of variations, be stated to be void?
- On what basis should such timeframes to be regarded as unreasonable?
- Should legislation prescribe a time period for the giving of such notices (such as, say 10 or 20 business days) so as not to deprive a contractor/subcontractor's right to make such claims?

### *Should notice provisions be codified?*

Stakeholders were divided over whether to codify notice provisions for making claims relating to delay costs or variations. Several stakeholders<sup>800</sup> indicated their support for the codification of time bars, delay costs and/or variations. The CFMEU, NECA SA/NT and AMCA SA said that while they agree there should be time bars, they were unsure as to what the timeframes should be.

MBAV, MBA NSW and HIA did not support the codification of time bars because of the difficulties associated with such an exercise.

MBA WA believe the inclusion of time-bar clauses in contracts has shifted from their original intent, and they are now used by some parties to avoid their legal obligations. MBA WA therefore acknowledged there is scope for a prohibition clause to be included in contracts so that contract provisions that prescribe a short and unreasonable time period for the giving of notices should be prohibited.

NECA noted that most subcontractors have limited resources to devote to detailed contract administration and that delays in the project are often caused by circumstances beyond their direct control. As such, NECA advocates that subcontractors should only be required to submit extensions of time in cases where the subcontractor is the direct cause of the delay.

AMCA proposed an alternative option of giving broader scope to parts of the legislation that make certain terms void, and by empowering adjudicators to disregard contractual time bars if they are considered to be unreasonable.

Other stakeholders<sup>801</sup> noted that unreasonable and onerous contracts are an issue and that much of the problem emanates from excessive amendments to the provisions set out in standard forms of contract, which are often offered on a 'take-it-or-leave-it' basis.

The Adjudication Forum submitted that the legislation should include a provision that only a time bar that is 'reasonable in the circumstance' should be regarded as a valid reason for withholding payment and that 'what is reasonable in the circumstances should be a matter for the adjudicator to decide or determine based on the submissions provided by the parties'.<sup>802</sup>

### *When are timeframes unreasonable?*

Many stakeholders indicated difficulty in trying to determine on what basis such timeframes are to be regarded as unreasonable.<sup>803</sup> The MPAQ suggested that this might occur where a subcontractor does not have sufficient time, or is inhibited from making a claim on time – for example when contractors shut down their IT — thereby making it difficult for subcontractors to submit claims within the contract period.

<sup>800</sup> Including MEA, MPAQ, NECA SA/NT, AMCA SA and QMBA.

<sup>801</sup> Including Subcontractors WA, CFMEU and MBA NT.

<sup>802</sup> Adjudication Forum, written submission, para. 8.4, p. 38.

<sup>803</sup> Including QMBA, HIA Qld, MBAV and AMCA.



Likewise, NECA submitted that timeframes which would be insufficient for the subcontractor to formulate a claim at the same time as carrying out their works in accordance with the construction program might be considered unreasonable.<sup>804</sup>

MBA WA submits that a definitive timeframe would need to be specified so as to provide guidance to industry, otherwise industry may find many would-be claims are unreasonable. However, it noted there is debate as to what should be considered an appropriate timeframe.

### *What timeframes should be prescribed?*

Many stakeholders were uncertain as to what time period should be prescribed for giving notices. NECA proposed a time period of 10 business days as appropriate, while QMBA suggested there should be a time period of 20 business days to submit the claim, and 5 days to notify a claim will be submitted. MBAV considered that a 'normal' timeframe in the industry is 20 business days at the most and no less than 10 business days. According to MBAV, any longer timeframe could be considered unfair to the other party as they will have little or no ability to mitigate their loss.

On 15 June 2017, SoCLA convened a nationwide event amongst its membership, via video conferencing, and invited participants to discuss the issue of time bars in detail. Some 80 SoCLA members participated and specifically addressed the following five questions:

- 1) Do some time bars go beyond the needs of the legitimate interests of paymasters, and if enforced, do those time bars operate unfairly to defeat the agreed underlying contractual arrangements as to entitlement to time and/or money?
- 2) Is there presently uncertainty as to how courts, arbitrators and adjudicators approach the application of time bars?
- 3) Is it in the interests of fairness and certainty to set a statutory benchmark as to which time bars are enforceable?
- 4) If so:
  - a) Is it preferable for that benchmark to be prescriptive, defining e.g. what time limits should be imposed; or
  - b) Should the benchmarks be more flexible seeking to separate legitimate use of time bars from illegitimate use, according to the context? To assist in this question the indicative draft clause that is presently up for discussion is in the following form:
    1. A provision in a Construction Contract which purports to make a right to claim or receive payment, or a right to claim or receive an extension of time, conditional upon the provision of any notice shall be of no effect if and insofar as:
      - (i) Compliance with the requirement of the provision would not be reasonably possible or would be unreasonably onerous; or
      - (ii) The requirements of the provision are not reasonably justifiable by any legitimate commercial purpose.
        - a. For the purposes of clause 1, 'notice' includes any notice, claim for payment, narrative or calculation as to actual or estimated time or money.
        - b. The failure of any provision or part of a provision to satisfy the requirement of reasonableness at subsection 1(i) of this section in relation to a right or claim to

<sup>804</sup> NECA, written submission, p. 27.



money and/or time shall not of itself render that provision ineffective for the purpose of any right or claim to other time and/or money.

It may very well be that this discussion will lead to an improvement of that wording. The key question, of course, is not whether a statutory benchmark like this would be free from difficulty, but rather whether it would be preferable to the present free-for-all.

5) Or, having sought opinions on not interfering with contract in question 1, we should perhaps put the opposite extreme to a vote: should time bars be banned entirely?

The responses by those members who participated in the video conference were summarised in SoCLA's written submissions, as follows:

There was a substantial consensus in relation to question 1: time bars do frequently go beyond the legitimate interests of paymasters and do operate unfairly. That unfairness operates particularly at the lower rungs of contractual ladders.

The response to question 2 was more varied, some of us thought that the approach of the courts to time bars was now reasonably well understood, others of us thought that there was considerable uncertainty. There was, however, consensus that the greatest uncertainty operates at the level of adjudication, with comments that adjudicators not untypically get around time bars by making findings of estoppel or waiver in circumstances where courts would not come to the same conclusion. There was a brief canvassing of the notion that there might be a different approach applying only to adjudication, but we concluded that a split between the rules which apply to adjudication and the rules which apply to litigation or arbitration would be unhelpful.

There was a broader range of opinion as to what to do about this. Nobody thought the time bars should be banned entirely. And there was little enthusiasm for any 'one size fits all' interference with contractual freedom. But we were fairly evenly split as to whether a statutory benchmark along the lines exemplified would be beneficial. About half of us thought that it would be, and the other half, whilst recognising that there was a real problem here, had concerns about whether a statutory benchmark might complicate matters yet further. No one found it easy to come up with an alternative formulation.

This is plainly a difficult issue. In addition to answering the questions as set out above, there were a number of comments that time bars do tend to set up a claims culture, and are unhelpful for good contractual relationships. It would obviously be desirable for there to be cultural change, and a greater use of the standard forms, which are much more reasonable than some of the very aggressive bespoke forms, but it is by no means clear how that cultural change might best be brought about.<sup>805</sup>

SoCLA also referred the Review to the article that won its 2017 essay prize (Brooking Prize) '*Locked Behind Time Bars*'.<sup>806</sup> The authors of that essay posit a case for legislative intervention in order to provide greater balance in the treatment of time bars. The authors suggest that an exemplar worthy of consideration when considering this issue is the Commonwealth's *Insurance Contracts Act 1984* (Cth). In particular the authors endorse the approach that Act has adopted to address the former practice of insurers including provisions in their policies to decline indemnity for technical procedural breaches, regardless of whether such breach had caused any detriment to the insurer. The authors then proceed to make the following observation:

Given the importance they hold in the proper administration of a construction project a blanket prohibition on time bars is not the solution. However, for the simple reason that a time bar provision can in certain circumstances ... serve no purpose other than to enrich one party at the cost of another,

<sup>805</sup> SoCLA, written submission, paras 65–68.

<sup>806</sup> Smiley, A. and Rawal, R. (2017), *Locked Behind Time Bars*, SoCLA National Conference 2017.

the law should ‘strike a new balance’ and seek to ensure that time bars are only enforced to the extent they serve their recognised purpose.<sup>807</sup>

The LCA also considered this issue and, like SoCLA, was unable to reach a consensus position. Nonetheless, the LCA did offer the following comment:

[There] was a prevailing view of those operating under the Queensland and Victorian schemes that lessons learned in the development of the Australian Consumer Law might apply here.

We note that the relevant sections of the Competition and Consumer Act 2010 and the Australian Consumer Law only apply presently to small business. The sections do not provide a prescriptive statement as to when a contract clause will be ‘unfair’. Rather, the definition of when something is unfair (and hence void) includes where it would cause a significant imbalance in the parties’ rights and obligations and it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it.

Importantly, any proposal should be structured such that it can apply to the whole of the contractual chain. Delays and extensions of time can affect the entire contractual chain (e.g. a delay to a subcontractor needs to be notified to a contractor within a time such that the contractor, if appropriate, can comply with the EOT clause in the head contract).

In the case of a short notice period for an EOT or variation or other claim to be able to be claimed, the circumstances of the project would need to be considered and, in the case of a subcontractor, whether the head contractor requirements are such that a short notice period is necessary.

Generally, the legislation should not interfere with participant’s rights to arrive at their own commercial terms in regard to a project.<sup>808</sup>

## Discussion and recommendation

### *Balancing right to receive notice against cost and time implications*

It can be seen from the above that the issue of how time bars are to be dealt with requires a balancing of two equally meritorious ‘rights’. On the one hand, there is the right of the principal or head contractor to receive notice of the claims it may face, together with the costs and time ramifications associated with such claims. Equally however, a contractor or subcontractor has the right to an extension of time if its work has been delayed by a qualifying cause as well as the right to receive payment for the additional time it may have to spend on a project.

There appears to be broad agreement within industry that in striking the appropriate balance the relevant test to be applied is to enquire whether:

- the preconditions relating to giving notice associated with any claim serves a legitimate commercial purpose, and
- whether compliance with the prescribed time requirements are reasonably possible and not unduly onerous.

Clearly a provision requiring a party to give notice within 3 business days of an event happening together with full details of the cost and time implications would not only not be reasonably possible, but be regarded as unduly onerous. However, a longer time period, of say 30 days, might be reasonable and not unduly onerous. Clearly much will depend on the circumstances relating to a particular event but, for the main, most fair-minded people would agree that a party should not be deprived of its significant rights merely because of its failure to provide notice within a tight

<sup>807</sup> Ibid, p. 13.

<sup>808</sup> LCA, written submission, paras 16.1 to 16.5.

timeframe, or where the timeframe was both not reasonably possible to comply with and where little detriment has been suffered by the other party.

I agree with the observations made by SoCLA that, to some degree, much of the 'claims culture' that has taken hold within the industry could be overcome by greater use of standard form contracts (particularly when prepared and published by an independent organisation like Standards Australia). Certainly, the use of various bespoke contracts that contain one-sided and aggressive time-bar clauses needs to be addressed and I believe that the most effective way of doing this is for the legislation to contain a provision along the lines of that presented by Mr Fenwick-Elliott in his article *Queen of Hearts in the Dock*, which reads as follows:

- (a) A provision in a Construction Contract which purports to make a right to claim or receive payment, or a right to claim or receive an extension of time, conditional upon the provision of any notice shall be of no effect if and insofar as:
  - (i) Compliance with the requirements of the provision would not be reasonably possible or would be unreasonable onerous, or
  - (ii) The requirements of the provision are not reasonably justifiable by any legitimate commercial purpose
- (b) For the purpose, 'notice' includes any notice, claim for payment, narrative or calculation as to actual or estimated time or money.
- (c) The failure of any provision or part of a provision to satisfy the requirement of reasonableness at subsection (1) (a) of this section in relation to a right or claim to money and/or time shall not of itself render that provision ineffective for the purpose of any right or claim to other time and /or money.<sup>809</sup>

Insofar as there may be concerns that adjudicators could seek to interpret a particular contract provision in a more 'liberal' manner than an arbitrator or the courts (and thereby create further uncertainty), then I can only respond by suggesting that the recommendations contained elsewhere in this Report should result in a superior decision-making process than what is currently the case.

#### **Recommendation 84:**

The legislation should void a contractual term that purports to make a right to claim or receive payment, or a right to claim an extension of time, conditional upon giving notice where compliance with the notice requirements would:

- a) not be reasonably possible; or
- b) be unreasonably onerous; or
- c) serve no commercial purpose.

<sup>809</sup> Elliott, R. Fenwick (2017), op cit

# Chapter 17:

# Statutory trusts

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## 17. Statutory trusts

### 17.1 Background

As highlighted earlier in the report, the construction industry has a high incidence of insolvency and payment default. The hierarchical contractual chain within which the industry operates makes subcontractors vulnerable whenever a party higher up the contractual chain either misuses funds that are rightfully due to subcontractors, or becomes insolvent.

Whereas security of payment laws to date have primarily focused on enshrining the right to progress payments and providing a mechanism for the rapid resolution of disputed payment claims, very little has been done to ensure that payments made to a party higher up the chain for work carried out by subcontractors are protected from insolvency and misuse. This chapter considers what measures can be made to protect such payments from diversion and misuse.

### 17.2 Historical consideration of the issues

#### Issues first considered by NSW in early 1990s

The issue of establishing a statutory trust has been debated within industry over the past 25 years. As early as 1991, NSW Business and Consumers Affairs published an issues paper which sought industry comment regarding the enactment of legislation to mandate a trust provision in subcontractors' contracts. A broad-based industry group (the NSW Security of Payment Committee) was established which developed the concept whereby once a progress claim has been certified and payment made in respect of that claim, the party who received that payment holds that amount in trust for those to whom payment is rightfully due. The concept of a deemed statutory trust was submitted to the NSW Government who then commissioned an external consultant, Andersen Consulting, to conduct a feasibility study of the proposal. Andersen Consulting rejected the proposal, citing the following three reasons:

- 1) The proposal has serious legal shortcomings;
- 2) The proposal may lead to an increase in the cost of building projects in NSW;
- 3) The proposal is designed to deal with two connected problems which may be less serious than thought:
  - a) the delay in payments to building subcontractors; and
  - b) the effect this has on subcontractor liquidity and hence failure.<sup>810</sup>

Andersen Consulting suggested several alternative approaches to address the security of payment problems, such as through the implementation of a government code of practice underpinned by government contracts which would include a provision for mandatory trusts for retention moneys. It also recommended the use of alternative dispute resolution and increased training of industry participants. The NSW Government proceeded to implement these recommendations, including the introduction of various contractual measures such as:

- allowing subcontractors to provide unconditional undertakings (bank guarantees) from financial institutions in lieu of cash security or cash retentions, and
- requiring cash security or cash retention provided by a subcontractor to be held in trust so as to quarantine such moneys from the head contractor's cash flow.

<sup>810</sup> Andersen Consulting (1993), *Feasibility Study into the proposal prepared by the NSW Security of Payment Committee: Final Report*, 28 May 1993

Significantly however, in respect of the Committee's deemed statutory trust proposal, the NSW Government's response was as follows:

(The) complexities associated with the mixing of trust monies with other funds of a contractor, together with the impact of other existing regulations/laws on the status of such moneys, would inevitably result in a costly and complex dispute process. Therefore, recovery of trust funds in the event of insolvency is extremely unlikely, while existing legal remedies are available for recovery if insolvency is not at issue.

The practical benefit of trusts as proposed by the Security of Payment Review Committee was seen as having a strict regime in place to punish those who fail to pay and therefore breached their trust obligations.

Any such additional punitive regime is not considered appropriate at this stage.<sup>811</sup>

### WA Law Reform Commission report

In 1995, the WA Law Reform Commission was asked by the WA Government:

To recommend what changes to the law, if any (other than contractor's liens and charges), should be adopted for the protection of the interest of subcontractors, workers and others in the building and construction industry in receiving payment for work done or materials supplied.<sup>812</sup>

The Chairman of the WA Law Reform Commission, Mr Wayne Martin QC (as he then was) tabled the Report *Financial Protection in the Building and Construction Industry* in March 1998.<sup>813</sup> The Commission recommended that a statutory trust scheme be established, notwithstanding that the majority of the submissions it had received were opposed to the concept of trusts. The Commission stated that a statutory trust has the following advantages:

1. It provides a means of ensuring that a head contractor and subcontractors are paid for their services and for materials supplied while keeping contract moneys within the control of the parties to the project.
2. It imposes ethical standards on the payment of participants in the industry for work done or materials supplied in an industry which has failed to use self-regulation to control the use of various unfair or unscrupulous practices.
3. It reinforces good practice in the distribution of funds for a project to the participants in the project and is consistent with the concept of cooperative contracting, which is seen as way of improving the efficiency of the industry.
4. Because the moneys are held in trust, they cannot be seized or frozen by a receiver or liquidator of the trustee or the trustee of the estate of a bankrupt trustee. This means that the position of a person further down the chain can be secured and the payment of funds downward can still take place because the project funds held in trust will not form part of property distributed in the bankruptcy or winding up of the trustee.
5. A wider range of remedies is available for a breach or possible breach of trust than for a breach of contract.
6. It may result in a speedier resolution of disputes between, for example, a head contractor and a subcontractor, because generally the head contractor cannot withdraw money from the trust fund until all the claims of the fund's beneficiaries have been met. It removes the incentive for

<sup>811</sup> NSCO Government Green Paper, 1996, 'The Construction Industry in NSW: Opportunities and Challenges', p. 82.

<sup>812</sup> Law Reform Commission, Parliament of Western Australia, *Project No.82: Financial Protection in the Building and Construction Industry — Report* (1998), p. 1, Terms of Reference.

<sup>813</sup> Mr Martin is now the Chief Justice of the WA Supreme Court.

those holding funds to create artificial disputes and resolve them through purely commercial pressure.

7. For the same reason, it may result in speedier payment of subcontractors.<sup>814</sup>

The Commission noted and responded to the various criticisms of the concept of trust schemes, and these main criticisms (together with the Commission's responses) can be summarised as follows:

1. Trust schemes may not be simple to administer and may involve substantial administration costs.

(WA Law Reform Commission Response) — [The] additional accounting requirements will be limited to requiring each trustee to keep a trust account for project funds for each project separate from its general banking account. Doing this will not necessarily require any more stringent book keeping than is now required for the proper running of a business or to comply with taxation laws.<sup>815</sup>

2. A trust scheme is only effective to the extent that there is trust properly available to meet the claims of beneficiaries. It does not guarantee payment where, for example, the contractor or subcontractor has underbid a job or where the right of set-off arises because of an incomplete or deficient job.

(WA Law Reform Commission Response) — A trust scheme might, however, deter underbidding or underquoting because it would be a breach of trust for trust funds for one project to be used to meet financial obligations on another project and if there were insufficient funds available to pay all beneficiaries the funds would have to be distributed on a pro rata basis to the beneficiaries and the head contractor would not be entitled to any of the trust funds.

3. The consequence of a trust scheme is that it will reduce the scope for head contractors to divert money received from one project to meet payment on another project.

(WA Law Reform Commission Response) — It is merely good business practice and good governance to ensure that adequate funding is available for a project without recourse to funds properly due to another contractor on another project and without putting those funds at risk by using them on the project.<sup>816</sup>

4. Those higher up the contractual chain may attempt to evade a trust scheme by adopting a residence or domicile outside the state, and a trust scheme would breach section 92 of the Commonwealth Constitution, which provides that 'trade, commerce and intercourse among the states... shall be absolutely free.'

(WA Law Reform Commission Response) — The State Parliament can enact laws having extraterritorial operation,<sup>817</sup> that is, laws which affect persons, conduct or things outside the State, so long as the law has a sufficient connection with the State. There might also be concern that a trust scheme would breach section 92 of the Commonwealth Constitution which provides that 'trade, commerce, and intercourse among the States ... shall be absolutely free'... this is not the case because a trust scheme would not impose government controls or burdens which discriminate against interstate trade and commerce so as to protect intrastate trade against competition.<sup>818</sup>

<sup>814</sup> Law Reform Commission, Parliament of Western Australia, *Project No.82: Financial Protection in the Building and Construction Industry — Report* (1998), pp. 52–3.

<sup>815</sup> *Ibid*, p. 53 [3.16].

<sup>816</sup> *Ibid*, p. 55, [3.18].

<sup>817</sup> Refer to s.2(1) of the *Australia Act 1986* (Cth).

<sup>818</sup> Law Reform Commission, Parliament of Western Australia, *Project No.82: Financial Protection in the Building and Construction Industry — Report* (1998), p. 55.



5. A trust scheme may involve third parties particularly because the law of trusts provides powers relating to the tracing of funds.

(WA Law Reform Commission Response) – ... trust funds can be traced and recovered only if they come into the hands of a third party who is not a bona fide purchaser for value without notice of the breach of trust. Otherwise the beneficiary may recover the trust monies or any other property into which the money has been converted or obtain a charge on the trust money or its traceable product. As notice of the breach may be constructive those dealing with trustees in legitimate business dealings, such as banks which hold trust funds, need to confirm that payments from trust funds to them, for example to reduce an overdraft or under an assignment of accounts receivable, are in accordance with the trust. If they are, they are free from fund tracing actions by beneficiaries of the trust. Canadian cases suggest that if a bank is aware that a customer is a head contractor or subcontractor and funds deposited in its account are the proceeds of building contracts, the bank is taken to have notice that the relevant legislation impresses the funds with a trust to the extent that; there are unpaid beneficiaries. Where banks are aware that funds deposited with them are trust monies they can avoid being subject to tracing actions by ensuring that the beneficiaries have been paid before receiving payments from their customer.<sup>819</sup>

6. A trust scheme interferes with the application of the insolvency laws and the priorities for the distribution of a debtor's assets to its creditors because trust funds payable to participants in a project do not form part of the debtor's estate for distribution to the debtor's creditors.

(WA Law Reform Commission Response) — ... this interference can be justified because if it were not the case, creditors other than participants in the project would obtain a benefit from the work and materials supplied by the participants for which they had not been paid.<sup>820</sup>

As was the case in NSW, the WA Law Reform Commission's recommendation relating to the adoption of a trust scheme were **not** adopted by the WA Government because of what was said to be 'difficulties' associated in the implementation as well as 'the inflexibility that would have been imposed on a builder's business operation.'<sup>821</sup>

## Other state government inquiries

### *Scurr Report (Queensland) 1996*

In the 1990s, other state governments also explored the viability of introducing trust schemes for the construction industry. The Queensland Government conducted a Commission of Inquiry in 1996 which was headed by Mr Arthur Scurr.<sup>822</sup> Mr Scurr put forward a proposal that would involve a total of 5% of the total project contract price being placed in trust, half of which would be provided by the client and the other half by the head contractor, to secure the payment of the parties down the contractual chain. Mr Scurr equated these amounts to the amounts subcontractors are required to provide to secure the performance of their contractual obligations and suggested that parties higher up the contractual chain should similarly be required to secure the performance of their contractual obligation to pay parties down the contractual chain. Mr Scurr's proposal was not taken up by the Queensland Government, although the reasons for that decision remain unclear.

<sup>819</sup> Ibid, p. 56.

<sup>820</sup> Ibid.

<sup>821</sup> Evans Review, op cit, p. 80, footnote 282.

<sup>822</sup> Scurr, A. (1996), *Inquiry into Security of Payment in the Building and Construction Industry*, Queensland Government, September 1996.

### *South Australia reviews of Worker's Liens Act*

The South Australian Parliament produced two reports on the SA Liens Act in the 1990s, one by a Select Committee of the House of Assembly and the other by a Ministerial Working Party.<sup>823</sup> The Select Committee examined the operation of the SA Liens Act and concluded that the Act was no longer effective. It recommended a number of alternative measures such as standardising building contracts to enable owners to pay subcontractors directly, as well as a scheme to enable subcontractors to ensure against a builder becoming insolvent. The Ministerial Working Party was set up to advise the Minister on measures that would reduce insolvency in the industry and it recommended a range of measures (such as enhanced industry education and mandatory trade indemnity insurance), but **not** the establishment of a trust scheme.

### *Cole Royal Commission*

The 2003 Cole Royal Commission noted the debate that had occurred in relation to the concept of a trust model and that none of the governments of NSW, Queensland and Western Australia had accepted recommendations for such a model to be implemented, and that key organisations like MBA, HIA, AIG and ACA remained opposed to its adoption. Commissioner Cole accordingly did not recommend adopting a trust model (except in the limited case of insolvency of the party who holds security and retention moneys) and went on to make the following comments:

Security and retention moneys, being moneys provided by a downstream party to an upstream party, are in a different position to money flowing from a client to a head contractor (the traditional focus of the deemed trust model), which has never been earmarked as payable to a subcontractor. A deemed trust in relation to security and retention moneys, which arises only in the event of insolvency, therefore should not give rise to the practical objections otherwise made in relation to deemed trusts...

**In not recommending the wider adoption of a deemed trust model, the Commission should not be taken to be recommending against that model. On the contrary, it appears to me that many of the objections to the deemed trust model may be overstated.** The fact is however that industry opposition to trusts is so entrenched that any recommendation in relation to them would very likely be vigorously opposed and debate in relation to it would be likely to be protracted. The Commission has therefore chosen to focus upon reform recommendations to improve security of payment that have better prospects of being accepted and implemented. [emphasis added]<sup>824</sup>

Thus, the main thrust of the Commissioner Cole's Final Report was the recommendation that the Commonwealth enact security of payments legislation, a model bill of which was included as an Appendix to the Final Report.<sup>825</sup> It is of course now history that no such Commonwealth legislation was enacted but each of the state and territory governments, between the period of 2002 and 2009, enacted their own versions of such legislation.

### *Collins Inquiry (NSW) 2012*

The issue of a trust scheme was, however, to be revisited by Mr Bruce Collins QC in 2012 in the inquiry he conducted into insolvency in the NSW construction industry. Mr Collins considered all of the previous reports that dealt with this issue. He observed that the WA Law Reform Commission Report 'remains one of the most scholarly and convincing analysis of the statutory construction trust'.<sup>826</sup> He noted that the Commission's recommendation had, however, not been adopted, in large part due to the Crown Solicitor's Office advice. He devoted a large part of his Report to addressing

<sup>823</sup> South Australia Parliament, Select Committee of the House of Assembly (1990), *Report of the Select Committee of the House of Assembly on the Operation of the Worker's Liens Act 1893*, Government Printer, Adelaide.

<sup>824</sup> Cole Royal Commission, op cit, paras 108–109.

<sup>825</sup> Ibid, Appendix 1 to ch. 14, vol. 8.

<sup>826</sup> Collins Inquiry, op cit, p. 214.

each and every previous report that had criticised the concept of a statutory construction trust in the previous 20 years. Mr Collins' critique of the arguments of the opponents for the introduction of a statutory trust represents an extraordinary intellectual achievement.

In relation to the 1993 Andersen Report,<sup>827</sup> Mr Collins observed:

[When] properly analysed, it is a non-analytical document which simply threw up a series of questions without answering those questions in a closely reasoned way at all ... At best, it throws a number of questions up in the air, declines to attempt to answer those questions and then says it is all too hard and the proposal should not be carried forward. That is not a rational or sensible approach to the question of law reform in the face of overwhelming evidence crying out for remedial action.<sup>828</sup>

Insofar as the Andersen Consulting report asserted that a deemed statutory trust may result in third parties being dragged into disputes and suffering consequential loss, Mr Collins responded by stating that such a view is entirely misplaced:

This is a disappointing criticism and one that is entirely beside the point. The only way that a third party can be 'dragged into disputes and suffer consequential financial loss' is if that party falls within the rule of *Barnes v Addy*, a rule formulated in 1874.<sup>829</sup>

Third parties will only be liable where they have wrongfully and with knowledge of the trust, assisted a wrongdoer in the dispersal of trust funds. It can hardly be logged as a criticism of the construction trust fund proposal to say that it drags a third party into dispute, when in reality the third party will only become liable by reason of its wrongful breach of a principle which has stood for the last 130 years and has been fully affirmed in the High Court of Australia as recently as 2007 in *Farah Construction Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 ...

The second reason for rejecting the Andersen Report criticism is that one of the reasons why the trust concept is advocated is **because** it provides an additional protection to the subcontractor in the precise event of unlawful dispersal of the trust funds by third parties. Far from this being a disadvantage which is said to be potentially 'the most difficult aspect of the present ... proposal; the involvement of third parties is a powerful additional safeguard to the subcontractor. The flavour of the Andersen Report shows the writer striving by use of exaggeration and misattribution, to dredge up any possible criticism with a view to justifying the heading 'The Proposal has some serious flaws'. The report tries too hard and falls well short.<sup>830</sup>

Insofar as the Andersen Consulting report asserted that the deemed statutory trust proposal 'could make litigation a more attractive option for subcontractors who would seek to exercise their rights ... because there would be more people from whom to extract moneys (i.e. the offices of the trustee based upon their fiduciary responsibility), Mr Collins responded that such criticism is purely speculative. In any event, in order to establish an entitlement to the money in the trust funds, a subcontractor would have to establish precisely the same things that it would currently need to establish under the security of payment legislation:

The only additional right given to the subcontractor is to enforce its proven claim against a preserved fund which has been held upon trust, rather than to run the risk of pursuing an insolvent trustee/head contractor. Once moneys have been paid into the trust fund it is already established that the subcontractor is entitled to at least some of the agreed part of those funds ... If once the funds are in the trust account, if there is a dispute as to the amount, if there is a dispute as to the amount paid out to the subcontractor then SOPA will determine that dispute.<sup>831</sup>

<sup>827</sup> Andersen Consulting (1993), op cit

<sup>828</sup> Collins Inquiry, op cit, pp. 217–218.

<sup>829</sup> (1873–74) LR 9. p. 244.

<sup>830</sup> Collins Inquiry, op cit, pp. 221–2.

<sup>831</sup> Ibid, pp. 228–9.

Mr Collins also disagreed with the Andersen Consulting report's suggestion that the introduction of a deemed statutory trust would create major administrative burdens, particularly for small contractors and requiring a 'higher level of monitoring of amounts in bank accounts', stating that:

... the account will have to be monitored presumably as it would have been in any event. If the trust monies are paid out as they should be, there is no question of them being 'continually maintained at a level to allow potential payments.' There is no question of 'maintaining levels.' The account can only contain what the owner put in.<sup>832</sup>

In regard to the advice that the NSW Crown Solicitor's Office provided (in 1998) to the NSW Government recommending against the adoption of a deemed statutory trust, Mr Collins made the following general comment:

This was not a detailed legal analysis and the Crown Solicitor does not appear to have been briefed in detail or requested to provide detailed advice. There is no attempt to analyse the contextual proposal that was put up ... and there is no reference to any statutory provision or case law. In the Inquiry's respectful view, the conclusions in the Crown Solicitor's advice are not legally correct and present no impediment to the statutory construction trust model proposed by the Inquiry.<sup>833</sup>

The Crown Solicitor also stated that a deemed statutory trust 'presents real difficulties in relation to the general law of trusts'; however, Mr Collins observed that the advice did not indicate how and in what respect there was said to have been a clash. In any event, Mr Collins considered that '[t]he legislation sets up a trust to which the general law of trusts applied unless those rules have been expressly varied by legislation itself'.<sup>834</sup>

Insofar as the Crown Solicitor stated that the proposal had 'the potential to disturb the order of priority of employees and secured creditors', Mr Collins disagreed:

... In addition, it was suspected that the provisions made banks and other lending institutions reluctant to provide normal financing arrangements within the construction industry. The (Manitoba Law Reform) Commission acknowledged that it had found however, no evidence of any impediments to financing and indeed found general favour for the trust scheme within the construction industry ...<sup>835</sup>

Mr Collins also noted a 2001 Security of Payment Task Force for the Western Australian Building Industry report entitled *Report to the Minister for Housing and Works* (the WA Taskforce Report), which enquired into the issue of insolvency in the WA construction industry.<sup>836</sup> The WA Taskforce Report, whilst acknowledging the significant problem of insolvency in the industry, nonetheless rejected the notion of a statutory trust, stating:

However, after carefully considering advice from the WA Crown Solicitor's Office and the research and conclusions of other jurisdictions, the Taskforce does not recommend state legislation to establish a statutory trust regime as it believes the need to administer contract payments in a trust framework will impose a disproportionate and unfair burden on contractors. The Taskforce believes that the protection of outstanding moneys in circumstances of insolvency cannot be cost effectively achieved via state legislation and would [be] better addressed via amendments of the Commonwealth Bankruptcy Act.

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<sup>832</sup> Collins Inquiry, p. 235.

<sup>833</sup> Ibid, p. 292.

<sup>834</sup> Ibid, p. 292.

<sup>835</sup> Ibid, p. 294. The reference to the article is Ettinger, LP (1988-1989), 'Trusts in the Construction Industry' (1988-1989) 27 (3) *Alberta Law Review*, 390, p. 393.

<sup>836</sup> The Security of Payment Task Force for the Western Australian Building Industry (2001), *Report to the Minister for Housing and Works*, November 2001, Department of Housing and Works, Perth

The Commonwealth Government has recently indicated a willingness to amend its Bankruptcy Act to increase protection to funds owed to workers when an employer becomes insolvent. The situation for small contractors is similar to that of workers and the particular circumstances in construction where title passes to the landholder deserve special consideration. The Taskforce recommends that the state approach the Commonwealth to amend the Bankruptcy Act to provide protection for unpaid contractors similar to that proposed for employees of insolvent companies.<sup>837</sup>

Mr Collins was mystified as to the Taskforce's conclusion not to support the WA Law Reform Commission's recommendation but insofar as it could be better addressed by amendments to the *Bankruptcy Act 1966* (Cth), such reason was misconceived:

The Bankruptcy Act is irrelevant to the problem under examination. The trust protects the principal's payment and adds to the likelihood that subcontractors will be paid 100 cents in the dollar for the progress claims in the trust account. The inquiry does not hold the view that s. 556 of the Corporations Act should be amended so as to give some greater protection to subcontractors.<sup>838</sup>

Thus, after analysing each of the criticisms that had been made in relation to the concept of a statutory trust, Mr Collins summarised the opposition to the concept in the following eloquent manner:

After many discussions with interested parties upon the subject of the introduction of the construction trust the overwhelming evidence demonstrates that opposition to the introduction of the construction trust is born out of misunderstanding. That is not too difficult to appreciate because the genius of the trust is that it is not an impediment yet at the same time it is the most effective guarantee against the loss of moneys that should have been passed on to the subcontractor. By far the greater part of the opposition to the construction trust may be put down in the view of the Inquiry to the perfectly understandable lack of knowledge in the building and construction industry of the trust device itself.

In the practical sense and in the real world, the construction trust will not place a heavy hand upon the conduct of those in the building and construction industry — its real role will only be demonstrated and become prominent if and when an insolvency occurs. The trust will then ensure that moneys that have been ring fenced are not available in the general insolvency of the company.

It is going too far, and it is unnecessary, to say that the construction trust is 'invisible' whilst ever the head contractor is busily trading in a state of solvency making profits and paying its creditors. However, in one important sense whilst everything is going along as it should, moneys are simply being passed through the trust at greater speed and with greater safety to their proper and ultimate destination, namely the subcontractors. It is difficult if not impossible to see anything wrong with this regime.

Let the matter be tested this way. In the absence of any insolvency it is business as usual except for the requirement that one new account be opened up for the total number of contractors projects and that that account be as it were, monitored by the head contractor in much the same way that any prudent business monitors the state of its bank account by looking at the deposits and the withdrawals and keeping a weather eye on all of types of things that a business should be conscious of, for example, upcoming payments to creditors and so on.<sup>839</sup>

Accordingly, the Collins Inquiry report recommended the establishment of a statutory construction trust to apply to all building projects valued at \$1 million or more. The NSW Government responded to this part of the Collins Inquiry by amending the NSW Act and only requiring retention money held by head contractors for projects valued over \$20 million to be held in a trust account with an

<sup>837</sup> Ibid, p. 17.

<sup>838</sup> Collins Inquiry, op cit, p. 300.

<sup>839</sup> Ibid, p. 309.

authorised deposit taking institution.<sup>840</sup> It also agreed to trial project bank accounts (PBAs) for selected government projects.

Collins also examined the different statutory trust schemes that operate in various provinces of Canada and the states of the USA. He was attracted to the statutory construction trust set out in the Code of Maryland, Real Property Article, Title 9, which states:

Title 9. Statutory Liens on Real Property:

Subtitle 2: Trust relationships in the Construction Industry

Moneys to be held in trust.

Any moneys paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor for work done or materials furnished, or both, for or about a building by any subcontractor, shall be held in trust by the contractor or subcontractor, as trustee, for those subcontractors who did work or furnished materials, or both, for or about the building, for purposes of paying those subcontractors.<sup>841</sup>

A number of other states in the USA have adopted their own statutory construction trust laws.<sup>842</sup>

### Senate Economic References Committee Report (2015)

In its Report, the SERC Inquiry noted the strong support from a number of organisations for the adoption of a statutory construction trust 'at a national level, or across all states and territories'<sup>843</sup> and that such support marked a clear change from the viewpoints industry had expressed a decade earlier.<sup>844</sup> The Committee accordingly went on to make the following three recommendations:

#### Recommendation 29

The committee recommends that commencing as soon as practicable, but no later than 1 July 2016, the Government undertake a two-year trial of Project Bank Accounts (PBAs) on no less than twenty construction projects where the Commonwealth's funding for the project exceeds \$10 million.

#### Recommendation 30

The committee recommends that after the trial has concluded, a timely evaluation of the trial of PBAs on Commonwealth funded projects be conducted with a view to making the use of PBAs compulsory on all future Commonwealth funded projects and mandating extending the use of PBAs to private sector construction projects.

#### Recommendation 31

The committee recommends that, while the Commonwealth trial of Project Bank Accounts is underway, the Attorney-General refer to the Australian Law Reform Commission for inquiry and report a reference on statutory trusts for the construction industry. This inquiry should recommend

<sup>840</sup> Building and Construction Industry Security of Payment Regulation III of 2015, Schedule 1 [2].

<sup>841</sup> Collins Inquiry, op cit, pp. 153–4.

<sup>842</sup> Arizona Revised Statutes, s. 1005; Colorado Revised Statutes Amended, s. 38–22–127; Delaware Code Amended Title 6, s. 3502; 770 Illinois Compiled Statute 60/21.02; Michigan Com. Laws, ss. 570, 151 et seq. (1961); Minnesota Statute Amendment, s. 514.02 (2003); New Jersey Stat. Ann., s. 2A:44–148 (West 2004) and New Jersey Stat. Ann. ss. 2A:29A et seq; New York Lien Law, ss. 70–79A; Oklahoma State. Tit. 42, ss. 152 and 153 (2004); South Dakota Codified Laws, s. 44–9–13 (2004); Texas Property Code, 10, sub. B, ch. 162; Vermont Stat. Ann. Tit 9, ss. 4003, 4005a; Washington Rev. Code s. 60.28.010 (2004); and Wisconsin Stat. s. 779.02(5) and 779.16(2003).

<sup>843</sup> SERC Inquiry Report, op cit, para. 10.12.

<sup>844</sup> Ibid, para. 10.3.



what statutory model trust account should be adopted for the construction industry as a whole, including whether it should apply to both public and private sector construction work.<sup>845</sup>

### 17.3 Recent trials of Project Bank Accounts

Over the past three years the NSW, Western Australia and Queensland governments have trialled PBAs on various state government construction projects. The concept of the PBAs that have been trialled to date require the head contractor to establish an account into which the principal pays certified payments, which are then distributed between the head contractor and first-tier subcontractors.

Thus, in the case of NSW, its Procurement Board trialled the use of PBAs on 10 NSW Government projects between the period November 2013 to December 2015. In July 2015, the NSW Government published an interim report which confirmed that PBAs were an option for use by state government agencies.<sup>846</sup> In the case of Western Australia, a similar PBA model has been trialled on Western Australian Department of Finance, Building Management and Works construction projects. In a publication issued by the Western Australian Government the trialled PBAs were said to have been successful in that it improved transparency of the payment process as well as the speed of payment for subcontractors. The publication did however note that establishing a PBA can be challenging and require demanding administration of the monthly payment process.<sup>847</sup> The Western Australian Government proposed that the PBA scheme will be applied to a number of projects tendered by its Department of Finance, Building Management and Works involving a construction value between \$1.5 million and \$100 million. The Western Australian Government forecast that by 30 June 2017, up to 30 contracts incorporating the use of PBAs will have been awarded with a combined value of approximately \$220 million.

It is, however, the Queensland Government that has been the most active in exploring the viability of introducing PBAs on construction projects. In early 2016, it released a security of payment discussion paper seeking feedback on how best to ensure that subcontractors receive payment for construction work carried out.<sup>848</sup> The discussion paper identified a series of options including PBAs, a Retention Trust Fund Scheme (RTFS), Insurance Schemes, lobbying the Commonwealth for reform to Commonwealth legislation and education for industry stakeholders on matters such as financial and business management. The Queensland Government also commissioned Deloitte to evaluate these options and this evaluation comprised of three components:

1. A cost-benefit analysis quantifying the benefits and costs accruing to government (as principal and as Regulator), head contractors and subcontractors.
2. A multi-criteria analysis assessing impacts that could not be quantified in the cost-benefit analysis.
3. An economic impact analysis measuring the economy-wide effects of improved risk allocation and therefore efficiency in the construction industry.

<sup>845</sup> Ibid, p. xxxi.

<sup>846</sup> See <<https://www.procurepoint.nsw.gov.au/before-you-buy/construction/project-bank-accounts>>.

<sup>847</sup> See <[https://audit.wa.gov.au/wp-content/uploads/2016/12/report2016\\_31-PaymentSubcontractors.pdf](https://audit.wa.gov.au/wp-content/uploads/2016/12/report2016_31-PaymentSubcontractors.pdf)>.

<sup>848</sup> Department of Housing and Public Works (2016), *Queensland Building Plan: A discussion paper for industry and consumers*: <<http://queenslandbuildingplan.engagemthq.com/23620/documents/47339>>



Two subsequent Deloitte reports<sup>849</sup> stated that the benefits of PBAs outweighed the costs but that the opposite was true for RTFS.

As noted earlier in this Report, the Queensland Bill 2017, which was introduced on 22 August 2017, is a broad ranging legislation intended to introduce PBAs and effect changes to the current Queensland Act, SC Act, retentions, phoenixing and minimum financing requirements.

The Queensland Bill 2017 provides for PBAs to apply to state government building projects between \$1 million and \$10 million from January 2018, but the Queensland Government has announced its intention to expand PBAs to all private non-residential and public building projects over \$1 million by no later than January 2019. The Bill requires head contractors to set up a PBA for the project within 20 business days after entering the first subcontract. Specifically, the head contractor will need to open three separate trust accounts — a general trust account, a retention trust account and a disputed trust account. The Bill also provides for the head contractor to be trustee of the PBA, with the head contractor and each of its subcontractors having a beneficial interest in the amounts held in trust under the PBA, to the extent of:

- a) for a subcontractor – an amount the subcontractor is entitled to be paid under its subcontract, including a retention amount and an amount the subject of a payment dispute; or
- b) for the head contractor – the remainder for the project bank account.<sup>850</sup>

The PBA will involve a process whereby the principal's payments are made directly into the PBA general trust account. If a subcontractor is entitled to be paid under a subcontract entered into with the head contractor, the head contractor will forward the payment instruction to the bank for such amount to be paid from the PBA.

If, however, the head contractor had issued a payment schedule to the subcontractor that is less than the amount claimed by the subcontractor, then the subcontractor will still be able to refer its disputed payment claim to adjudication. Insofar as the head contractor is required to pay an amount that is 'disputed' into the disputed trust account of the PBA, that amount will be the difference between the payment schedule and the payment instruction (**not** the difference between the amount claimed as set out in the subcontractor's payment claim and the scheduled amount).

In relation to the retention trust account, the head contractor will be permitted to withdraw an amount from that account 'to correct defects to in the building works, or otherwise to secure wholly or partly, the performance of a subcontract by a subcontractor beneficiary'.<sup>851</sup> All payments to subcontractors must be made from the PBA and thus, if there are insufficient funds in the PBA when subcontractors are required to be paid, the head contractor will need to "top up" the PBA so that such payments can take place..

Master Builders Queensland have produced the flowchart in **Figure 3** below showing the PBA payment process as set out in the Queensland Bill 2017.

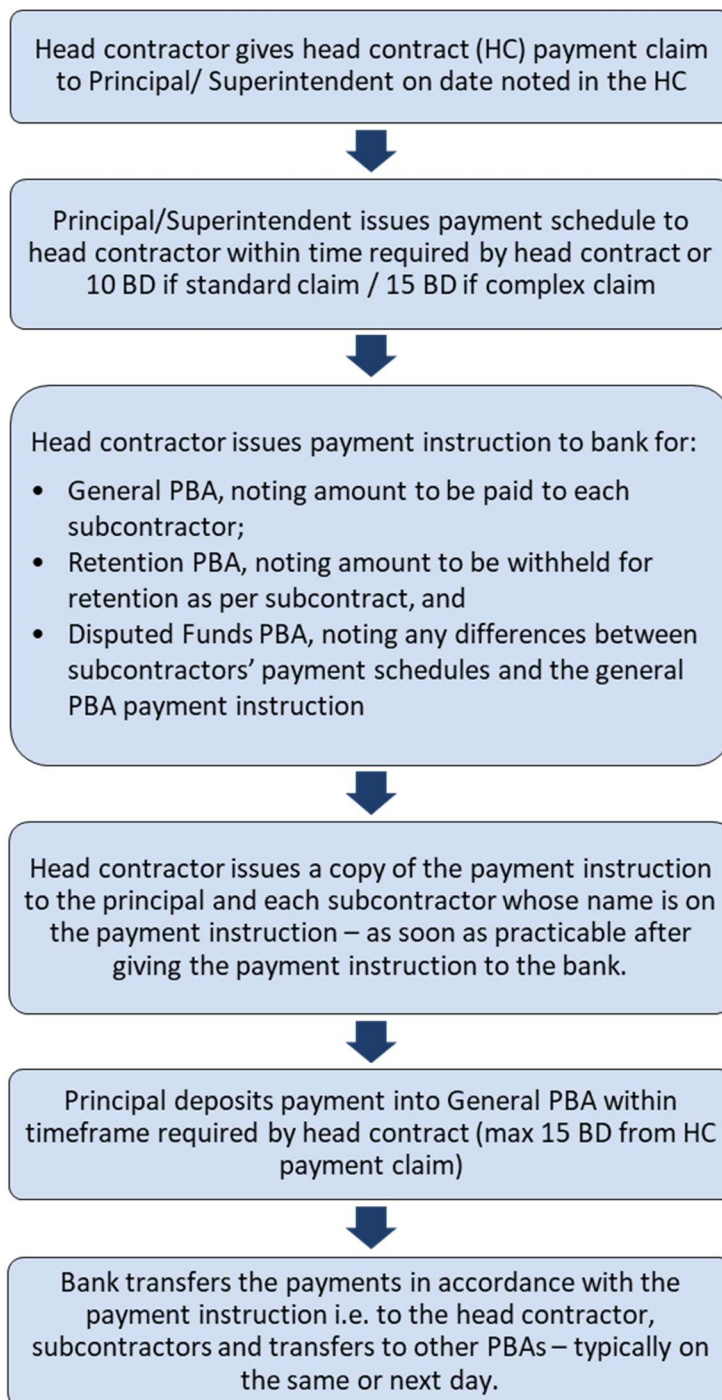
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<sup>849</sup> Deloitte Access Economics (2016), *Analysis of Security of Payment reform for the building and construction industry* — prepared for the Queensland Department of Housing and Public Works, 8 November 2016; and Deloitte Access Economics (2017), *Analysis of Security of Payment reform for the building and construction industry — Addendum Report* — prepared for the Queensland Department of Housing and Public Works, 19 July 2017.

<sup>850</sup> Subclause 9(3) of the Bill.

<sup>851</sup> Clause 34(2)(b) of the Bill.

**Figure 3: The Project Bank Account payment process as set out in the Queensland Bill 2017**



HC: head contractor; BD: business days; PBA: project bank account  
**Source:** Queensland Master Builders Association

The provisions within the Queensland Bill 2017 relating to the PBA, whilst supported by subcontractor groups, have been the subject of strident criticism from sectors of the legal profession and from organisations like QMBA. The main thrust of criticisms of the Queensland Bill 2017 can be summarised as follows:

1. The PBA proposal only provides protection to one layer of the industry, being those subcontractors who have entered into a subcontract with head contractors. No protection is given to those sub-subcontractors who have entered into a contract with the subcontractor.
2. The PBA will not, contrary to the government assertion, guarantee that subcontractors will get paid the full amount claimed every time a payment claim is submitted to the head contractor. A subcontractor's entitlement to receive payment will turn on whether it has performed its contractual obligations, which in turn will require consideration of whether the head contractor has a contractual entitlement to withdraw an amount from a progress payment due to a subcontractor.
3. The notion of the PBA model presumes that the payment claims submitted under the head contract will correlate with the payment claim submitted under the head contract. Such a presumption, however, is misplaced because head contracts are typically based on a trade package break down whereas subcontracts are based on a particular scope of works. Thus, the amount due to a subcontractor under the subcontract has little bearing on the assessment of the head contractor's payment claim under the head contract.
4. Notwithstanding that the principal's progress payments to the head contractor are required to be paid into the PBA, it is the head contractor who will determine the amount paid out of the PBA to each subcontractor. Insofar as a Superintendent has been appointed for a project, the Superintendent's function is to administer the head contract, not the subcontracts.
5. The amount held in the PBA in trust for a subcontractor is the amount that is noted by the head contractor on the PBA payment instruction. If the PBA payment instruction does not correctly reflect the moneys due and payable to the subcontractor at the time, then the subcontractor will not have beneficial interest in any moneys that may subsequently be paid into the PBA. In any event, payments out of the PBA are processed on the same or next day as the payment is made into the PBA by the principal. Therefore, the progress payment PBA is a 'zero balance' account and in the event of insolvency of the head contractor, there will not be any money in the PBA for payment to subcontractors.
6. The requirements under the Bill for head contractor to set up and manage the three different PBA accounts will significantly increase the head contractor's costs and administrative burden. Specifically, the following costs have been identified:
  - a) legal costs to draw up the PBA agreement between the principal and the head contractor
  - b) legal costs to draw up the PBA trust deed between the head contractor and the subcontractors
  - c) costs to set up and administer the PBA accounts
  - d) costs associated with the audit of the PBAs, and
  - e) costs charged by the bank in relation to the PBAs.

According to QMBA and based on feedback from its members who had been involved in trialling PBAs on governance projects in Western Australia, the PBA model resulted in an average **additional** cost of 1.5% of the project value. QMBA emphasise that those costs were incurred by larger head contractors and it contends that the likely impost on smaller head contractors, who cannot rely on economies of scale and have fewer resources, could be as high as 3%.

Insofar as the Queensland Government relies on the Deloitte Reports in support of the proposition that the introduction of PBAs would result in a net benefit to the community, QMBA and Queensland Major Contractors Association consider that such a proposition is misplaced. Both

organisations contend that the assumption within the Deloitte Report that the introduction of PBAs will result in a reduction in project costs of 2.5% is based on a report by Highways England.<sup>852</sup> They further contend that not only was the report not prepared by an independent third party, but the report did not actually make the claim of a 2.5% reduction but rather in turn referred to research undertaken by the office of Government Commerce which ‘suggested that savings in the region of 1–2.5% could be achieved through PBAs’.<sup>853</sup> Further, the Highway England PBS scheme was used on large public civil engineering construction (road building) projects and covered payments to three layers of the construction chain. While Deloitte assumes that the additional administration cost that the head contractor will incur in the implementation of the PBAs will not be passed on to clients, this assumption goes against the grain of normal principles of economics and commerce.

## 17.4 Consideration of statutory trusts

### Responses from stakeholders

Stakeholders were invited to express their views regarding the establishment of a statutory trust and whether such trusts should apply to all moneys owed or be confined only to retention moneys. Not surprisingly, this question drew a range of responses from stakeholders.

As already noted, the QMBA does not support the PBA model to be implemented under the Queensland Bill 2017, and in particular its extension to the private sector. QMBA contends that the proposal will impose additional costs that will tie up more money within the industry. Additionally, because the Queensland PBA model will only address one part of the contractual chain (i.e. principal/client and head contractor), the proposal will not address the problem of insolvency within the building industry in any meaningful way:

**All** building industry participants are entitled to payment for work that they have undertaken, that is Head-Contractor, Sub-Contractor, the Sub-Sub-Contractor and Supplier — not just the first layer of Subcontractors.<sup>854</sup> [emphasis added]

Master Builders Australia and other state and territory MBA’s also support the position outlined by QMBA regarding the adoption of PBAs based on the Queensland model.

Similar opposition to the concept of PBAs (or any form of statutory trusts) was also expressed by organisations representing head contractors. The ACA and HIA also oppose PBAs or the establishment of statutory trusts, and especially in the residential sector:

The reality is that the normal practice in the residential construction industry is that both builder and trade contractor are paid periodically and in arrears during the execution of the works.

Both essentially act as financiers of a sort.

A builder receives progress payment from a client for work performed under the contract with the owner. But it is the builder that carries the contractual risk and statutory liability to the owner for that work.

If these progress claim funds are to be held in a trust account for the benefit of particular subcontractors (even if not yet due and payable) builders will incur additional financing costs for working capital.<sup>855</sup>

<sup>852</sup> Implementation of PBAs across Highways England, Lloyd Biddell —

<https://www.slideshare.net/LloydBiddell/implemntation-of-project-bank-accounts-across-highways-england-50357285>

<sup>853</sup> Ibid, p. 5.

<sup>854</sup> Queensland Master Builders Association (2017), *Submission to Queensland Building Plan Discussion Paper*, February 2017, p. 88, a copy of which was provided following meeting with QMBA on 15 February 2017.

The LCA also expressed the view that ‘consideration should not be given to the establishment of statutory trusts’<sup>856</sup> and that PBAs do not offer a practical solution.

Many of the organisations representing subcontractors however strongly supported the PBA model/statutory trusts.<sup>857</sup> NECA recommended the security of payment legislation should, at the very least, introduce a low-cost Retention Money Trust Account similar to that relating to the real estate industry and the legal profession. NECA recommends that such a scheme should be administered by government ‘to reduce or avoid administrative burdens on business as well as seeking to create a level playing field via a consistent and transparent approach’.<sup>858</sup> Further, NECA considers that there is merit in the use of PBA’s on ‘selected government projects’.<sup>859</sup>

AMCA submits that:

[a]ny provision included in a SOP Act should be prescriptive, encompassing requirements relating to the process and timing of payments, and especially the endorsement of subcontracts as a party to the pre-approval process for claims submitted by the head contractor to the principal.<sup>860</sup>

The CFMEU contends that ‘...for the sake of lasting improvement to the industry and the benefit of all those who work within it, we urge [that] priority [be given] to the PBA and statutory trust system.’<sup>861</sup>

Both the Adjudication Forum and Adjudicate Today support the introduction of a statutory trust along the lines recommended in the Collins Inquiry. Adjudicate Today observed that Mr Collins’ proposal was ‘... endorsed following extensive industry consultation and an exhaustive analysis of similar schemes which have operated in other jurisdictions for many years, most notably Canada and the US.’<sup>862</sup>

Many parties refer to the consultancy report commissioned by the UK Office of Government Commerce in respect to the impact of using PBA’s on construction costs and in particular the finding that public sector clients could expect to save up to 2.5% as outlined above. QMBA contests the assumptions upon which the UK consultant’s report is based.<sup>863</sup>

Responses from governments and officials regarding the use of PBAs were generally positive, with those in NSW, Queensland and Western Australia unsurprisingly supportive of PBAs, given that those jurisdictions are currently either trialling or proposing to trial PBAs. Governments and officials in Victoria, South Australia and the ACT were open to further exploring the use of PBAs following the outcomes of current trials and the findings and recommendations of this Review. The Tasmanian and Northern Territory governments did not offer a position on the use of PBAs.

## Discussion and recommendation

As can be seen from the above, the concept of a statutory trust has been the subject of extensive consideration in a number of previous inquiries and it seems that this issue has been kicked down the road over many years. Despite repeated recommendations for the implementation of a statutory

<sup>855</sup> HIA, written submission, p. 11.

<sup>856</sup> LCA, written submission, para. 23.2, p. 20.

<sup>857</sup> Including MPA, AMCA, NECA, the Subcontractor’s Alliance and Subcontractors WA.

<sup>858</sup> NECA, written submission, p. 35.

<sup>859</sup> Ibid.

<sup>860</sup> AMCA, written submission, p. 19.

<sup>861</sup> CFMEU correspondence dated 8 May 2017.

<sup>862</sup> Adjudicate Today, written submission, p. 66.

<sup>863</sup> Queensland Master Builders Association (2017), op cit., pp. 88–94

[https://www.mbqld.com.au/\\_data/assets/pdf\\_file/0009/578682/Master-Builders-Submission-Qld-Building-Plan.pdf](https://www.mbqld.com.au/_data/assets/pdf_file/0009/578682/Master-Builders-Submission-Qld-Building-Plan.pdf).

trust, including those emanating from Mr Wayne Martin QC (as he then was when he chaired the WA Law Reform Commission) and Mr Bruce Collins QC (head of the Independent Inquiry into Construction Industry Insolvency in NSW), no state government, other than the current Queensland Government when it introduced the Queensland Bill 2017 in August 2017, has shown any political will to advance this concept. The Cole Royal Commission expressed the view that ‘many of the objections to the deemed statutory trust model may be overstated’<sup>864</sup> and that the primary reason for not recommending the adoption of a deemed statutory trust his concern that such a recommendation may protract the implementation of his other reform recommendations to improve security of payment. However, in its Report the SERC Inquiry noted that since the Cole Royal Commission ‘... opposition to a trust model has softened markedly’<sup>865</sup> and that accordingly the Australian Government should trial PBAs over a two-year period and at the same time, the Attorney-General should refer to the Australian Law Reform Commission ‘for enquiry and report’ a reference on statutory trust for the construction industry.<sup>866</sup>

### *Difference between deemed statutory trusts and PBAs*

There is a need to distinguish PBAs from the concept of a deemed statutory trust insofar as the notion of a PBA may be seen as the ‘second wave of security of payment’.<sup>867</sup> The notion of a deemed statutory trust was best encapsulated in the Collins Inquiry, when it was described as follows:

Whenever a payment is made by a principal or by a head contractor or subcontractor which includes payment in respect of work and materials carried out and supplied by subcontractors, sub-subcontractors or suppliers, then the lead contractor as the case may be, will from the moment of receipt of those moneys, hold them as trust moneys on behalf of the subcontractors of sub-subcontractors or suppliers as the case may be, for the sole purpose of payment of moneys due and payable to such subcontractors, sub-subcontractors or suppliers.<sup>868</sup>

On the other hand, a PBA, at least as that expression is referred to under the Queensland Bill 2017, is defined under clause 9, as follows:

9 What is a project bank account

(1) A **project bank account** is a trust over the following amounts –

- (a) an amount paid by the principal to the head contractor under a building contract;
- (b) an amount a subcontractor is entitled to be paid by the head contractor under a first tier subcontract;
- (c) a retention amount withheld from a subcontractor under a first tier subcontract;
- (d) an amount that is the subject of a payment dispute.

(2) The head contractor is the trustee of the project bank account.

(3) The head contractor and each subcontractor are the beneficiaries of the project bank account and have a beneficial interest in the amounts held on trust under the project bank account to the extent of

<sup>864</sup> Cole Royal Commission, op cit, ch. 14, vol. 7, para. 109.

<sup>865</sup> SERC Inquiry Report, op cit, p. 151, para. 10.50.

<sup>866</sup> Ibid, Recommendation 31.

<sup>867</sup> The author was kindly provided with a copy of Dr Jeremy Coggins’ draft paper entitled, ‘*Project Bank Accounts: The Second Wave of Security of Payment?*’

<sup>868</sup> Collins Inquiry, op cit, p. 317.



- (a) for a subcontractor – an amount the subcontractor is entitled to be paid under its subcontract, including a retention amount and an amount the subject of a payment dispute; or
- (b) for the head contractor – the remainder for the project bank account.

(4) A subcontractor –

- (a) becomes a beneficiary when its subcontract is entered into; and
- (b) ceases to be a beneficiary when paid all amounts, including any retention amount, it is entitled to be paid under its subcontract.

(5) In this section –

**remainder**, for a project bank account, means the amount held in trust under the project bank account after subtracting all of the following amounts –

- (a) an amount a subcontractor is entitled to be paid by the head contractor under a first tier subcontract;
- (b) a retention amount withheld from a subcontractor under a first tier subcontract;
- (c) an amount that is the subject of a payment dispute.

**subcontractor**, for a building contract, means a subcontractor, other than a supplier, for a first tier subcontract for the building contract.

It can be seen from the above that the most obvious difference between a deemed statutory trust and a PBA is that a deemed statutory trust operates such that each contractor or subcontractor holds funds down the line on trust for the person with whom they are in contract. A PBA on the other hand is a bank account, opened and maintained by a head contractor, into which contractual payments by the principal are deposited and through which payments are made to the head contractor and its subcontractors directly by the participating bank.

Accordingly, a deemed statutory trust will protect **all** parties involved in the contractual chain, whereas a PBA will **only** provide protection to tier-one subcontractors (i.e. those subcontractors who had entered into a subcontract with the head contractor). True, the introduction of a PBA is a good first step, but no such protection is given to those sub-subcontractors who entered into a contract with the subcontractor, or to those sub-sub-subcontractors who entered into a contract with the sub-subcontractor. Given the pyramidal structure within which the industry operates and that those sub-subcontractors at the base of the pyramid are most vulnerable to the consequences of late payments and the risk of insolvency of the parties higher up the contractual chain, any reform proposal that does not include protection to the most vulnerable must be considered as sub-optimal. Therefore, on this very measure, the PBA proposed in the Queensland Bill 2017 will produce an inferior outcome when compared to the deemed statutory trust concept that had been recommended by the WA Law Reform Commission and the Collins Inquiry. It must however be emphasised that when introducing the Queensland Bill 2017, the Minister stated the intention to progressively extend PBAs to all layers of the contractual chain:

We have listened to industry and under our new laws we will also have the ability to expand PBAs down beyond the first tier of subcontractors to protect those subcontractors and suppliers further down the contractual chain.<sup>869</sup>

<sup>869</sup> Hon. MC de Brenni, Minister for Housing and Public Works and Minister for Sport, Building Industry Fairness (Security of Payment) Bill, Introduction, Hansard, 22 August 2017, p. 2284.



### *Would a cascading trust impose unacceptable administrative burden?*

During the consultation phase of my Review and when I met various subcontractor groups who pressed for the universal adoption of the PBA model, I asked them the question as to why they resisted the concept of a cascading trust that would cover all parties within the contractual chain. In other words, if payments made by a principal to a head contractor were to be treated as trust funds, why should not the payments made by a head contractor to a subcontractor also be treated in the same manner? The answer that I received was that the implementation of a cascading trust would impose an unacceptable administrative burden on the many subcontractors and sub-subcontractors, many of whom operate as small businesses and that in any event, the problem of late payment and the risks of insolvency was primarily a problem confined to the head contractor / subcontractor part of the contractual chain.

Fortunately, not every subcontractor group subscribed to that view, but it was nonetheless a view that was repeatedly put forward by those that opposed the concept of a cascading trust. Insofar as such a view is to be regarded as the formal position of a sector of the industry then it is a position that I cannot agree with. If the concept of introducing a trust is to protect moneys from diversion, misuse or the risk of insolvency, then such protection should flow down to **all** the parties involved in the building payment chain. This is not only to ensure that the subcontractor business that had carried out construction work and/or supplied materials receives payment, but to also ensure that those businesses have the cash flow to pay the wages of their workforce and meet all of their workers' entitlements. That is why the union movement supports 'the adoption of the Collins trust recommendation at a national level'.<sup>870</sup> This is also why Cbus Super supports a deemed statutory trust because it believes that any reform package that protects the payment of its member employers will in turn make it more likely that the employers will pay their employees' superannuation contribution in a timely manner. Importantly, Cbus Super advise that most of their employer members employ less than five employees, thereby reinforcing the need of ensuring that the payments of sub-subcontractors are also protected. This will not be achieved by a PBA which only covers tier one subcontractors, but rather only by a cascading trust.

Therefore, the subcontractor groups that clamour for the adoption of a PBA over the deemed statutory trust are adopting a position that undermines their cause. The fundamental point that needs to be underscored is that the concept of a deemed statutory trust is the **only** proposal that will provide a cost-effective and fair means of dealing with a party's entitlement to be paid. Insofar as industry participants reject the concept of a deemed statutory trust because of increased administrative burden, then the evidence from the various previous inquiries that had considered this very issue, suggests otherwise. Both the WA Law Reform Commission and the Collins Inquiry specifically addressed the issue of administrative burden and concluded that this would not be the case. Similarly, in his Final Report, Commissioner Cole expressed the view that the arguments that opponents to a deemed statutory trust had advanced in relation to the increased administrative burden were 'overstated'.<sup>871</sup> Indeed a careful reading of the step-by-step administrative process that a trustee would be required to carry out would disabuse those that contend that the burden imposed by the adoption of such a scheme would be onerous.

### *Is a deemed statutory trust too complex?*

Further, the concerns of stakeholders who have suggested that the concept of a deemed statutory trust would create complex legal issues have been dispelled in the clinical analysis set out in the Collins Inquiry. It is also important to highlight that the concept of a deemed statutory trust has operated within the construction industry in large parts of North America for many years. Further, in Canada, the Law Reform Commission of British Columbia [1972], the Nova Scotia Law Reform

<sup>870</sup> CFMEU's submission to the Senate Economics Reference Committee, p. 31.

<sup>871</sup> Collins Inquiry, op cit, ch. 14, para. 109.

Commission [1976], the Manitoba Law Reform Commission [1979], the Ontario Government Advisory Committee [1982], the Saskatchewan Government Industry Task Force on Builders' Lien [1988] and the Newfoundland Law Reform Commission [1990] all recommended the adoption of trusts. A recent Report prepared for the Ontario Ministry of the Attorney-General and the Ministry of Economic Development, Employment and Infrastructure by Mr Bruce Reynolds and Ms Sharon Vogel recommended that the Ontario *Construction Lien Act R.S.O 1990* (Ontario Act) be amended so as to reflect the trust fund bookkeeping system similar to that applied in the New York Lien Law.<sup>872</sup> Thus, the concept of a deemed statutory trust has not only been operating in large parts of North America for many years without inhibiting the smooth functioning of the industry, but it has also (unlike the case of the various security of payment laws in Australia) not been the subject of significant critical reviews.

### ***Restriction on the ability to use progress payment moneys as working capital***

Finally, insofar as some stakeholders (particularly organisations representing the interests of head contractors) oppose the concept of trusts because it would restrict the ability of a contractor to use progress payment moneys as working capital, then it must be stated that that is one of the main reasons for recommending that such payment moneys be quarantined as trust funds.

It is unethical for a contractor who has received funds, a significant proportion of which represents the work carried out by its subcontractors, to treat such funds as if it were its own. It is immoral to argue that the subcontractor should supply the contractor with interest-free working capital. Further, the notion of free working capital not only undermines the integrity of the industry but encourages undercapitalised companies to operate in the industry and compete, unfairly, with better capitalised firms. The notion of protecting the use of such free working capital should be condemned, not condoned.

## ***Conclusion***

### **Cascading statutory trust to apply to all levels of contractual payment**

Accordingly, for all the reasons set out above, I have come to the conclusion that a deemed statutory trust scheme should be established by legislation and apply to all parts of the contractual payment chain. Such legislative intervention is long overdue as it has been an issue first promoted in the early 1990s and specifically recommended in the only two previous inquiries that specifically considered the issues of financial protection and insolvency in the construction industry in Australia, namely the WA Law Reform Commission in 1998 and the Collins Inquiry in 2012.

In its Report in 2015, the SERC Inquiry noted that there had been a shift in industry attitudes towards a statutory trust, and perhaps, to some extent, that may be so. Nonetheless, those opposed to the introduction of a deemed statutory trust continue to raise the same arguments that previous inquiries have rejected as baseless and unmeritorious. But for the lack of political will, reform in this area by way of the introduction of a deemed statutory trust would have been put in place many years ago and, but for the failure to introduce such reforms, many fine firms, through no fault of their own, have suffered financial hardship. It is time to stop kicking the can down the road and to introduce legislation for a deemed statutory trust that will secure certified money received from misuse and minimise the risk of not being paid due to the insolvency of the upstream party. The introduction of a deemed statutory trust will complement the security of payment laws and better protect the vulnerable parties within the industry.

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<sup>872</sup> Reynolds, B. and Vogel, S. (2016), *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, Report prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, Ministry of the Attorney General, Ontario, Canada. Refer to Recommendation 43, p. 290. <<http://www.constructionlienactreview.com/wp-content/uploads/2015/07/Striking-the-Balance-Expert-Review-of-Ontarios-Construction-Lien-Act.pdf>>

In arriving at the above conclusion, I do not mean to disregard the action of the Queensland Government in proposing to legislate for a PBA under the Queensland Bill 2017. In many ways it is a very courageous step but, unfortunately, and for the reasons I have outlined above, it will result in a sub-optimal outcome compared to what would be able to be achieved through the introduction of a cascading statutory trust.

Given the conclusion I have outlined above and given that the Collins Inquiry had extensively considered the range of issues relating to a statutory trust, I recommend that the Australian Government conduct a targeted consultation program with industry on a program for implementation of the various recommendations from the Collins Inquiry, as listed below, including a program for industry education and training.

To be clear and for the avoidance of doubt, my recommendation should not be construed as yet a further kicking of the can down the road. It is not yet another opportunity for the opponents of the introduction of any trust scheme to re-agitate the same arguments that they have previously advanced, but rather an opportunity for industry to influence the process and program for its implementation. This is an opportunity for industry to work in a cooperative manner with regulators and unions to shape the implementation of a national statutory trust that would apply for all construction projects of a value of \$1 million or more. The risk for industry if it does not seize this opportunity is to have the various state and territory governments progressively implement their own version of a trust scheme, with some governments (as already evident from the Queensland Bill 2017) adopting a form of a PBA, whilst others may adopt different trust arrangements. Industry should not be under any illusion that the momentum for legislative intervention can be held back yet again. The momentum for the introduction of a statutory scheme is now irreversible and so to avoid a replication of the same fragmented approach as happened with the security of payment laws, industry should work cooperatively for the adoption of a cohesive approach on this issue.

To the extent that the proposed deemed statutory trust model has the intended effect of securing payments for subcontractors and reducing the incidence of insolvency in the construction industry, there are also significant potential economic benefits for the Australian Government.

Currently the Australian Government administers the Fair Entitlements Guarantee (FEG) program, which is a legislative safety net that provides financial assistance to cover certain unpaid employment entitlements<sup>873</sup> to eligible employees who lose their job due to the liquidation or bankruptcy of their employer.

Figures provided by the Australian Government Department of Jobs and Small Business to this Review indicate that the construction industry is one of the biggest beneficiaries of the FEG program (see **Appendix E**). Over the period 2009-10 to 30 September 2017, FEG assistance of \$300.9 million (representing 17% of all payments) was paid to 22 317 construction industry employees (representing 18.4% of all claims) as a result of 2 588 liquidation or bankruptcy events. In 2016-17 alone, the most recent complete financial year, \$43.3 million was paid to 2 935 construction industry employees.

Given the quantum of payments made to construction industry employees, even a small reduction in insolvencies resulting from implementation of a deemed statutory trust model is likely to result in millions of dollars in administered savings to the Australian Government each year.

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<sup>873</sup> Under the FEG program eligible employees may be able to claim unpaid wages (up to 13 weeks); unpaid annual leave and long service leave; payment in lieu of notice (up to five weeks) and redundancy pay (up to four weeks per full year of service).

### Support for specific recommendations of the Collins Inquiry

In establishing a deemed statutory trust model, the specific recommendations of the Collins Inquiry, which I consider relevant, and which I endorse, are as follows.

#### *The statutory construction trust*

Any payment by a principal to a head contractor or by a head contractor to a subcontractor on account of, or in respect of, any work done or materials supplied by the head contractor, any subcontractor, sub-subcontractor or supplier whether as a result of a favourable adjudication under SOPA or not, shall be made and treated in the following way:

- any cheque drawn upon a bank account in favour of the head contractor in respect of such work shall be held on trust for the head contractor, subcontractor, sub-subcontractor and supplier; and
- the proceeds of any such cheques when banked will be held upon the same trust for the head contractor, subcontractor, sub-subcontractor and supplier;
- where moneys are paid by electronic transfer they will be deemed to be held in trust by the head contractor the instant they are received by electronic transfer from the principal.

The statutory construction trust requirement should apply to all building projects valued at \$1 000 000 or more.

The statutory construction trust will be established for the purposes of paying the subcontractors and suppliers.<sup>874</sup>

Mr Collins' commentary relating to this recommendation was as follows:

This statutory construction trust is based upon the Maryland construction trust legislation.

The first important characteristic of this trust is that the moneys are not at any time deposited into a bank account owned and operated by the head contractor. There is no point at which the funds may be 'scooped' by the bank, nor is there any physical payment outside the trust account by a head contractor to a subcontractor which might attract the unfavourable attention of the rules concerning preferences. Commentary and illustrations which form part of the chapter in this Report headed 'The Heart of the Matter', work through different situations which may occur in practice and which might dictate different consequences according to the circumstances themselves. The head contractor holds moneys upon trust for its subcontractors. A quite distinct trust arises upon payment to the subcontractor who then holds on trust for any sub-subcontractor or supplier. In each case, the objective is to pay the trust moneys out as quickly as possible to those who are entitled to them.<sup>875</sup>

#### *Project value threshold for the construction trust*

The construction trust requirements shall not apply to projects of less than \$1 million.<sup>876</sup>

Mr Collins arrived at the threshold value based on views expressed by HIA and MBA. The threshold value of \$1 million appears to reflect the commonly held view that the construction trust should not apply to projects of a value less than that amount. This is also the threshold value announced by the Queensland Government regarding the application of PBAs from January 2019.

#### *All subcontractors to be paid what is due and owing before head contractor draws from the fund*

Mr Collins recommended that a provision similar to section 8(2) of the Ontario Act be inserted in the security of payment legislation:

<sup>874</sup> Collins Inquiry, op cit, Recommendation 6.

<sup>875</sup> Ibid, p. 355.

<sup>876</sup> Ibid, Recommendation 7.

The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.<sup>877</sup>

Mr Collins went on to make the following commentary in relation to this recommendation:

By that means together with the adoption of the Maryland construction trust model, a layered structure is created so that each contractor or subcontractor holds funds down the line on trust for the person with whom they are in contract. Section 8 (2) of the Ontario Act makes it plain, as does section 8 (1), that the trust applies to suppliers as well as to contractors and subcontractors. That is as it should be.

#### *Certificate to bank to pay*

Before the head contractor/trustee makes any payment out of the trust account to a subcontractor, it shall submit a certificate to the bank which:

- Certifies that the payment is of an amount due and payable to a subcontractor engaged on (here state the project); and
- That it is in order (here state the sum) that the sum be paid out to the named subcontractor from the trust account.<sup>878</sup>

Mr Collins states that this will achieve two objectives, 'First it gives protection to banks. Second, it provides a safeguard against unauthorised disbursement by the contractor.'<sup>879</sup>

#### *Third parties with knowledge of breach of trust are liable*

For the purposes of ensuring that subcontractors remain protected where trust funds are dissipated wrongfully, Mr Collins recommended a provision similar to section 13(1) of the Ontario Act be enacted in the security of payment legislation.

Section 13(1) of the Ontario Act under the heading 'Liability for breach of trust by corporation' reads as follows:

In addition to the persons who are otherwise liable for breach of trust under this Part,

- a) Every director or officer of a corporation; and
- b) Any person including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities, who has sensed to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.<sup>880</sup>

#### *Subcontractors' right to information*

The subcontractor who is the beneficiary under the construction trust of which the head contractor is the trustee may, in accordance with its rights as a beneficiary and notwithstanding that payment to them may not be due at any particular time, exercise their rights as a beneficiary to call upon the trustee to provide information as to the time, date of payment and details of payment made to the head contractor trustee by the principal and payments out of the account to any subcontractor including the right to be informed of any reasons for non-payment or retention.<sup>881</sup>

<sup>877</sup> Ibid, Recommendation 8.

<sup>878</sup> Ibid, p. 356.

<sup>879</sup> Ibid, p. 357.

<sup>880</sup> Ibid, Recommendation 12.

<sup>881</sup> Ibid, Recommendation 13.

Clearly the same right would apply to a sub-subcontractor trust.

#### *Accounts and records to be maintained by trustee*

Accounts and records shall be maintained by the contractor trustee and the subcontractor trustee. Such accounts and records shall record all payments into the trust account by the principal and all payments out of the trust account by the trustee contractor and the purposes of such payments.<sup>882</sup>

Mr Collins emphasises that '[such] accounts should not need to extend beyond the bank records of the principal's payments in[to], and the head contractors payments out, of the trust fund. The purpose of the payment will be evidenced by the certificate referred to [above].'<sup>883</sup>

#### *Right to inspect the books of account*

All subcontractors who have made claims for payment upon a contractor have the right to inspect the accounts of the trust referred to in recommendation 14.<sup>884</sup>

Mr Collins emphasises that this entitlement should be clearly stated but confined to access to the accounts of the trust and not the contractor's general accounts.

#### *Appointment of new trustee*

Where the head contractor/trustee becomes insolvent, any beneficiary shall be entitled to make application to the state Supreme Court for the appointment of a new trustee and the beneficiary shall have the standing to make such application even if the due date of payment of the subcontractor's payment claim had not yet occurred.<sup>885</sup>

#### *No breach if payment made in accordance with adjudication*

It shall not constitute a breach of trust if a contractor or subcontractor pays money out of a trust account in accordance with, and on the basis of a SOPA adjudication and it is later determined by a court, arbitrator or by expert determination, that the amount owing to the subcontractor or the sub-subcontractor or supplier, as the case may be, is more or less than the adjudicated sum paid out.<sup>886</sup>

Given that any disputes between the head contractor and subcontractor relating to payments (or between subcontractor and sub-subcontractor) may be referred to adjudication, appropriate protection will need to be given to the head contractor/trustee (or the subcontractor/trustee) where an adjudicator has determined an adjudication amount.

#### *Retention sums*

Retention sums as between principals and head contractors and head contractors and subcontractors shall be held in the construction trust account referred to in recommendation 6. Those retention sums shall be paid out of such account in accordance with any relevant certificate, agreement between the parties, SOPA determination, or a decision of a court of competent jurisdiction, an arbitrator or expert determination, as the case may be.<sup>887</sup>

Ensuring that retention moneys are held in trust will go a long way in resolving many of the grievances of subcontractors. The security of payment laws will need to be amended to extend the adjudicators jurisdiction to deal with disputes relating to retention moneys.

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<sup>882</sup> Ibid, Recommendation 14.

<sup>883</sup> Ibid, p. 359.

<sup>884</sup> Ibid, Recommendation 15.

<sup>885</sup> Ibid, Recommendation 16.

<sup>886</sup> Ibid, Recommendation 17.

<sup>887</sup> Ibid, Recommendation 18.

*Interest on retention sums*

- a) Subject to the resolution of any dispute concerning the entitlement to the return of the retention sum, the head contractor and the subcontractor, as the case may be, shall be entitled to the interest earned on the fund.
- b) Where the corpus of the fund is insufficient to provide for the cost of any necessary rectification work, then the interest earned shall also be available to provide for such work.<sup>888</sup>

Mr Collins' commentary relating to this recommendation was:

Entitlement to interest should follow the merits of and the resolution of competing claims upon the retention sums. If there is no claim against the fund, all of the interest in the fund should go to the head contractor or subcontractor, as the case may be.<sup>889</sup>

*Adjudicated amount to be paid into statutory trust*

Where a payment dispute has been referred to adjudication and where an adjudicator has determined that a respondent head contractor or a respondent subcontractor (as the case may be) is to pay an adjudicated amount to a claimant, then such amount is to be paid into the statutory trust.<sup>890</sup>

**Recommendation 85:**

A deemed statutory trust model should apply to all parts of the contractual payment chain for construction projects over \$1 million. The deemed statutory trust model outlined in the Collins Inquiry provides a suitable basis.

**Recommendation 86:**

The Australian Government should take a lead role in working with the states and territories and key industry stakeholders towards the establishment of a nationally consistent deemed statutory trust model. The establishment and implementation of such a model should be accompanied by a program of industry-wide education and training.

<sup>888</sup> Ibid, Recommendation 19.

<sup>889</sup> Ibid, p. 361.

<sup>890</sup> Ibid, Recommendations 28 and 33.



# Chapter 18: Implementation

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## 18. Implementation

In this report I have considered the various security of payment legislative regimes in place across Australia and made recommendations on what I consider would be a best practice model to address the issue of late payment in the construction industry.

While not forming any part of the Terms of Reference for this Review, the ways to achieve consistency in security of payment laws nationally is a related consideration. The vast majority of stakeholders consulted both as part of this and other reviews on security of payment and related topics are in favour of achieving greater consistency in security of payment laws.<sup>891</sup> There are various ways that greater consistency could be achieved, including for example:

1. Commonwealth to legislate
2. Referral of power
3. Mirror legislation
4. Complementary ('Applied') legislation

### 18.1 Methods to achieve greater consistency

#### Commonwealth to legislate

In his 2003 inquiry into the Building and Construction Industry Commissioner Cole concluded that the Commonwealth had the ability to legislate in relation to security of payment by drawing on its constitutional head of power and explored this option in some detail.<sup>892</sup> Commissioner Cole argued that Federal legislation would be engaged provided that at least one of the transacting parties is a corporation, which he suggested is the case in the vast majority of building transactions. However, various commentators have asserted that this view is not beyond doubt.<sup>893</sup>

One major issue with the approach recommended by Commissioner Cole is that the corporations power only allows the Commonwealth to make laws with respect to "*foreign corporations, and financial or trading corporations formed within the limits of the Commonwealth.*"<sup>894</sup> The high levels of smaller unincorporated businesses in the construction industry<sup>895</sup> mean that Commonwealth security of payment legislation underpinned by the corporations power could not be enacted with certainty of jurisdictional coverage. Arguably, such entities are the most vulnerable to insolvency and late payment by parties higher in the contractual chain, and therefore most in need of access to security of payment legislation.

<sup>891</sup> See for example the SERC Inquiry Report, op cit; SoCLA Report on Security of Payment (2014) op cit; and the Cole Royal Commission op cit.

<sup>892</sup> Cole Royal Commission, op cit

<sup>893</sup> Farrar, M (2016), 'Difficulties with Harmonisation of Security of Payment Legislation across Australia – is Federalism a friend or foe?', *Society of Construction Law Australia*, 2016/8 [www.scl.org.au](http://www.scl.org.au)

<sup>894</sup> Section 51(xx) of the *Constitution*.

<sup>895</sup> As of June 2016, the construction industry had the highest number of businesses operating in Australia with 358,466 businesses. Almost 99% of these were self-employing (59%) or engaged less than 20 employees (39.8%) (See ABS (2017), *Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016*, ABS Cat. No. 8165.0). In August 2016, there were approximately 1.2 million owner managers of unincorporated enterprises, of which approximately 21% (252,000) worked in the construction industry, and 826,900 owner managers of incorporated enterprises, of which approximately 19% (157,111) worked in the construction industry (See ABS (2016), *Characteristics of Employment, Australia, August 2016*, ABS Cat. No. 6333.0). This suggests almost 62% of owner managers in the construction industry are unincorporated.

However, it is possible that greater certainty of coverage by a Commonwealth security of payment legislation could be achieved if complementary measures were also introduced for a cooperative Commonwealth and state model, for example, referral of power and/or intergovernmental agreements.

### Referral of power

Section 51(xxxvii) of the *Constitution* provides that in addition to the heads of power set out in section 51, the Commonwealth has power to make laws with respect to matters referred to the Commonwealth by states. Considering the constitutional limitations discussed above, the Fair Work Act is an example of where the Commonwealth was unable to comprehensively regulate workplace relations for the private sector using the corporations power alone. As a result, the Fair Work Act is complemented by a range of measures, including multilateral intergovernmental agreement and bilateral intergovernmental agreements, to enhance coverage. Despite this, Western Australia has not referred its workplace relations powers to the Commonwealth.

The *Corporations Act 2001* (Cth) and *Australian Securities and Investment Commissions Act 2001* (Cth) are similarly underpinned by intergovernmental agreements and state referrals of power under section 51(xxxvii) of the *Constitution*. Those Acts have specific provisions dealing with possible inconsistencies between state and Commonwealth regulation.

### Mirror legislation

Mirror legislation or ‘harmonised’ laws usually refers to a system where one jurisdiction enacts a law that is then enacted in similar terms by other jurisdictions, ‘mirroring’ the terms of the original legislation.<sup>896</sup> An example of mirror legislation is Australia’s Model WHS Act,<sup>897</sup> which has been mirrored by the Commonwealth and all states and territories (some with minor variations appropriate to their jurisdictions), except for Western Australia and Victoria.

### Complementary (‘applied’) legislation

A complementary legislative scheme involves one jurisdiction (which need not be the Commonwealth) enacting a law on a topic which other jurisdictions then apply through enacting their own legislation.<sup>898</sup> Where the Commonwealth enacts a law that applies to matters within the Commonwealth’s constitutional power, the law will apply in the states as a Commonwealth law to the extent possible and state legislation will apply to the extent that its application is consistent with the application of the Commonwealth law.<sup>899</sup>

An example of a complementary legislative scheme is the *Uniform Consumer Credit Code* (Consumer Credit Code), which was enacted by the Queensland Parliament in accordance with the *Uniform Credit Laws Agreement 1993* (UCLA) of the States and Territories, and subsequently applied in all jurisdictions.

## 18.2 Consideration

Each of the above methods for achieving greater national consistency in security of payment legislation has its own benefits and disadvantages from a legal, practical, policy and enforcement perspective which would need to be explored in greater detail.

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<sup>896</sup> Australian Law Reform Commission (2008), *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), 12 August 2008, Vol. 1, p. 201 <<https://www.alrc.gov.au/publications/3.AchievingNationalConsistency/options-reform-ftn68>>

<sup>897</sup> The *Model Work Health and Safety Act 2011* was developed, and is maintained, by Safe Work Australia: <[www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)>

<sup>898</sup> Australian Law Reform Commission (2008), op cit

<sup>899</sup> Ibid

However, what is clear is that the adoption of a nationally consistent and effective set of security of payment laws will require Commonwealth involvement. The issues of poor payment practices and insolvency have plagued the construction industry for decades, and despite the best intentions of the various jurisdictions in enacting their own security of payment legislation to deal with these issues, the different approaches are not serving the industry well. Leaving it to the states and territories to implement the recommendations of this Review will only result in cherry-picking and further divergence in the security of payment legislations operating across the nation.

Ultimately it is imperative that Commonwealth, state and territory ministers work together to implement the best practice recommendations I have made throughout this report and I urge all parties to do so. It is time that this issue is dealt with at a national level in a cohesive and cooperative manner. We cannot afford to 'kick the can' any further down the road.

If the states and territories are unwilling to come together with the Commonwealth to address the issue, then the Commonwealth must take a leadership role in spearheading change and be a driving force to galvanise action. In this respect, I support the recommendation of the Cole Royal Commission for nationally consistent security of payment legislation.

# Appendices

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## Appendix A — List of stakeholders consulted

### Stakeholders consulted

Organisations	
Stakeholder	Jurisdiction
Able Adjudication	Qld
ACT Environment, Planning and Sustainable Development Directorate	ACT
Adjudicate Today	NSW
Adjudication Forum	NSW
AI Group and Australian Constructors Association	National
Air Conditioning and Mechanical Contractors' Association	National
Air Conditioning and Mechanical Contractors' Association SA	SA
Association of Wall and Ceiling Industries Queensland	Qld
Australian Building and Construction Commission	Cth
Australian Institute of Building	National
Australian Small Business and Family Enterprise Ombudsman	Cth
Australian Solutions Centre	National
Badge Queensland	Qld.
Baker McKenzie Lawyers	National
Building Commissioner WA	WA
CBUS Super	National
CDI Lawyers	Qld
Civil Contractors Federation	National
Civil Contractors Federation Victoria	Vic.
Clayton Utz Lawyers	Qld
Construction, Forestry, Mining and Energy Union NSW	NSW
Contractor's Debt Recovery	National
Department of Finance NSW	NSW
Department of Justice, Consumer, Building and Occupational Services Tas	Tas.
Gillis Delaney Lawyers	NSW
Housing Industry Association	National
Housing Industry Association QLD	Qld
INPEX Operations Australia Pty Ltd	National
Jackson McDonald Lawyers	WA
Law Council of Australia	National
Major Contractors Group	Qld.
Master Builders Association of the ACT	ACT

<b>Organisations</b>	
<b>Stakeholder</b>	<b>Jurisdiction</b>
Master Builders Association of NSW	NSW
Master Builders Association of South Australia	SA
Master Builders Association of Victoria	Vic.
Master Builders Association of Western Australia	WA
Master Builders Australia	National
Master Builders Northern Territory	NT
Master Builders Tasmania	Tas.
Master Electricians Association Qld	Qld
Master Plumbers Association	National
Master Plumbers Association Qld	Qld.
Master Plumbers NSW	NSW
Minter Ellison Lawyers	WA
National Electrical and Communications Association	National
National Electrical and Communications Association South Australian / Northern Territory Chapter	SA/NT
NT Department of Attorney-General and Justice	NT
Plumbing and Pipe Trades Employees Union	National
Queensland Building and Construction Commission	Qld
Queensland Master Builders Association	Qld
Queensland Resources Council	Qld
Resolution Institute	National
Resolution Institute WA Chapter	WA
SA Small Business Commissioner	SA
Singapore Government Building and Construction Authority	Singapore
Singapore Mediation Centre	Singapore
Society of Construction Law Australia	National
Stockland	National
Subcontractors Alliance Qld	Qld
Subcontractors WA	WA
Victorian Building Authority	Vic.
Victorian Department of Environment, Land, Water and Planning	Vic.
Victorian Small Business Commissioner	Vic.
WA Small Business Commissioner	WA



**Individuals**

Ambrose, Mr Mark

Applegarth, The Hon. Justice

Bell, Mr Matthew

Blue, The Hon. Justice Malcolm

Bond, The Hon. Justice

Christie QC, Mr Michael

Coggins, Dr Jeremy

Elliott, Mr Robert Fenwick

Georgiou, Mr Basil

Grimm, Ms Eve

Holt SC, Mr Bob

Jochelson, Mr Geoffrey

McDougall, The Hon. Justice Robert

Rozenbes, Mr Saul

Skaik, Mr Samer

Steensma, Mr Auke

Sullivan, Mr Tim

Tozer, Mr Barry

Vickery, The Hon. Justice

Wood, Mr Stuart

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## Appendix B — Survey of contractors

### Respondent profiles

In total, 526 survey responses were collected from respondents in all states and territories, with the vast majority being from Queensland (46.8%), Western Australia (30.8%) and NSW (17.9%).

The majority of respondents are highly experienced, with 51% having been employed in the building and construction industry for more than 21 years, and a further 31% being employed in the industry for between 11 and 20 years.

A total of 48% of respondents were subcontractors, with 45% being either contractors or head contractors. The most prominent sector of employment is Electrical, with 45% of respondents falling into that category. Remaining respondents fell into numerous other Building and Construction sectors, including Block and Bricklaying, Civil Contracting, Plastering, Carpentry and others.

A total of 73% of respondents worked for businesses employing 20 or fewer people.

A total of 34% of respondents worked for businesses with a turnover less than \$1 million per annum and 22% for businesses with turnover of \$1–2.5 million per annum. The majority of turnover was comprised of commercial construction (48%) followed by residential or private home construction (24%).

### Payment terms and late payment

A total of 78% of respondents indicated they use 30-day or less as their standard payment terms. Almost half of all respondents (46%) indicated they use 30 days payment terms for invoices. Almost three quarters (72%) of all respondents said that 40% or more of their invoices were paid late. Significantly, around one-third (36%) of respondents said 60% or more of their invoices were paid late.

A total of 44% of respondents claimed that, on average, their invoices remain unpaid for more than 30 days after the due date, and a further 41% claimed that, on average, their invoices remain unpaid between 11 and 30 days after the due date. Significantly, 14% of respondents reported payment delays of more than 60 days.

When considering the most recent invoice, only 20% of respondents claimed that it was paid within the due date. A further 26% indicated that the invoice was paid 1–10 days after the due date, 35% claimed it was paid 11–30 days after the due date and a further 17% claimed the invoice was paid 31–60 days after the due date.

Because the most common invoice term is ‘due in 30 days’, it is likely that many construction industry contractors are not receiving payment until at least 60–90 days after work has been completed.

Several reasons were given for late payment of invoices. The most common reason, experienced by 53% of all respondents, was ‘waiting on payment from someone else’ while 33% of all respondents claimed they were not given any reason at all. A further 26% of all respondents were told ‘cash flow problems’ was the reason for late payment of invoices. Other common reasons included ‘administrative issues’, ‘did not receive the invoice’ (16%) and ‘forgot to pay’ (12%).

The fact that more than half of respondents (53%) noted ‘waiting on payment from someone else’ as a reason for given for late payment of an invoice and just over a quarter (26%) noted ‘cash flow problems’ as the reason suggests that late payment higher up the contractual chain has a cascading effect on those awaiting payment further down the chain.

## Security of payment laws and claims made

Only 50% of respondents were very or somewhat familiar with security of payment laws, and 20% had never heard of them.

Of those familiar with the laws, only 35% had ever attended an information session about them. Some 70% of these information sessions were organised and made by the relevant Industry Association, with 23% made by a lawyer or solicitor.

In total, only 23% of respondents had ever made a claim for delayed or disputed payments under security of payment laws. In the last two years, 53% of these respondents had made one to two claims; 23% had made 3–5 claims; 5% had made 6–10 claims; 3% had made 11–20 claims; and 2% had made 20 or more claims. A further 14% had not made a claim in the last two years.

The average dollar amount of the most recent claim using security of payment laws was \$221 633. The most common claim amount noted by 25% of claimants in the last two years was between \$100 001 to \$500 000. Some 60% of respondents noted that the most recent claim was made against the head contractor, while 24% noted that the claim was made against the client or principal.

Of those respondents who had made a claim under security of payment laws in the last two years, 77% made the claim within three months after the due date of their invoice. A total of 24% made the claim less than 30 days after the due date of their invoice; 34% between 31 to 60 days after the due date, and a further 19% 2–3 months after the due date. Only 8% of respondents left it longer than 6 months to make a claim.

In total, 94% of respondents who made a claim in the last two years stated that they would use the security of payments process again, although 59% claimed they were 'hesitant to use the process again'.

Of those with some hesitation or who would not use the process again, the primary reasons included 'I have had a poor experience with the process to date' (53%), 'I think the security of payments laws are too complex' (49%) and 'I think the process takes too long' (40%). Other reasons mentioned include 'I am concerned about cost' (32%), 'I am concerned it might affect my business relationships' (29%) and 'I am concerned about threats or intimidation' (18%).

For respondents who had made a claim in the last two years, most were dissatisfied with the cost effectiveness and rapidity of the process, rating each measure at 4.1 and 4.5 out of 10 (0 = very poor; 10 = excellent).

Only 4% of respondents indicated that they have had a security of payment claim made against them in the last two years.

Larger organisations, with higher annual turnover and a larger number of employees, were generally more likely to have made a security of payment claim, suggesting claims are more likely to be made when costs are able to be met.

## Assistance and adjudication

Respondents who had made or received a claim under security of payment laws primarily used a lawyer or solicitor (51%) or the relevant industry association (29%) or to assist with the process. Consultants (16%), the Regulator (10%) and ANAs (8%) were also used.

52% of respondents with claims made or received in the last two years had those claims referred to adjudication. Of those respondents with claims referred, 24% settled prior to adjudication. However, only 12% of claimants referred to adjudication have subsequently done business with the other party.

## Appendix C — Causes of business failure

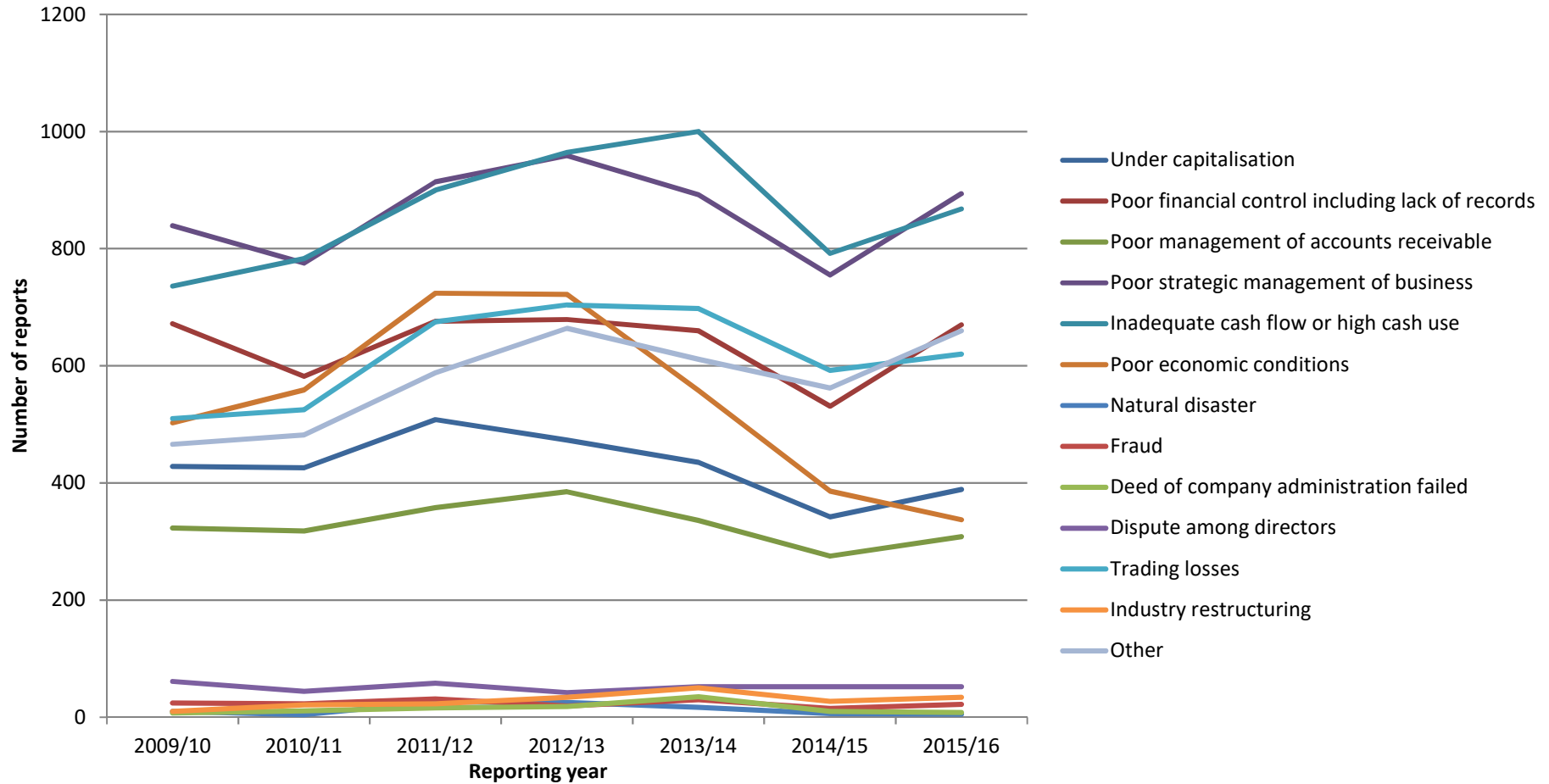
### Initial external administrators' reports: Nominated causes of business failure for the construction industry 2009/10 to 2015/16

Causes of failure	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	Total (%)
Under capitalisation	428	426	508	473	435	342	389	<b>3001 (8.6%)</b>
Poor financial control including lack of records	672	582	676	679	660	531	670	<b>4470 (12.8%)</b>
Poor management of accounts receivable	323	318	358	385	336	275	308	<b>2303 (6.6%)</b>
Poor strategic management of business	839	775	914	959	892	755	894	<b>6028 (17.3%)</b>
Inadequate cash flow or high cash use	736	783	900	964	1000	792	868	<b>6043 (17.3%)</b>
Poor economic conditions	503	559	724	722	558	386	337	<b>3789 (10.9%)</b>
Natural disaster	10	4	26	25	17	6	5	<b>93 (0.3%)</b>
Fraud	24	23	31	19	30	15	22	<b>164 (0.5%)</b>
DOCA failed	7	11	16	18	35	10	8	<b>105 (0.3%)</b>
Dispute among directors	61	44	58	42	52	52	52	<b>361 (1%)</b>
Trading losses	510	525	675	704	698	592	620	<b>4324 (12.4%)</b>
Industry restructuring	10	21	23	34	50	27	34	<b>199 (0.6%)</b>
Other	466	482	588	664	611	562	660	<b>4033 (11.6%)</b>
<b>Total</b>	<b>4589</b>	<b>4553</b>	<b>5497</b>	<b>5688</b>	<b>5374</b>	<b>4345</b>	<b>4867</b>	<b>NA</b>

Source: Australian Securities and Investments Commission, *Insolvency statistics - Series 3 External administrator reports*

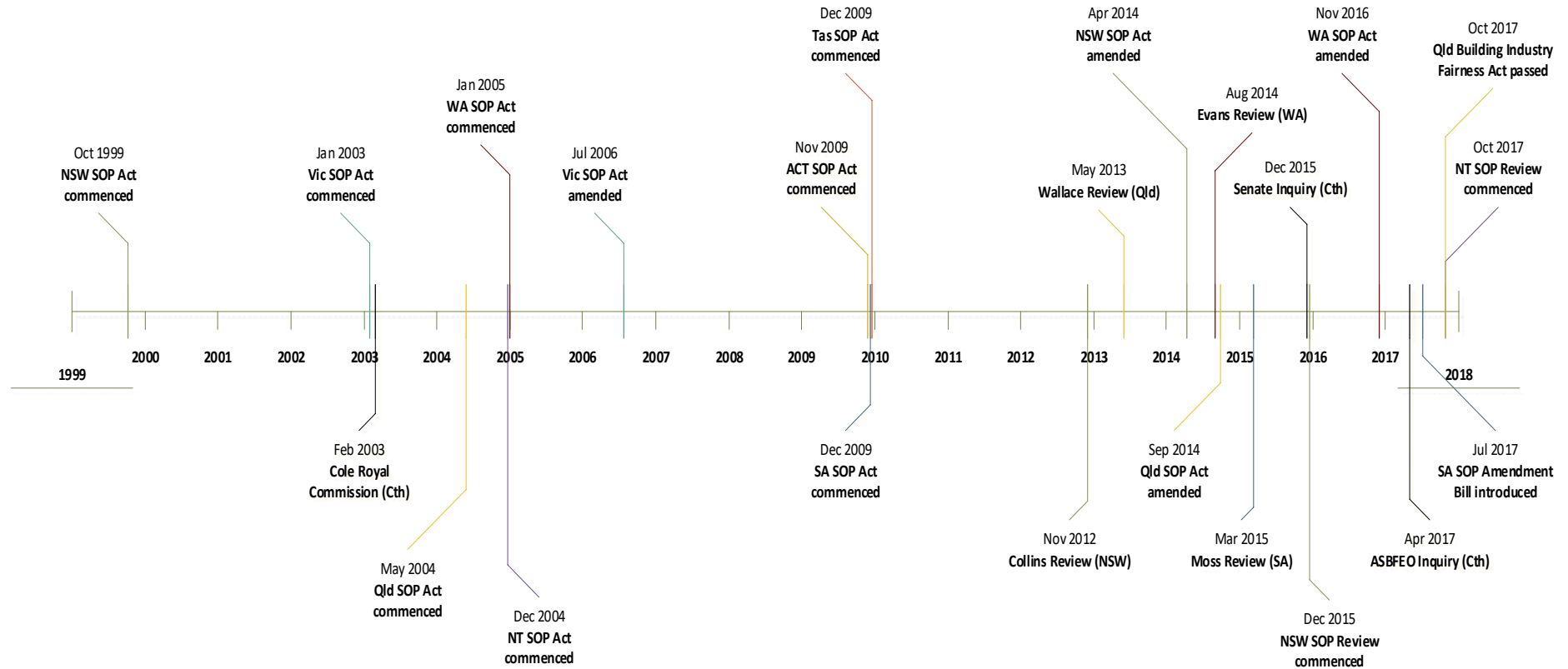
The following graph illustrates these figures.

### Nominated causes of business failure for the construction industry 2009/10 to 2015/16



## Appendix D — Security of payment timeline

This timeline highlights Security of Payment (SoP) Acts, key reviews and legislative amendments since 1999.



## Appendix E — Fair Entitlement Guarantee statistics

### Claims paid by industry and financial year 2009-10 to 2017-18\*

Industry	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18*	Total
Manufacturing	3675 (23.4%)	2975 (19.3%)	2856 (20.5%)	2978 (18.4%)	2180 (19.4%)	3322 (17.4%)	1859 (12.9%)	2114 (17.1%)	397 (13.1%)	22356 (18.4%)
Construction	2092 (13.3%)	2377 (15.4%)	2286 (16.4%)	4451 (27.5%)	1644 (14.6%)	3267 (17.1%)	2576 (17.9%)	2935 (23.8%)	689 (22.6%)	22317 (18.4%)
Retail Trade	1478 (9.4%)	1224 (7.9%)	1515 (10.9%)	2486 (15.3%)	1149 (10.2%)	2283 (12.0%)	1523 (10.6%)	1500 (12.1%)	231 (7.6%)	13389 (11.0%)
Other Services	662 (4.2%)	1576 (10.2%)	667 (4.8%)	955 (5.9%)	1340 (11.9%)	3055 (16.0%)	1068 (7.4%)	589 (4.8%)	162 (5.3%)	10074 (8.3%)
Transport, Postal and Warehousing	1248 (8.0%)	1056 (6.9%)	1452 (10.4%)	604 (3.7%)	680 (6.0%)	883 (4.6%)	839 (5.8%)	682 (5.5%)	141 (4.6%)	7585 (6.3%)
Administrative and Support Services	1136 (7.2%)	2265 (14.7%)	1019 (7.3%)	785 (4.8%)	492 (4.4%)	458 (2.4%)	345 (2.4%)	363 (2.9%)	454 (14.9%)	7317 (6.0%)
Accommodation and Food Services	461 (2.9%)	692 (4.5%)	729 (5.2%)	1070 (6.6%)	501 (4.5%)	624 (3.3%)	585 (4.1%)	844 (6.8%)	196 (6.4%)	5702 (4.7%)
Mining	226 (1.4%)	91 (0.6%)	98 (0.7%)	157 (1.0%)	797 (7.1%)	1414 (7.4%)	2039 (14.2%)	362 (2.9%)	197 (6.5%)	5381 (4.4%)
Education and Training	1334 (8.5%)	746 (4.8%)	319 (2.3%)	387 (2.4%)	125 (1.1%)	214 (1.1%)	692 (4.8%)	927 (7.5%)	269 (8.8%)	5013 (4.1%)
Information Media and Telecommunications	464 (3.0%)	303 (2.0%)	506 (3.6%)	678 (4.2%)	758 (6.7%)	558 (2.9%)	421 (2.9%)	240 (1.9%)	30 (1.0%)	3958 (3.3%)
Professional, Scientific and Technical Services	672 (4.3%)	363 (2.4%)	504 (3.6%)	239 (1.5%)	470 (4.2%)	644 (3.4%)	525 (3.7%)	416 (3.4%)	75 (2.5%)	3908 (3.2%)



Industry	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18*	Total
Electricity, Gas, Water and Waste Services	225 (1.4%)	387 (2.5%)	619 (4.4%)	251 (1.5%)	143 (1.3%)	1076 (5.6%)	208 (1.4%)	288 (2.3%)	68 (2.2%)	3265 (2.7%)
Health Care and Social Assistance	661 (4.2%)	427 (2.8%)	281 (2.0%)	358 (2.2%)	274 (2.4%)	381 (2.0%)	206 (1.4%)	479 (3.9%)	30 (1.0%)	3097 (2.6%)
Wholesale Trade	416 (2.7%)	162 (1.1%)	254 (1.8%)	206 (1.3%)	299 (2.7%)	366 (1.9%)	345 (2.4%)	150 (1.2%)	68 (2.2%)	2266 (1.9%)
Arts and Recreation Services	446 (2.8%)	254 (1.6%)	199 (1.4%)	123 (0.8%)	41 (0.4%)	109 (0.6%)	135 (0.9%)	85 (0.7%)	11 (0.4%)	1403 (1.2%)
Rental, Hiring and Real Estate Services	32 (0.2%)	98 (0.6%)	156 (1.1%)	164 (1.0%)	75 (0.7%)	201 (1.1%)	523 (3.6%)	87 (0.7%)	7 (0.2%)	1343 (1.1%)
Financial and Insurance Services	125 (0.8%)	133 (0.9%)	175 (1.3%)	157 (1.0%)	205 (1.8%)	127 (0.7%)	289 (2.0%)	120 (1.0%)	6 (0.2%)	1337 (1.1%)
Agriculture, Forestry and Fishing	218 (1.4%)	236 (1.5%)	114 (0.8%)	152 (0.9%)	80 (0.7%)	85 (0.4%)	135 (0.9%)	129 (1.0%)	6 (0.2%)	1155 (1.0%)
Public Administration and Safety	110 (0.7%)	44 (0.3%)	181 (1.3%)	12 (0.1%)	0 (0.0%)	13 (0.1%)	49 (0.3%)	44 (0.4%)	5 (0.2%)	458 (0.4%)
<b>TOTAL</b>	<b>15681</b>	<b>15409</b>	<b>13930</b>	<b>16213</b>	<b>11253</b>	<b>19080</b>	<b>14362</b>	<b>12354</b>	<b>3042</b>	<b>121324</b>

Source: Australian Government Department of Jobs and Small Business, unpublished data

\* 2017-18 figures are up to 30 September 2017

**Amount paid (\$millions) by industry and financial year 2009-10 to 2017-18\***

Industry	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18*	Total
Manufacturing	\$48.4 (30.5%)	\$46.6 (29.8%)	\$41.2 (21.5%)	\$74.8 (28.9%)	\$49.6 (25.9%)	\$82.5 (25.8%)	\$34.9 (13.1%)	\$42.0 (22.9%)	\$7.9 (17.5%)	\$427.9 (24.2%)
Construction	\$17.8 (11.2%)	\$21.3 (13.6%)	\$33.4 (17.5%)	\$68.1 (26.4%)	\$23.1 (12.0%)	\$49.3 (15.5%)	\$35.9 (13.5%)	\$43.3 (23.6%)	\$8.8 (19.4%)	\$300.9 (17.0%)
Mining	\$2.6 (1.7%)	\$1.1 (0.7%)	\$1.2 (0.6%)	\$2.1 (0.8%)	\$20.8 (10.8%)	\$26.8 (8.4%)	\$93.8 (35.2%)	\$7.6 (4.1%)	\$7.6 (16.8%)	\$163.5 (9.2%)
Retail Trade	\$13.2 (8.3%)	\$9.4 (6.0%)	\$13.1 (6.9%)	\$27.0 (10.4%)	\$15.4 (8.0%)	\$30.8 (9.7%)	\$13.8 (5.2%)	\$16.6 (9.1%)	\$2.9 (6.3%)	\$142.3 (8.0%)
Transport, Postal and Warehousing	\$12.8 (8.1%)	\$8.9 (5.7%)	\$24.2 (12.6%)	\$7.5 (2.9%)	\$12.1 (6.3%)	\$12.4 (3.9%)	\$11.1 (4.2%)	\$11.5 (6.3%)	\$1.9 (4.1%)	\$102.3 (5.8%)
Other Services	\$4.5 (2.9%)	\$13.0 (8.3%)	\$6.2 (3.2%)	\$10.2 (4.0%)	\$15.1 (7.9%)	\$21.5 (6.8%)	\$10.9 (4.1%)	\$7.1 (3.9%)	\$2.2 (4.8%)	\$90.7 (5.1%)
Information Media and Telecommunications	\$9.5 (6.0%)	\$3.6 (2.3%)	\$7.6 (4.0%)	\$14.8 (5.7%)	\$16.5 (8.6%)	\$10.8 (3.4%)	\$7.0 (2.6%)	\$5.6 (3.0%)	\$0.6 (1.4%)	\$75.9 (4.3%)
Professional, Scientific and Technical Services	\$7.7 (4.9%)	\$6.2 (4.0%)	\$8.7 (4.6%)	\$3.6 (1.4%)	\$9.6 (5.0%)	\$14.1 (4.4%)	\$9.3 (3.5%)	\$9.3 (5.1%)	\$1.3 (2.9%)	\$69.8 (3.9%)
Administrative and Support Services	\$9.6 (6.1%)	\$17.2 (11.0%)	\$6.9 (3.6%)	\$8.3 (3.2%)	\$5.1 (2.6%)	\$5.6 (1.7%)	\$5.6 (2.1%)	\$4.9 (2.7%)	\$6.5 (14.4%)	\$69.6 (3.9%)
Electricity, Gas, Water and Waste Services	\$2.7 (1.7%)	\$4.2 (2.7%)	\$9.0 (4.7%)	\$3.9 (1.5%)	\$1.7 (0.9%)	\$21.3 (6.7%)	\$2.5 (0.9%)	\$5.8 (3.2%)	\$1.0 (2.3%)	\$52.2 (2.9%)
Education and Training	\$9.0 (5.7%)	\$6.4 (4.1%)	\$2.9 (1.5%)	\$8.3 (3.2%)	\$1.3 (0.7%)	\$2.6 (0.8%)	\$9.8 (3.7%)	\$10.7 (5.8%)	\$1.3 (3.0%)	\$52.3 (3.0%)
Accommodation and Food Services	\$2.1 (1.3%)	\$4.0 (2.6%)	\$7.5 (3.9%)	\$6.8 (2.6%)	\$3.9 (2.0%)	\$5.3 (1.6%)	\$4.7 (1.7%)	\$5.5 (3.0%)	\$1.6 (3.6%)	\$41.3 (2.3%)

Industry	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18*	Total
Not Recorded	\$0.0 (0.0%)	\$0.5 (0.3%)	\$13.2 (6.9%)	\$5.5 (2.1%)	\$5.2 (2.7%)	\$12.0 (3.7%)	\$0.0 (0.0%)	\$0.0 (0.0%)	\$0.0 (0.0%)	\$36.4 (2.1%)
Wholesale Trade	\$3.7 (2.4%)	\$1.5 (1.0%)	\$3.4 (1.8%)	\$3.2 (1.2%)	\$5.0 (2.6%)	\$11.3 (3.5%)	\$5.0 (1.9%)	\$1.9 (1.1%)	\$1.0 (2.1%)	\$36.2 (2.0%)
Health Care and Social Assistance	\$6.7 (4.2%)	\$4.9 (3.1%)	\$3.5 (1.9%)	\$3.7 (1.4%)	\$1.6 (0.8%)	\$4.4 (1.4%)	\$2.6 (1.0%)	\$5.4 (2.9%)	\$0.2 (0.5%)	\$33.1 (1.9%)
Financial and Insurance Services	\$1.5 (0.9%)	\$1.6 (1.0%)	\$2.9 (1.5%)	\$3.5 (1.3%)	\$3.0 (1.6%)	\$2.0 (0.6%)	\$6.0 (2.3%)	\$1.7 (0.9%)	\$0.1 (0.1%)	\$22.3 (1.3%)
Rental, Hiring and Real Estate Services	\$0.3 (0.2%)	\$0.9 (0.6%)	\$1.4 (0.7%)	\$1.9 (0.7%)	\$1.1 (0.6%)	\$3.7 (1.2%)	\$9.7 (3.6%)	\$0.8 (0.4%)	\$0.1 (0.2%)	\$19.9 (1.1%)
Arts and Recreation Services	\$3.8 (2.4%)	\$2.4 (1.5%)	\$2.4 (1.3%)	\$2.5 (1.0%)	\$0.7 (0.4%)	\$1.9 (0.6%)	\$1.4 (0.5%)	\$1.0 (0.5%)	\$0.1 (0.3%)	\$16.2 (0.9%)
Agriculture, Forestry and Fishing	\$2.1 (1.3%)	\$2.6 (1.6%)	\$1.1 (0.6%)	\$2.7 (1.1%)	\$1.1 (0.6%)	\$1.0 (0.3%)	\$2.2 (0.8%)	\$2.5 (1.4%)	\$0.1 (0.2%)	\$15.4 (0.9%)
Public Administration and Safety	\$0.5 (0.3%)	\$0.2 (0.1%)	\$1.3 (0.7%)	\$0.1 (0.0%)	\$0.0 (0.0%)	\$0.1 (0.0%)	\$0.6 (0.2%)	\$0.6 (0.3%)	\$0.0 (0.0%)	\$3.4 (0.2%)
<b>TOTAL</b>	<b>\$158.7</b>	<b>\$156.5</b>	<b>\$191.0</b>	<b>\$258.5</b>	<b>\$191.9</b>	<b>\$319.1</b>	<b>\$266.7</b>	<b>\$183.7</b>	<b>\$45.2</b>	<b>\$1,771.4</b>

Source: Australian Government Department of Jobs and Small Business, unpublished data

\* 2017-18 figures are up to 30 September 2017

**Insolvency cases# paid by industry and financial year 2009-10 to 2017-18\*\***

Industry	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18*	Total
Construction	338 (18.1%)	248 (15.3%)	286 (16.5%)	367 (20.9%)	197 (17.7%)	400 (19.4%)	347 (19.9%)	318 (21.1%)	87 (22.8%)	2588 (18.8%)
Manufacturing	320 (17.1%)	249 (15.3%)	267 (15.4%)	243 (13.8%)	172 (15.5%)	332 (16.1%)	215 (12.3%)	215 (14.3%)	52 (13.6%)	2065 (15.0%)
Retail Trade	255 (13.6%)	242 (14.9%)	241 (13.9%)	241 (13.7%)	155 (13.9%)	326 (15.8%)	238 (13.6%)	187 (12.4%)	49 (12.8%)	1934 (14.0%)
Accommodation and Food Services	127 (6.8%)	162 (10.0%)	162 (9.3%)	189 (10.8%)	104 (9.3%)	178 (8.6%)	181 (10.4%)	188 (12.5%)	52 (13.6%)	1343 (9.7%)
Other Services	113 (6.0%)	154 (9.5%)	155 (8.9%)	173 (9.9%)	95 (8.5%)	153 (7.4%)	165 (9.5%)	123 (8.2%)	29 (7.6%)	1160 (8.4%)
Transport, Postal and Warehousing	122 (6.5%)	108 (6.7%)	108 (6.2%)	82 (4.7%)	58 (5.2%)	94 (4.6%)	113 (6.5%)	93 (6.2%)	22 (5.8%)	800 (5.8%)
Administrative and Support Services	113 (6.0%)	74 (4.6%)	73 (4.2%)	66 (3.8%)	47 (4.2%)	71 (3.4%)	41 (2.3%)	65 (4.3%)	17 (4.5%)	567 (4.1%)
Professional, Scientific and Technical Services	115 (6.2%)	53 (3.3%)	76 (4.4%)	54 (3.1%)	50 (4.5%)	74 (3.6%)	66 (3.8%)	40 (2.7%)	13 (3.4%)	541 (3.9%)
Information Media and Telecommunications	53 (2.8%)	55 (3.4%)	76 (4.4%)	66 (3.8%)	38 (3.4%)	71 (3.4%)	73 (4.2%)	46 (3.1%)	4 (1.0%)	482 (3.5%)
Wholesale Trade	71 (3.8%)	47 (2.9%)	43 (2.5%)	39 (2.2%)	38 (3.4%)	60 (2.9%)	47 (2.7%)	39 (2.6%)	12 (3.1%)	396 (2.9%)
Education and Training	52 (2.8%)	42 (2.6%)	26 (1.5%)	29 (1.7%)	21 (1.9%)	29 (1.4%)	42 (2.4%)	48 (3.2%)	13 (3.4%)	302 (2.2%)
Rental, Hiring and Real Estate Services	14 (0.7%)	34 (2.1%)	50 (2.9%)	41 (2.3%)	17 (1.5%)	50 (2.4%)	25 (1.4%)	26 (1.7%)	8 (2.1%)	265 (1.9%)

Industry	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18*	Total
Electricity, Gas, Water and Waste Services	14 (0.7%)	39 (2.4%)	41 (2.4%)	35 (2.0%)	19 (1.7%)	35 (1.7%)	23 (1.3%)	16 (1.1%)	4 (1.0%)	226 (1.6%)
Health Care and Social Assistance	49 (2.6%)	23 (1.4%)	28 (1.6%)	23 (1.3%)	21 (1.9%)	42 (2.0%)	14 (0.8%)	23 (1.5%)	4 (1.0%)	227 (1.6%)
Financial and Insurance Services	25 (1.3%)	26 (1.6%)	27 (1.6%)	24 (1.4%)	12 (1.1%)	26 (1.3%)	35 (2.0%)	15 (1.0%)	4 (1.0%)	194 (1.4%)
Arts and Recreation Services	37 (2.0%)	27 (1.7%)	28 (1.6%)	18 (1.0%)	10 (0.9%)	25 (1.2%)	31 (1.8%)	17 (1.1%)	4 (1.0%)	197 (1.4%)
Mining	18 (1.0%)	10 (0.6%)	6 (0.3%)	10 (0.6%)	19 (1.7%)	38 (1.8%)	62 (3.6%)	21 (1.4%)	3 (0.8%)	187 (1.4%)
Agriculture, Forestry and Fishing	22 (1.2%)	22 (1.4%)	22 (1.3%)	19 (1.1%)	13 (1.2%)	17 (0.8%)	17 (1.0%)	17 (1.1%)	3 (0.8%)	152 (1.1%)
Not Recorded	1 (0.1%)	3 (0.2%)	17 (1.0%)	32 (1.8%)	27 (2.4%)	32 (1.6%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	112 (0.8%)
Public Administration and Safety	10 (0.5%)	5 (0.3%)	5 (0.3%)	4 (0.2%)	0 (0.0%)	7 (0.3%)	11 (0.6%)	7 (0.5%)	2 (0.5%)	51 (0.4%)
<b>TOTAL</b>	<b>1869</b>	<b>1623</b>	<b>1737</b>	<b>1755</b>	<b>1113</b>	<b>2060</b>	<b>1746</b>	<b>1504</b>	<b>382</b>	<b>13789</b>

Source: Australian Government Department of Jobs and Small Business, unpublished data

# Cases are represented based on when they are first paid so these figures are not directly comparable to financial statements.

\* 2017-18 figures are up to 30 September 2017

# References

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## References

### Books

Gerber, P. and Ong, B.J. (2013), *Best practice in construction disputes: avoidance, management and resolution*, LexisNexis Butterworths, Chatswood, NSW, 2013

Jacobs, M. (2016), *Security of payment in the Australian Building and Construction Industry* (5th edition), Thomson Reuters, Pyrmont, NSW, 2016

### Cases

*Abel Point Marina (Whitsundays) Pty Ltd v O'Brien & Anor* [2007] QSC 091

*Alucity Architectural Product Supply Pty Ltd v Australian Solutions Centre & Paul J Hick* [2016] NSWSC 608

*Amasya Enterprises Pty Ltd and Anor v Asta Developments (Aust) Pty Ltd* [2015] VSC 233

*Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor (No 2)* [2015] VSC 500

*Amflo Constructions Pty Ltd v Jefferies* [2003] NSWSC 856

*Ang Cheng Guan Construction Pty Ltd v Corporate Residence Pty Ltd* [2017] SGHC 9

*Barnes v Addy* (1873–74) LR 9 Ch app 244

*Bauen Constructions v Westwood Interiors* {2010} NSWSC 1359

*Blissgrange v John McGregor (Contractors)* 1987 GWD 19–707

*BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd and Ors (No 2)* [2013] QSC 67

*BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 218

*Bremer Handolsgesellschaft mbtt v Vanden Avenne Izegam PVBA* [1978] 2 Lloyd's Rep 109

*Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394

*Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1

*Cant Contracting Pty Ltd v Casella & Anor* [2006] QSC 242

*Class Electrical Services v Go Electrical* [2013] NSWSC 363

*Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd* [2012] WASAT 13

*Conveyor & General Engineering v Basetec* [2014] QSC 30

*Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWSC 312

*Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229

*Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd & Ors* [2005] NSWCA 228

*Coordinated Construction Co v JM Hargreaves & Ors* [2005] NSWSC 77

*Dawnays Ltd v FG Minter* [1971] 1 WLR 1205



*Décor Ceilings Pty Ltd v Cox Construction Pty Ltd* [2006] SASC 85

*Energetech v Sides Engineering* [2005] NSWSC 801

*Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247

*Façade Treatment Engineering Pty Ltd v Brookfield Multiplex Construction Pty Ltd* [2015] VSC 41

*Falgat Construction Pty Ltd v Masterform* [2005] NSWSC 525

*Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2005] NSWCA 49

*Fifty Property Investments Pty Ltd v Barry J O'Mara & Anor* [2006] NSWSC 428

*Gantley Pty Ltd & Ors v Phoenix International Group Pty Ltd & Anor* [2010] VSC 106

*Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2006] QSC 243

*Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143

*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284

*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689

*Gisley Investment Pty Ltd v Williams & Anor* [2010] QSC 178

*Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture* [2009] VSC 339

*Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426

*Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32

*Hamersley Iron Pty Ltd v James* [2015] WASC 10

*Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136

*Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156

*HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor* [2012] QSC 4

*Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129

*Howship Holdings Pty Ltd v Leslie and Anor* [1996] NSWSC 314

*INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45

*J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126

*JAR Developments Pty Ltd v Castleplex Pty Ltd* [2007] NSWSC 737

*John Goss Projects Pty Ltd v Leighton Contractor Pty Ltd & Anor* [2006] NSWSC 798

*John Holland Pty Ltd v Roads and Traffic Authority of New South Wales & Ors* [2007] NSWCA 19

*John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2006] NSWSC 874

*Kennett Pty Ltd v Janssen* [2013] SASC 20

*Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1

*Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602

*Koch Hightex GMBH v New Millennium Experience Company Ltd* [1999] EWCA Civ 983

*Laing O'Rourke Australia Construction v H & M Engineering and Construction* [2010] NSWSC 818

*Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130

*Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd & Anor* [2014] QSC 293

*Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103

*Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288

*Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2

*Maxstra Constructions Pty Ltd v Gilbert & Ors* [2013] VSC 243

*McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269

*McNab NQ Pty Ltd v Walkrete Pty Ltd & Ors* [2013] QSC 128

*Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199

*Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd (No. 2)* [2010] VSC 255

*Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48

*Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Ors* [2007] QSC 333

*Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing (NSW) Pty Ltd & Ors* [2005] NSWCA 142

*Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823

*Mooney v Henry Boot Construction Ltd* 80 BLR 66

*Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140

*Musico & Ors v Davenport* [2003] NSWSC 977

*Okaroo Pty Ltd v Vos Construction and Joinery Pty Limited and Anor* [2005] NSWSC 45

*Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349

*Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd t/as Total Concept Group* [2017] NSWSC 194

*Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217

*Printing and Numerical Registering Co v Sampson* (1875) LCR 19

*Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSW 770

*Protectvale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248

*Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116

*Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6

*Reed v Eire* [2009] NSWSC 678

*Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd* [2016] NSW 1229

*Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 115

*Saville v Hallmarc Construction Pty Ltd* [2015] VSCA 318

*Schokman v Xception Construction Pty Ltd* [2005] NSWSC 297

*Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183

*Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379

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

*Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502

*SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC 631

*St Hilliers Property Pty Ltd v ACT Projects Pty Ltd & Anor* [2017] ACTSC 117

*State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879

*Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor* [2013] VSC 535

*Tersons Ltd v Stevenage Development Corporation* [1963] 2 Lloyds Rep. 333

*Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd* [2010] QSC 007

*Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor* [2012] QCA 276

*Timwin Constructions Pty Ltd v Façade Innovations Pty Ltd* [2005] NSWSC 548

*W Y Steel Construction Pty Ltd v Osko Pty Ltd* [2013] SGCA 32

*Walter Construction Group Pty Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266

*Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors* [2011] QSC 67

*Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168

### **Conference Papers**

Jones, Prof D. (2008), *Can prevention be cured by time bars* (Paper presented at the Society of Construction Law and Technology and Construction Bar Association) London, 17 September 2008

McDougall, Justice R. (2006), 'Prohibition of Contracting out of the Building and Construction Industry Security of Payment Act 1999' (Paper presented at the Institute of Arbitrators and Mediators Australia National Conference) 27 May 2006:

<http://www.austlii.edu.au/au/journals/NSWJSchol/2006/6.pdf>

Smiley, A and Rawal, R (2017), *Locked Behind Time Bars*, (Paper presented at the Society of Construction Law Australia National Conference)

## Correspondence

Email from Houston, L. CEO of MBA Insurance Services to Mr John Murray, 19 June 2017

Email from Igra, A. General Manager, Contractors Debt Recovery to Mr John Murray, 15 May 2017

## Discussion and Consultation Papers

Department of Housing and Public Works (2016), *Queensland Building Plan: A discussion paper for industry and consumers*:

<<http://queenslandbuildingplan.engagementhq.com/23620/documents/47339>>

Environment, Planning and Sustainable Development Directorate (2015), *Improving the ACT Building Regulatory System: Discussion Paper*:

<[http://www.planning.act.gov.au/\\_data/assets/pdf\\_file/0006/898458/Improving\\_the\\_ACT\\_Building\\_Regulatory\\_System-201115-BM-accessible.pdf](http://www.planning.act.gov.au/_data/assets/pdf_file/0006/898458/Improving_the_ACT_Building_Regulatory_System-201115-BM-accessible.pdf)>

Murray, J. (2017), *Review of Security of Payments laws: Issues Paper*, Department of Jobs and Small Business, Canberra, Australia, February 2017

<[https://docs.jobs.gov.au/system/files/doc/other/review\\_of\\_security\\_of\\_payments\\_laws\\_-\\_issues\\_paper.pdf](https://docs.jobs.gov.au/system/files/doc/other/review_of_security_of_payments_laws_-_issues_paper.pdf)>

New South Wales Department of Finance & Services (2012), *NSW Discussion and Issues Paper: Inquiry into Construction Industry Insolvency in NSW*, 12 October 2012

New South Wales Department of Public Works and Services (1996), *NSW Government Green Paper: The Construction Industry in NSW: Opportunities and Challenges*

Northern Territory Department of the Attorney-General and Justice (2017), *Review of the Construction Contracts (Security of Payments) Act (NT): Issues Paper*:

<[https://justice.nt.gov.au/\\_data/assets/pdf\\_file/0011/456077/Issues-paper-on-NT-Construction-Contracts-Security-of-Payments-Act2-FINAL-AS-AT-26.10.2017.pdf](https://justice.nt.gov.au/_data/assets/pdf_file/0011/456077/Issues-paper-on-NT-Construction-Contracts-Security-of-Payments-Act2-FINAL-AS-AT-26.10.2017.pdf)>

Queensland Department of Housing and Public Works (2015), *Security of Payment: Discussion Paper*: <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDiscussionPaper.pdf>>

South Australia Small Business Commissioner (2016), *Proposed changes to the Building and Construction Industry Security of Payment 2009 and other initiatives to improve payment to subcontractors in the building and construction industry: Consultation Paper*:

[https://www.sasbc.sa.gov.au/files/540\\_consultation\\_paper\\_2016\\_06\\_17.pdf](https://www.sasbc.sa.gov.au/files/540_consultation_paper_2016_06_17.pdf)

## Internet Materials

Biddel, L. (2015), *Implementation of PBAs across Highways England* (17 June 2015) Slideshare:

<<https://www.slideshare.net/LloydBiddell/implementation-of-project-bank-accounts-across-highways-england-50357285>>

Consumer Affairs Victoria (2017), *Domestic Building Dispute Resolution service now available –News Alert* (26 April 2017) Consumer Affairs Victoria:

<<https://www.consumer.vic.gov.au/news-and-events/news-updates/domestic-building-dispute-resolution-victoria-service-now-available-news-alert>>

Elliott, R. Fenwick (2017), *A Suggested Ban on Queens of Hearts Clauses* (28 February 2017) Feconslaw:

<<http://feconslaw.wordpress.com/2017/02/28>>

Environment, Planning and Sustainable Development Directorate (2016), *Improving the Act Building Regulatory System: Summary of Proposed Reforms* (June 2016) ACT Government:  
<[http://www.planning.act.gov.au/\\_data/assets/pdf\\_file/0012/898680/Summary\\_of\\_reforms.pdf](http://www.planning.act.gov.au/_data/assets/pdf_file/0012/898680/Summary_of_reforms.pdf)>

Igra, A. (2017), 'Security of Payment: Why Not a Single Act for the Whole Country?', *Sourceable*, 19 April 2017:  
<<https://m.sourceable.net/m/single/?name=security-of-payment-why-not-a-single-act-for-the-whole-country>>

Queensland Master Builders Association (2017), *Submission to the Queensland Building Plan Discussion Paper* (February 2017) Master Builders Queensland:  
<[https://www.mbqld.com.au/\\_data/assets/pdf\\_file/0009/578682/Master-Builders-Submission-Qld-Building-Plan.pdf](https://www.mbqld.com.au/_data/assets/pdf_file/0009/578682/Master-Builders-Submission-Qld-Building-Plan.pdf)>

Master Builders Queensland Insurance Services (undated), *Insurance Fact Sheet — Trade Credit Insurance — Who needs it?*, Master Builders Queensland:  
<[https://www.mbqld.com.au/\\_data/assets/pdf\\_file/0006/525795/Trade-Credit-insurance-fact-sheet\\_LATEST-VERSION.pdf](https://www.mbqld.com.au/_data/assets/pdf_file/0006/525795/Trade-Credit-insurance-fact-sheet_LATEST-VERSION.pdf)>

New South Wales Government (2015), *Project Bank Accounts* (July 2015), Procure Point:  
<https://www.procurepoint.nsw.gov.au/before-you-buy/construction/project-bank-accounts>>

Parliament of Tasmania (2015), *Fact Sheet: Residential Building Work Contracts and Dispute Resolution Bill 2015* (undated) Parliament of Tasmania:  
<[http://www.parliament.tas.gov.au/bills/Bills2015/pdf/notes/54\\_of\\_2015-Fact\\_Sheet.pdf](http://www.parliament.tas.gov.au/bills/Bills2015/pdf/notes/54_of_2015-Fact_Sheet.pdf)>

South Australia Small Business Commissioner (2017), *Code of Conduct for Authorised Nominating Authorities* (April 2017) South Australian Government:  
[https://www.sasbc.sa.gov.au/files/908\\_ana\\_code\\_of\\_conduct.pdf](https://www.sasbc.sa.gov.au/files/908_ana_code_of_conduct.pdf)>

## Journal Articles

Bell, M. and Vella, D. (2010), 'From Motley Patchwork to Security Blanket: The Challenge of National Uniformity in Australian Security of Payment Legislation'; *Australian Law Journal*, Vol. 84(8)

Coggins, J. (2011), 'From disparity to harmonisation of construction industry payment legislation in Australia: a proposal for a dual process of adjudication based upon size of progress payment claim', *Australasian Journal of Construction Economics and Building*, 2011, 11(2)

Coggins, J., Elliott, R. Fenwick and Bell, M. (2010), 'Towards Harmonisation of Construction Industry by the East and West Coast Models in Australia', *Australian Journal of Construction Economics and Building*, 10(3)

Farrar, M. (2016), 'Difficulties with Harmonisation of Security of Payment Legislation across Australia — is Federalism a friend or foe?', *Society of Construction Law Australia*, 2016/8:  
<[www.scl.org.au](http://www.scl.org.au)>

Tran, C. (2011), 'Trading or financial corporations under s. 51(xx) of the Constitution: A multifactorial approach', *Monash University Law Review* 37(3)

Zhang, T. (2009), 'Why national legislation is required for the effective operation of the security of payment scheme', *Building and Construction Law Journal* 25

Ettinger, L.P. (1988-1989), 'Trusts in the Construction Industry', *Alberta Law Review*, 27 (3)

## Legislation

### Acts

*Australian Constitution*

*Australia Act 1986 (Cth)*

*Electronic Transactions Act 2000 (NSW)*

*Building and Construction Commission Act 1999 (Qld)*

*Building and Construction Industry Payments Act 2004 (Qld)*

*Building and Construction Industry Payments Amendment Act 2014 (Qld)*

*Building and Construction Industry Security of Payment Act 2004 (Singapore)*

*Building and Construction Industry Security of Payment Act 1999 (NSW)*

*Building and Construction Industry (Security of Payment) Act 2009 (ACT)*

*Building and Construction Industry Security of Payment Act 2009 (SA)*

*Building and Construction Industry Security of Payment Act 2009 (Tas)*

*Building and Construction Industry Security of Payment Act 2002 (Vic)*

*Building and Construction Industry Security of Payment (Amendment) Act 2006 (Vic)*

*Building Industry Fairness (Security of Payment) Act 2017 (Qld)*

*Building and Construction Industry Security of Payment Amendment Act 2013 (NSW)*

*Construction Contracts Act 2004 (WA)*

*Construction Contracts Amendment Act 2016 (WA)*

*Construction Contracts (Security of Payments) Act 2004 (NT)*

*Supreme Court Act 1970 (NSW)*

*Queensland Building and Construction Commission Act 1991 (Qld)*

*Work Health and Safety Act 2011*

### Subordinate Legislation

*Building and Construction Industry Security of Payment Regulations 2006 (Singapore)*

*Construction Contracts Regulations 2004 (WA)*

*Construction Contracts (Security of Payments) Regulations 2010 (NT)*

*Work Health and Safety Regulations 2011 (Cth)*

## Parliamentary Documents

### Bills

*Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA)*

Building Industry Fairness (Security of Payment) Bill 2017 (Qld)

Explanatory Notes, Building Industry Fairness (Security of Payment) Bill 2017 (Qld):  
<<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T1395.pdf>>

Explanatory Memorandum, Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (Cth)

### **Debates**

Australian Capital Territory, *Parliamentary Debates*, 15 October 2009, 4540–44 (John Hargreaves, Minister for Industrial Relations)

New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, p. 6541 (the Hon. Morris Iemma, Minister for Public Works and Services)

New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2013, (Matthew Mason-Cox, Parliamentary Secretary, on behalf of Duncan Gay, Minister for Roads and Ports).

Northern Territory, *Parliamentary Debates*, 14 October 2004, p.1 (Peter Toyne, Attorney General and Minister for Justice)

Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2004, pp. 71–2 (Robert Schwarten, Minister for Public Works)

South Australia, *Parliamentary Debates*, House of Assembly, 5 March 2009 (Tom Kenyon)

South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2017 (MLJ Hamilton-Smith, Minister for Small Business)

Tasmania, *Parliamentary Debates*, House of Assembly, 4 November 2009, 30-186 (Lisa Singh, Minister for Workplace Relations)

Victoria, *Parliamentary Debates*, House of Assembly, 21 March 2002, 426–7 (Mary Delahunty, Minister for Planning)

Victoria, *Parliamentary Debates*, House of Assembly, 9 February 2006, p. 219 (Robert Hulls, Minister for Planning)

Victoria, *Parliamentary Debates*, Legislative Council, 15 June 2006, p. 2420 (Marsha Thomson, Minister for Consumer Affairs)

Western Australia, *Parliamentary Debates*, Assembly, 3 March 2004, 274d-275a (Allanah MacTiernan, Minister for Planning and Infrastructure)

Western Australia, *Parliamentary Debates*, Assembly, 22 September 2016, p.1 (S K L'Estrange, Minister for Small Business)

### **Other**

*Building and Construction Industry Security of Payment Act 2002 Ministerial Guidelines*, Special Gazette No. S 69, 30 March 2007

*Building and Construction Industry Security of Payments Act 2009 Ministerial Guidelines* No. 1/10 issued on 11 February 2010:

<[http://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/0006/342285/Ministerial\\_Guidelines\\_2010.pdf](http://www.justice.tas.gov.au/_data/assets/pdf_file/0006/342285/Ministerial_Guidelines_2010.pdf)>



## Parliamentary Committee Reports

Senate Economics References Committee (2015), Parliament of Australia, *Insolvency in the Australian Construction Industry*

Australian Government (2017), *Australian Government response to the Senate Economic References Committee Report: Insolvency in the Australian Construction Industry*

Law Reform Commission (1998), *Project No.82: Financial Protection in the Building and Construction Industry — Report*, Parliament of Western Australia

Select Committee of the House of Assembly (1990), *Report of the Select Committee of the House of Assembly on the Operation of the Worker's Liens Act 1893*, South Australia Parliament

## Parliamentary Committee Submissions

Construction, Forestry, Mining and Energy Union (2015), Submission No. 15 to the Senate Economics Reference Committee *Inquiry into Insolvency in the Australian construction industry*, 1 May 2015

## Other Reports

Andersen Consulting (1993), *Feasibility Study into the proposal prepared by the NSW Security of Payment Committee: Final Report*, 28 May 1993

Australian Bureau of Statistics (2016), *Characteristics of Employment, Australia, August 2016*, ABS Cat. No. 6333.0

Australian Bureau of Statistics (2016), *Education and Work, Australia May 2016*, ABS Cat. No. 6227.0

Australian Bureau of Statistics (2017), *Australian National Accounts: National Income, Expenditure and Product, December Quarter 2017*, ABS Cat. No. 5206.0, Table 37

Australian Bureau of Statistics (2017), *Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016*, ABS Cat. No. 8165.0

Australian Law Reform Commission (2008), *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), 12 August 2008:

[https://www.alrc.gov.au/sites/default/files/pdfs/108\\_vol1.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/108_vol1.pdf)

Australian Security and Investment Commission, *Insolvency statistics – Series 1A Companies entering external administration by industry*:

<http://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-1a-companies-entering-external-administration-by-industry/>

Australian Securities and Investment Commission, *Insolvency statistics – Series 3 External administrator reports*:

<http://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/>

Australian Small Business and Family Enterprise Ombudsman (2017), *Payment Times and Practices Inquiry – Final Report*, Canberra, April 2017:

<http://www.asbfeo.gov.au/sites/default/files/ASBFEOPaymentTimesandPracticesInquiryReport.pdf>

Deloitte (2016), *Analysis of security of payment reform for the building and construction industry*, report to the Queensland Department of Housing and Public Works, 8 November 2016:

<http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDeloitteReport.pdf>

Deloitte Access Economics (2017), *Analysis of Security of Payment reform for the building and construction industry – Addendum Report* – prepared for the Queensland Department of Housing and Public Works, 19 July 2017:

<<http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDeloitteReport.pdf>>

IBISWorld (2017), *IBISWorld Industry Report E: Construction in Australia*, January 2017

Reynolds, B. and Vogel, S. (2016), *Striking the Balance: Expert Review of Ontario’s Construction Lien Act*, Report prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, Ministry of the Attorney General, Ontario, Canada

<<http://www.constructionlienactreview.com/wp-content/uploads/2015/07/Striking-the-Balance-Expert-Review-of-Ontarios-Construction-Lien-Act.pdf>>

Society of Construction Law (2014), *Report of Security of Payment and Adjudication in the Australian Construction Industry*, May 2014

<[https://www.scl.org.au/news.php/14/report-on-security-of-payment-and-adjudication-in-the-australian->](https://www.scl.org.au/news.php/14/report-on-security-of-payment-and-adjudication-in-the-australian-)

Western Australian Auditor General (2016), *Assessment of Progress to Improve Payment Security for Government Construction Subcontractors*, Report, 31 December 2016:

<[https://audit.wa.gov.au/wp-content/uploads/2016/12/report2016\\_31-PaymentSubcontractors.pdf](https://audit.wa.gov.au/wp-content/uploads/2016/12/report2016_31-PaymentSubcontractors.pdf)>

### Government reviews

Collins, B. QC (2015), *Final Report: Independent Inquiry into Construction Industry Insolvency in NSW*, NSW Department of Finance, Services and Innovation, Sydney, November 2015:

<<https://www.finance.nsw.gov.au/sites/default/files/IICII-final-report.pdf>>

Evans, Professor P. (2015), *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*, Western Australian Department of Commerce, Perth, August 2015:

<[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca\\_review\\_report.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca_review_report.pdf)>

Latham, M. (1994), *Constructing the Team: Final report of the Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*

Moss, A. (2015) *Review of Building and Construction Industry Security of Payments Act 2009 (SA)*, South Australia Small Business Commissioner, Adelaide:

<[https://www.sasbc.sa.gov.au/files/542\\_review\\_of\\_building\\_and\\_construction\\_industry\\_security\\_of\\_payments\\_act\\_2009\\_prepared\\_by\\_alan\\_moss.pdf](https://www.sasbc.sa.gov.au/files/542_review_of_building_and_construction_industry_security_of_payments_act_2009_prepared_by_alan_moss.pdf)>

Security of Payment Task Force for the Western Australian Building Industry (2001), *Report to the Minister for Housing and Works*, November 2001, Department of Housing and Works, Perth

Wallace, A. (2013), *Discussion Paper: Payment Dispute Resolution in the Queensland Building and Construction Industry – Final Report*, Queensland Building and Construction Commission, Brisbane, May 2013:

<[https://www.qbcc.qld.gov.au/sites/default/files/Final\\_Report\\_-\\_Discussion\\_Paper\\_-\\_Payment\\_dispute\\_resolution\\_in\\_the\\_Queensland\\_building\\_and\\_construction\\_industry\\_PDF.pdf](https://www.qbcc.qld.gov.au/sites/default/files/Final_Report_-_Discussion_Paper_-_Payment_dispute_resolution_in_the_Queensland_building_and_construction_industry_PDF.pdf)>

### Royal Commissions

Commonwealth (2003), Royal Commission into the Building and Construction Industry, *Final Report of the Royal Commission into the Building and Construction Industry*, Vol. 8, Reform – National issues Part 2

New South Wales Government (1992), Royal Commission into Productivity in the Building Industry in New South Wales, *Final Report of the Royal Commission into Productivity in the Building Industry in New South Wales*

### Speeches

Hon. Justice Peter Vickery, 'Security of Payment Legislation in Australia,

Differences between the States – 'Vive la Différence?' (Speech delivered to the Building Dispute Practitioners Society), 12 October 2011:

<<http://www.austlii.edu.au/au/journals/VicJSchol/2011/47.pdf>>

### Theses

Coggins, J. (2012), *Proposal for the harmonisation of the security of payment legislation in the Australian Building and Construction Industry* (PhD Thesis, Adelaide University, 2012)

### Unpublished sources

ACT Environment, Planning and Sustainable Development Directorate, consultation minutes

Adjudicate Today, written submission

Adjudication Forum, written submission

Baker McKenzie, written submission

CFMEU, written submission

Coggins, J., draft paper entitled, '*Project Bank Accounts: The Second Wave of Security of Payment?*'.

Coggins, J., written submission

Contractors Debt Recovery, written submission

HIA, written submission

Law Council of Australia, written submission

Master Builders Australia, written submission

Master Builders Association of South Australia, written submission

Master Builders Association of Victoria, written submission

NECA, written submission

Resolution Institute WA Chapter, written submission

Resolution Institute, written submission

Rozenbes, Saul., written submission

Skaik, S., written submission

Society of Construction Law Australia, written submission

Steensma, A. (2017), Draft Thesis for Degree of Doctor of Philosophy, *A statutory review of Adjudicators Determinations under the Construction Contracts Act 2004 (WA) by the State Administrative Tribunal and the Courts*

South Australia Small Business Commissioner, consultation minutes

Tasmanian Department of Justice, Consumer, Building and Occupational Services, consultation minutes

Tozer, B., written submission

Victorian Government, Department of Environment, Land, Water and Planning, written submission

Wood, S., written submission